1976

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1976-1977]

COMMENTS

THE DOCTRINE OF SPECIAL LEGISLATION IN PENNSYLVANIA ZONING LAW

I. Introduction

Today, the power to regulate land use through zoning and other regulatory schemes is virtually unquestioned. In Pennsylvania, the constitutional validity of zoning was settled as early as 1926 in White's Appeal,¹ which held that the exercise of the police power through zoning was valid if "clearly necessary to preserve the health, safety or morals of the people."² Even though this standard was later modified to the requirement that a zoning ordinance need only bear a "substantial relationship" to the health, safety, or general welfare of the community,³ the Pennsylvania Supreme Court has continued to recognize that

an owner of property is still entitled in Pennsylvania to certain unalienable constitutional rights of liberty and property. These include a right to use his own home [or property] in any way he desires, provided he does not (1) violate any provision of the Federal or State Constitutions; or (2) create a nuisance; or (3) violate any covenant, restriction or easement; or (4) violate any laws or zoning or police regulations which are constitutional.⁴

From this balancing of individual and governmental interests has emerged the general rule that zoning ordinances are constitutional whenever they bear a substantial relation to the public welfare and are not unjustly discriminatory, arbitrary, unreasonable, or confiscatory in their application to a particular piece of property.⁵

Despite these articulated limitations on the police power, one commentator has noted that until the mid-1960's, the Pennsylvania Supreme Court permitted, at least in a practical sense, the unfettered exercise of broad local governmental discretion in the zoning area.⁶ Stressing that

2. Id. at 265, 134 A. at 411.
zoning ordinances were legislative enactments passed by duly elected representatives, the court was reluctant to substitute its substantive judgment for that of the zoning authority. Consequently, a zoning action would be upset only when it involved the most flagrant abuse of legislative discretion.

With the advent of the exclusionary zoning cases in the mid-1960's, however, the court became more willing to involve itself in the substantive issues of zoning. As the court began to examine more closely the motivation of local zoning authorities in cases involving allegations of exclusionary intent, it also assumed a more active role in cases where it was alleged that zoning actions were unjustly discriminatory toward a particular property. In a series of decisions involving alleged discriminatory behavior by local governments against individual land owners, the supreme court developed the doctrine of special legislation, which can be summarized as follows: if a zoning ordinance is aimed directly at a particular piece of property to prevent the use of that property for a formerly lawful purpose, it is held to be special legislation and is thus inapplicable to that particular piece of property.

This Comment reviews the various decisions in which the special legislation doctrine has been relied upon and examines some of the practical problems which have arisen in connection with its use. After a discussion of the theoretical predicates of special legislation and an analysis of cases decided under that doctrine, the Comment examines problems stemming from the interpretation of language employed in several of the cases. Attention is then focused upon two problems concerning the proof of special legislation: 1) the dilemma faced by challengers because most of the evidence, or sources thereof, is in the hands of the defendant municipal officials; and 2) the failure of the Municipalities Planning Code (MPC) to assist the challenger in obtaining proof due to the absence of adequate discovery provisions. Next, the Comment addresses the question of the choice of the forum in which special legislation challenges should be initiated. Finally, the Comment briefly discusses the proper remedy to be applied after a successful special legislation challenge.

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14. PA. STAT. ANN. tit. 53, §§ 10101-11202 (Purdon 1972). The MPC, approved July 31, 1968, and subsequently amended, was designed to replace the multitude of enabling statutes which formerly governed zoning in the commonwealth.
II. Background

Before the special legislation cases can be analyzed, it is necessary to examine certain basic doctrines of zoning law from which the doctrine of special legislation in Pennsylvania evolved. These principles include the vested rights doctrine, the pending ordinance principle, and the doctrine of spot zoning.

Under the doctrine of “vested rights,” when an applicant has received a permit to erect a building or conduct a certain use then permitted by existing ordinances, and has proceeded to act in good faith under that permit, he thereby acquires a vested property right which will be protected by the constitution on the theory that the disturbance of such a right would deprive the holder thereof of his property without due process of law. As to the extent of work or other action required before a property right vests, the leading Pennsylvania case on point, Herskovits v. Irvin, held that when, in reliance upon a permit, an owner in good faith incurs obligations and begins work, his rights are then vested.

At the heart of the vested rights doctrine is the good faith reliance by the land owner upon existing law, and the equitable protection of expenditures made in that reliance. The Herskovits decision distinguished cases where permits were not obtained in good faith, but merely in anticipation of an amendment to the zoning ordinance. It follows that where


15. 299 Pa. 155, 149 A. 195 (1930). In Herskovits, plaintiff applied for and received an excavation permit to begin work on a planned six-story apartment building which complied with zoning and building ordinances. Id. at 158, 149 A. at 196. He then contracted for labor and materials for the erection of the building and excavation was begun. Id. Thereafter, an amendment to the zoning ordinance was proposed which would have limited the height of all buildings in the area, and on the basis of that pending amendment plaintiff’s permit was revoked and a “final” permit was refused. Id. at 158–59, 149 A. at 196.

16. Id. at 160, 149 A. at 197. The court stated:

While it is true that some of the cases . . . go on the theory that the letting of a contract, or even the building of foundations, is not of itself such work as to create a vested right, we follow the rule . . . that a property interest arises where, after permit granted [sic], a landowner begins construction of a building and incurs liability for future work.

Id. at 162, 149 A. at 197–98 (citation omitted).

A more recent case, Gallagher v. Building Inspector, 432 Pa. 301, 247 A.2d 572 (1968), held that a properly issued permit cannot be revoked on the basis of a subsequent zoning amendment whether or not the landowner has incurred costs in reliance upon the permit. Id. at 306, 247 A.2d at 574. Although Gallagher appears to eliminate the traditional necessity for showing something more than the mere acquisition of a permit, the case involved a subsequent zoning amendment aimed directly at preventing the landowner’s previously lawful use. As will be discussed (see text accompanying notes 76–83 infra), it was a case involving special legislation. It is thus submitted that Gallagher was not a traditional vested rights case and may not have eliminated the requirement for further action in reliance upon the permit in normal cases. But see R. Ryan, supra note 14, at § 8.2.3.

17. 299 Pa. at 160–61, 149 A. at 197.
the landowner has notice of a pending or contemplated change in the applicable law, he is not justified in taking action in reliance upon that law. The “pending ordinance” doctrine developed as a natural corollary to the vested rights theory.\(^{18}\) It is clear that in Pennsylvania a permit may be denied if, on the date when the application is filed, there is an ordinance “pending” that would, if adopted, require the denial of the permit.\(^{19}\) In the A. N. “Ab” Young Co. Zoning Case,\(^{20}\) the Pennsylvania Supreme Court recognized that the mere act of applying for a permit did not confer a vested right even though the proposed use was in conformity with then existing law.\(^{21}\) The application could be refused when an ordinance pending at the time, if adopted, would forbid the proposed use; or, if a permit had previously been granted but no further improvements or expenditures had been made in reliance on the permit, it could be revoked because of an ordinance enacted after the date of the application.\(^{22}\) Likewise, in A.J. Aberman, Inc. v. New Kensington,\(^{23}\) the supreme court held that “a municipality may properly refuse a building permit for a land use repugnant to a pending and later enacted zoning ordinance even though application for the permit [was] made when the intended use [conformed] to existing regulations . . .”\(^{24}\) For purposes of the doctrine, an ordinance is “pending” only after its proposal has been advertised according to law.\(^{25}\)

21. Id. at 431-32, 61 A.2d at 840. But see note 16 supra. The plaintiff in Young, who had previously built several double dwellings in disregard of the boundary lines of the plotted lots, applied for a permit to construct another dwelling on part of a lot which already had parts of other buildings on it. 360 Pa. at 430, 61 A.2d at 839. The permit was at first granted and then revoked, but plaintiff did not appeal. Id. No work had been undertaken in reliance upon the permit. Id. Soon thereafter, an amendment to the zoning ordinance was proposed which provided that not more than one building could be erected on a distinct numbered lot. Id. When plaintiff reapplied for a permit, he was refused because of the pending amendment. Id. at 430, 61 A.2d 839-40. The court held that even though he filed before the effective date of the new amendment, he had not yet acquired any vested right; thus, he was subject to the new ordinance. Id. at 432, 61 A.2d at 840-44. See also Gold v. Building Comm., 334 Pa. 10, 5 A.2d 367 (1939).
22. 360 Pa. at 431-32, 61 A.2d at 840.
24. Id. at 527-28, 105 A.2d at 589-90. The zoning ordinance in Aberman had been proposed by the city council, prepared by the planning commission, and discussed in public hearings before an application for a permit was filed. Id. at 522-23, 105 A.2d at 587. Compare Aberman with Lhormer v. Bowen, 410 Pa. 508, 188 A.2d 747 (1963), where an amending ordinance was proposed and referred to the planning commission for study, but neither public hearings were held nor public notice advertised before plaintiff’s building permit application was filed. Id. at 511, 188 A.2d at 748. Under such circumstances it was held that the ordinance was not legally “pending.” Id.; see Casey v. Zoning Hearing Bd., 459 Pa. 219, 225-27, 328 A.2d 464, 466-67 (1974).
The third concept of zoning law which contributed to the development of special legislation was spot zoning — the arbitrary and unreasonable classification and zoning of a small parcel of land which is usually set apart or carved out of a surrounding or a larger neighboring tract. The validity of spot zoning can be challenged on three grounds. First, most zoning enabling statutes expressly require that zoning amendments be in accordance with a comprehensive plan for orderly growth. For example, the MPC grants to municipalities the general power to "enact, amend and repeal zoning ordinances to implement comprehensive plans . . . ." Spot zoning is not in accord with the comprehensive plan and thus is invalid. Second, due process requires that for any zoning regulation to be valid, it must bear a substantial relationship to the public health, safety, morals, or welfare, a criterion which spot zoning presumably does not meet. Third, spot zoning is arguably a denial of the basic constitutional right of equal protection under the laws because it involves the unequal treatment of similarly situated properties without any rational basis for such a distinction.

The spot zoning doctrine was first articulated in Pennsylvania in *Huebner v. Philadelphia Saving Fund Society*, wherein the superior court held that, in the absence of extenuating circumstances, the rezoning of a single lot differently from those surrounding it was discriminatory and invalid. A municipality may rezone a small piece of property for a use different from that of surrounding uses if such use is in accord with the comprehensive plan and is a reasonable use in the area. It may not, the precautionary rule of the pending ordinance doctrine in the context of a developer-initiated exclusionary zoning challenge).


28. See note 33 and accompanying text infra.

29. See notes 3 & 5 and accompanying text supra. This constitutional mandate has been incorporated into section 604 of the MPC: "The provisions of zoning ordinances shall be designed: (1) To promote, protect and facilitate one or more of the following: the public health, safety, morals, general welfare . . . ." PA. STAT. ANN. tit. 53, § 10604 (Purdon 1972).


32. Id. at 38-39, 192 A.2d at 143.

33. Trinity Evangelical Lutheran Church v. City Council, 2 Pa. Commw. Ct. 222, 278 A.2d 372 (1971). Thus, it has been held that the natural extension of an already existing district into an adjoining district might not constitute spot zoning. Upper Darby Twp. Appeal, 413 Pa. 583, 198 A.2d 538 (1964).
however, lawfully "create an "island" of more or less restricted use within a district zoned for a different use or uses where there are no differentiating relevant factors between the "island" and the district."

These three concepts of basic zoning law collectively formed the theoretical predicates for the doctrine of special legislation. While the classic spot zoning case involved special treatment of a particular tract, which usually benefited the owner, the case law recognized that the theory was equally applicable when the special treatment worked to the economic detriment of the landowner. Discriminatory treatment of a particular tract or an unwanted use could be attacked as spot zoning when the local authorities could not defend it as being in accordance with their comprehensive plan. However, two factors made the spot zoning doctrine inadequate to protect fully landowners from discrimination. First, since the doctrine was based upon disregard of the comprehensive plan and lack of a substantial relationship to the general public welfare, it is submitted that a municipality could prevent an otherwise lawful use by means of a rezoning which could be supported as having some rational relation to the public welfare and which still allowed some uses (other than that proposed by the particular landowner) conforming to those already existing or permitted in the neighborhood. Given the heavy burden of proving that the amendment was discriminatory or bore no reasonable relationship to the objectives of the comprehensive plan, a landowner could find himself facing an insurmountable burden. Second, because under the spot zoning doctrine the rezoning applies only to the "spot" itself, which is treated differently than neighboring property, a municipality could circumvent the


[Spot zoning is the] practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district. It is also, but more rarely, used to describe the reverse proposition, that is, one in which a single lot has burdens imposed upon it which are more rigid than those imposed upon other properties within the same district.

A. Rathkoff, supra note 26, at 26-1 (footnote omitted).

The Glorioso case was apparently the only time a landowner was successful in applying the spot zoning doctrine to the less common situation mentioned by Rathkoff. In Glorioso the challenger owned one of three parcels that were classified in an especially restrictive zone completely surrounded by commercial zones and uses. 413 Pa. at 196, 196 A.2d 670. The special zone was struck down as spot zoning because of the absence of any basis for the separate, more burdensome treatment. Id. at 200, 196 A.2d at 672. Factually, Glorioso was very similar to a special legislation case. Compare Glorioso with Shapiro v. Zoning Bd. of Adj., 377 Pa. 621, 105 A.2d 299 (1954). In fact, the landowner in Glorioso unsuccessfully based his challenge upon an attack against the motives of the municipal officials. 413 Pa. at 196, 196 A.2d at 670. See also Guentter v. Borough of Lansdale, 21 Pa. Commw. Ct. 287, 345 A.2d 306 (1975).

37. See notes 124-37 and accompanying text infra.
doctrine by rezoning an entire neighborhood, uniformly prohibiting a use which most likely would have been practical only on the discriminated owner's land. Such a circumvention was attempted in Lower Merion v. Frankel, where the landowner-developer wished to construct a high rise apartment building to which neighbors were vehemently opposed. On the same day on which a preliminary permit was requested, a neighborhood group petitioned the local legislative body to rezone the entire neighborhood to a classification which forbade apartments. An amendment was proposed and enacted, the preliminary permit was revoked, and a final permit was denied. In challenging this ruling, the developer argued that the amendment was spot zoning and that action he had taken in reliance upon the preliminary permit created a vested right to his proposed use. At trial, he contended that the inclusion of other properties was a mere device to screen the discriminatory nature of the ordinance, and that it would have been impossible to build apartments on any of the other properties. The court, however, found that the alleged discriminatory purpose was not as apparent as the developer contended.

Thus, if a permit could be obtained and acted upon before the introduction of any zoning amendments, the landowner would be protected by the vested rights doctrine against the inevitable rezoning proposals which usually followed public knowledge of imminent development. However, if municipal officials who objected to the proposed use were sufficiently alert, the developer could expect minor technical and substantive objections to delay the granting of a permit until amending ordinances had been introduced and advertised. In order to protect the individual against the arbitrary abuse of local legislative discretion, the doctrine of special legislation, long a part of local government law, was adopted to the field of zoning.

III. The Special Legislation Cases

The seminal case applying the doctrine of special legislation to zoning ordinances was Shapiro v. Zoning Board of Adjustment. Plaintiff in

40. Id. at 16-17.
41. Id.
42. Id.
43. Id. at 35. Other circumstances, though, led the court to find that the ordinance was discriminatory and arbitrary, and that vested rights had arisen before the ordinance was proposed. Id. at 31. On appeal, this finding was affirmed by the supreme court. 358 Pa. 430, 57 A.2d 900 (1948).
44. The MPC now provides that once an application for land development or subdivision plat approval is "duly filed" and pending, no change or amendment of the zoning, land development and subdivision, or other governing ordinance shall affect that application. Pa. Stat. Ann. tit. 53, § 10508(4) (Purdon 1972).
Shapiro was the lessee of land located in an “A-Commercial” district, the permitted uses of which included athletic and amusement parks.\(^\text{47}\) On March 18, 1953, plaintiff applied for use permits which would have enabled him to establish a “kiddie amusement park” on his premises.\(^\text{48}\) The application was rejected on April 23, and on May 25, while plaintiff’s appeal of the rejection was pending, an amendment to the zoning ordinance was proposed which would have prevented the establishment of amusement parks in “A-Commercial” districts.\(^\text{49}\) Despite a lower court ruling, filed on June 25, that plaintiff’s use was permissible, the city council voted on July 2 to enact the proposed amendment at its next session, scheduled for July 23.\(^\text{50}\) The use permit was issued on July 10 in compliance with the lower court’s order, but plaintiff was warned that it would be revoked if the pending amendment was adopted.\(^\text{51}\) The city council adopted the amendment on July 23, and plaintiff’s permit was revoked on August 13.\(^\text{52}\) In deciding plaintiff’s appeal of the revocation, the Pennsylvania Supreme Court agreed with the lower court that the amendment “‘was special legislation, unjustly discriminatory, arbitrary, unreasonable, and confiscatory in its application, in that it was aimed directly at this particular piece of property . . . ’.”\(^\text{53}\) It affirmed the holding that the amendment was inapplicable to plaintiff’s land and had no effect upon his rights to develop because it constituted “special legislation directed at a particular individual . . . ”\(^\text{54}\) Therefore, the pending ordinance doctrine did not apply, and the action which plaintiff had undertaken in reliance upon the permit created a vested right to his proposed use.\(^\text{55}\)

In the next special legislation case decided by the supreme court, Yocum v. Power,\(^\text{60}\) the developer would have been unsuccessful had the pending ordinance doctrine alone been applicable. A church congregation

\(^{47}\) Id. at 623, 105 A.2d at 300.

\(^{48}\) Id.

\(^{49}\) Id. at 623-26, 105 A.2d at 300-01.

\(^{50}\) Id. at 625, 105 A.2d at 301.

\(^{51}\) Id. at 625-26, 105 A.2d at 301.

\(^{52}\) Id. at 626, 105 A.2d at 301.

\(^{53}\) Id. at 628, 105 A.2d at 302-03 (quoting lower court) (emphasis supplied by the court).

\(^{54}\) Id. at 626, 105 A.2d at 302. That the amendment was aimed directly at plaintiff was clearly shown by the language with which the council resolved on July 2 to enact the new ordinance: “‘WHEREAS, There appears to be the possibility of the establishment of such an amusement park immediately adjoining a residential district in northwest Philadelphia . . . ’” Id. at 625, 105 A.2d at 301 (quoting lower court).

\(^{55}\) Id. at 626, 105 A.2d at 302. Factually, Shapiro was a traditional vested rights case. See notes 14-17 and accompanying text supra. Rather than base its disposition of the case solely upon vested rights, however, the supreme court instead chose to rest its holding upon both the vested rights doctrine and the special legislation principle. See text accompanying notes 80-83 infra.

purchased land zoned “A-Residential,” which allowed construction of new churches. At the behest of complaining neighbors, a bill was introduced in city council on June 12, 1958, which would have reclassified the specific tract involved to “AA-Residential,” a zone which excluded new churches. The congregation received notice of the proposed amendment on August 4 when a public hearing was announced, and it quickly applied for and received a zoning permit on August 13 and a building permit on August 18. Correctly alleging that the amendment had been pending when applications had been made, the neighbors appealed the issuance of the permits. Because the church had taken no action which would give rise to vested rights, it would have been subject to the pending ordinance, but the supreme court held that the amendment was “special legislation which the Constitution prohibits” and affirmed dismissal of the neighbors’ appeal.

The leading Pennsylvania Supreme Court case on special legislation, Commercial Properties, Inc. v. Peternel, also involved a pending ordinance which might otherwise have frustrated the developer’s plans. The plaintiff in Peternel was the construction agent of a optionee which had a contingent sales contract for ten acres of land in a “Neighborhood Shopping (NS)” zone, which permitted shopping centers. In April 1963 an officer of plaintiff met with the township manager to determine the necessary procedure to be followed in order to erect a shopping center. A preliminary plot plan was filed on April 23, but five objections were raised to it. Plaintiff remedied those objections, but at each of several subsequent meetings new objections were raised. On June 25 the Planning Commission voted to deny plot plan approval. On July 8 a proposed amendment was introduced to the Board of Commissioners to change the zoning from “NS” to “R-1 Residential,” which would have prohibited the shopping center. Later in July the township engineer approved plaintiff’s revised plot plan as being in “technical compliance” with the requirements of the original ordinance, but a formal application for a grading permit, filed on August 7, 1963, was denied because it was not in triplicate.

57. Id. at 225, 157 A.2d at 369.
58. Id.
59. Id.
60. Id.
61. Id. at 227, 157 A.2d at 370. Apparently, the amendment would have rezoned only the property owned by the church, so that it was clearly “aimed directly at this particular piece of property.” Id. at 229, 157 A.2d at 371 (quoting lower court). This language is identical to that in Shapiro v. Zoning Bd. of Adj., 377 Pa. 621, 628, 105 A.2d 299, 303 (1954), which was relied upon as a “wholesome precedent” standing “as a beacon light to guide the decision in the case at hand.” Yocum v. Power, 398 Pa. at 228, 157 A.2d at 371.
63. Id. at 305, 211 A.2d at 516.
64. Id. at 307, 211 A.2d at 516.
65. Id. at 308, 211 A.2d at 517.
66. Id. at 307-08, 211 A.2d at 516-17.
67. Id. at 307, 211 A.2d at 516.
was not prepared by a registered engineer, and had no specifications attached. Soon thereafter, in a move subsequently held to be aimed directly at plaintiff, the grading ordinance was amended to make the securing of a building permit a prerequisite to obtaining a grading permit. On both August 30 and September 20 grading permits were denied, even though plaintiff was in “technical compliance,” because no building permit had been secured and because of the pending zoning amendment.

Upon plaintiff’s suit for mandamus, the trial court directed that both the grading permit and the building permit issue. This order was affirmed by the supreme court, which noted that even though plaintiff’s orginal application had been denied before the amendment was proposed, and even though the amendment had been pending when the revised plot plan was submitted, the pending ordinance doctrine presupposed a valid pending ordinance. However, the “sole purpose” of the proposed amendment in Peternel was to prevent plaintiff from constructing its project. The court stressed that despite plaintiff’s legal right to build the shopping center, “at each step of the way [it was] met with obstructionism and hastily erected barriers. As [plaintiff] overcame each objection or complied with each request, township officials were busily erecting new barriers.” The amendment was therefore held to be special legislation and inapplicable to the plaintiff.

The most recent supreme court case which can be interpreted as involving special legislation was Gallagher v. Building Inspector. Plaintiff in Gallagher obtained building permits to construct townhouses in a zone suitable for that use. After neighbors protested, the permits were suspended; thereafter, an amendment was proposed and adopted which rezoned a six-block area, including plaintiff’s land, from “B” to “A,” which prohibited townhouses. The permits were then revoked pursuant to the new zoning regulation. On appeal, however, the supreme court mandated their reissuance.

68. Id. at 308, 211 A.2d at 517.
69. Id.
70. Id. The amendment was not finally enacted until June 8, 1964. Id. at 307, 211 A.2d at 516.
71. Id. at 309, 211 A.2d at 517.
72. Id. at 310, 211 A.2d at 518.
73. Id. at 311, 211 A.2d at 518. Although the court found that discrimination against the developer was the “sole purpose” of the proposed amendment, id., “sole purpose” has never been specifically held by the court to be the test for special legislation. See text accompanying notes 124-33 infra.
74. 418 Pa. at 312, 211 A.2d at 519.
75. Id. at 313, 211 A.2d at 519. Peternel, it is submitted, illustrates the impediments which can be placed in front of a developer of a lawful but unpopular use by local officials who are opposed to such a use in their community.
77. Id. at 302, 247 A.2d at 572.
78. Id.
79. Id. at 305, 247 A.2d at 574.
Gallagher may be classified as a special legislation case because of its factual situation and because the supreme court based its decision, in part, upon Shapiro and Yocom. The decision, however, was based equally upon a finding that vested rights had arisen. Therefore, while Gallagher has been interpreted as a vested rights case, it is submitted that, like Shapiro, it actually combined the vested rights doctrine with the special legislation doctrine for the purposes of adjudication.

Gallagher was the last special legislation case decided by the Pennsylvania Supreme Court. On January 1, 1970, the Commonwealth Court of Pennsylvania was established and was delegated primary appellate jurisdiction in land use cases. Shortly thereafter, another alleged abuse of local legislative power brought the doctrine of special legislation before the commonwealth court in Limekiln Golf Course, Inc. v. Zoning Board of Adjustment. Plaintiff in Limekiln had the right to use and an option to buy a tract of land in the “AA” residential zone, which permitted golf courses as a special exception. An exception was applied for in November 1968, but the public hearing on the proposal, held in December, was continued because the proposal was “somewhat indefinite.” At the continued hearing on January 13, 1969, the zoning hearing board erroneously contended that the applicant had no right to the exception because it was not the equitable owner, and it convinced plaintiff to withdraw its application until it had exercised its option. On the following night the supervisors proposed a zoning amendment which would have deleted golf courses in “AA,” “A,” and “B” districts; the new ordinance was prepared and advertised within days. Meanwhile, plaintiff exercised its option on January 27 and reapplied for the exception on February 4. On that afternoon plaintiff’s representative was told that the application would be acceptable even though not “notarized.” However, the amending ordinance was adopted the same evening, and a few days later plaintiff re-

80. The court noted that the “instant case is quite similar to Shapiro . . . ."
81. Id. at 304-05, 247 A.2d at 573-74.
82. See R. Ryan, supra note 14, at § 8.2.3. See also note 16 supra.
83. See note 55 supra.
86. Id. at 501-02, 275 A.2d at 898.
87. Id. at 503, 275 A.2d at 899 (quoting the record).
88. This advice was erroneous because Limekiln, which had the right to use the land for five years, had standing to make the application. See 1 Pa. Commw. Ct. at 503 n.1, 275 A.2d at 899 n.1.
89. Id. at 503, 275 A.2d at 899.
90. Id. at 504-05, 275 A.2d at 900.
91. Id. at 505, 275 A.2d at 900.
92. Id.
ceived its application in the mail with a request that it be notarized. The application was refiled on February 11 but thereafter denied by the zoning hearing board because it had not been “received” until after the amending ordinance had become effective.

Even though the amendment applied to three whole zones and plaintiff’s land was only a part of one zone, the commonwealth court found it could have had “no conceivable purpose except to prohibit the use Limekiln proposed.” The court discussed the supreme court’s rulings in special legislation cases and held them determinative of the case at bar. Noting that each of the township’s objections was based upon minor details, the court stated that the pattern of behavior of the officials involved revealed that the ordinance was “tailored” to Limekiln for the “special purpose” of preventing its use. It was thus held to be special legislation and ineffective as to plaintiff’s land.

Limekiln was followed soon thereafter by Linda Development Corp. v. Plymouth Township. In September 1969, the defendant township rezoned the “A-Residential” district in which plaintiff’s land was situated to “High-Rise Apartment.” Neighbors immediately appealed the change in two separate actions. While these appeals were pending, plaintiff attempted to secure a building permit for development of a high rise apartment building. In December 1969, its application was denied because of the pending suits and plaintiff’s failure to supply certain data which the township contended was required. On January 8, 1970, the Board of Commissions set a zoning hearing to consider another amendment which would have rezoned only plaintiff’s individual tract back to “A-Residential.” On January 21, another building permit application was rejected because of the pending ordinance and plaintiff’s failure to supply complete drainage plans. Plaintiff thereafter appealed from this denial. On August 5, 1970, plaintiff filed preliminary objections to the two suits brought in September 1969 by neighbors appealing the first rezoning. Appeals were

93. Id.
94. Id.
95. Id. at 509, 275 A.2d at 902.
96. Id. at 507-09, 275 A.2d at 901-02.
97. Id. at 509-10, 275 A.2d at 902.
98. Id. at 510, 275 A.2d at 902-03. The court also held that the zoning hearing board had committed an error of law by refusing the admission of certain evidence offered for the purpose of proving special legislation. Id. at 511, 275 A.2d at 903; see notes 136-38 and accompanying text infra.
100. Id. at 336, 281 A.2d at 785-86.
101. Id., 281 A.2d 786.
102. Id. at 337, 281 A.2d at 786.
103. Id.
104. Id.
105. Id.
106. Id.
also taken from the separate dismissals of those preliminary objections, and plaintiff’s three appeals were then consolidated for disposition by the commonwealth court.\textsuperscript{107}

In a complex and difficult opinion, the commonwealth court held, first, that plaintiff’s original application should not have been rejected on the basis of the neighbors’ pending suits, and that under the then effective “High-Rise Apartment” zone plaintiff had a clear legal right to that use.\textsuperscript{108} It then held that the new rezoning back to “A-Residential” was unconstitutional as applied to plaintiff and inapplicable to its land because it was special legislation.\textsuperscript{109} The court found that there could be no doubt that the “sole purpose”\textsuperscript{110} of the second rezoning was to prevent plaintiff’s lawful use of its tract.\textsuperscript{111}

\textit{Linda Development} was the last appellate case in which a developer successfully alleged the special legislation doctrine.\textsuperscript{112} By the time it was decided in 1971, the elements necessary for invocation of the doctrine had been conclusively determined: a zoning ordinance aimed directly at a particular piece of property to prevent its use for a theretofore legal purpose would be characterized as special legislation and held inapplicable to that particular piece of property.\textsuperscript{113} The absence of appellate level cases since \textit{Linda}, however, does not mean that municipal officials have stopped discriminating against particular developers or projects. Rather, it is submitted that these officials had, by 1971, become aware of the growth of the doctrine, and that they have since developed more sophisticated means of disguising their discriminatory purposes. At the same time, several practical problems have arisen which make it difficult for landowners’ counsel to invoke the special legislation principle against discriminatory actions. These problems, which will now be discussed, derive from the language of the special legislation cases and the Pennsylvania zoning appeals procedure.

\textsuperscript{107} Id.
\textsuperscript{108} Id. at 338, 281 A.2d at 786. The court held that the lower court should have sustained plaintiff’s preliminary objections to the neighbors’ suits, and that therefore those pending suits could not form the basis for a denial of the permits in the instant case. \textit{Id}. The court further stated that it was not deciding the issue of whether pending suits generally could be a valid basis for denying a permit. \textit{Id}. at 338 n.1, 281 A.2d at 786 n.1.
\textsuperscript{109} Id. at 338, 281 A.2d at 786, \textit{citing} Commercial Properties, Inc. v. Peternel, 418 Pa. 304, 211 A.2d 514 (1965).
\textsuperscript{110} See notes 124–33 and accompanying text infra.
\textsuperscript{111} 3 Pa. Commw. Ct. at 340, 281 A.2d at 787. A dissenting opinion by one member of the court addressed only the court’s further holdings on the preliminary objections appeals. \textit{Id}. at 347, 281 A.2d at 791 (Mercer, J., dissenting).
\textsuperscript{113} In special legislation cases, the facial validity of the amending ordinance is not in question. Since the challenge is to the constitutionality of the rezoning as it applies to plaintiff, a holding of special legislation invalidates only the application of the amendment to plaintiff’s particular land, not its general prospective application. \textit{See}, e.g., Shapiro v. Zoning Bd. of Adj., 377 Pa. 621, 629, 105 A.2d 299, 303 (1954).
IV. JUDICIAL LANGUAGE AND BURDENS OF PROOF: SOME IMPEDIMENTS TO SPECIAL LEGISLATION CHALLENGES

The major problems of the special legislation doctrine concern the element of proof.\(^{114}\) To attack successfully a rezoning as a special legislation, a landowner must prove that the amendment was "aimed directly at [his] particular piece of property"\(^{115}\) to prevent his proposed lawful use of the land. Unlike certain other types of zoning litigation, the burden of proof in a special legislation case does not shift to the defendant after the plaintiff has shown certain preliminary facts.\(^{116}\) The developer is also subject to a more important practical burden because the "proof" is in the hands — and minds — of the defendant municipal officials.\(^{117}\) This is especially burdensome because under the MPC the developer must build his record before the zoning hearing board.\(^{118}\) The MPC, however, does not provide for discovery procedures at the zoning hearing board level. This omission and the language of some of the special legislation cases have fostered significant practical problems for landowners with special legislation claims.

\(^{114}\) In general, since the ultimate power to enact zoning ordinances is vested in the local governing body, its good faith in acting for the public welfare is not scrutinized by the courts. Gratton v. Conte, 364 Pa. 578, 583, 73 A.2d 381, 384 (1959). Pennsylvania courts do not consider it their function to substitute their discretion for that of the local legislative body, "except where that body has manifestly abused its powers by arbitrary or confiscatory actions." Silver v. Zoning Bd. of Adj., 381 Pa. 41, 45, 112 A.2d 84, 87 (1955). It is undisputed that a zoning ordinance "is presumed to be valid and Constitutional and [that] the burden of proving otherwise is upon [the challenger]." Cleaver v. Board of Adj., 414 Pa. 367, 373, 200 A.2d 408, 412 (1964), citing DiSanto v. Zoning Bd. of Adj., 410 Pa. 331, 189 A.2d 135 (1963). Before a zoning ordinance can be declared unconstitutional, the challenger must prove that "its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. If the validity of the legislative judgment is fairly debatable, the legislative judgment must be allowed to control . . . ." Glorioso Appeal, 413 Pa. 194, 198, 196 A.2d 668, 671 (1964), citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); see Exton Quarries, Inc. v. Zoning Bd. of Adj., 425 Pa. 43, 228 A.2d 169 (1967); Best v. Zoning Bd. of Adj., 393 Pa. 106, 141 A.2d 606 (1958); Kaiser v. Springfield Twp., 22 Pa. Commw. Ct. 287, 348 A.2d 467 (1975); Ellick v. Board of Supervisors, 17 Pa. Commw. Ct. 404, 333 A.2d 239 (1975).


\(^{116}\) In the usual zoning challenge, the plaintiff has the burden of proof throughout. See note 114 supra. Different rules, however, govern total prohibition and exclusionary zoning cases. See, e.g., Beaver Gas Co. v. Osborne Borough, 445 Pa. 571, 285 A.2d 501 (1971), which held that once the developer proves a total prohibition of an otherwise lawful use, the burden of proof shifts to the municipality to prove that the prohibition bears a relationship to the public health, safety, or welfare. Id. at 576, 285 A.2d at 504 (1971). See also Concord Twp. Appeal, 439 Pa. 466, 268 A.2d 765 (1970), an exclusionary zoning case which placed the burden upon the municipality to prove an "extraordinary justification" for two- or three-acre minimum lot sizes. Id. at 471, 268 A.2d at 767. No court has yet adapted the "shifting burden" approach to a special legislation case. See note 138 infra.

\(^{117}\) See notes 136–38 and accompanying text infra.

A. Size of the Rezoning

Related to the practical problems of proving specific intent on the part of municipal officials to discriminate against a particular parcel\(^{119}\) is the issue of whether a municipality can circumvent the special legislation doctrine by rezoning a tract of land larger than that owned by plaintiff.\(^{120}\) This question arose because of certain language in the Peternel decision which was later quoted in the Linda Development case.

In Peternel, the township had contended that the proposed rezoning was unlike spot zoning because it involved a large area — plaintiff's ten-acre tract.\(^{121}\) The court noted, however, that the size of the rezoning was irrelevant, and that regardless of the size of the area affected, a rezoning would still be invalid so long as it was aimed at preventing a theretofore legal use "of an integrated unit owned by one common interest . . . ."\(^{122}\) This language suggested two possible interpretations. It was arguable that after Peternel a municipality could not disguise discrimination against a particular parcel by rezoning it and several neighboring parcels — for example, discriminating against a particular one-half acre plot by rezoning its whole fifty-acre neighborhood. A more limited interpretation, however, would be that the words "of an integrated unit owned by one common interest" were meant to limit the special legislation doctrine to rezonings of only a single parcel, whether that parcel was a one-half acre lot or a fifty-acre tract.

Because both Peternel and Linda Development involved amendments which rezoned only the land owned by the plaintiffs in those cases, they would seem to be consistent with the second, more limiting interpretation; yet, because they involved rezonings of only one parcel, the issue of whether a rezoning of several parcels owned by different landowners could also be held to be special legislation directed against one of those parcels did not arise. The issue did arise, however, in Limekiln, and was settled by implication. In Limekiln, plaintiff's parcel was only a part of the "AA" residential district, and the zoning amendment eliminated his proposed use from all of the "AA," "A," and "B" residential zones.\(^{123}\) Therefore, the holding of Limekiln that the rezoning was special legislation clearly settled by implication the issue of whether the special legislation doctrine could be applied to rezonings of more than one parcel.

\(^{119}\) See notes 136-58 and accompanying text infra.
\(^{120}\) Stated otherwise, the issue is whether the municipality can circumvent the doctrine by denying a use in an entire neighborhood which, practically speaking, only one person could have used. A related issue, beyond the scope of this discussion, is whether special legislation could be used in the same manner as spot zoning to challenge a rezoning which favors an individual by allowing a use throughout a district which would benefit only that single individual.
\(^{121}\) 418 Pa. at 312, 211 A.2d at 519.
\(^{122}\) Id. This language was thereafter quoted without discussion by the commonwealth court in Linda Dev. Corp. v. Plymouth Twp., 3 Pa. Commw. Ct. 334, 339, 281 A.2d 784, 787 (1971).
\(^{123}\) 1 Pa. Commw. Ct. at 509, 275 A.2d at 902.
B. "Sole Purpose"

Since Peternel, the special legislation cases have almost unanimously adopted the supreme court's language in that case that the rezoning was "for the sole purpose of preventing the legal use by plaintiffs of their property." Even though no court has ever expressly held that in order to prevail in a special legislation case the landowner must prove that the "sole purpose" of the amendment was to prevent his proposed use, there is a possibility that the survival of this language could lead to problems for developers. For example, in Clover Hill Farms, Inc. v. Lehigh Township, the commonwealth court held that the landowner failed to prove that the ordinance involved "was specifically directed against its property, or was meant in any manner to be discriminatory." However, a headnote in the official report of that case stated: "Zoning ordinances are not invalid as special legislation of a discriminatory nature unless such are enacted for the sole purpose of preventing the otherwise lawful use of land by its owner."

It is submitted that "sole purpose" is not, and never has been, the test of special legislation, and that careless use of the "sole purpose" language should therefore be avoided. In several of the cases it was clear that discrimination was the sole purpose for the rezonings involved. In several others, where there apparently could have been other legitimate reasons advanced to support the rezonings, not all of the courts have found a discriminatory sole purpose. Thus, several cases have held that proving that discrimination was the "sole purpose" was sufficient, but none has held that such proof was necessary. The distinction is important because municipal officials are vested with legislative discretion in the adoption of zoning ordinances, and courts are generally unwilling to substitute their judgment for that of the officials. Since local officials can cite innumerable reasons to show a rational relationship between nearly any zoning ordinance and the public health, safety, or welfare, landowners alleging

124. 418 Pa. at 311, 211 A.2d at 518 (1965) (quoting lower court).
126. Id. at 242, 289 A.2d at 780.
127. Id. at 239. The "official" headnotes are used only in the official reporter and do not appear in the West Atlantic Second Reporter.
129. But see Limekiln Golf Course, Inc. v. Zoning Bd. of Adj., 1 Pa. Commw. Ct. 499, 275 A.2d 896 (1971), wherein the court noted that the amendment there could have had "no conceivable purpose except to prohibit the use Limekiln proposed." Id. at 509, 275 A.2d at 902.
131. See note 114 supra.
special legislation would be faced with an almost insurmountable burden if required to prove that preventing their particular use was the sole purpose for an ordinance. This is especially so when the burden is considered in light of the problems involved in proving discriminatory motive.133

It is submitted that the cases provide a more workable test than "sole purpose" in their requirement that the landowner prove that the ordinance was "aimed directly at [his] particular piece of property" to prevent a theretofore lawful use of his land.134 Such a test is flexible enough to function in an area of the law where some legitimate reasons can always be advanced to support the rationality of an exercise of discretion. Even though a rezoning may rationally be supported by legitimate reasons, if it would not have been enacted but for its anticipated effect of preventing the otherwise lawful use of property by a particular landowner, then such a rezoning should be struck down as special legislation. While such a test has been implicitly adopted by all of the special legislation cases135 it is submitted that the courts should expressly articulate the standard to prevent further confusion.

C. Proof in the Hands of Defendant

The fact that a plaintiff alleging special legislation must in effect prove the state of mind of local legislators places a very difficult burden upon a landowner. Since local officials will probably not admit to conspiring purposefully against a plaintiff, this burden culminates in the landowner’s attempting to prove by way of inferences that certain behavior was undoubtedly caused by certain unlawful motives. Furthermore, most of the information needed to prove these motives is held by the defendant, so that even plaintiff’s preliminary investigation may be hindered by the fact that only the defendant officials know what records, telephone calls, and conversations, recorded and unrecorded, bear witness to the true purposes for their actions. Other areas of zoning litigation, such as the total prohibition cases136 and the large lot exclusionary zoning and tokenism de-

133. See notes 136–58 and accompanying text infra.
cisions,137 have developed a shifting burden of proof concept which greatly benefits landowners.138 However, there is nothing a landowner can do to raise a presumption of special legislation and shift the burden of proof onto the municipality.139 A shifting burden test would make the doctrine a much more practical tool for combatting discrimination.

D. No Discovery

Another major impediment to the plaintiff landowner in a special legislation case is the lack of discovery provisions in the MPC. The MPC sets up an elaborate scheme of procedure for challenging the constitutionality of a zoning ordinance.140 Landowners are given two methods by which to contest the substantive validity of an ordinance. They may go to the zoning hearing board (board) for a "report" on the validity of the ordinance,141 or they may go to the governing body with a request for a "curative amendment."142 As a practical matter, however, many landowner appeals end up before the board,143 which is required to take evidence, to make a record, to make findings of fact, and to decide all contested ques-

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137. See Willistown Twp. v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975); Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Easttown Twp. Bd. of Adj., 419 Pa. 504, 215 A.2d 597 (1965). These cases involved zoning ordinances which were held to have either the intent or effect of limiting the growth of the municipalities involved and excluding outsiders who wanted to migrate into the municipalities but could not do so because of the effects of the zoning.


138. See note 116 supra. The total prohibition cases developed the rule that when an individual challenging a zoning ordinance proves a total prohibition of an otherwise lawful use, the burden shifts to the municipality to prove that the prohibition bears a relationship to the public health, safety, or welfare. See, e.g., Beaver Gas Co. v. Osborne Borough, 445 Pa. 571, 576, 285 A.2d 501, 504 (1971).

The exclusionary zoning cases may be read as supporting the proposition that absent some compelling governmental interest, a zoning ordinance which excludes outsiders will be held unconstitutional. For example, in Concord Twp. Appeal, 439 Pa. 466, 268 A.2d 765 (1970), the supreme court stated that absent some "extraordinary justification" two- or three-acre minimum lot size requirements are unreasonable. Id. at 471, 268 A.2d at 767; see Willistown Twp. v. Chesterdale Farms, Inc., 462 Pa. 445, 449, 341 A.2d 466, 468 (1975), quoting with approval Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975). See also 1 Suburban Action Institute, A Study of Exclusion S2 (1973); Williams & Norman, Exclusionary Land Use Controls: The Case of Northeastern New Jersey, 22 SYRACUSE L. REV. 475, 543, 569 (1971).

139. See note 116 supra.


141. Id. § 11004(1)(a).

142. Id. § 11004(1)(b). But see text accompanying notes 159-76 infra.
tions, factual or substantive.\textsuperscript{144} In hearings before the board, the parties may be represented by counsel, may offer evidence, and may cross-examine adverse witnesses.\textsuperscript{145} Formal rules of evidence do not apply.\textsuperscript{146} The board is empowered to administer oaths and to issue subpoenas, including subpoenas duces tecum to compel the production of relevant documents and papers.\textsuperscript{147} However, there is no provision for prior discovery of any kind.\textsuperscript{148} As a practical result of this procedure, plaintiff is severely hindered in making its record because pre-litigation investigation has been hindered and because plaintiff is never certain what evidence will be available at the hearing. Besides the difficulty of preparing for the hearings, the inability of counsel to discover records before hearings and to depose municipal officials makes it difficult for the plaintiff to induce admissions or other suggestions of unlawful motive from the officials, who can otherwise be quite rehearsed in their testimony by the time they testify at the hearing. In addition, under the current law, the developer must put these officials on the witness stand and ask them questions about the rezoning while having no idea of how they will respond.\textsuperscript{149}

After determination by the board, substantive challenges can be appealed to the court of common pleas,\textsuperscript{150} which issues a writ of certiorari

\textsuperscript{143} Even if a request for a curative amendment under section 11004(1)(b) is denied, the landowner may begin a new challenge before the board. \textit{Pa. Stat. Ann. tit. 53, § 11004(3) (Purdon 1972)}. The governing body's decision may also be appealed directly to a court. \textit{Id.}

\textsuperscript{144} \textit{Id.} § 10910. Provisions relating to the board are covered in article 9 of the MPC. \textit{See id. §§ 10901-10916.}

\textsuperscript{145} \textit{Id.} § 10908(5).

\textsuperscript{146} \textit{Id.} § 10908(6).

\textsuperscript{147} \textit{Id.} § 10908(4). The subpoena power is often ineffective, however, because the board lacks the effective power to enforce its orders and is often unwilling to do so in the face of apathy by subpoenaed witnesses.


\textsuperscript{149} A further problem with regard to board procedures, but one which lies beyond the scope of this Comment, is the applicability of an attorney-client privilege to dealings between public officials and municipal solicitors. In the context of the instant discussion, the question is whether records of meetings, discussions, or advice involving public officials and solicitors about actions later challenged as special legislation are privileged or can be discovered and admitted into evidence.

commanding the board to certify to the court the entire record, including
the transcript of testimony before the board. 151 While the court has discri-
tion to hold a hearing to receive additional evidence or to remand the case to
the board to receive additional evidence, 152 this procedure is rarely em-
ployed. 153 When no additional testimony is taken by the court, the findings
of the board will not be overturned if supported by substantial evidence or
unless the board clearly abused its discretion.154

It is submitted that the lack of discovery prior to board proceedings,
coupled with the courts' usual practice of not hearing zoning appeals de
novo, increases the developer's difficulty in sustaining his burden of proof
in special legislation cases. As one authority has stated: "One of the
underlying purposes of the Discovery Rules is to prevent a party who has
a justifiable claim from being penalized because the facts necessary to prove
the claim are in the possession of his adversary."155 In effect, making the
challenging landowner prove the hidden motives of those possessing the
evidence of those motives without the assistance of discovery procedures
gives the defendant municipal officials an unjust advantage and denies
aggrieved landowners ready access to the doctrine of special legislation.

The lack of discovery provisions in the MPC is probably a significant
factor in the decrease of special legislation challenges in recent years. Only
a courageous landowner would risk withholding his proof of special legis-
lation at the zoning hearing board level in the hope that, on appeal from
an adverse decision, the court would later allow him discovery and the
opportunity to present his evidence. The discovery provisions of the Penn-
sylvania Rules of Civil Procedure156 currently provide for discovery only
in actions brought in "court" which is subject to the Rules.157 Only
if the court allowed the presentation of additional evidence would the
landowner benefit from the opportunity to seek discovery at the common

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151. Id. § 11008(2).
152. Id. § 11010.
153. Even though the courts may take additional evidence, they are not required
to and usually will not do so. See Krasnowiecki, Zoning Litigation and the New
commentator has suggested, by way of explanation, that most courts fear they would
be swamped with requests for the very evidentiary hearings which the board pro-
dcedures were designed to prevent. Ryan, Zoning — Recent Developments in Penn-
sylvania Zoning Laws, Problems of the Land Developer; Challenging Local Ordinances,
Ukrainian Orthodox Church v. Fun Bun, Inc., 3 Pa. Commw. Ct. 394, 398, 283 A.2d
75, 281 A.2d 93, 96 (1971). See also Wynnewood Civic Ass'n v. Lower Merion Twp.
of the purposes for the procedure in which the board rather than a court makes the
record is to expedite zoning appeals. However, if counsel do not obtain defendant's
materials until the hearing, continuances and delays occur while counsel sift through
all the papers, follow up leads, and prepare plaintiff's presentation.
157. Id. 4001.
pleas level. Since he is required to make his record before the board, later discovery is practically useless. Thus, the lack of discovery procedures prior to the board stage is a deficiency in the MPC procedure which should be remedied by legislative amendment of either the MPC or the Rules of Civil Procedure. One possibility would be the recognition that board proceedings are, in effect, quasi-judicial factfinding proceedings and that, therefore, the statutory definition of "court" should be amended to include the boards. Another possibility would be a specific amendment to the MPC to provide for discovery.

E. Route of Appeal

Prior to the adoption of the MPC, a landowner with a special legislation case could appeal the denial or revocation of a building permit either through the zoning board of adjustment process or by going directly to court with an action in mandamus. By proceeding in mandamus, the landowner commenced his challenge directly in the courts instead of before the municipality's own zoning board, which enabled him, if he desired, to seek discovery at the very beginning of his challenge and before being required to present his witnesses.

However, the adoption of the MPC has created serious doubt as to the continued viability of the mandamus route. Although it would appear that the MPC gives the landowner the choice of proceeding in mandamus, with the right to seek discovery, or proceeding before the zoning hearing board or the governing body using the appeal process authorized by article X of the MPC, without the right to seek discovery, it is submitted

158. See note 157 and accompanying text supra.
161. See text accompanying notes 136–58 supra.
163. Section 1004 of the MPC, id. § 11004, offers two methods by which a landowner may challenge the substantive validity of an ordinance. He may submit his challenge to the governing body of the municipality with a request for a curative amendment under section 609.1 of the MPC, id. § 10609.1, or he may appeal to the zoning hearing board under sections 910 or 913.1, id. §§ 10910, 10913.1.
that under the MPC procedures, mandamus is not a practical choice. This impracticality stems from two hazards in the mandamus route, one caused by the nature of the mandamus action, and the other caused by the effect of the MPC upon the writ.

The first hazard is caused by the practical problems involved in proving a "clear legal right" to relief in mandamus.\textsuperscript{164} In a special legislation action, this means that the landowner must prove: 1) that he applied for his permit under the old ordinance; 2) that he was entitled to the permit under the old ordinance; and 3) that the old ordinance is the law applicable to his application. It is this last point, which in effect requires that the landowner clearly prove that the new ordinance is not applicable to him because it is unconstitutional special legislation, which creates the problems for the plaintiff. As discussed previously,\textsuperscript{165} it is difficult for the landowner to overcome the burdens of proof and the presumptions of validity surrounding a zoning ordinance and to prove that the new ordinance is unconstitutional in the face of the innumerable reasons offered by municipal officials to show that the ordinance is related to the public health, safety, or general welfare. In order to be entitled to mandamus, however, the landowner must accomplish this task so convincingly as to persuade the court that he is clearly entitled to the relief sought.\textsuperscript{166} Whether this requirement increases the already heavy burden on the landowner is an unanswered, and perhaps unanswerable, question. Its mere existence, however, is itself a deterrent to the choice of the mandamus route.

The second hazard to using mandamus is the MPC and its relationship to rule 1095(6) of the Pennsylvania Rules of Civil Procedure.\textsuperscript{167} Rule 1095 sets forth the requirements for a complaint in mandamus and includes, in subsection 6, the requirement that there be a "want of any other adequate remedy at law."\textsuperscript{168} Thus, one risk which the landowner seeking mandamus would face is that the court might find that the article X appeal procedures in the MPC provide the challenger with an adequate remedy at law for the adjudication of his special legislation claim. The structuring of MPC procedures for landowner-initiated challenges increases the possibility of such a ruling. The procedure for landowner challenges to the substantive validity of zoning ordinances, such as special legislation claims, is set out in section 1004 of the MPC.\textsuperscript{169} That section authorizes curative amendment requests under section 609.1 of the MPC,\textsuperscript{170} and zoning hearing board appeals under sections 910 or 913.1,\textsuperscript{171} but it makes no reference to section 909, which recognizes the right to proceed in

\textsuperscript{164} See note 160 supra.

\textsuperscript{165} See text accompanying notes 136-58 supra.

\textsuperscript{166} See note 160 supra.

\textsuperscript{167} Pa. R. Civ. P. 1095(6).

\textsuperscript{168} Id.


\textsuperscript{170} Id. § 10609.1.

\textsuperscript{171} Id. §§ 10910, 10913.1.
mandamus. In addition, the developer choosing to sue in mandamus runs the risk of having the court hold that section 1004 is the exclusive remedy. Section 1001 states that the provisions set forth in article X (which nowhere refer to section 909) "shall constitute the exclusive mode of securing review of any ordinance, decision, determination or order of the governing body of a municipality . . . ."173

Thus, under the MPC, the landowner is faced with two very real deterrents to proceeding in mandamus and seeking discovery, as opposed to proceeding under the MPC without discovery. Full discussion of these deterrents, however, requires consideration of the results which could ensue should mandamus be wrongly chosen.

It would appear that a decision denying mandamus on the ground that an adequate remedy at law exists would delay, but would not be fatal to, the landowner's cause. At the worst he would be forced to file a new application and obtain a new refusal before proceeding.174 Thereafter, he could still adjudicate the challenge under the MPC.175

However, a decision denying mandamus on the ground that the landowner did not have a "clear legal right" to relief could have graver repercussions. Res judicata may be applicable in zoning cases,176 and may bar a subsequent action under the MPC in this situation. While this issue is now unanswered, the deterrent effect of the possibility of such a result virtually dictates the use of the MPC procedures, rather than mandamus, to adjudicate special legislation claims. When the risks inherent in the "adequate remedy at law" issue are also considered, the practitioner's choice becomes clear: special legislation cases must proceed under the MPC even though handicapped by the lack of discovery.

F. Remedies

Prior to the adoption of the MPC, when the mandamus action was a viable method of challenging special legislation,177 a landowner successful

172. Id. § 10909; see note 162 supra.
174. After an original permit refusal, the landowner has 30 days to appeal through the MPC procedures. See Pa. STAT. ANN. tit. 53, § 11004(2) (b) (Purdon 1972). By the time a court, ruling on the landowner's mandamus action, would hold he had an adequate remedy at law, the developer's MPC appeal period for that permit would surely have passed. However, the rejection of one application for a permit does not bar a second application for a permit. See Schubach v. Silver, 461 Pa. 336, 336 A.2d 328 (1975); R. Ryan, supra note 14, at § 9.4.17.
176. See, e.g., Cheltenham Twp. Appeal, 413 Pa. 379, 196 A.2d 363 (1964); Grace Bldg. Co. v. Hatfield Twp., 16 Pa. Commw. Ct. 530, 329 A.2d 925 (1974). Even though res judicata is normally held to be inapplicable to zoning challenges for the reasons discussed in R. Ryan, supra note 14, at § 9.4.17, it is submitted that a mandamus denial based upon a finding of no clear legal right is the type of zoning challenge to which res judicata could be applied.
177. See text accompanying notes 159–76 supra.
in a mandamus action was entitled to a writ ordering the issuance of his permit.\textsuperscript{178} Even though the MPC appears to make the writ of mandamus an impractical remedy,\textsuperscript{179} it does invest the courts with power to order the approval of a proposed development in all its elements or to order some elements approved and refer others to appropriate bodies or agencies for further proceedings.\textsuperscript{180} This power to order definitive relief\textsuperscript{181} lies regardless of the fact that plans and development applications are not in the form otherwise required for final approval.\textsuperscript{182} Definitive relief, which has been upheld in several cases,\textsuperscript{183} provides the courts with an excellent tool with which to recompense developers whose planning and proposals have been hindered by abuses of local legislative discretion.

IV. Conclusion

For several years the doctrine of special legislation proved to be an effective weapon against the discriminatory action of municipalities toward unpopular developments. However, as municipal solicitors became aware of the growing significance of the doctrine, they developed more sophisticated methods of hiding discriminatory actions and became much more conscious of their words and actions and the possible inferences which could be drawn from them. This, coupled with certain practical problems in proving special legislation, resulted in burdening landowners with an almost insurmountable task in successfully proving their claims. It is submitted, however, that if discovery procedures are made available at the start of the zoning hearing board process, if the shifting burden of proof principle is extended to the special legislation area, if the courts clarify that the proper test for special legislation is not proof of a "sole" purpose but rather that the ordinance was "aimed directly" at the plaintiff regardless of its other alleged purposes, and if the mandamus action is reevaluated in view of its emasculation by the MPC and made more viable, then the doctrine will remain a powerful tool with which to fight unlawful discrimination.

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\textsuperscript{179} See notes 159–76 and accompanying text supra.
\textsuperscript{181} See generally Comment, Judicial Relief in Exclusionary Zoning Cases: Pennsylvania's Definitive Relief Approach, 21 Vill. L. Rev. 701 (1976).