1994

Zoning and Planning Litigation Procedures under the Revised Pennsylvania Municipalities Planning Code

Jan Z. Krasnowiecki
L.B. Kregenow

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Land Use Law Commons, and the Property Law and Real Estate Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol39/iss4/3

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlon@law.villanova.edu.
ZONING AND PLANNING LITIGATION PROCEDURES UNDER THE REVISED PENNSYLVANIA MUNICIPALITIES PLANNING CODE

JAN Z. KRASNOWIECKI AND LB KREGENOW*

I. INTRODUCTION

THE Pennsylvania legislature should reconsider the changes it enacted in 1978 and 1988 affecting the procedures that govern the administration, review and correction of local zoning and planning measures. The rules that govern procedures such as standing, timing, ripeness, and scope, and availability of relief are as important in controlling arbitrary local government action as are the relevant substantive rules.1 Unfortunately, some of the 1978 and 1988 revisions to the Municipalities Planning Code (MPC) were either ill-conceived or ill-drafted, so that the zoning and planning litigation procedures have become muddled and, in some cases, unworkable.

In 1972, Pennsylvania revised its 1968 MPC2 by enacting extensive changes in the procedures for the administration and judicial review of local zoning and planning measures.3 The 1972 MPC was designed to tip the balance in favor of new development and against the exclusionary tendencies of local governments.4 That spin has since been completely reversed by changes in the MPC enacted in 19785 and 19886.

The fact that the 1978 revisions met with little opposition from the development industry is probably attributable to the fact that the 1978 changes passed through the legislature within fifteen

---

* Mr. Krasnowiecki is a Shareholder in the Philadelphia office of Klett, Lieber, Rooney & Schorling. Ms. Kregenow is an associate in the same office. Their litigation practice centers on real estate, zoning, land use, environmental matters and eminent domain proceedings.


4. Mr. Krasnowiecki was the principal draftsman of the 1972 changes.


months, giving the industry little opportunity to organize and present a response. That the 1978 changes were allowed to survive into the major revision of the MPC, which occurred in 1988, and that further limitations on a developer's ability to challenge the determinations of local governments were added without objection, is more difficult to explain. It is possible that the recession deadened opposition. For the last five or six years, there has been little development pressure; thus, very few developers have experienced the full effect of the recent procedural changes to the MPC. When development picks up, however, the new MPC will become a major obstacle to such development. This Article examines the MPC from a developer's point of view and identifies many of the new pitfalls facing developers. The Article is also intended to furnish the practitioner with a road-map that not only describes the procedures set forth in the MPC, but also examines the rationale behind them. Finally, the Article suggests possible revisions to the MPC and also describes general considerations applicable to future reform.

II. Procedure for Challenging Zoning on Substantive Grounds

A. Landowner Challenges

1. Historical Introduction

In the 1950s, Pennsylvania developed a rule that all persons wishing to challenge zoning on substantive grounds, be they persons who desire to secure relief from unwanted restrictions or limitations on their land (hereinafter "landowner challengers") or...
neighbors or civic groups who complain about development permitted on the land of another (hereinafter "protestants"), must do so by taking an appeal to the Board of Adjustment (now the Zoning Hearing Board in municipalities governed by the MPC). In an attempt to provide a statutory basis for this rule, the Supreme Court of Pennsylvania held in *Jacobs v. Fetzer*\(^{11}\) that the landowner challenger must first seek a building permit for the use that he desires (notwithstanding that a zoning restriction would prevent such a use) and, upon being turned down, take the statutorily prescribed appeal to the Zoning Hearing Board.\(^{12}\) In doing so, however, the court overlooked the wording of the statute.\(^{13}\)

Thus, under the "building permit rule," the Zoning Hearing Board was the forum in which the validity of the underlying zoning scheme was challenged. A similar rule was also established for protestant challengers. In *Knup v. City of Philadelphia*,\(^{14}\) the Supreme Court of Pennsylvania held that the protestants must wait until the building permit issues, and then appeal to the Board.\(^{15}\) While there was very little statutory basis for the holdings in *Jacobs*\(^{16}\) and *Knup*,\(^{17}\) the practical merit of the rule was that it enabled the courts to avoid lengthy evidentiary hearings and probably allowed litigants to make their record more quickly in a less formal (albeit, for the landowner, more hostile) forum.

Co. v. Kohn, 215 A.2d 597, 603 (Pa. 1965). This view was codified in the MPC in 1972 and carried forward into the 1978 MPC. PA. STAT. ANN. tit. 53, § 10107(a) (Supp. 1994). For further discussion of the rule on standing for landowner challengers, see infra notes 62-63 and accompanying text.


12. Id. at 357-58.

13. Under the old Zoning Enabling Act, there was no basis for invoking the jurisdiction of the Board of Adjustment (now the Zoning Hearing Board) except on appeal from the action of the "Administrative Officer" (now the Zoning Officer). In developing the building permit rule, the Pennsylvania courts erroneously thought that a building permit rejection for zoning reasons would serve as such an action. The courts overlooked the fact that the Board’s jurisdiction was limited to correcting mistakes or errors of the administrative officer. PA. STAT. ANN. tit. 53, § 10909 (repealed 1988). A permit officer who refuses a permit for a use that is clearly not permitted by the zoning ordinance (for example, an apartment building in a single family detached zoning district) is not committing any error.


15. Id. at 403.


17. Knup v. City of Phila., 126 A.2d 399 (Pa. 1956). In the case of a protestant appeal, a zoning officer or building inspector who issues a building permit for a building that is permitted by the zoning is likewise committing no mistake or error.
There were, however, several very serious defects in the old Pennsylvania procedure. First, by requiring the landowner challenger to secure a turndown for a building permit, the rule suggested that the challenger must process the development to the point where an application for a building permit would be appropriate, even though the desired development was clearly prohibited by the zoning. In connection with a large subdivision, that meant that a developer could not challenge a minimum lot size requirement without first doing all of the engineering work as well as posting appropriate security for the completion of basic improvements in the desired but not permitted subdivision, because typically, only then would a building permit be available. Fortunately, in *National Land & Investment Co. v. Kohn*, the case that launched the Pennsylvania exclusionary zoning doctrine, the Supreme Court of Pennsylvania approved a procedure in which the developer would simply submit a sketch plan of one substandard lot to the building officer and seek a building permit for a home on it, thereby satisfying the building permit rule.

The insistence that the landowner challenger first seek a building permit also suggested that such a challenger must be the record owner of the property. Again, the *National Land* case established that the challenger did not have to be the record owner, but could simply be a person holding an option or an agreement of sale conditioned on his ability to overturn the zoning.

These two procedural rulings in *National Land* had more to do with the explosion of exclusionary zoning cases in the 1960s and 1970s than the exclusionary zoning doctrine itself. If the Pennsylvania courts had held, as have many courts of other jurisdictions, that the challenger must be the record owner of the land, in all probability, we would not have seen many exclusionary zoning cases in Pennsylvania. Existing landowners, who are typically long-term residents of the community, are extremely reluctant to litigate the zoning or to lend their names to litigation by others. A developer, on the other hand, would be reluctant to invest in the land without knowing whether he can secure relief from the zoning.

While *National Land* solved the problem for landowner challengers, it did nothing to modify the *Knup* rule that protestants must wait until the building permit issues. Matters eventually

---

19. *Id.* at 604-05.
20. *Id.* at 603.
21. See *Knup*, 126 A.2d at 403 (holding that protestants must await application
came to a head in *Levitt & Sons, Inc. v. Kane.*

Levitt sought to develop some 800 acres that were then zoned for one acre minimum lot sizes. Levitt wanted to build single family detached homes on one-half acre lots. Montgomery Township, in which the property was situated, approved of the proposal and rezoned Levitt's property from one acre to one-half acre minimum lot sizes. The Township included within the area to be rezoned some adjacent properties that had also been zoned for one acre minimum lot sizes.

After the rezoning ordinance went into effect, the residents in the adjacent area that had been rezoned along with Levitt's property brought an action in the Common Pleas Court of Montgomery County challenging the rezoning. In addition to challenging Levitt's rezoning, they sought to challenge the rezoning of their own property from one acre to one-half acre lots.

The common pleas court dismissed the challenge to Levitt's rezoning on the ground that the challenge was premature because the protestants should have waited until the building permit is issued. The court sustained a challenge to the rezoning of the protestants' properties on the grounds that the new zoning was in general arbitrary and capricious.

Ironically, but not surprisingly, Levitt appealed the decision that had dismissed the protestants' challenge to the rezoning of his property as premature. Levitt's strategy of appealing an apparently favorable ruling is easily understandable. The ruling left a sword of Damocles hanging over the development, requiring Levitt to complete the engineering work on the entire subdivision, post security for improvements and enter into a developer's agreement before he could apply for and obtain a building permit that would trigger a challenge by the surrounding residents. As would most developers, Levitt preferred to have his rights adjudicated without the necessity of incurring all those costs.

The Pennsylvania Commonwealth Court dismissed Levitt's appeal to zoning authorities for building permit before following appeal procedure prescribed by statute.

23. *Id.* at 918-19.
24. *Id.* at 918. The Township rezoned a rectangle of about 1300 acres, of which 800 were Levitt's. *Id.*
25. *Id.* at 917-19.
26. *Id.* at 919.
27. *Id.*
28. *Id.*
peal on the grounds that Levitt had no standing to appeal a favorable ruling.\textsuperscript{29} Even more peculiar, however, was the commonwealth court's holding regarding the lower court's decision in favor of the protestants' challenge to the rezoning of their own properties. The commonwealth court reversed the lower court and held that the Pennsylvania building permit rule applies, so the protestants must seek and be turned down for a building permit before they may commence an action.\textsuperscript{30} How that was supposed to be accomplished was not clear. If the protestants had applied for permits on one acre lots, they would have been granted the permits because, obviously, in a one-half acre minimum lot area district, homes on one acre lots are permitted. Had the protestants applied for such permits, therefore, there would have been no adverse decision of the administrative officer from which an appeal could be taken. One is tempted to echo Lord Coke's famous dictum: "He knows not the law who knows not the reason thereof."\textsuperscript{31}

The only conceivable basis for the building permit rule is that such a requirement is an appropriate test of ripeness, \textit{i.e.}, a necessary step to frame the issues. In most cases, however, the characteristics of the building itself have nothing to do with the issues in a zoning challenge, so requiring a challenger to wait until a building permit application has been ruled upon makes no sense. This was so, for example, in the minimum lot size challenge in \textit{Levitt}.\textsuperscript{32} Neither the court nor the litigants needed to see what a single family detached home looks like in order to envisage the difference between a development of single family homes on one-half acre lots and a development of single family homes on one acre lots.

In 1972, the Pennsylvania zoning litigation practice came under extensive legislative scrutiny. That year saw a complete revision of the litigation procedures through the adoption of a new Article X of the Municipalities Planning Code and the adoption, in Article VI, of the unique "curative amendment" procedure for challenging zoning.\textsuperscript{33} In 1978, the MPC was again revised.\textsuperscript{34} Many of the changes made in the Pennsylvania procedures in 1972 were car-

\begin{itemize}
  \item \textsuperscript{29} Id.
  \item \textsuperscript{30} Id. at 922-24.
  \item \textsuperscript{31} See 3 E. Coke, A Systematic Arrangement of Lord Coke's First Institute of the Laws of England 574 (J. Thomas ed., 1818).
  \item \textsuperscript{32} For a discussion of the minimum lot size challenge in \textit{Levitt}, see supra notes 22-31 and accompanying text.
  \item \textsuperscript{34} Act 249, 1978 Pa. Laws 1067.
\end{itemize}
ried forward into the new Code verbatim. Some were not and, as we will see, in many cases the changes are inexplicable. When the Code was again revised in 1988, the drafters embraced some of the changes that had been made in 1978. The result is a mishmash of ideas that makes it very difficult for a developer to obtain any relief from an unfavorable local action and makes it equally difficult to defend any local action granting approval to develop.

2. **Procedure Under the MPC**

   a. **Jurisdiction of Zoning Hearing Board Retained: An Alternative Route Through “Curative Amendment” Opened**

      The 1972 MPC continued the old practice of having substantive challenges to the validity of zoning go to the Zoning Hearing Board. However, the 1972 MPC opened an alternative route, that of filing a challenge with the governing body via a “curative amendment.” Except for some important differences, which will be noted later, procedurally, the two routes were treated the same.

      Several concerns prompted the 1972 revisions that allowed alternative paths for zoning challenges. In addition to the unwanted complications of the old building permit rule, the Pennsylvania procedure that required zoning challengers to take the matter to the Zoning Hearing Board in the first instance created a practical problem for the developer who, believing that he could persuade the local governing body to rezone, decides to proceed before the governing body first. Although requests for rezoning do not require the presentation of evidence, as a practical matter most developers tend to make their case for rezoning through the testimony of experts and exhibits. Under the pre-1972 procedure, if the request for a change was not granted by the governing body, the developer would then have to proceed with a challenge before the Zoning Hearing Board, putting on much the same evidentiary case before the Board as he had just produced before the governing body. To avoid this result and to encourage local governing bodies to correct their ordinances without necessitating the intervention

---

35. *Id.*
38. *Id.* §§ 10609.1, 11004.
39. For a discussion of the differences between the alternative routes for zoning challenges, see *infra* notes 41-49 and accompanying text.
40. See *Jacobs v. Fetzer*, 112 A.2d 356, 358 (Pa. 1955) (stating that landowner challenger must seek building permit for desired use before appealing zoning ordinance to Zoning Board of Adjustment (Zoning Hearing Board)).
of the courts, the 1972 MPC created the "curative amendment" procedure under which the developer could present his challenge to the existing zoning restrictions on the record before the governing body in an effort to persuade it to adopt a zoning change that would cure the alleged defect.\footnote{PA. STAT. ANN. tit. 53, § 10609.1.} If the governing body chose not to adopt the proposed curative amendment,\footnote{There was an issue under the 1972 MPC whether the governing body would be free to disregard the amendment proposed by the developer and adopt some other "cure," perhaps a modification of the cure proposed by the challenger. Part of the problem had already been addressed by the Pennsylvania Supreme Court in Casey v. Zoning Hearing Board, 328 A.2d 464 (Pa. 1974). The court held that a governing body cannot, unless the amendatory ordinance was "pending" before the challenge to the zoning was filed, cure the defect in its ordinance by an amendment that is designed to "zone around" and to "thwart" the developer. \textit{Id.} at 469. This holding, however, did not preclude an amendment that would rezone the developer's land to the desired category of development but change many of the regulatory details such as height of buildings, density, amount of open space and so forth. \textit{Id.} In Appeal of Carr, 374 A.2d 735, 739 (Pa. Commw. Ct. 1977), the commonwealth court clearly precluded that option. The ruling in \textit{Appeal of Carr} has now been legislatively reversed by the current MPC §§ 609.1(c) and 916.1(c)(5). PA. STAT. ANN. tit. 53, §§ 10609.1(c), 10916.1(c)(5) (Supp. 1994). For further discussion of this issue, see infra notes 70-112 and accompanying text.} the developer could then go directly to court on the record made before the governing body. The intent was to open two alternative and equally available avenues of substantive challenge for the landowner regardless of the grounds for the challenge: the landowner could challenge the validity of a zoning scheme before either the Zoning Hearing Board or the governing body.\footnote{PA. STAT. ANN. tit. 53, § 10916.1(a).} The courts, at first, made a mish-mash of this intent. Let us explain why.

Substantive challenges to a zoning ordinance fall generally into two classes: (1) those that sound more like a "taking" argument and argue the unreasonableness of a restriction by reference to the location of the site and its suitability for the proposed use ("site specific" challenges);\footnote{\textit{See, e.g.,} Robin Corp. v. Board of Supervisors, 332 A.2d 841 (Pa. Commw. Ct. 1975) (providing example of site specific challenge).} and (2) those, on the other hand, that argue the invalidity of a zoning scheme by reference to some overall policy, such as the need for specific types of housing or the duty of a local government to provide for all lawful uses ("community wide" challenges).\footnote{\textit{See, e.g.,} Township of Plymouth v. County of Montgomery, 531 A.2d 49 (Pa. Commw. Ct. 1987) ("The key point is that when a municipal governing body ... confines its vision to just one isolated place or problem within the community, disregarding a community wide perspective, that body is not engaged in lawful zoning.") \textit{appeal denied}, 554 A.2d 515 (1988).} Shortly after the enactment of the 1972 MPC, the commonwealth court seemed to be leaning in favor of a rule that
would have required all challenges involving “community wide”
grounds to take the curative amendment route and all those involving
“site specific” grounds to take the route through the Zoning
Hearing Board.46 That mistaken view was partially corrected in
Beekhuis v. Zoning Hearing Board,47 where the court held that the
Zoning Hearing Board may hear all types of challenges, whether
based on site specific arguments or community wide grounds.48
However, there is a suggestion in the case that site specific chal-
lenges that do not include any community wide arguments cannot
be presented through the curative amendment route.49

The revised MPC repeats verbatim the provisions of the 1972
Code to the effect that a challenger is free to submit his challenge
either to the Board or to the governing body.50 However, the revi-
sions then muddy the waters by stating that the Zoning Hearing
Board has jurisdiction over substantive challenges to the validity of
any land use ordinance “except those brought before the governing
body pursuant to [the curative amendment procedure].”51 This
language is either surplusage, because if a case is brought before
the governing body no issue of Board jurisdiction could arise, or it
suggests that there are some cases that may appropriately be
brought before the governing body, which cannot alternatively be
brought before the Board. This confusion should never have been
allowed to occur.52

b. Building Permit Turndown Not Required

The 1972 MPC abolished the rule that the developer must first
seek a building permit and then take his challenge to the Zoning
Hearing Board by way of an appeal from the denial of the permit.
Under the 1972 MPC, a challenge to the zoning ordinance could
be commenced simply by filing a challenge with the Zoning Hear-

46. See Robin Corp., 332 A.2d at 847 (holding that landowner’s request for cura-
tive amendment, in challenge to zoning of his land only, was inappropriate). But cf.
1974) (“We . . . dispose of Township’s argument that the curative amendment proce-
dure . . . is limited to facial attacks on the constitutionality of a zoning ordi-
nance.” (citing Jan Z. Krasnowiecki, Zoning Litigation and the New Pennsylvania Proce-
dures, 120 U. PA. L. REV. 1029, 1102 (1972))).
48. Id. at 1233-35 & n.2.
49. See id. (distinguishing between two-pronged challenges and site-specific
only challenges).
52. For a general discussion of the rules governing zoning procedures and
associated problems, see sources cites at supra note 1.
ing Board or the governing body containing "a short statement reasonably informing the board or the governing body of the matters that are in issue and the grounds for the challenge." The substance of this provision was carried forward into the revised MPC, although the old language was abbreviated to: "The request shall contain the reasons for the challenge."

c. Timing

Under the building permit rule, which required the landowner challengers to wait until an application for a building permit had been turned down before they could raise their challenge to the zoning scheme, it was clear that the challenger did not need to challenge a zoning ordinance as soon as adopted. Rather, a landowner challenger could wait until a permit had been denied—the challenge would then have to be filed within thirty days of the denial. With the abolition of the building permit rule for landowner challengers, the 1972 MPC restated the time limits as follows:

(b) The request may be submitted at any time after the ordinance or map takes effect but if an application for a permit or approval is denied thereunder, the request shall be made not later than the time provided for appeal from the denial thereof. In such case, if the landowner elects to make the request to the governing body and the request is timely, the time within which he may seek review of the denial of the permit or approval on other issues shall not begin to run until the request to the governing body is finally disposed of.

For some unexplained reason, the revised MPC repealed this provision. It is now unclear whether there is any limitation on the timing of a challenge. One of the functions of the repealed provision was to abolish the old building permit rule by stating clearly that a challenge to an ordinance governed by the MPC may be filed at "any time" after the ordinance becomes effective, but not later

54. PA. STAT. ANN. tit. 53, § 10916.1(a), (c)(1).
55. For a discussion of the building permit rule, see supra notes 10-32 and accompanying text. For a discussion of the different rule applying to procedural challenges, see infra notes 142-44 and accompanying text.
than thirty days after a permit thereunder has been denied.\footnote{59} By deleting this provision, the revised MPC opens the door to the possibility that some court might reinstate the old building permit rule.\footnote{60} It is possible that the deletion was designed to remove a potential procedural trap for the unwary practitioner, but if that were the case, the legislature should have dealt with the trap rather than repeal the entire provision.\footnote{61}

d. Standing

The 1972 MPC also codified the \textit{National Land} rule on standing for landowner challengers by defining "landowner" as any "legal or beneficial owner or owners of land including the holder of an option or a contract to purchase (whether or not such option or contract is subject to any condition)."\footnote{62} This definition, which also controls who is entitled to make applications for development, was carried forward, verbatim, into the revised MPC, section 107 (definition of "landowner").\footnote{63}

e. Ripeness: Requirement That Challengers Present Plans

To ensure that challengers ask the governing body or the Zon-
ing Hearing Board to decide only those challenges to the zoning ordinance that were ripe, the 1972 MPC required that “[t]he request shall be accompanied by plans and other materials describing the use or development proposed by the landowner in lieu of the use or development permitted by the challenged ordinance or map." 64 To make it clear that a developer would not be required to prepare final engineered plans when such detail has nothing to do with the issues presented, the 1972 MPC went on to say:

Such plans and other materials shall not be required to meet the standards prescribed for preliminary, tentative or final approval or for the issuance of a permit so long as they provide reasonable notice of the proposed use or development and a sufficient basis for evaluating the challenged ordinance or map in the light thereof. 65

For some inexplicable reason, the revised MPC carries this plan submission requirement forward only for challenges filed with the governing body under the curative amendment procedure and does not require that challenges filed with the Zoning Hearing Board be accompanied by such plans. 66 As a result, in Budco Theatres, Inc. v. Zoning Hearing Board, 67 the Pennsylvania Commonwealth Court was forced to hold that challenges filed with the Board need not be accompanied by any plans. 68 The revised MPC thus presents the challenger with a new consideration when choosing whether to go before the governing body with a curative amendment or to present the challenge to the Zoning Hearing Board. In certain unique circumstances a challenger may prefer not to submit any plans with his challenge. In most cases, however, the plans have an important role in that they provide a basis for granting definitive relief. 69 Why the legislature decided to abolish the requirement for

65. Id.
67. 632 A.2d 1072 (Pa. Commw. Ct. 1993). In Budco, the commonwealth court rejected the argument of the trial court and board that the deletion was merely an oversight by the legislature. Id. at 1075. Instead, the court chose to rely on the plain language of the statute, which only requires that plans be submitted when proceeding under the curative amendment procedures. Id.
68. Id.
69. The 1972 MPC requirement that all challengers submit plans sufficient to describe the desired development served two purposes: (1) to facilitate the granting of definitive relief; and (2) to satisfy the concern of the courts that they should not be required to pass on the validity of a zoning ordinance without having some proof of the landowner’s intent to proceed with a particular development. For a discussion of definitive relief, see infra notes 70-112 and accompanying text.
challenges filed with the Board and not for those filed with the governing body remains an enigma.

f. Definitive Relief

The specificity with which a challenger describes his project in plans and other materials has a number of functions besides assuring a court that the challenger is, indeed, on the threshold of development (i.e., that his challenge is ripe). Theoretically, a court need not see what an apartment project looks like in order to make the determination that apartments have been unlawfully excluded from the municipality in question. In reality, however, the design of the project, the exact siting of the building or buildings in relation to surrounding single family homes, or other site specific information generally provided on development plans may have a significant effect on the outcome of a particular challenge. 70

70. Indeed, the relevance of site specific information in a case that involves exclusionary zoning issues is merely the obverse side of another issue—whether a court that invalidates zoning restrictions because they amount to exclusionary zoning, frees only the land of the challenger or all land in the municipality from any restrictions that would prevent the type of development at issue in the challenge. In Kasorex v. Board of Supervisors, 452 A.2d 921, 927 (Pa. Commw. Ct. 1982), Judge Craig, in a carefully reasoned opinion, concluded that a successful challenge to zoning restrictions, even when based on community wide reasons, only invalidates the zoning restrictions that affect the land of the challenger. In a prior decision involving another challenger and a different property, the court had held that the Montgomery Township zoning ordinance was exclusionary as to mobile home parks. Id. at 922. The Township subsequently amended its ordinance to provide sufficient land zoned for mobile home parks. Id. The developer in Kasorex, who arrived on the scene much later (three years later), claimed that he should be entitled to develop quadruplex and twin homes on his land because the earlier decision invalidated the entire zoning ordinance in the Township. Id. The developer unsuccessfully argued that the subsequent amendments to allow mobile homes were meaningless because they purported to amend a nonexistent ordinance and, therefore, his land was, in effect, left unzoned. Id.

Because the developer in Kasorex sought freedom to develop for a housing type different from that involved in the prior case, the decision does not necessarily dispose of the question of whether the prior decree is effective against another property. In other words, had the Township not cured the defect in its ordinance after the first developer established that it was exclusionary of mobile home parks, and had another developer then sought approval for a mobile home park on another property, would the decree in the first case be dispositive of the second developer's right to develop a mobile home park on this other property? Kasorex does not necessarily dispose of that question; however, Judge Craig indicated that his preference is to limit the effect of a decree to the particular property involved in the challenge. Id. at 927. After noting Casey v. Zoning Hearing Board, 328 A.2d 464 (Pa. 1974), Judge Craig was concerned primarily with making certain that the successful challenger be allowed to put the excluded development on his land, with the right to obtain definitive relief. Kasorex, 452 A.2d at 927. Judge Craig wrote: “However, a judicious balancing of developer and community interests does not support the idea of enlarging [the threat of having the excluded development occur on the challenger's land] into a punishment by opening avenues to
While a reviewing body may be favorably swayed by evidence describing the proposed development, such evidence is indispensable if the challenger seeks relief that goes beyond the mere invalidation of the challenged restrictions and actually orders the municipality to approve a proposed development (i.e., to grant definitive relief). Several practical and theoretical difficulties arise, however, in securing definitive relief in zoning cases.

First, under our system of land use controls, land development is subjected to a number of separate regimes of regulation at separate levels of government. For example, at the local government level, a development typically comes under regulation both as to subdivision and land development matters and as to zoning matters, each of which, though enabled in the same statute, is required to be governed by a separate ordinance and is subjected to a different administrative regime. A court that overturns the zoning restriction cannot order the development approved until the developer has completed the subdivision and land development process. As already noted, requiring a developer to secure subdivision approval before he secures a determination as to the zoning would subject the developer to unreasonable expense and delay.\footnote{Id.}

In addition, because most local governmental agencies appear to operate on the basis of the “Massachusetts crossing law,” securing a subdivision approval prior to a zoning determination may be impossible. The story may be apocryphal, but the Massachusetts crossing law was reputed to have said that, when two cars arrive at an intersection that had no traffic light, both of them shall stop and neither shall proceed until the other one has passed. Following this wisdom, a planning commission will refuse to process a subdivision approval if the lot sizes violate the underlying zoning.\footnote{Jan Z. Krasnowiecki, Zoning Litigation: How to Win Without Really Losing, in 1 Institute on Planning, Zoning and Eminent Domain 20 (Southwest Legal Foundation ed. 1976) (citing frustration and inefficiency in waiting for approval by multiple government bodies). While such a law would solve the Massachusetts crossing law problem by allowing the challenger to secure determinations of compliance as to all aspects of its development before seeking court review of the zoning scheme, in practice, it would not be particularly useful because few developers would incur the costs of obtaining such determinations. For example, it is unlikely that a devel-}

non-challengers and thus extending the \textit{Casey} rule beyond the \textit{Casey} facts.”

\footnote{For a further discussion of \textit{Casey}, see \textit{infra} notes 83-84 and accompanying text.}

\footnote{For further discussion of this burden, see \textit{supra} notes 10-36 and accompanying text.}

\footnote{Many years ago, one of the authors thought that this problem could be easily solved by a general law that stated that each agency and each subdivision of this Commonwealth shall process applications on matters within its charge on the assumption that all other agencies and subdivisions of this Commonwealth will approve of those aspects of the development that are within their charge. See Jan Z. Krasnowiecki, Zoning Litigation: How to Win Without Really Losing, in 1 Institute on Planning, Zoning and Eminent Domain 20 (Southwest Legal Foundation ed. 1976) (citing frustration and inefficiency in waiting for approval by multiple government bodies). While such a law would solve the Massachusetts crossing law problem by allowing the challenger to secure determinations of compliance as to all aspects of its development before seeking court review of the zoning scheme, in practice, it would not be particularly useful because few developers would incur the costs of obtaining such determinations. For example, it is unlikely that a devel-}
usually happens that when the challenger appeals to the court to remove improper zoning restrictions, he has not completed his subdivision and land development processing and has not had his building plans reviewed under the building codes. Even if a court has a final set of plans for the development before it, it cannot order the development approved and the building permits issued if the local government has not had the opportunity to review and pass on the development under other regulatory regimes that are not subject to challenge. 73

Second, there has been reluctance in other jurisdictions to order a development approved because of a sensitivity to the separation of powers doctrine. The concern is that in many cases, where a court holds zoning restrictions invalid, there are a number of alternatives which can cure the invalidity. A heightened concern for the separation of powers doctrine would argue that a court cannot take the choice away from the local legislative body by approving the alternative chosen by the developer. 74 However, the courts that take the practical approach to the problem and order approval of

73. Precisely because the local government has unlawfully excluded the type of development in question, it can often happen that the local government does not have any regulations adopted under other applicable regimes to deal with the development in question. For example, if the local government has totally excluded apartments and townhouses under its zoning, it is unlikely to have subdivision and land development standards that are applicable to these types of housing. See, e.g., Ellick v. Board of Supervisors, 333 A.2d 239, 249 (Pa. Commw. Ct. 1975) (rather than simply disregarding local prerogative to review site plans for development, court remanded case to municipality to apply reasonable standards in such review).

74. See, e.g., Ed Zaagman, Inc. v. City of Kentwood, 277 N.W.2d 475, 480-81 (Mich. 1979) (ruling that matter be remanded to zoning authority for adoption of amendatory ordinance comporting with dictates of equity). But see Schwartz v. City of Flint, 395 N.W.2d 678, 684 (Mich. 1986) (overruling Zaagman as improper usurpation by judiciary of legislative function). An early opinion by Judge Schaefer of the Illinois Supreme Court in Sinclair Pipe Line v. Richton Park, 167 N.E.2d 406, 411 (Ill. 1960), argues that the runaround that the local government is likely to give to the challenger if given the opportunity to select its preferred "cure" outweights the need for judicial deference to the local legislature. Nevertheless, instead of giving the developer any relief, in Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 734 (N.J.), cert. denied, 423 U.S. 808 (1975), the Supreme Court of New Jersey, after holding the Mount Laurel ordinance invalid as exclusionary of low cost housing, remanded the case to the Township with instructions to revise its ordinance to provide for such housing. Naturally, the Township had fun with that redraft. Chastened by the experience, in Oakwood at Madison, Inc. v. Township of Madison, 371 A.2d 1192, 1226-27 (N.J. 1977), the court ordered the plaintiff developer's project approved, stating that any lesser relief would deprive the excluded class, i.e., those seeking low cost housing, of their most effective champion, and thus "chill" the assertion of their constitutional rights.
the landowner challenger’s project, have a better understanding of the abuses suffered by developers as well as the necessary remedies. Local governments that have demonstrated their exclusionary bent cannot be trusted to treat the challenger fairly, and given the opportunity, they will always punish the challenger by curing their ordinance on someone else’s land.\textsuperscript{75} If the landowner challenger cannot get relief entitling him to develop, he is not likely to spend the money to make the challenge and there is no one else, as a practical matter, who is likely to proceed in his stead.\textsuperscript{76} Indeed, Pennsylvania has one embarrassing case that holds that the prospective residents of the excluded development have no standing to challenge the exclusion.\textsuperscript{77}

In light of the practical need for a complete remedy, section 1011(2) of the 1972 MPC authorized the courts to approve the development described by the challenger in plans and other materials submitted by him with his challenge.\textsuperscript{78} In order to reflect the fact that the court may not be in a position to order approval of those aspects of the development that do not involve the challenged zoning, such as subdivision and land development matters, section 1011(2) provided that the court may

order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court’s opinion and order.\textsuperscript{79}

\textsuperscript{75} See Casey v. Zoning Hearing Bd., 328 A.2d 464, 468 (Pa. 1974) (indicating that courts will not read statute in way that would allow municipality to prevent any challenger from obtaining meaningful relief).

\textsuperscript{76} See id. (indicating that developers will not challenge unconstitutional ordinances if municipality could frustrate relief requested).

\textsuperscript{77} Commonwealth v. County of Bucks, 302 A.2d 897 (Pa. Commw. Ct. 1973). The case rests on the Pennsylvania building permit rule that was abolished by the 1972 MPC. For further discussion of this rule, see supra notes 10-32 and accompanying text. The problem persists, however, because standing to bring challenges under the MPC is given to “landowners,” a term that does not include prospective home purchasers or renters. See PA. STAT. ANN. tit. 53, § 10107 (Supp. 1994). This limitation appears to be inconsistent with Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), at least where federally protected constitutional rights are involved. For further discussion of the standing issue, see supra notes 62-63 and accompanying text.

\textsuperscript{78} Act 93, § 1101, 1972 Pa. Laws 333, 351 (codified at PA. STAT. ANN. tit. 53, § 11011 (1972)) (repealed and replaced by PA. STAT. ANN. tit. 53, § 11006-A(c) (Supp. 1994)).

\textsuperscript{79} Id.
MUNICIPALITIES PLANNING CODE

To prevent the local government from abusing the referral, section 1011(2) expressly provided that "[t]he court shall retain jurisdiction of the appeal during the pendency of any such further proceeding and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order." Both of these provisions are still in the revised MPC at sections 1006-A(c) and 1006-A(d), but, as we shall see, their simplicity has been marred by additional requirements and poor draftsmanship. For example, the provision requiring the court to retain jurisdiction has been moved to a subsection that deals with the court's power to take additional evidence (revised MPC section 1006-A(d)). The provision has thus been moved to a subsection where it makes no sense at all.

The power of the courts to grant definitive relief was strongly endorsed by the Supreme Court of Pennsylvania in Casey v. Zoning Hearing Board. The court, in Casey, held that any legislative attempt to cure the defective zoning ordinance must be disregarded unless it was pending on the date when the challenge was filed. Subsequent decisions made clear that a cure ordinance is not "pending" for purposes of the Casey analysis unless it actually has been drafted and the draft advertised for adoption. This holding not only supported the grant of definitive relief, but also disposed of another potential problem—the local government gambit of attempting to cure the exclusionary defect in their ordinance by rezoning other land for the excluded development as soon as a developer files his challenge, preferably land that is never likely to be developed.

Although Casey precluded the local government from curing its ordinance by rushing to amend it on land other than the challenger’s, the court left open the possibility that the local government might be allowed to limit the developer’s relief. This would be accomplished by adopting in mid-stream, after the challenge has been filed, a cure that would allow the proposed development but limit it in various ways (i.e., by allowing the type of housing sought

80. Id.
82. Id. § 11006-A(d).
84. Id. at 468.
85. See Board of Supervisors v. Barness, 382 A.2d 140, 144 (Pa. Commw. Ct. 1978) (holding challengers entitled to definitive relief because request for curative amendment preceded first sufficient public declaration of intent to amend).
but at lesser density than proposed by the challenger). That possibility was foreclosed in *Appeal of Carr.*\(^{86}\) The effect of *Casey* and *Carr* together was that a community that waited to cure its defective zoning until a challenge was filed could be severely penalized by having to accept the developer's perspective of the proper cure. This state of the law had very salutary effects in curbing the worst of the exclusionary zoning practices.

Unfortunately, the effect of *Casey* and *Carr* was severely undermined by changes to the MPC. In 1977, several Bucks County communities that were then experiencing significant development pressures began efforts to update their ordinances to bring them into colorable compliance with the prevailing exclusionary zoning doctrines. In response, several developers filed simultaneous challenges to the existing zoning scheme. These were the facts in *Board of Supervisors v. Barness.*\(^{87}\) The holding in *Barness*—that efforts at rezoning not evidenced by an advertized draft of the proposed changes are not pending and must be disregarded—so incensed the Bucks County communities that they marched on Harrisburg with a whole sheaf of changes to the MPC. These changes, based as they were in anger and protectionism, became Act 249.\(^{88}\)

Aside from provisions that have since been repealed, some of them of questionable constitutional validity,\(^ {89}\) Act 249 aimed an arrow at definitive relief by requiring a court to make findings as to a number of environmental matters before ordering approval of the

---

86. 374 A.2d 735 (Pa. Commw. Ct. 1977). The challenger in *Carr* filed a request for a curative amendment. *Id.* at 736. Subsequently, the Board of Supervisors amended the zoning ordinance to correct the ordinance's constitutional infirmity. *Id.* However, the amendment fell short of the challenger's requested relief. *Id.* The court held that the challenger's appeal should not be affected by the amendment. *Id.* at 739.


89. See, e.g., Act 249, § 1004(2)(a), 1978 Pa. Laws 1067 (repealed). Act 249 required every landowner challenger to certify in writing that the challenger did not know at the time of the filing of the challenge that the municipality in question had resolved to consider a particular scheme of rezoning and that the challenger did not know at the time that the scheme of rezoning would be inconsistent with his proposed development. This provision was aimed at what happened in *Barness* and was enacted as Act 249, § 1004(2)(a), 1978 Pa. Laws 1067 (now repealed). The Act also purported to establish standards for a court to follow before holding a zoning ordinance invalid. See Act 249, § 1011(1), 1978 Pa. laws 1067 (now repealed). However, in Hopewell Township Bd. of Supervisors v. Golla, 428 A.2d 701, 706 (Pa. Commw. Ct. 1981), aff'd on other grounds, 452 A.2d 1337 (1982), the commonwealth court held the provisions of § 1011(1) invalid to the extent they sought to alter the constitutional standards for determining whether a zoning ordinance was valid or invalid.
challenger's plans in whole or in part. Because the unique Pennsylvania practice of channeling all zoning challenges through a local body for an evidentiary hearing and findings was designed to save trial time on appeal to the courts, the Pennsylvania rule has always been that the courts need not hear any additional evidence in a zoning appeal. The appellant may move the court to accept additional evidence, but the decision to do so is discretionary with the court, unless the appellant can show that he or she was precluded from presenting relevant evidence before the local hearing body.

When Act 249 prohibited a court from granting definitive relief unless the court considered specific planning and environment-

90. Act 249, § 1011(2), 1978 Pa. Laws 1067, 1071 (repealed and reenacted in modified form as PA. STAT. ANN. tit. 53, §§ 10609.1(c) and 10916.1(c)(5) (Supp. 1994)). Under Act 249, the court not only had to consider the proposed curative amendment and any plans or evidence produced by the challenger, but also:

(i) the locational suitability of the site for the uses proposed including the general location of the site with regard to major roads, sewer facilities, water supplies, schools and other public service facilities or the comprehensive plan and zoning ordinance of the municipality and county if they exist;

(ii) the impact of the proposal on regional housing needs, the transportation network, and the other public services and facilities;

(iii) the suitability of the site for the intensity of use proposed by the site's soils, slopes, woodland, wetlands, flood plains, aquifers, natural resources and other natural features;

(iv) the impact of the proposed use on the site's soils, slopes, woodlands, wetlands, flood plains, natural resources and natural features, the degree to which these are protected or destroyed, the tolerance of the resources to development and any adverse environmental impacts; and

(v) the impact of the proposal on the preservation of agriculture and other land uses which are essential to public health and welfare.

Id.


92. See id. As codified in the 1972 MPC, if the court declined to take additional evidence, the findings of fact of the local body could not be disturbed if supported by substantial evidence. Act 93, § 1010, 1972 Pa. Laws 333. If the court agreed to take additional evidence, the court was required to make de novo findings as to all issues, regardless of whether the additional evidence addressed all the issues or only some small aspect of the case. Id. The standard of review on appeal to the commonwealth court reflected this practice: If the court below took no additional evidence, the standard of review was whether the local body committed an error of law or abused its discretion; if the court took additional evidence, the standard would be de novo. See Appeal of Hoover, 608 A.2d 607, 610 (Pa. Commw. Ct. 1992) (stating that where court did not take additional evidence, scope of review was limited to determining whether there was abuse of discretion or error of law); Benham v. Board of Supervisors, 349 A.2d 484, 487 (Pa. Commw. Ct. 1975) (discussing scope of review when additional evidence is taken). Section 1010 of the 1972 MPC was carried forward without change into the revised MPC as PA. STAT. ANN. tit. 53, § 11005-A (Supp. 1994).
tal issues as listed in the Act, several procedural questions arose. If the challenger did not present sufficient evidence before the local hearing body so that the court could make the required findings, did the court have to hear additional evidence, or could it simply remand to the local body for the taking of additional evidence? Act 249 authorized the court "to hold a hearing to receive additional evidence and to employ experts to aid the court to frame an appropriate order," but it did not require the court to do so.93 The choice appears to be within the court's discretion. However, one thing seemed clear under the 1978 revisions: The findings themselves were required to be made by the court, so even if the local body made such findings, the court was obligated to review the evidence produced before the local body de novo before making its own findings.

The revised MPC, true to its anti-development bias, not only adopted the requirement that definitive relief be preceded by the consideration of the planning and environmental criteria listed in Act 249, but it also required that the local governing body make such findings for challenges brought by curative amendment and that the Zoning Hearing Board make such findings for challenges brought before the Board.94 The same sections of the revised MPC have reversed the holding in *Appeal of Carr*95 so that the local body is not only authorized to consider alternative "cures," but also, in the case of the Zoning Hearing Board, must consider alternative "cures."96 The cure which is adopted, therefore, could be markedly different from the proposal submitted by the challenger. While this authorization is probably still under the constraint of the *Casey*97 decision, which held that the local government may not intentionally "thwart" the challenger's development, it goes a long way toward taking the teeth out of definitive relief.98 Unless a local

---

94. PA. STAT. ANN. tit. 53, §§ 10609.1(c), 10916.1(c) (Supp. 1994).
95. For further discussion of *Carr*, see supra note 86 and accompanying text.
96. The governing body, upon finding that a curative amendment challenge has merit, is authorized to "adopt an alternative amendment which will cure the challenged defects." PA. STAT. ANN. tit. 53, § 10609.1(c). Correspondingly, the Zoning Hearing Board, upon finding that a substantive challenge has merit, is directed to include "recommended amendments to the challenged ordinance which will cure the defects found." PA. STAT. ANN. tit. 53, § 10916.1(c)(5).
97. For further discussion of *Casey*, see supra notes 83-85 and accompanying text.
98. It should be noted that the revised MPC, retains a provision of the old law that states that a curative amendment challenge is deemed denied when, *inter alia*, "the governing body adopts another curative amendment which is unacceptable to the landowner." PA. STAT. ANN. tit. 53, § 10916.1(f)(3). This provision, however, is
government is very stupid and simply digs in and refuses to give the challenger any relief, it is impossible to imagine how anyone can be assured of getting enough relief to make the litigation worthwhile under the revised MPC.

The more recent decisions of the Supreme Court of Pennsylvania on the subject of definitive relief do not provide much encouragement. In *Fernley v. Board of Supervisors,* the Pennsylvania Supreme Court, after holding that the standards of Act 249 could not be applied to deny relief to the challenger because that Act was enacted after the challenge was filed, nevertheless found that the challenger's right to develop the site for the proposed development could be denied if the local government could show his plan to be "incompatible with the site."100

In *H.R. Miller Co. v. Board of Supervisors,*101 the court drew a strange distinction between *de facto* and *de jure* exclusionary zoning. Generally, *de jure* exclusion occurs when a zoning ordinance contains no provisions for the existence of a use anywhere in the municipality. *De facto* exclusion involves two types of exclusion: (1) where the zoning ordinance provides for the use in question but the ordinance restrictions are so severe that the use cannot, in fact, occur; and (2) where the ordinance provides for the use in question, but the area zoned for it is a "token" area not reflecting the municipality's "fair share" of the use.102

In *H.R. Miller,* the landowner tried to secure approval for the use of its land as a quarry. To do so, Miller showed that whereas quarries are a permitted use in the industrial zone, they can not, in fact, be developed anywhere in that zone because of a 500 foot setback requirement.103 The lower court, after holding that the setback requirement effected a *de facto* exclusion of all quarry operations from the township, struck the setback requirement.104 However, the lower court denied site specific relief to Miller because, after applying the environmental factors, which under the then applicable law was still the duty of the court, the site was found

---

100. *Id.* at 591.
103. *H.R. Miller,* 605 A.2d at 322-23.
104. *Id.* at 323.
to be unsuitable for the quarry operations. The Pennsylvania Commonwealth Court affirmed this decision. On appeal, the Supreme Court of Pennsylvania agreed that where there is a district that permits the development in question and there is sufficient land available for that use in that district, but the exclusionary effect is produced by some special requirement, such as setback, height or bulk requirement, the vice can be cured by striking the requirement from the regulations for that district ("cured district"). In such a case, the challenger need not be given site specific relief, making it likely that the challenger will be unable to develop his property as planned because his property may not fall within the cured district. The court indicated, however, that where there is de jure exclusion, some site specific relief must be given to the landowner.

The purpose of definitive or site specific relief is to reward the challenger for pointing out constitutional infirmities in the zoning ordinance; otherwise, no one will have the incentive to do so. If that is the policy, there is no reason why the challenger who complains of a de facto exclusion should not be similarly rewarded. Logically, there is no reason why the H.R. Miller philosophy would not apply to a "fair share" case. If it does apply, a court finding that a municipality failed to provide its fair share of a certain type of housing could simply order the municipality to make more land available for that type of housing elsewhere in the municipality, even on land other than the challenger's. One can only hope that the courts will not extend H.R. Miller beyond its facts.

A recent decision of the commonwealth court, In re Appeal of Miller & Son Paving, Inc., suggests that the sloppy drafting of the 1988 revisions to the MPC may have backfired in a significant way. When the legislature shifted the required environmental findings from the level of the reviewing court to the local hearing level, obviously with the purpose of making definitive relief impossible to obtain, it failed to realize that the opening language of that requirement, which made perfect sense at the reviewing court level, deprives the local board of an opportunity to make adverse environmental findings to support a decision denying a

105. Id. at 324. The lower court's decision was based on the "comprehensive and progressive residential character" of the neighboring area. Id.
106. Id. at 322.
107. Id. at 324-25.
108. Id.
109. Id.
challenge. The old provision required the court to make environ-
mental findings only if the court determined that the challenge had
merit. The same precondition has been retained at the local board
level. In *Miller & Son*, Judge Colins, author of the court's opinion,
noted that when a board has improperly denied a challenge, the
reviewing court will not consider the board’s adverse environmental
findings, if any.\textsuperscript{111} In addition, the court is no longer authorized
to make any environmental findings of its own before granting de-
finitive relief.\textsuperscript{112}

B. Protestant Challenges

1. Historical Introduction

It has been noted that going as far back as the 1950s, the Penn-
sylvania courts required all substantive challenges to the validity of a
zoning ordinance, including those brought by protestants, to be
taken in the first instance to the Zoning Hearing Board. To explain
how the Board could claim jurisdiction over such challenges under
the then-applicable Zoning Enabling Law, the courts required all
such challengers to wait until a building permit issued and then
take an appeal to the board from the issuance of the permit.\textsuperscript{113} A
weak excuse for the rule was that until the building permit issued,
the controversy was not “ripe” for adjudication.\textsuperscript{114} As noted earlier,
forcing challengers to wait until a building permit is attainable in
order to prove that a claim is ripe is nonsensical because challenges
to the validity of a zoning ordinance seldom involve building design
issues, especially when the challenge is to the minimum lot size al-
lowed for a single family detached residential development.\textsuperscript{115} In
most cases, there are a number of significant events that precede
the issuance of a building permit and that might serve as a better
indicator of ripeness in cases where the challenger is a protestant.

First, there is the adoption of the zoning ordinance itself. One
might argue that requiring protestants to challenge the zoning
when adopted is unfair because there may be no change in circum-
stances that is apparent to a neighboring property owner until there
is some development activity under the new zoning classifica-

\textsuperscript{111} *Id.* at 277.
\textsuperscript{112} *Id.*
\textsuperscript{113} For a discussion of the “building permit rule,” see *supra* notes 10-32 and
accompanying text.
\textsuperscript{114} See Knup v. City of Phila., 126 A.2d 399, 400 (Pa. 1956).
\textsuperscript{115} For an appropriate legal maxim relevant to this argument, see text ac-
companying *supra* note 51.
tion. Under this theory, a protestant should not be asked to act until it becomes clear that some change has occurred. Such an argument might be persuasive if it were true that controversial development occurs under a long-standing zoning classification of the property in question. For reasons explained elsewhere though, it is unlikely that any land is ever zoned for a development that might be the least bit controversial in advance of the arrival of a developer who actually wants to proceed with such a development. 116 Most controversial development, on the other hand, is commenced by an application for a zoning change, triggering widespread discussion of plans for the proposed development at public hearings and in the press. If that is so, there is very little reason to allow protestants to wait until a building permit issues before they are required to file a challenge. The absurdity of such a requirement when the type of building has nothing to do with the issues, as in the case of *Levitt & Sons, Inc. v. Kane*, 117 has already been discussed. 118

Moreover, issuance of a building permit is the one event in the development process that does not require the publication of any notice. How can one, therefore, justify the rule that protestants are precluded from challenging a zoning ordinance if they do not file an appeal to a building permit issuance within the prescribed appeal period—usually thirty days? 119 The answer that Pennsylvania practitioners give is that protestants can always send someone over to check on the issuance of a permit. How do protestants get notice that they should send someone over? The answer is that they know because there was recently a controversial zoning change. The existence of the Pennsylvania building permit rule for protestant challenges is proof that zoning for controversial development never occurs in advance of development; otherwise, that rule was and is unconstitutional.

2. **Procedure for Protestants Under the MPC**

a. **Jurisdiction of Zoning Hearing Board Retained**

As already noted, the 1972 revisions to the MPC, while retaining the rule that substantive challenges to the validity of an ordinance must be filed with the Zoning Hearing Board, dispensed with

---

116. **See generally** Krasnowiecki, *Abolish Zoning, supra* note 1 (arguing that all development occurs through zoning changes that are "applied for and granted on the threshold of development" (emphasis omitted)).


118. For a discussion of *Levitt*, see *supra* notes 22-31 and accompanying text.

119. **See, e.g.,** PA. STAT. ANN. tit. 53, § 10914.1(a) (Supp. 1994) (imposing 30-day time limit on Board challenges to development application approvals).
the requirement that such challenges be commenced by an appeal from the "decision of the administrative officer." Instead, such challenges were to be commenced by filing a challenge directly with the Board or by proposing a curative amendment before the governing body.

b. Timing: Ripeness

Section 915 of the 1972 MPC, which was intended to govern the timing and ripeness of protestant challenges, provided:

No person shall be allowed to file any proceeding with the board later than thirty days after any application for development, preliminary or final, has been approved by an appropriate municipal officer, agency or body if such proceeding is designed to secure reversal or to limit the approval in any manner unless such person alleges and proves that he had no notice, knowledge, or reason to believe that such approval had been given. If such person has succeeded to his interest after such approval, he shall be bound by the knowledge of his predecessor in interest.

Section 107(2) of the 1972 MPC defined "application for development" as "every application, whether preliminary or final, required to be filed and approved prior to start of construction or development including but not limited to an application for a building permit, for the approval of a subdivision plat or plan or for the approval of a development plan." While these provisions did not require that protestants file their challenge as soon as a zoning change authorizing a development was adopted, they did not per-
mit protestants to wait until the building permit issued. The intent of these provisions was that, thirty days after a preliminary subdivision or land development plan was approved, any challenge to the zoning classification under which the approval was given as well as to the approval itself was cut off, because, in the words of section 915, a successful challenge to the zoning would have the effect of reversing or certainly limiting the approval.\textsuperscript{126} Mindful of the fact that making a developer wait until a preliminary subdivision plan, much less a final subdivision or a building permit application, was approved may be too onerous (a supposition that is fast becoming true of even the simplest type of development), section 1005(b) of the 1972 MPC provided an alternative procedure under which a developer could trigger a challenge before completing all of the work associated with such an approval.\textsuperscript{127} All of these provisions of the 1972 MPC have been carried forward with little alteration into the revised MPC.\textsuperscript{128}

c. Is the Building Permit Rule Back?

There should, therefore, be no doubt that protestants have an obligation to file a challenge as soon as any preliminary or final development approval is secured and, in addition, that the developer has the right to foreclose a challenge by following the procedure set forth in section 916.2.\textsuperscript{129} Unfortunately, the commonwealth court has on two recent occasions reiterated the old rule that allows and requires protestants to wait until a building permit issues.\textsuperscript{130}

\textsuperscript{126} Id. § 10915 (repealed and reenacted as \textit{PA. STAT. ANN.} tit. 53, § 10914.1 (Supp. 1994)).

\textsuperscript{127} Id. § 11005(b) (repealed and reenacted as \textit{PA. STAT. ANN.} tit. 53, § 10916.2 (Supp. 1994)). Section 1005(b) stated:

\begin{quote}
In order not to unreasonably delay the time when a landowner may secure assurance that the ordinance or map under which he proposes to build is free from challenge, and recognizing that the procedure for preliminary approval of his development may be too cumbersome or may be unavailable, the landowner may advance the date from which time for any challenge to the ordinance or map will run under section 915 by the following procedure . . . .
\end{quote}

\textit{Id.}

\textsuperscript{128} See \textit{PA. STAT. ANN.} tit. 53, §§ 10107(a), 10914.1, 10916.2 (Supp. 1994).

\textsuperscript{129} Id. § 10916.2.

d. Protection Against Frivolous Lawsuits

It may come as a surprise, but many other systems of land use control, for example the English system, do not accord standing to neighboring property owners or civic groups to secure review of planning action that permits development. The right to litigate any decision that is favorable to development, which we accord to neighboring property owners, suggests that we view land use controls as extensions of private property rights rather than as instruments of public policy. Whatever the merits of that view, the fact is that it gives our land use control system a significant anti-development bias. Because most development relies on outside financing, which freezes when a lawsuit challenging a permit is filed, protestants need not seek temporary relief to bring a development to a halt. The mere filing of a zoning appeal or permit appeal has the same effect. Indeed, under the Standard State Zoning Enabling Act, which was in effect before the MPC, an appeal to the zoning board from any action of the administrative officer automatically stayed that action, so that protestants were given a free ride.

As we have seen, the 1972 MPC did not change the practice of requiring that all protestant complaints about development, including challenges to the zoning ordinance, be taken first to the Zoning Hearing Board. Nor did it change the provision that established an automatic stay on appeal to the Board. It did attempt, however, to reverse the anti-development bias of the system by granting to the developer whose permit was threatened by an appeal or a challenge, the right to petition a court for an order requiring the protestants to post bond or have their appeal or challenge dismissed. This procedure was available not only during the proceedings before the Board, but also on appeal from the Board to the court. The 1972 MPC left the amount of the bond to the


132. See id. at 58-59 (suggesting that standing may be extended to neighbors "because we are persuaded that zoning is primarily designed to protect his interests, as distinguished from those of the public at large").

133. STANDARD STATE ZONING ENABLING ACT, supra note 120, at § 7.


135. Id. § 10916 (repealed and reenacted as PA. STAT. ANN. tit. 53, § 10915.1(a)-(b) (Supp. 1994)).

136. Id.

137. Id. § 11008(4) (repealed and reenacted as PA. STAT. ANN. tit. 53, § 11003-A(d) (Supp. 1994)).
court's discretion.\textsuperscript{138} The idea was that a court could generally sense from the petition and answer whether the attack on the development had any merit and determine the amount of the bond accordingly. In \textit{Driscoll v. Plymouth Township},\textsuperscript{139} the commonwealth court upheld this procedure against a due process attack.\textsuperscript{140}

In 1978, the same group that hobbled the definitive relief provisions of the 1972 MPC also killed the bonding requirement by requiring a court to hold an evidentiary hearing and to find specifically that the protestant's case was frivolous and brought solely for purposes of delay before imposing a bond.\textsuperscript{141} After that change, there would be little sense in seeking a bond because a petition would result in a mini-trial on the merits. If, having conducted such hearings, the court were to order the posting of a bond, an appeal could follow where the sole issue would be whether the court erred in concluding that the protestant's case was frivolous and instituted for the purpose of delay. If, on such appeal, the commonwealth court disagreed with the trial court, the reversal would simply lead to another trial on the merits. The 1988 revisions to the MPC merely reenacted all of the changes made in the MPC during the 1978 assault on all pro-development provisions.

\section*{C. Challenges to Zoning Ordinance on Procedural Grounds}

Under the old MPC, challenges to the process of enacting a zoning ordinance or a zoning ordinance amendment were required to be filed directly in court within thirty days of the effective date of the enactment.\textsuperscript{142} The revised MPC requires all such challenges to be filed with the Zoning Hearing Board within the same period.\textsuperscript{143} There is almost no reason why a challenger (whether landowner or protestant) would want to file such a challenge unless the challenger anticipates an imminent change in the composition of the governing body or a change of mind due to political embarrassment. A challenge on procedural grounds does not accomplish anything more than delay. Should a court find the adoption of an

\begin{itemize}
\item[138.] \textit{Id.} §§ 10916, 11008(4) (repealed and reenacted as PA. STAT. ANN. tit. 53, §§ 10915.1(c), 11003-A(d) (Supp. 1994)).
\item[140.] \textit{See id.} at 448 (holding that § 916 of MPC is constitutional as rational means to effectuate legitimate state interests).
\item[141.] PA. STAT. ANN. tit. 53, §§ 10915.1(b), 11003-A(d) (Supp. 1994).
\item[142.] PA. STAT. ANN. tit. 53, § 11005 (1972) (repealed 1988).
\item[143.] PA. STAT. ANN. tit. 53, § 10909.1(a)(2) (Supp. 1994). Where a municipality is enacting a zoning ordinance for the first time and a Zoning Hearing Board has not yet been constituted, the challenge goes directly before a court. \textit{Id.}
ordinance procedurally defective, the municipality may simply cure the identified defect and reenact the ordinance. There is, however, at least one set of circumstances in which a landowner may deem a procedural challenge worthwhile: Where the landowner's application for development or challenge to an ordinance would otherwise be trumped by the “pending ordinance” doctrine, he should consider knocking out the pending ordinance on procedural grounds, thereby gaining priority over it.

III. Procedure for Review of Subdivision and Land Development Decisions

A. Introduction

This Article bows to tradition in discussing zoning litigation procedures before those applicable to subdivision and land development decisions. In fact, when significant development begins again in Pennsylvania, it will be the issues surrounding subdivision and land development that will spawn the next era of controversy and litigation. Municipalities have discovered that there are few standards, if any, governing the review of planning commission and governing body decisions. Standardless discretion has proven to be an almost irresistible invitation to excess and abuse. In theory, the governing body and, of course, the planning commission, act in an administrative capacity and must support their determinations by pointing to specific provisions of a duly enacted subdivision and land development ordinance. Indeed, in 1972, it was believed that time limitations on the local body's decision-making process and certain procedural requirements would prevent abuse. Section 508 was enacted: (1) to establish some definite deadlines for rendering a decision (a ninety-day cycle for each mandatory step in the procedure, with deemed approval of the application as the penalty


for inaction); 146 and (2) to require that decisions be in writing and communicated to the applicant promptly 147 and that, if the "application is not approved in terms as filed the decision shall specify the defects found in the application and describe the requirements which have not been met and shall, in each case, cite to the provisions of the statute or ordinance relied upon." 148

In reality, however, municipalities have found that by piling vast amounts of confusing and self-contradictory standards and requirements into their subdivision and land development ordinance, they can always find some standard or provision that has not been met. If an unwanted development enters the subdivision and land development process, the game is simply to hold it up as long as possible until the developer is forced to compromise or withdraw altogether. The ninety-day cycle has been a joke. Prior to the expiration of the ninety-day period, the municipality simply tells the developer that unless he gives it an extension, his application will be disapproved and he will then be required to litigate the disapproval if he so chooses. Another technique for imposing delay is to approve the plans subject to three or four pages of conditions. 149

Most developers are forced by time pressures to either grant an extension or accept the conditions, only to find that the municipality refuses to reach a final decision or acknowledge when the condi-

146. PA. STAT. ANN. tit. 53, § 10508(3) (1972). The 1972 provision was carried forward without change to the current MPC. PA. STAT. ANN. tit. 53, § 10508(3) (Supp. 1994).

147. PA. STAT. ANN. tit. 53, § 10508(1) (1972). The 1972 provision required that notice of the decision be communicated within five days of the decision. See id. The current MPC's time limit is 15 days. See PA. STAT. ANN. tit. 53, § 10508(1) (Supp. 1994).


149. The courts have held that an approval with conditions that are unacceptable to the applicant may be treated by the applicant as a denial. Because § 508(2) of the MPC, PA. STAT. ANN. tit. 53, § 10508(2), has always required that a denial be accompanied by written reasons for the denial, the municipality can be caught in a "deemed approval" if its approval with conditions comes at the end of the 90-day cycle and the applicant does not accept the conditions. See, e.g., Board of Township Comm'rs v. Livengood, 403 A.2d 1055, 1057 (Pa. Commw. Ct. 1979) (holding that § 508(4) of MPC permits municipality to approve plan conditionally only if applicant accepts conditions). Under § 508(1) of the MPC, PA. STAT. ANN. tit. 53, § 10508(1), the municipality has 15 additional days, on top of the 90 days, within which to communicate its decision. See Sunset Dev., Inc. v. Board of Supervisors, 600 A.2d 641, 643 (Pa. Commw. Ct. 1991) (holding that MPC contemplates bifurcation of oral (90 days) and written (15 days) decision-making processes) (quoting Rouse/Chamberlin, Inc. v. Board of Supervisors, 504 A.2d 375, 378 (Pa. Commw. Ct. 1986)). Consequently, all that a municipality need do is require that an applicant accept or reject the conditions before that time expires.
tions have been met. For example, if a condition requires the development of a drainage plan that is satisfactory to the township’s engineer, the developer will suddenly find that the engineer is generally unavailable or has very high standards bordering on the unreasonable.\footnote{150}

Because subdivision and land development controls were not thought to be significant impediments to development, there was no support for “judicializing” the application process by requiring formal hearings, cross examination of witnesses, stenographic recording and written findings. In hindsight, the lack of consideration given this issue was unfortunate because nothing would guard against or prevent arbitrary actions on the local level better than requiring that all evidence and decisions be placed on a permanent, accessible record.

B. Applicant Appeals

The 1972 revisions to the MPC provided the applicant with a choice between appealing an adverse determination directly to a court or presenting his case first to the Zoning Hearing Board.\footnote{151} The concern was that because there was no requirement for a record to be made before the planning commission or the governing body, an applicant would have a difficult time getting a court to reverse the local body’s action unless he could persuade the court to take additional evidence on appeal, which, as we have seen, is entirely discretionary with the court.\footnote{152}

The revised MPC not only repealed the old section 1006(1)(a), but also confused the appellate provisions. The revised MPC draws a distinction between “decisions” and “determinations.” A “decision” is defined by section 107 as a “final adjudication of any board or other body granted jurisdiction under any land use ordinance or this act, either by reason of the grant of exclusive jurisdiction or by reason of appeals from determinations.”\footnote{153} That same definition states that “[a]ll decisions shall be appealable to the court of common pleas of the county and judicial district wherein

\footnote{150. See generally Carolyn W. Poulin, Comment, Land Use Applications Not Acted Upon Shall be Deemed Approved: A Weighing of the Interests, 57 UMKC L. Rev. 607 (1989) (providing overview of “deemed approval” statutes).

151. Pa. Stat. Ann. tit. 53, § 11006(1)(a) (1972) (repealed 1988). Unfortunately, the section was somewhat garbled by a last-minute change in the provision that included a reference to old § 913.1 as the source of the Board’s jurisdiction, which, in the authors’ view, was an improper reference.

152. For a discussion of a court’s discretion when deciding whether to accept additional evidence on appeal, see supra notes 91-92 and accompanying text.

the municipality lies."\textsuperscript{154}

"Determinations," which are defined in section 107, are distinguished from "decisions." A "determination" is a "final action by an officer, body or agency charged with the administration of any land use ordinance or applications thereunder . . . ."\textsuperscript{155} However, the definition excepts (as not constituting a "determination") any action by:

(1) the governing body; (2) the zoning hearing board or (3) the planning agency, only if and to the extent the planning agency is charged with final decision on preliminary or final plans under the subdivision and land development ordinance or planned residential development provisions. Determinations shall be appealable only to the boards designated as having jurisdiction for such appeal.\textsuperscript{156}

When the planning commission is not given the final decision-making function, the action of a governing body denying final subdivision approval appears to be a "decision" that is appealable to a court. Whether such a denial is a "decision" is debatable, however, because the action of the governing body on final plan approval does not fit nicely into the words "final adjudication" used in the definition of "decision." If a denial of a final plan approval is a final adjudication, the denial of a preliminary plan approval should also be a final adjudication, making both appealable to the Court of Common Pleas.

C. Provisions for Protestant Appeals

With regard to third parties who are opposed to approval of a plan ("protestants"), the preliminary approval of a plan should be treated as a final decision because a developer is entitled to final approval in accordance with the preliminary approval. Unfortunately, the MPC does not make this point clear. Section 1002-A of the revised MPC\textsuperscript{157} requires anyone seeking review of a "decision" to file an appeal with a court within thirty days after entry of the decision, as provided in title 42, section 5571 (b) of the Pennsylvania Code. What happens, however, when there is no decision within ninety days and the application is "deemed approved?" Sec-

\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. § 11002-A.
tion 1002-A refers to section 908(9), which requires that notice of the deemed approval be published before the thirty-day time for appeals begins to run, but section 908(9) applies only to Zoning Hearing Boards.\textsuperscript{158} Thus, any decision other than one issued by the Zoning Hearing Board, which would include "deemed approval" cases, must be appealed within thirty days from the date when the decision occurred or was deemed to have occurred, as required by title 42, section 5571 (c)(6) of the Pennsylvania Code.\textsuperscript{159}

The problem with section 1002-A, which sends all appeals relating to subdivision approval or disapproval directly to a court,\textsuperscript{160} is that a court may, but is not required to, take additional evidence.\textsuperscript{161} Because the MPC does not require that a record of the subdivision and land development proceedings be made below, the fact that the revised MPC does not allow for a hearing before the Zoning Hearing Board will make review of such actions very difficult unless the courts are willing to take additional evidence as a matter of course.

IV. Conclusion

The major revisions made to the MPC in 1972 were undertaken as a unified whole and were designed to encourage new development, limit local governmental abuses and provide efficient, practical avenues through which a developer and protestants could appeal adverse decisions. The changes enacted in 1978 were more the result of anti-development fervor than of reason. As pointed out in this Article, such motivating factors do not always produce a coherent regulatory scheme. In fact, some portions of the revised MPC now pose unintended traps for developers, protestants and local governments alike. The more extensive revisions of 1988 carried many of the 1978 changes forward, and, in some instances, exacerbated the procedural problems created by the earlier revisions.

Although the litigation procedures applicable to both zoning challenges and subdivision and land development disputes have been muddled through the revision process, it is the subdivision and land development procedures that have prompted the authors to publish this Article in an attempt to raise awareness of these is-

\textsuperscript{158} Id. § 10908(9).
\textsuperscript{159} For a discussion of "deemed approval" situations, see supra notes 146-47 and accompanying text.
\textsuperscript{160} PA. STAT. ANN. tit. 53, § 11002-A.
\textsuperscript{161} Id. § 11005-A.
If, as is expected, the improving economy encourages new construction and development projects, the lack of protection for developers from local arbitrariness as well as the irregularities in the MPC's litigation procedures will cause unnecessary and intolerable delays for developers along with a new wave of procedural challenges in the courts. Even neighboring landowners, whose interests were supposedly advanced through the 1978 revisions, will suffer through an extended period of regulatory instability while the parties attempt to parse and understand the confusing procedures.

To meet the challenges of the twenty-first century, the MPC should be revised to restore the fundamental concepts of the 1972 MPC:

(1) Local governments should not be permitted to cure a constitutional defect in a zoning ordinance by zoning around a challenger or by prescribing their own diminutive substitute for a challenger's project. The job of deciding whether a successful challenger should get some or all of what he has asked for should remain with the courts.

(2) The legislature should not tell the courts what criteria to use when fashioning a constitutionally acceptable remedy. If a court decides to remand any aspect of a challenger's development proposal to a local government, the court should retain jurisdiction so that, upon motion, it may protect the rights of the challenger during such subsequent local proceedings.

(3) When a miracle occurs and a development proposal is actually approved by a local government, it should not follow that every neighboring property owner is allowed to drag the approval through the courts. Legislative changes to the MPC are necessary to curb the practice of "strike suits."

(4) The legislature should also consider abolishing the "curative amendment" challenge route. The precise and limited role that route was designed to serve has been discussed in this Article; its purpose, however, has been generally misunderstood. It is senseless to keep a procedure that no one wants or is able to use properly.

These are some of our suggestions for reform of the zoning procedures. More important from our point of view, however, is to convey the message that the new source of arbitrary governmental decision-making on the local level will arise not out of zoning, but

162. See Krasnowiecki, supra note 131, at 55-63 (refuting common assumption that standing to challenge proposals extends to any person whose interests are affected in any way).
rather out of the current subdivision and land development review process.

To carry out an overall reform of the MPC, consideration should be given to the following:

First, because most development involves both zoning and subdivision land development matters, it makes no sense to impose these regulations through separate local regulatory regimes, each with its own standards and review procedures. Instead of dividing the local administrative review of a project between the zoning authorities and the zoning hearing board on the one hand and the planning commission and governing body on the other, the regulatory system should be unified through one enabling law, one ordinance and one local administrative process.

Second, a conclusion that follows from the first, the subdivision and land development review process should be "judicialized" so that the parties enjoy the same due process safeguards as are prescribed for zoning matters. There is no justification for requiring local zoning decisions to be made at a formal hearing on the record and to be supported by findings of fact while allowing land development and subdivision decisions to be made without a formal hearing, without a record and without findings. Such reform would go a long way toward limiting the avenues of abuse that currently exist under the MPC and would encourage local governments to exercise their subdivision and land use powers in a rational manner.
