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ZONING LITIGATION AND THE NEW PENNSYLVANIA PROCEDURES

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TABLE OF CONTENTS

INTRODUCTION	1032
PART 1: PROCEDURE FOR PERSONS HAVING THE REQUISITE INTEREST IN MAKING A USE OR DEVELOPMENT OF LAND PROHIBITED OR RESTRICTED BY THE PUBLIC ACTION OR INACTION IN QUESTION	1036
I. PROCEDURE UNDER THE STANDARD ACTS	1037
A. <i>The Statutory Framework</i>	1037
1. The SZEA	1038
2. The SPEA: Subdivision and Site Planning Control	1041
B. <i>The Problems in Other Jurisdictions</i>	1043
1. Exhaustion	1043
a. <i>Subdivision and Site Planning Control</i>	1044
b. <i>Zoning</i>	1046
(i) Optional Departures	1046
(ii) Standard Zoning	1048
2. Appeal From the Board of Adjustment	1050
3. Standing	1054
4. Ripeness and Justiciability	1057
5. Definitive Relief	1059
a. <i>Variances</i>	1059
b. <i>Void Ordinance</i>	1060
II. THE PENNSYLVANIA PROCEDURES	1065
A. <i>Under the Standard Acts</i>	1065
1. Problem 1: Zoning Matters: Exhaustion and Ex- ceptions to the Rule of <i>Jacobs v. Fetzer</i>	1068
a. <i>Defects in the Process of Enactment</i>	1069
b. <i>Collateral Attack on the Ordinance Not Involving</i> <i>Local Zoning Policy</i>	1069
c. <i>Amendments That "Slam the Door" on an</i> <i>Application for Development</i>	1070
2. Problem 2: Zoning Matters: Scope of Review	1072
3. Problem 3: Estoppel to Raise Constitutional Ob- jections	1074
4. Problem 4: Zoning Matters: Standing, Ripeness, Justiciability	1076

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- 5. Problem 5: Zoning and Other Matters: Scope of Relief 1079
- 6. Problem 6: Subdivision and Other Matters: Exhaustion, Standing, Ripeness: Effects of a Divisive Approach to Land Use Control 1083
- B. *The Municipalities Planning Code* 1084
 - 1. Problems 1 and 6: Exhaustion: Zoning and Other Matters 1085
 - a. *Exceptions to the Board's Jurisdiction* 1087
 - 2. Problems 2 and 3: Scope of Review: Estoppel on Constitutional Objections 1089
 - 3. Problems 4 and 6: Standing, Ripeness, and Justiciability: Zoning and Other Matters 1089
 - 4. Problem 5: Scope of Relief 1091
- C. *The New Article X* 1093
 - 1. Challenges to an Ordinance on Procedural Grounds: Section 1003 1094
 - 2. Errors of the Administrative Officer: Section 909 .. 1096
 - 3. Substantive Challenge to an Ordinance: Sections 1004, 609.1, 910, 913.1, and 1008-11 1097
 - a. *Exhaustion of Local Remedies: Ripeness for Adjudication and Justiciability* 1097
 - b. *Standing Under Section 1004 and Exceptions* .. 1101
 - (i) Issues Not Involving a Particular Site 1103
 - (ii) Appropriate Use of Site Not in Issue 1104
 - (iii) Cases Not Calling for Removal of Restrictions 1108
 - c. *Scope of Review* 1108
 - d. *Relief* 1109
 - e. *Exhaustion: Matters Other Than Zoning* 1109
 - 4. Review of Orders and Decisions, Not Involving the Validity of an Ordinance: Section 1006 1110

PART 2: PROCEDURE FOR THE PERSON AGGRIEVED BY A USE OR DEVELOPMENT OF LAND PERMITTED ON THE LAND OF ANOTHER BY THE PUBLIC ACTION OR INACTION IN QUESTION 1112

- I. PROCEDURE UNDER THE STANDARD ACTS 1112
 - A. *The Statutory Framework* 1112
 - 1. The SZA 1112
 - 2. The SPEA 1114
 - B. *The Problems in Other Jurisdictions* 1114
 - 1. Exhaustion 1114
 - a. *Zoning* 1114
 - (i) Errors of the Administrative Officer 1115
 - (ii) Special Exceptions and Other "Departures" 1116
 - b. *Subdivision and Site Planning Controls* 1117
 - 2. Appeal From the Board 1117
 - a. *Validity of the Ordinance* 1117
 - b. *Decisions of the Board* 1117
 - 3. Standing 1118
 - 4. Ripeness and Justiciability: Time Limitations on Appeal to and from the Board of Adjustment 1121
 - a. *Zoning Matters* 1121
 - b. *Challenges to the Validity of an Ordinance* 1121

c. <i>How Early Can the Action Be Commenced?</i> . . .	1122
(i) "Discretionary" Controls	1122
(ii) Standard Zoning	1123
d. <i>How Late Can the Action Be Commenced?</i>	1124
(i) "Discretionary" Controls	1124
(ii) Standard Zoning	1125
II. THE PENNSYLVANIA PROCEDURES	1125
A. <i>Under the Standard Acts</i>	1125
1. Subdivision Control	1125
2. Zoning	1127
3. Problem 1: Zoning Matters: Exhaustion	1129
4. Problem 2: Appeal From the Board: Scope of Review	1130
5. Problem 3: Estoppel to Raise Constitutional Objections	1130
6. Problem 4: Waiting Until the Building Permit Issues: Standing, Ripeness, and Justiciability	1130
a. <i>How Early May a Challenge Be Commenced?</i> . .	1131
(i) Subdivision and "Discretionary" Zoning Controls	1131
(ii) Standard Zoning	1132
b. <i>How Late May the Challenge Be Commenced?</i> .	1133
(i) Subdivision and "Discretionary" Zoning Controls	1133
(ii) Standard Zoning	1135
B. <i>The Municipalities Planning Code</i>	1138
1. Problem 1: Exhaustion	1139
2. Problems 2 and 3: Review of the Board: Estoppel .	1140
3. Problem 4: Waiting Until the Building Permit Issues: Standing, Ripeness, and Justiciability . .	1140
4. Problem 5: Protestants Intent on Delay: Stays and Preliminary Injunctions	1142
C. <i>The New Article X</i>	1145
1. Challenges to an Ordinance on Procedural Grounds: Section 1003	1145
2. Errors of the Administrative Officer: Section 909 . .	1145
3. Substantive Challenge to an Ordinance: Section 1005	1145
4. Problem 1: Exhaustion	1146
5. Problems 2 and 3: Review of the Board: Estoppel .	1148
6. Problem 4: Waiting Until the Building Permit Issues: Standing, Ripeness, and Justiciability	1148
7. Review of Orders and Decisions, Not Involving the Validity of an Ordinance: Section 1007	1152
8. Problem 5: Protestants Intent on Delay: Stays, Supersedeas, and Defects in the Process of Enactment	1153
9. Insubstantial Procedural Challenges Under Section 1003	1154
CONCLUSION	1155
APPENDIX: SELECTED PROVISIONS OF THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE AMENDMENTS	1157

INTRODUCTION

In 1968 Pennsylvania adopted a new enabling law governing zoning and planning. To some, the new Municipalities Planning Code (MPC)¹ is a disappointment. The power to make decisions continues to be lodged with the smallest units of local government.² Review of the local decisions, for what this can contribute to overall direction, still lies with the local trial courts.³ Except in article VII, which governs planned unit developments,⁴ nothing has been done to abolish the artificial distinctions that exist between various regulatory activities on the local level, such as zoning and subdivision control. The cumbersome and divisive distribution of powers and functions among the governing body, board of adjustment (now zoning hearing board), planning commission, and sundry other officers and agencies established by the Standard Acts of the 1920's,⁵ is continued as before.⁶

As I have noted elsewhere,⁷ the system established by the Standard Acts is based on the assumption that the local legislative body will sit down one fine day and promulgate all of the rules for development into some remote future, looking toward an end state for the community. This is pure nonsense. In reality, no local government can

¹ PA. STAT. ANN. tit. 53, §§ 10,101-202 (Supp. 1972) (effective Jan. 1, 1969) [hereinafter cited as MPC].

² See *id.* §§ 10,107(13), 10,201. The MPC delegates the zoning and planning functions to every level of municipal government, down to townships of the first and second classes. The provisions of the MPC are not applicable to cities of the first and second classes (Philadelphia and Pittsburgh, respectively), *id.* § 10,107(5), or to counties of the first class (Allegheny County), *id.* § 10,107(6), and the exercise of the powers by any city, township, or borough automatically displaces the power of the counties, *id.* §§ 10,502, 10,602, except for certain recommending powers, *id.* §§ 10,304, 10,502.

³ *Id.* § 11,002 (Supp. 1972), as amended, Act No. 93, § 19 (Pa. Legis. Serv. 238 (1972)) (effective Aug. 1, 1972).

⁴ *Id.* §§ 10,701-12 (Supp. 1972) (especially §§ 10,701, 10,705(f)).

⁵ A STANDARD STATE ZONING ENABLING ACT (U.S. Dep't of Commerce, rev. ed. 1926) [hereinafter cited as SZE]; A STANDARD CITY PLANNING ENABLING ACT (U.S. Dep't of Commerce, 1928) [hereinafter cited as SPEA]. These acts are reprinted in ALI MODEL LAND DEVELOPMENT CODE 210 (SZE), 222 (SPEA) (Tent. Draft No. 1, 1968).

⁶ The MPC deals with subdivision and land development control in article V and with zoning separately in article VI. The power to administer the zoning ordinance is lodged in a "zoning officer" and a "zoning hearing board," PA. STAT. ANN. tit. 53, §§ 10,614, 10,901-16 (Supp. 1972), whereas the power to make decisions on subdivision and land development applications may be delegated to the "planning agency" or retained by the governing body. *Id.* §§ 10,501, 10,508 (Supp. 1972), as amended, Act No. 93, § 4 (Pa. Legis. Serv. 238 (1972)) (effective Aug. 1, 1972).

⁷ See Krasnowiecki, *The Basic System of Land Use Control: Legislative Pre-regulation v. Administrative Discretion*, in *THE NEW ZONING 3* (N. Marcus & M. Groves eds. 1970).

afford to provide today for the development that it is prepared to accept over an extended period of time. There are two reasons for this.

First, the existing land use control doctrine does not appear to accommodate any attempt to limit permitted development by some form of quota or other timing devices.⁸ Yet, in the absence of some

⁸ For example, can a zoning ordinance zone an undeveloped area of the municipality, let us say an area of 500 acres, for single-family detached homes on ¼-acre lots, but provide that no more than 100 homes will be given approval each year? There are, of course, many cases which touch on the question whether inadequacy of existing schools and other public services and facilities can be used as a justification for zoning restrictions. The courts have generally taken a skeptical view of this excuse. See *Concord Twp. Appeal*, 439 Pa. 466, 471-74, 268 A.2d 765, 767-68 (1970) (*Ki-Mar*); *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 525-28, 215 A.2d 597, 608-10 (1965); *Christine Bldg. Co. v. City of Troy*, 367 Mich. 508, 518-19, 116 N.W.2d 816, 821 (1962); *Midtown Properties, Inc. v. Township of Madison*, 68 N.J. Super. 197, 209-10, 172 A.2d 40, 47 (L. Div. 1961), *aff'd mem.*, 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1963); *Township of Springfield v. Bensley*, 19 N.J. Super. 147, 158, 88 A.2d 271, 276-77 (Ch. Div. 1952); *Hendlin v. Fairmount Constr. Co.*, 8 N.J. Super. 310, 72 A.2d 541 (Ch. Div. 1950); *cf. Gruber v. Mayor & Twp. Comm.*, 68 N.J. Super. 118, 123-28, 172 A.2d 47, 50-52 (L. Div. 1961), *rev'd*, 73 N.J. Super. 120, 131-32, 179 A.2d 145, 151 (App. Div.), *aff'd*, 39 N.J. 1, 9-11, 186 A.2d 489, 493-94 (1962); *Joseph v. Town Bd.*, 24 Misc. 2d 366, 198 N.Y.S.2d 695 (Sup. Ct. 1960). But all of the above cases involved a blanket district restriction applicable to all owners alike, and none of them involved a blanket permission coupled with a quota.

Local officials assume, and I think rightly, that any regulatory scheme which overtly allows one landowner to affect another's share of permitted development will require some substantial justification, even when the other is not deprived of his share but merely delayed a certain period. Thus, for example, in the important recent case of *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971), the township conceded the invalidity of a statutory provision allowing the construction of only 200 multi-family units annually. *Id.* at 17, 283 A.2d at 356. In general, any such scheme must at the very least provide an acceptable rationale for the delay and include appropriate safeguards against favoritism. The above cases indicate that lack of public services and facilities alone will not provide a judicially acceptable rationale for the delay unless coupled with a plan of public improvement which evidences a bona fide effort to absorb a fair share of growth. Local officials are not prepared to articulate such a plan because their real attitude toward growth, in most cases, does not meet the minimum demands of bona fides.

On October 7, 1969, however, the Town of Ramapo, N.Y., took its courage in both hands and established a permit system for residential development tied to a plan of capital improvements stretching over 18 years. I expected that the courts would instinctively recoil from this scheme. No matter how conscientiously such a plan is developed, it can only serve to point up the irrationality of a system which undertakes to service and control growth through small municipalities. A small municipality simply does not have the resources to provide any assurance that its capital program will in fact be carried out as planned. Furthermore, the natural propensity of a suburban constituency is against residential development. There is, therefore, no reason to believe that the governing body will adhere steadfastly to any plan that favors growth in that direction. It is hard to believe that a plan for the extension of municipal services and facilities will in fact be administered impartially over the long run. The courts have shown a strong distaste for schemes that overtly suggest a strong possibility of favoritism, *see, e.g., Eves v. Zoning Bd. of Adjustment*, 401 Pa. 211, 220-21, 164 A.2d 7, 12 (1960); *Rockhill v. Township of Chesterfield*, 23 N.J. 117, 126-29, 128 A.2d 473, 478-80 (1957). This thought seemed uppermost in the minds of the majority of the appellate division when they struck down the Ramapo scheme in *Golden v. Planning Bd. of Ramapo*, 37 App. Div. 2d 236, 324 N.Y.S.2d 178 (1971), *rev'd*, 30 N.Y.2d 359, 285 N.E.2d 291, — N.Y.S.2d — (1972).

Ironically, the existing approach to zoning simply encourages local authorities to zone against any residential development and then to operate a de facto quota system through amendments, where it can be hidden from sight. *See* note 13 *infra* & accompanying text. That is why I prefer the Ramapo approach. An articulated

such device, a community can have no assurance that the development which it is prepared to absorb over, for example, the next twenty years will not in fact occur in the next two. Second, the existing land use control doctrine does not permit any discrimination among developers relating to matters such as financial capacity, reputation, or quality of the product.⁹

Faced with these limitations on their power, local officials will naturally tend to set their zoning controls at a level which is just below the level at which any development will be encouraged to occur. For example, if marketable single-family homes could be constructed economically on lots of up to three-quarters of an acre, local officials would tend to set the controls at the one-acre minimum or higher. This preserves the fiction of a comprehensive land use plan, the real plan being, of course, to deal with each development as it comes along, through amendments,¹⁰ variances,¹¹ and special exceptions.¹² Thus, in the name of generality based on an abhorrence of individualized treatment we actually permit local governments to operate a discriminatory quota system without requiring that they state the principles upon which it is based.¹³ Moreover, the mechanism that is available for the correction

quota system is reviewable, and is surely an improvement even if the courts' perspective is little broader than the myopic point of view of local governments. But my preference is born of cynicism about how zoning operates in reality, and I am surprised that the New York Court of Appeals was prepared to abandon the prevailing myth about the impartiality and certainty of existing zoning approaches in favor of the Ramapo scheme. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, — N.Y.S.2d — (1972).

Indeed, I doubt that other courts will follow suit. I believe that courts will prefer to wait until state legislatures provide some centralized mechanism for allocating the benefits and burdens of growth to each locality, a preference which motivated Judge Breitel to dissent in the *Ramapo* case. I have been able to find only one other case that has touched on the quota problem: *DeMaria v. Enfield Planning & Zoning Comm'n*, 159 Conn. 534, 271 A.2d 105 (1970). The town of Enfield adopted a zoning ordinance which established a quota by limiting the number of apartment units that could be constructed in certain residential districts. In the district in question, the ordinance limited the apartment units to 375. Three developers applied successively for 212, 162, and 112 units respectively. The first and last applications were approved but the second was denied on aesthetic grounds. On appeal, the Connecticut Supreme Court, assuming that the 375 units would be approved on a first-come, first-served basis, held that aesthetic objections were not sufficient to support the denial. One searches in vain for some indication that the court was aware of the uniqueness of the scheme itself. On the contrary, the court simply noted that the result of its decision was that the third developer could not proceed. *Id.* at 542-43, 271 A.2d at 109.

⁹ See Note, *The Ad Hominem Element in the Treatment of Zoning Problems*, 109 U. PA. L. REV. 992 (1961).

¹⁰ SZEA, *supra* note 5, § 5.

¹¹ *Id.* § 7.

¹² *Id.*

¹³ See note 8 *supra*. Of all the sources of flexibility, the zoning amendment has posed the greatest dilemma for the courts. At first, it seemed that the worst abuses could be curbed by requiring that all amendments be (a) confined to pre-existing district categories, and (b) limited to a change in district boundaries, rather than creating an "island" within another preexisting district. Neither limitation, however, makes any sense. For (a) virtually says that a community which zoned

of these local decisions is so cumbersome and confused that it positively contributes to the misuse of land use control powers.

In the MPC, Pennsylvania made an effort to solve some of the problems that have plagued zoning review and litigation procedures. Unfortunately, the MPC bore the marks of last-minute modification, which resulted in many gaps and conflicts in its procedural provisions.¹⁴ What the courts did with this confusion did not help. Accordingly, a new procedural article X was prepared by the Joint State Government Commission and becomes effective on August 1, 1972.¹⁵ This Article offers an analysis of the new procedural provisions and the problems that arose under prior practice to which the provisions are addressed. A comparison of the major differences that have existed between the

itself in 1935 to single-family detached homes and street-front stores cannot now accommodate apartments, townhouses, shopping centers, and the like, and (b) is simply bad planning. The dilemma is exemplified by the Pennsylvania development. Having held in *Eves v. Zoning Bd. of Adjustment*, 401 Pa. 211, 164 A.2d 7 (1960), that the floating zone cannot be employed as a solution to the obvious problem with (a), the Supreme Court of Pennsylvania was, unwittingly, left with a situation where a community that did not have apartments in its original districting could not have them except through a variance or, possibly, through a special exception. Later, in *Donahue v. Zoning Bd. of Adjustment*, 412 Pa. 332, 194 A.2d 610 (1963), the court held that a community can create a new apartment district provided that it concurrently rezones a specific parcel of ground to the new district classification. The principle that seems to emerge from these cases is that if a new zoning category is created and it is announced that several landowners may qualify for it through rezoning, it is impermissible (*Eves*), but if a new zoning category is created for which only one owner qualifies, it is permissible (*Donahue*).

Eves and *Donahue* also focus on the importance of coordinating amendments with a preexisting comprehensive plan. Yet neither reliance on a comprehensive plan nor the adoption of artificial constraints such as the Maryland "mistake or change of conditions" rule, *McDonald v. Board of County Comm'rs*, 238 Md. 549, 210 A.2d 325 (1965), can serve to guarantee wisdom or forethought in zoning change. Human nature being what it is, only prohibiting change itself will prevent lack of forethought or absence of wisdom. Moreover, if a comprehensive plan may be changed under the same procedure as the zoning ordinance, why should a court conclude that the zoning change is contrary to the plan rather than that it constitutes a pro tanto amendment of the plan? Indeed, judicial recognition of this situation is now occurring, as in *Village 2 at New Hope, Inc., Appeals*, 429 Pa. 626, 241 A.2d 81 (1968) (*Cheney*), where the court concluded that an amendment to the zoning ordinance which was plainly contrary to the comprehensive plan constituted an amendment of the plan. Of course, the procedures for adoption and amendment of the plan could be made cumbersome, like the procedures for the amendment of a constitution. See *Dalton v. Honolulu*, 51 Hawaii 400, 462 P.2d 199 (1969). But would that be wise? I think not. See *Krasnowiecki, supra* note 7, at 8-10. See also *Krasnowiecki, Model Land Use and Development Planning Code* §§ 209, 303 & commentary, in *MARYLAND PLANNING AND ZONING LAW STUDY COMMISSION, FINAL REPORT: LEGISLATIVE RECOMMENDATIONS 107-10, 113-16* (1969), reprinted in part in 1971 URBAN L. ANN. 101.

¹⁴ See notes 211-52 *infra* & accompanying text.

¹⁵ Act No. 93 (Pa. Legis. Serv. 238 (1972)) (effective Aug. 1, 1972), makes a number of other changes in the MPC, but the changes relating to litigation procedures and court reviews are effected through the following: §§ 612, 712, 911, and the whole of article VIII of the MPC have been repealed, former PA. STAT. ANN. tit. 53, §§ 10,612, 10,712, 10,911, 10,801-02 (Supp. 1972), respectively; article X of the MPC, former PA. STAT. ANN. tit. 53, §§ 11,001-12, has been repealed, and a new article X, Act No. 93, § 19 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972), has been substituted.

New §§ 609.1, 910, 913.1, 915, and the new article X are reproduced in the appendix.

Pennsylvania procedures and those prevailing in other states serves to illustrate both the unique nature of the Pennsylvania approach as well as the purpose which lies behind the new provisions.

One point needs to be made early because it explains the organization of this Article. In any system of land use control a clear distinction should be preserved between, first, the claims of persons who are interested in making a use or development of land contrary to a prohibition or restriction placed on that use or development by the public authority in question, and, second, the claims of persons who are interested in preventing a use or development which is permitted to be made by another person. I believe that recognition of this distinction is essential for any sound analysis of many fundamental issues, such as standing, ripeness for adjudication, justiciability, and the role of the courts or of any alternative reviewing agency;¹⁶ I note that the new Pennsylvania provisions preserve this distinction.¹⁷

PART 1: PROCEDURE FOR PERSONS HAVING THE REQUISITE INTEREST IN MAKING A USE OR DEVELOPMENT OF LAND PROHIBITED OR RESTRICTED BY THE PUBLIC ACTION OR INACTION IN QUESTION

The cases considered under this title are commonly referred to in Pennsylvania as "landowner appeals" to distinguish them from cases which involve aggrieved third parties. I refrain from describing the plaintiff in these cases as a "landowner" and the challenged restriction as one which is applicable to "his" land because these references tend to compromise some of the very questions that ought to be discussed under this title, such as whether certain contingent interests will qualify.¹⁸ I am mindful also of the growing movement to break down "exclusionary" zoning, which raises the question whether persons who have no current interest in the land may attack restrictions that prevent certain kinds of development which would provide them with adequate housing in the community.¹⁹

Until 1969, when the MPC became effective, Pennsylvania's statutory law governing zoning and planning was practically identical to that of most other jurisdictions, based as it was on the Standard Acts of the early twenties.²⁰ Yet Pennsylvania managed to develop some unique procedures for securing judicial review of local zoning (if not of other land use control activities). The cases suggest that the courts were not

¹⁶ See Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 55-63, 66-78 (1965).

¹⁷ See notes 255-56 *infra* & accompanying text.

¹⁸ See notes 102-06 *infra* & accompanying text.

¹⁹ See note 107 *infra* & accompanying text.

²⁰ See notes 37-38 *infra*.

aware of the extent to which the Pennsylvania practice had departed from that of other jurisdictions, nor how that departure had cut across the fundamental problems involved. As a result, some wrong turns were made and there was some confusion.²¹ Since the unique Pennsylvania approach is, by and large, continued through the recent statutory changes, a study of the problems that arose under the Standard Acts will throw considerable light on the new procedures.

I. PROCEDURE UNDER THE STANDARD ACTS

A. *The Statutory Framework*

The Standard Acts established a divisive approach to development control. The reason for this is not hard to find. Viewing the problems of their time, the architects of our land use control system first concentrated on the control of use, bulk, height, and spacing of buildings. These elements of development were singled out for special coverage under the Standard State Zoning Enabling Act (SZE A)²² because they appeared to call for different treatment according to location, distinctions which were not authorized, it was thought, under the general grant of legislative powers previously extended to local governments.²³ Matters relating to building materials and construction, on the other hand, could be handled under the general grant of power because they did not call for different treatment according to location;²⁴ indeed, such differentiation was, and still is, viewed as suspect on constitutional grounds. So urgent was the demand for zoning that the draftsmen of the SZE A were prepared to overlook the broader planning function that might be needed to inform the distinctions which they had authorized.²⁵ They also overlooked the narrower

²¹ See text accompanying notes 129-206 *infra*.

²² SZE A, *supra* note 5, § 1.

²³ Perhaps the most revealing discussion of the purpose and intent of the SZE A will be found in Bassett, *Zoning*, 9 NAT'L MUN. REV. 311 (1920). Bassett, one of the principal draftsmen of the SZE A, deals with the zoning power and its relationship to the police power, contrasting it to eminent domain, *id.* 319-20. He considers the need for enabling legislation, *id.* 327-31. These concerns are also reflected in *Explanatory Notes in General*, SZE A, *supra* note 5, at 210.

²⁴ Bassett, *supra* note 23, at 318.

²⁵ Section 3 of the SZE A, *supra* note 5, contained the well-known requirement that "such regulations shall be made in accordance with a comprehensive plan," but the Act provided no procedures for formulating such a plan, other than the procedures for adopting the zoning ordinance itself. Section 6 established a zoning commission whose function was "to recommend the boundaries of the various *original* districts and appropriate regulations to be enforced therein" (emphasis added), but it was clear that the commission was not intended to be a professional planning agency or to have any ongoing planning functions. Indeed, Bassett saw the commission as a group of neighborhood residents whose function would be to inform the zoning authorities of the needs and character of the neighborhood in which they live. See Bassett, *supra* note 23, at 327-28.

planning role that was needed to secure the proper distribution of buildings and improvements upon any particular site. These matters were covered subsequently by the Standard City Planning Enabling Act (SPEA).²⁶

Thus, through historical accident, a cleavage occurred at the heart of the land use control system: the control of use, bulk, height, and spacing of buildings (zoning) was separated from subdivision or site planning control. There is hardly a development that does not involve both sources of control; yet each is administered separately. Indeed, each represents a different theory of control.

1. The SZE A²⁷

The theory of the SZE A was that development ought to be controlled by self-administering rules²⁸ set down by the local legislative body in advance of development.²⁹ This becomes clear when we ex-

²⁶ SPEA, *supra* note 5, §§ 7, 14. The SPEA authorized the creation of a planning commission with certain planning and advisory powers and duties in tit. I, §§ 2-11. In tit. II, §§ 12-20, it gave to the planning commission the power to adopt and administer subdivision regulations. Title III, §§ 21-25, was devoted to the official map technique for preventing development in the path of future mapped streets and other public facilities. (Article IV of the MPC, PA. STAT. ANN. tit. 53, §§ 10,401-08, is derived from tit. III of the SPEA, as are similar laws in a number of other jurisdictions. See Kurcinek & Beuscher, *Wisconsin's Official Map Law*, 1957 WIS. L. REV. 176, 177-85.) Title IV of the SPEA made some effort in the direction of encouraging voluntary regional planning.

²⁷ Note 5 *supra*.

²⁸ I use the words "self-administering" here to describe rules designed to be so dispositive of each individual case as to leave no room for the exercise of discretion or judgment. A rule is "self-administering" in this sense even though it may require that an administrative agency determine compliance in each particular case, so long as the administrative role is intended to remain ministerial in nature.

²⁹ If one knew nothing of how our courts reacted to the idea of a discretionary land use control administration, and if one knew nothing of what the draftsmen of the SZE A had in mind, one would still have to conclude that the SZE A did not leave much room for discretionary administration. The Act repeatedly instructs the legislative body to proceed by adopting "regulations," SZE A, *supra* note 5, §§ 2-5. It is a fundamental principle of our constitutional form of government that the legislative power ought to be exercised in a general and impartial manner and that new law ought not be made in the individual case. This principle is sometimes enshrined in state constitutional provisions against "special legislation," see, e.g., PA. CONST. art. 3, § 32. The Federal Administrative Procedure Act defines "rule" as "an agency statement of general or particular applicability and future effect." 5 U.S.C. § 551(4) (1970). Indeed, the law developed for administrative agencies in our country provides an apt analogy to zoning. In a sense, local governments are charged with administering the state police power through enabling legislation like the SZE A. It is noteworthy that in administrative law a distinction is drawn between "rulemaking" and "adjudication." Adjudication occurs when an agency is making a decision or an order in a particular case. And, while an agency order may have the force of a rule, an agency cannot make a new rule during the course of an adjudication to dispose of the pending case unless it can justify it as interpretative of prior rules or unless it can surmount the strong due process objections to retroactivity. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); cf. *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). See also 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 5.01, 5.08 (1958 & Supp. 1970); *Yellow Transit Freight Lines, Inc. v. United States*, 221 F. Supp. 465, 469, 471 (N.D. Tex. 1963) (Brown, J., concurring; Hughes, J., dissenting); Newman, *How Courts Interpret Regulations*,

amine the powers given the administrative agency created by the Act, the board of adjustment. Of the three powers given the board, only one suggests that the local legislative body might establish some general standards, short of self-administering rules, and allow the board discretion to interpret and apply them in each particular case—the power to grant special exceptions.³⁰ But it is clear from the legislative history and from its name that the special exception power was designed to be employed sparingly to accommodate only those uses that have their maximum utility in districts where they also have their highest potential for an adverse impact on surrounding uses, so that they cannot be permitted to locate there as of right. A church or a school in a residential district are examples.³¹

35 CALIF. L. REV. 509, 532-36 (1947). It is not surprising, then, that the courts have had such difficulty with zoning amendments and with any attempt on the part of the legislative body to retain, through a two-step amendment (floating zone) process, power to apply new law in each individual case. There is a strong feeling that a legislative body cannot act on a case-by-case basis unless it can justify such activity as interpretive of prior law. See note 13 *supra*. See also Krasnowiecki, *Part I—The Legal Aspects*, in LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT (Urban Land Institute Tech. Bull. 52, 1965) (particularly §3.21, “Is the Local Legislative Body Required to State in Advance the Standards That Will Control Its Future Zoning Action?”); Krasnowiecki, *supra* note 7. In both of the cited discussions, I have benefited greatly from Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60. In other fields of law, the legislative solution to these problems has been to avoid the self-administering rule, see note 28 *supra*, whenever the nature of the subject matter requires a sensitive response to particular circumstances and to state only the policy and standards that ought to apply, leaving the determination in each particular case to an administrative arm. The SZEA, however, does not authorize any administrative agency capable of performing this function, see notes 30-33 *infra*. These observations support my view that the SZEA was based upon an “end state” theory of land use controls.

³⁰ SZEA, *supra* note 5, §7, authorized the local legislative body through “regulations . . . adopted pursuant to the authority of this act” to give to the board of adjustment the power “in appropriate cases and subject to appropriate conditions and safeguards, [to] make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.” (This is the only place in the Act where a distinction is drawn between “general” and “specific” rules, thus lending further support to the conclusion that zoning was supposed to operate through self-administering (“specific”) rules.)

³¹ The comments of the two principal draftsmen of the SZEA clearly indicate that this is how they viewed the special exception power. Bassett & Williams, *Report*, in E. BASSETT, F. WILLIAMS, A. BETTMAN & R. WHITTEN, MODEL LAWS FOR PLANNING CITIES, COUNTIES, AND STATES 13-14 (7 Harvard City Planning Studies 1935). A judicial statement which most nearly captures the original intention of the draftsmen appears in *Kotrich v. County of Du Page*, 19 Ill. 2d 181, 184-85, 166 N.E.2d 601, 603-04, *appeal dismissed*, 364 U.S. 475 (1960). Pressed by the fact that there is no other source of administrative flexibility in the zoning system, many courts have been prepared to expand the concept of the special exception beyond its original purpose, see, e.g., *Huff v. Board of Zoning Appeals*, 214 Md. 48, 133 A.2d 83 (1957); *Summ v. Zoning Comm’n*, 150 Conn. 79, 186 A.2d 160 (1962). A lower court in Pennsylvania, however, refused to allow the special exception to be used for locating office buildings in residential districts on the ground that office buildings can conveniently be located in their own zoning districts, though it did order the grant of a variance, accomplishing the same result: *Stofflet & Tillotson v. Cheltenham Twp.*, 75 Montg. Co. 479, 18 Pa. D. & C.2d 104 (C.P. 1959).

The other two powers given to the board are clearly quasi-judicial in nature. Both of them assume that the rules set down by the local legislative body leave nothing to discretion. Thus the board was given the power to correct "errors" made by an "administrative officer" in the course of applying and administering the provisions of the zoning ordinance. If the draftsmen had believed that he might be invested with substantial discretion, it is unlikely that they would have referred to him in such an oblique fashion.³² The most important power of the board, the power to grant variances, was designed to provide a mechanism for relieving particular properties from the strict letter of the legislatively established rule. It was to be exercised in cases where that rule imposes a burden upon a particular property which is not shared by other properties that are subject to the same rule, that is, in cases of unique hardship.³³

The power to correct "errors" of the "administrative officer" and the power to grant "variances" were to be exercised by the board on appeal from the decision or order of the "administrative officer." The special exception, if authorized by ordinance, was made a matter of direct application to the board.

Appeals from the decision of the board lay to the courts by certiorari, which confirms my observation that the board was conceived of as a quasi-judicial body.³⁴ Recognizing that certiorari will not work

³² SZEA, *supra* note 5, §7, gives the board power "[t]o hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto." The administrative officer is mentioned in one other place in §7: "Appeals to the board of adjustment may be taken by any person aggrieved . . . by any decision of the administrative officer."

Although I note in the text that the draftsmen obviously thought of the position of "administrative officer" as ministerial, the language of the SZEA is sufficiently neutral on the point to support a reading which would elevate this officer to the position of a powerful "zoning administrator." A number of local governments operating under home rule charters have created such an office (for example, the zoning hearing officer in Anne Arundel County, Maryland, who has the power to make zoning changes as well as grant variances, ANNE ARUNDEL COUNTY, Md., CHARTER §§ 534-35). I know, however, of no local government directly subject to the SZEA that has tried to elevate its administrative officer to such authority.

³³ The principles are so well established that they do not require extensive citation. For a full discussion, see 2 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 14.09-.41; for the Pennsylvania authorities, see R. RYAN, *PENNSYLVANIA ZONING LAW AND PRACTICE* §§ 6.2.4-5 (1970).

³⁴ Since the draftsmen of the SZEA were New Yorkers, it is noteworthy that by the early 1920's, New York had firmly established the doctrine that certiorari is not an appropriate mode of review for determinations which are "legislative" or "administrative" rather than "judicial" in nature, *People ex rel. Savage v. Board of Health*, 33 Barb. 344 (N.Y. Sup. Ct. 1861); *In re Mount Morris Square*, 2 Hill 14 (N.Y. Sup. Ct. 1841). See generally L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 165-76 (1965). Although Professor Jaffe feels that the distinction might better have been put in terms of whether the determination is or is not required to be made on the record, rather than in terms of whether it is "judicial" or "legislative" in nature, he notes that most state courts have tended to take the latter approach. New Jersey is a notable exception, see note 50 *infra*.

unless there is a full and complete record of the proceedings below, the draftsmen provided that the court may take additional evidence if it appears necessary or proper to do so.³⁵ Evidently, this solution was preferred to a requirement that the board have the proceedings recorded stenographically and that it conduct them in a sufficiently formal manner to secure an appropriate record.³⁶

The SZEA was adopted by all but three jurisdictions without significant change,³⁷ Pennsylvania being one of the first to do so.³⁸

2. The SPEA:³⁹ Subdivision and Site Planning Control

The SPEA received an uneven reception among the states. Most states, however, adopted a version of the provisions that authorized the exercise of subdivision and site planning control.⁴⁰ The theory of this control was markedly different from that of zoning. While the SPEA required that some rules be set forth in advance of development,⁴¹ it was clear that considerable room might be left for the exercise of judgment and discretion in each particular case.⁴² Under the SPEA, the power to make the final decision in each case was given to the planning commission.⁴³ Interestingly, the SPEA did not provide for any appeal from this decision. The draftsmen reasoned that the courts do not know enough about planning to review the decisions for

³⁵ SZEA, *supra* note 5, § 7.

³⁶ *Id.* contained the ambiguous instruction: "The board shall keep minutes of its proceedings, showing the vote of each member upon each question . . . and shall keep records of its examinations and other official actions"

³⁷ The exceptions are Hawaii, Idaho, and Mississippi. Hawaii has its own unique approach to land use control, HAWAII REV. LAWS §§ 205-1 to -15 (1968), *as amended*, §§ 205-2, -5, -6, -31 to -37 (Supp. 1971). Idaho and Mississippi have no general zoning enabling legislation. Statutory citations to the remaining 47 jurisdictions can be found in ALI MODEL LAND DEVELOPMENT CODE 207-09 (Tent. Draft No. 1, 1968).

³⁸ The SZEA was first published in January 1923. Only the revised edition of 1926, *supra* note 5, is generally available today. The introductory notes to the revised edition indicate that the only changes that were made in the 1923 edition were the addition of a new footnote 15a, and a new § 8, dealing with enforcement. Pennsylvania adopted what, presumably, was the 1923 draft for its first class townships, Law of June 29, 1923, No. 382, [1923] Pa. Laws 957. Cities of the second and first class followed in 1927, Law of Mar. 31, 1927, No. 69, [1927] Pa. Laws 98, and Law of May 6, 1929, No. 469, [1929] Pa. Laws 1551, respectively. Townships of the second class were added in Law of July 10, 1947, No. 567, art. XX, § 2001, [1947] Pa. Laws 1481, 1610.

³⁹ Note 5 *supra*.

⁴⁰ See Note, *An Analysis of Subdivision Control Legislation*, 28 IND. L.J. 544, 574-86 (1953).

⁴¹ SPEA, *supra* note 5, § 14.

⁴² *Id.* § 15 provided: "The [planning] commission shall have the power to agree with the applicant upon use, height, area, or bulk requirements or restrictions governing buildings and premises within the subdivision, provided such requirements or restrictions do not authorize the violation of the then effective zoning ordinance of the municipality" (footnote omitted). The subsequent history of this extraordinary provision is discussed in Krasnowiecki, *supra* note 16, at 78-85.

⁴³ SPEA, *supra* note 5, § 15.

their general quality and that they already have ample power to void any local action which is shown to be arbitrary or unauthorized by law.⁴⁴

There were some changes made in this pattern by the states. In its townships and boroughs, for example, Pennsylvania preferred to give the final decision on subdivision matters to the governing body, with the planning commission serving in an advisory capacity. From the decision of the governing body disapproving a subdivision plan, an appeal was allowed to the court of quarter sessions⁴⁵—an anachronism which indicates that subdivision control was considered to be a minor power. Most states, however, followed the pattern set by the SPEA, giving the final decision to the planning commission and making no provision for judicial review.⁴⁶

The draftsmen of the SPEA were, of course, right when they said that the courts already had the necessary jurisdiction to correct any abuse or excess of power by local authorities. This jurisdiction has always existed in equity and under the various prerogative writs.⁴⁷ That is why the draftsmen of the Standard Acts did not make any provision for judicial review of zoning ordinances or subdivision

⁴⁴ *Id.* n.76.

⁴⁵ PA. STAT. ANN. tit. 53, §58,066(f) (1957) (first class townships); *id.* §66,256(f) (second class townships); *id.* §46,607(f) (1966) (boroughs). All the foregoing provisions relating to subdivision control have been repealed by the MPC, *see id.* §11,201 (Supp. 1972), and replaced by article V of the MPC, effective Jan. 1, 1969, *id.* §§10,501-16. For a discussion of the changes made by the MPC and by the recent amendments, *supra* note 15, to the subdivision and site planning control procedures, see notes 322-24, 452-55, 483-501 *infra* & accompanying text.

⁴⁶ *See, e.g.*, N.J. REV. STAT. §40:55-1.14 (Supp. 1971) (giving the local governing body the option of delegating the final decisionmaking power to the planning board or retaining power in its own hands); *id.* §40:55-1.19 (Supp. 1971) ("Nothing in this act shall be construed to restrict the right of any party to obtain a review by any court of competent jurisdiction according to law."); N.Y. TOWN LAW §276 (McKinney Supp. 1971) & N.Y. VILLAGE LAW §179-k (McKinney Supp. 1971) (authorizing the local governing body to give the final decisionmaking power to the planning board). However, in New York, municipalities can probably dispense with the planning board and exercise subdivision and site planning controls through the governing body or through any other agency under N.Y. MUN. HOME RULE LAW §10(4)(a) (McKinney Supp. 1971). *See* Russell Oaks, Inc. v. Planning Bd., 28 App. Div. 2d 569, 280 N.Y.S.2d 436 (1967); 23 Op. St. COMPT. 848 (N.Y. 1967). N.Y. TOWN LAW §282 (McKinney Supp. 1971) and N.Y. VILLAGE LAW §179-q (McKinney Supp. 1971) do, however, provide for an appeal to court from the decision of the planning board pursuant to N.Y. CIV. PRAC. LAW art. 78 (McKinney Supp. 1971). *See* notes 85-98 *infra* & accompanying text.

⁴⁷ Whatever the limitations placed on certiorari, note 34 *supra*, or on mandamus, as these remedies evolved in the various states, there was never any question that the validity of a municipal ordinance or other legislative enactment could be tested in equity, in a proceeding to enjoin the municipality or municipal officials from taking any action pursuant to it that would result in irreparable harm to the plaintiff. As Professor Jaffe points out, this fundamental equitable power of the courts was a "catchall," available whenever the remedy at law was inadequate. *See* L. JAFFE, *supra* note 34, at 165-94; 17 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§49.50-59 (3d rev. ed. J. Latta 1968).

ordinances. This statement can come as a surprise only to Pennsylvanians, whose courts came to the impossible conclusion that they did not have jurisdiction to entertain substantive challenges to the zoning ordinance except on appeal from the board of adjustment; more of this later.⁴⁸ For the present it is sufficient to note that no other jurisdiction has ever doubted that questions concerning the validity of an ordinance lie within the original jurisdiction of the courts. Such questions may be tested by an action in equity for a declaratory judgment⁴⁹ or, in some states, by an expanded version of one of the prerogative writs.⁵⁰ If the board becomes involved in the matter, it does so only under the principles of exhaustion.

So much for the statutory framework. Now let me review the litigation problems that it has produced, first in other jurisdictions, then in Pennsylvania.

B. *The Problems in Other Jurisdictions*

1. Exhaustion

Although courts in other jurisdictions have recognized that the validity of an ordinance may be tested before them as an original matter, they have declined to exercise this original jurisdiction until the litigant has exhausted his remedies on the local level.⁵¹ All of the current writing concerning exhaustion takes zoning for its exclusive focus.⁵² While I am forced to continue this emphasis on zoning because that is where the action has been to date, I should note that it is systematically misleading. For the developer, exhaustion in its more literal sense lies in the divisive approach we have established for development control. Frequently, his development is unreasonably restrained under several sources of control, separately enabled and separately administered under separate ordinances. Moreover, each source of control appears to demand a different procedure and different prerequisites for obtaining judicial review, in terms of both exhaustion and

⁴⁸ See notes 129-38 *infra* & accompanying text.

⁴⁹ 3 R. ANDERSON, *supra* note 33, §§ 24.01-10.

⁵⁰ In New Jersey, the appropriate procedure to test the validity of an ordinance is an action in lieu of a prerogative writ under N.J. CIV. PRAC. R. 4:69 (1971). See, e.g., *Kent v. Borough of Mendham*, 111 N.J. Super. 67, 75-76, 267 A.2d 73, 77 (App. Div. 1970). This follows from the New Jersey decision holding that certiorari is available for review of "legislative" as well as "judicial" action. See *Fischer v. Township of Bedminster*, 5 N.J. 534, 76 A.2d 673 (1950). The New Jersey approach should be contrasted with the New York rule, note 34 *supra*.

⁵¹ See 3 R. ANDERSON, *supra* note 33, § 24.06 (1968 & Supp. 1970).

⁵² See, e.g., Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509 (1959); Crolly, *Exhaustion of Administrative Remedies Before Attacking a Zoning Ordinance*, 35 N.Y.S.B.J. 329 (1963); Note, *The State of Zoning Administration in Illinois: Procedural Requirements of Judicial Intervention*, 62 NW. U.L. REV. 462 (1967).

ripeness for adjudication. Faced with this situation, the developer cannot afford to attack all of the restraints that apply to his development at once, even though they are all arguably subject to challenge. He is forced to attack the most pervasive restraint, simply accepting the others or hoping that, if he wins, they will become negotiable.

Zoning has, in fact, been the most pervasive source of restraint to date, but the others are not far behind. Thus, many communities are beginning to realize that subdivision and site planning controls are far more effective mechanisms for preventing unwanted development because unreasonable requirements can be sheltered from judicial review, partly by a broader scope of discretion, but more importantly by the crushing expense of delay implicit in the current procedure for getting into court.⁵³ Thus, when a Pennsylvania court says that a community cannot zone on the basis of inadequacy of existing facilities such as sewers, but that it can prohibit development for the same reason under some other appropriate power,⁵⁴ that is surely a sign that the dragon has not been slain but is merely growing another head.

I cannot hope to deal with every head on the dragon—that would require my writing about land use control reform, about the way in which necessary supporting facilities ought to be financed, and about the entire taxing and governmental system as it relates to land use control. The task I have set myself here is to offer a better understanding of the present system and the litigation it has engendered. Because the focus of current litigation is upon zoning and, to a considerably lesser extent, upon subdivision controls, understanding how development can be caught between these two sources of control provides a good idea how it can be caught between all other relevant controls. I start with subdivision control because it is the least litigated and least understood system, so far as exhaustion is concerned.

a. *Subdivision and Site Planning Control*

In most jurisdictions, there is no statutory provision for court review concerning subdivision matters. Furthermore, the approving agency, whether it be the planning commission or the governing body, has no statutory power to vary any general rules established to guide the approval function.⁵⁵ Thus, in the case of subdivision and site planning control, exhaustion is not a matter of seeking available local relief, but rather of exploring the scope of discretion left to the ap-

⁵³ See, e.g., *Kleckner v. Wieand*, 31 Lehigh Co. 175 (Pa. C.P. 1965) (original filing Aug. 1963; submission of detailed plans ordered Mar. 1965).

⁵⁴ *Concord Twp. Appeal*, 439 Pa. 466, 473, 268 A.2d 765, 768 (1970).

⁵⁵ The exceptions are: MASS. GEN. LAWS ANN. ch. 41, §81R (Supp. 1971); OKLA. STAT. ANN. tit. 19, §863.9 (Supp. 1972).

proving agency under the governing rules or standards. By general principles, it should be clear that a developer is entitled to go directly to court whenever (1) he is challenging the validity of a rule (whether stated in an ordinance or in regulations of a planning commission) which is self-administering, that is, a rule whose scope and application in his case is mandatory and not in need of any further interpretation, or (2) he is challenging the validity of a rule or standard on the ground that it vests arbitrary or unauthorized discretion in the agency charged with administering it in his case—alleging either vagueness or improper delegation. On this basis, he should never be required to seek approval of his plans as a prerequisite for a challenge in court unless his complaint involves a rule or standard which, while not so vague as to be subject to attack on its face, requires some further exercise of judgment or discretion by an approving authority.

Needless to say, nothing so simple as this analysis prevails in practice. Courts have refused to entertain an attack on a self-administering rule until it has been applied in the context of a particular plan of development and have even refused to entertain an attack when the rule has been applied to a preliminary plan when it was clear that the same rule would be applied to a final plan.⁵⁶ Evidently the courts are all too prepared to confuse questions of exhaustion with questions of ripeness.⁵⁷ Though both criteria relate to the timing of judicial review, exhaustion focuses on whether administrative action is a prerequisite to judicial review, while ripeness addresses the broader question of what types of functions the courts should perform. Thus, generally speaking, a problem seemingly ripe for judicial consideration may merit deferral if it is possible that administrative action could narrow its scope even further.⁵⁸ Applying this principle to our situation, it could be argued that the validity of most subdivision control requirements cannot be tested without some definition of their impact within a specific plan of development. On this basis, review might be postponed until the rules have been applied to a specific plan. There is no

⁵⁶ Paul Livoli, Inc. v. Planning Bd., 347 Mass. 330, 197 N.E.2d 785 (1964); Kleckner v. Wieand, 31 Lehigh Co. 175 (Pa. C.P. 1965). See also Commonwealth v. Keller, 75 York L. Rec. 185 (Pa. Ct. Q. Sess. 1960) (holding licensing ordinance cannot be attacked until application is made for a license); Kit-Mar Builders, Inc. v. Township of Concord, 56 Del. Co. 240 (1968), *aff'd sub nom.* Concord Twp. Appeal, 439 Pa. 466, 268 A.2d 765 (1970) (discussed in note 205 *infra*). I have difficulty finding cases on this subject, probably for the reasons stated in note 60 *infra*.

⁵⁷ This is not to say that the law elsewhere is clear on this subject. For an extensive analysis of the distinction between exhaustion and ripeness as well as for some helpful suggestions about what the law ought to be, see 3 K. DAVIS, *supra* note 29, §§ 20.01-.10 (exhaustion, especially conclusions at § 20.10), §§ 21.01-.10 (ripeness, especially conclusions at § 21.10) (1958 & Supp. 1970).

⁵⁸ *Id.* § 21.02.

excuse, however, for delaying review until a final plan is presented if the rules have been applied to a preliminary plan and their application to the final plan is bound to be identical. Yet the courts have done just that.⁵⁹ Small wonder that developers are not prepared to tempt the gods by trying a direct attack on the preliminary determination in court. On the other hand, if the developer has to wait until final application, he might just as well give in, because by that time he has commitments that cannot wait for litigation. As a result, we have very few cases on subdivision control powers, so few that I cannot determine what the rules on exhaustion or ripeness are (or, rather, what they would be if the developer had more staying power to litigate). I can only assure the reader that the fact that there are so few cases does not mean that there are so few unhappy developers.⁶⁰

b. Zoning

The above discussion helps explain why zoning has occupied stage center in litigation. It has seemed most easily challenged, primarily because it has been by far the most decisive source of restraint, and it does have the characteristic of dealing mainly in self-administering rules. That, however, is changing.

(i) Optional Departures

Heartened by their experiences with subdivision and site planning control, and, perhaps, anticipating serious challenges to traditional zoning,⁶¹ local authorities are beginning to employ various options within their zoning systems, such as provisions for cluster and planned unit development, distracting attention from the underlying self-administering rule (for example, two-acre zoning) and probably never intending that options be of any use to the developer. Let me make this point clearer: existing zoning philosophy does not appear to allow flexible controls to operate from a "no-development" base. The assumption is that some development must be permitted as of right, through a standard self-administering type of control. Thus, the

⁵⁹ Note 56 *supra*.

⁶⁰ Some courts have recognized that the developer is in no position to contest subdivision requirements after he has prepared extensive plans: *West Park Ave., Inc. v. Township of Ocean*, 48 N.J. 122, 129-31, 224 A.2d 1, 5-6 (1966) (dictum); *Jordan Perlmutter*, 45 T.C. 311 (1965) (holding that developer who contributed subdivision land for schools and parks, pursuant to an allegedly unconstitutional requirement of a local ordinance, did so for sufficiently urgent business reasons to disentitle him to a deduction for a charitable contribution, and noting that the dedications required by the ordinance enhanced the value of developer's land).

⁶¹ See, e.g., *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971); *Commonwealth v. Bucks County*, 22 Bucks Co. 179 (Pa. C.P. 1972).

flexible controls are generally superimposed on standard zoning restrictions as optional departures.

This two-level approach to flexible control can effectively checkmate a developer. Faced both with underlying zoning restrictions which prevent his development, and with an optional departure which is either too restrictive or leaves too much to the unbridled discretion of local officials, he may find that a combined attack on the underlying zoning and the optional departure is too complicated for the courts to understand or entertain.⁶² The courts are likely to require that he apply for the optional departure before he will be allowed to challenge the underlying zoning restrictions. The expense and delay involved will generally force him to accept whatever decision is rendered by the local officials in his case.

Although many communities have embraced the new cluster and planned unit approaches to residential control with the hope of imposing more onerous requirements upon developers, they are beginning to discover that standard zoning was more effective in controlling the rate of development.⁶³ Indeed, a number of local governments in the Philadelphia area have repealed their planned unit provisions, probably for this reason. As I have noted,⁶⁴ standard zoning can be pitched at a level just below the level at which development would be encouraged, giving the local authorities plenary control over growth through vari-

⁶² For a suggestion of the dangers that lurk for the developer who is caught between the underlying restriction and optional departure, see *Swimming River Golf & Country Club, Inc. v. Borough of New Shrewsbury*, 30 N.J. 132, 152 A.2d 135 (1959); *Mann v. City of Fort Thomas*, 437 S.W.2d 209 (Ky. 1969).

⁶³ A recent controversy in Middletown Township, Pa., suggests the problem. The township adopted a planned residential development ordinance pursuant to the new article VII of the MPC, PA. STAT. ANN. tit. 53, §§10,701-12 (Supp. 1972). The planned unit option applied to all of its residential districts. The township approved one medium size project under the ordinance. Immediately thereafter, a second developer sought approval. Obviously, if all the undeveloped residential land were to be brought in for approval at the same time, the township would sustain a rate of growth which did not enter its wildest imagination. Probably for this reason, the township denied approval to the second developer, although it made some effort to give other reasons. The second developer has taken the township to court, arguing that having met the stated requirements of the ordinance, he is entitled to an approval, the burden being on the township to demonstrate some compelling reason why the approval should be denied. Support for this position can be found in the Pennsylvania rule concerning special exceptions. See *Mason v. Schaefer*, 410 Pa. 239, 241, 189 A.2d 178, 180 (1963) (township must show that granting special exception would be harmful if all criteria are met); *Hart Appeal*, 410 Pa. 439, 445, 189 A.2d 167, 170 (1963) (burden on protestants to show proposed swimming club did not fit into special exception) (by implication); *Archbishop O'Hara's Appeal*, 389 Pa. 35, 131 A.2d 587 (1957). However, more recent cases may have confused the law on this point. See *Cherbel Realty Corp. v. Zoning Hearing Bd.*, 4 Pa. Commw. 137, 285 A.2d 905 (1972); *Butler v. Derr Flooring Co.*, 4 Pa. Commw. 335, 285 A.2d 538 (1971); *Berlant v. Zoning Hearing Bd.*, 2 Pa. Commw. 583, 279 A.2d 400 (1971). I think the answer to the open-ended nature of the density increase available through PUD development lies in the recognition of a timing and quota system, see note 8 *supra*. Districting the planned unit may be more acceptable under the present law, but in my opinion, less honest.

⁶⁴ See text accompanying notes 7-13 *supra*.

ances and amendments. Assuming, therefore, that the whole system is not invalidated on substantive due process or equal protection grounds—and I might add that my view of how the system works surely suggests that it is vulnerable on the former ground—we must expect that the bulk of litigation will remain in the standard zoning area.

(ii) Standard Zoning

Challenges to standard zoning can only be taken on the local level either (a) to the board of adjustment upon a request for a variance,⁶⁵ or (b) to the governing body with a request for an amendment.⁶⁶

Generally accepted theory holds that one who wishes to attack a legislative enactment should not be required to exhaust the possibility that the legislature might be willing to change the rule in his case. I will indicate in a moment that this theory, though sound in other fields of the law, has very little to do with the reality of zoning. Most jurisdictions, however, adhere to it.⁶⁷ The question whether the litigant may go directly to court or must exhaust his local remedy therefore becomes a question whether the board of adjustment can arguably grant him relief through a variance. All courts agree that the board has no jurisdiction to amend the ordinance in the guise of a variance, the power to amend being a legislative prerogative.⁶⁸ But it is not clear from the decisions whether the board's jurisdiction is determined by the size of the area involved or by the degree of the departure sought or by both.⁶⁹ It is clear, however, when the area involved is large and the departure requested is substantial, that courts in jurisdictions other than Pennsylvania have been prepared to let the litigant by-pass the board.⁷⁰

Thus the litigant is actually faced with a bifurcated avenue to the courts and often left guessing whether he should bring an action directly in court or take the safe route and apply first to the board. Many commentators have bewailed this uncertainty. For most developers, however, I do not think that this is where the problem lies. The commentators often erroneously assume that the developer's strategy is based on the assumption that the local government is adamantly opposed to his development. Because the land use control sys-

⁶⁵ SZEA, *supra* note 5, § 7.

⁶⁶ *Id.* § 5.

⁶⁷ See, e.g., *Ulmer Park Realty Co. v. City of New York*, 267 App. Div. 291, 45 N.Y.S.2d 527 (1943). For the unique Illinois position, see note 52 *supra*; note 73 *infra*.

⁶⁸ See 3 R. ANDERSON, *supra* note 33, § 14.69.

⁶⁹ See, e.g., *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406 (1960).

⁷⁰ 3 R. ANDERSON, *supra* note 33, § 24.06, at 670-72.

tem is what it is—namely, that one can win his zoning battle only to lose it at the other levels of approval (subdivision, building permit, and so forth)—very few developers will litigate in the first instance unless they have some indication that the local officials favor the development privately though they do not wish to take the political responsibility for it. Thus, the initial climate is generally favorable, though neither the developer nor the local government knows how their positions might change if an angry crowd should turn up at a hearing on the proposed development. Because it is always easier to defend an amendment against attack by opponents than it is to defend a variance,⁷¹ particularly if there is some question whether the proposed development qualifies for a variance, the developer will often choose to apply for the amendment. Thus, when we examine the exhaustion rules, we must assume that a substantial amount of litigation begins after a request for an amendment has been denied, usually because the governing body has changed its position after it has encountered adverse public reaction at the hearing.

In theory, the hearing on an amendment is a legislative hearing; therefore, the developer should not be required to participate or to present any plans describing his proposed development. Of course, the theory is pure fiction; in practice, the developer cannot afford to stay at home. He will present plans and a parade of expert witnesses, and he may be obliged to do so on several occasions, first before the planning commission and then before the legislative body. Under these circumstances, the real problem with the exhaustion rule in most jurisdictions is that it does not recognize that legislative activity is sufficient for purposes of exhaustion. This is why the Illinois rule, which requires application to the legislative body in certain cases,⁷² is so much closer to reality than most commentators would allow. Perhaps requiring application to the legislative body for an amendment is unfair in those cases where the litigant is certain of an adverse outcome, but that disadvantage of the Illinois rule is outweighed by the fact that the litigant need not go back before the board if he has been turned down on an amendment.⁷³ In other jurisdictions, where the application for an amendment is irrelevant to the question of exhaustion, one who chooses to seek an amendment faces the possibility that he may have to put on the same case several times on the local level, at least

⁷¹ The courts have generally taken refuge from difficult planning questions by indulging a strong presumption of validity for local legislative actions. *See, e.g.,* *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 149 N.E.2d 869, 173 N.Y.S.2d 579 (1958); *Shepard v. Village of Skaneateles*, 300 N.Y. 115, 89 N.E.2d 619 (1949).

⁷² The Illinois situation is discussed at length in the articles cited at note 52 *supra*.

⁷³ *Herman v. Village of Hillside*, 15 Ill. 2d 396, 155 N.E.2d 47 (1958).

once on the amendment and once on an application for a variance, before he can get into court. The Illinois rule avoids this result, but it creates another problem. When direct access to the courts is available, the proceeding before the court is clearly an original proceeding and the evidence presented before the governing body on an amendment is irrelevant. Outside Illinois the litigant can, in such a case, choose not to apply for the amendment, thus avoiding the delay of two hearings on the same matter. In Illinois that choice may not be available.

2. Appeal from the Board of Adjustment

In those cases where an application to the board for a variance is clearly required as a matter of exhaustion or where it appears to be the safer course to follow, the litigant wants to know what his position will be when the variance is denied. The SZEA, I have noted, provides for an appeal to the courts by certiorari.⁷⁴ In theory, it is well settled that a variance ought to be denied if it will unduly disrupt the zoning scheme, even if the underlying zoning ordinance is unreasonable as applied to plaintiff's land and therefore constitutionally invalid.⁷⁵ In other words, the statutory standards for the grant or denial of a variance are not the same as the constitutional standards that govern the validity of the ordinance. As a practical matter, a court applying the statutory standards on review of the denial of a variance is likely to be influenced by considerations that go to the constitutional validity of the ordinance. A litigant who relies on this probability, however, is taking the substantial risk that a court might stand on principle and refuse to be influenced by those considerations.⁷⁶ In applying the statutory standards for a variance, the court might employ the doctrine of "self-inflicted hardship" to sustain the board's action, a doctrine which ought not to be applicable to the constitutional objections.⁷⁷

Accordingly, the litigant's best course would be to raise the constitutional objections, if possible, in such a way that they may be considered on appeal from the denial of the variance. It would be best, obviously, to raise the objections before the board, where a record on them can be made. The courts, however, have taken the position that

⁷⁴ See note 34 *supra* & accompanying text.

⁷⁵ See 3 R. ANDERSON, *supra* note 33, §14.68. This point is most forcefully stated in *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938).

⁷⁶ See *id.*, where in previous proceedings involving the same plaintiff, the trial court, the appellate division, and the court of appeals all refused to reverse the denial of a variance, but when the plaintiff commenced a new proceeding to challenge the validity of the ordinance as applied, the court of appeals held it invalid.

⁷⁷ See text accompanying notes 104-06 *infra*. The point is well illustrated by *Sposato v. Radnor Twp. Bd. of Adjustment*, 440 Pa. 107, 270 A.2d 616 (1970); see text accompanying notes 165-67 *infra*.

the board has no jurisdiction to entertain such objections because it cannot question the validity of the ordinance under which it operates. Indeed, some of the early cases suggested that a litigant who resorts to the board permanently waives his constitutional objections for this reason. This suggestion was quickly abandoned,⁷⁸ presumably because it would have conflicted with the courts' natural desire that the board determine as many cases as possible, but the doctrine that the board cannot consider the validity of an ordinance stayed on.⁷⁹ This raised the question whether the validity of the ordinance can be challenged and considered on appeal from the board's denial of a variance. If the board could not hear and decide such a challenge, it was hard to conceive how the court could do so on review of the board, particularly by certiorari. The obvious objection would be that the hearing before the board is not addressed to the validity of the ordinance and that a court should not consider the validity of the ordinance on the record because to do so may deprive some parties of an opportunity to present evidence on this question. Indeed, the governing body is not a necessary party to, and does not ordinarily participate in, a hearing on a request for a

⁷⁸ See 2 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 36-11 (3d ed. 1972). The suggestion was laid to rest in *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938), but it came up again in *Florentine v. Town of Darien*, 142 Conn. 415, 115 A.2d 328 (1955), and again had to be laid to rest in that case.

⁷⁹ Professor Anderson states this to be the general rule, 3 R. ANDERSON, *supra* note 33, §16.09, but he cites only New York cases. Obviously, the conclusion that the board cannot consider questions of validity is implicit in all of the jurisdictions that adhere to the New York rule that the validity of the ordinance cannot be considered on appeal from the board, particularly if they rely on the reasons given for that rule. But the reasons given for that rule, that the applicant for a variance is seeking relief under the ordinance and therefore submits to it or, alternatively, that the board has jurisdiction only to grant relief under the ordinance and therefore cannot question its validity, are not at all persuasive when the constitutionality of the ordinance is involved. If the constitutional challenge is to the zoning ordinance as a whole, the conclusion that the board cannot make the decision has some merit; but when the challenge is to the ordinance as applied to the particular property, it is odd to conclude that the board is being asked to decide the validity of the statutory authority under which it operates. Zoning ordinances are peculiar in comparison to other governing administrative statutes in that they apply and may be removed on a territorial basis. That is why the general view that an agency cannot question the validity of its own operating statutes seems inapposite; cf. 3 K. DAVIS, *supra* note 29, §20.04, at 74 n.1. Prior to adoption of the MPC in Pennsylvania, there were some lower court opinions which suggested that the board could pass on the constitutional validity of the ordinance as applied, *Keith Corp. v. Horsham Twp.*, 86 Montg. Co. 56 (Pa. C.P. 1965); *Loucks v. Crowther*, 11 Ches. Co. 497, 32 Pa. D. & C.2d 570 (C.P. 1963), but there were also some plain holdings to the contrary: *Kessler v. Borough of Pottstown*, 74 Montg. Co. 506 (Pa. C.P. 1957). Original §910 of the MPC, PA. STAT. ANN. tit. 53, §10,910 (Supp. 1972), expressly denied the board the power to pass on the validity of an ordinance. This made no sense since, under the Pennsylvania procedure, the board was required to hear challenges to the validity of an ordinance and to make findings of fact relating to such challenges, see text accompanying notes 210-13 *infra*. The newly adopted amendments sensibly authorize the board to make a decision as well. Act No. 93, §14 (Pa. Legis. Serv. 246 (1972)) (effective Aug. 1, 1972), amending PA. STAT. ANN. tit. 53, §10,910 (Supp. 1972).

variance.⁸⁰ Yet it is obviously a necessary party in a proceeding to challenge the validity of its ordinance. I have noted, however, that the statutory certiorari proceeding prescribed by the SZEAL for review of the board takes the applicant to the trial court level and authorizes, but does not require, the court to take additional evidence.⁸¹ The above objections, therefore, could have been overcome by a rule which would require both that the applicant join the governing body as a party defendant on appeal from the board and that the court take additional evidence offered by the applicant, the governing body, or any other proper party on the question of validity. Perhaps the most sensible approach would be to require that the applicant file a separate original complaint on the question of validity and later to allow him to consolidate this with his appeal for trial. But that does not appear to be the reasoning, nor the course, that was taken when this issue came before the courts, which split on the question whether the validity of an ordinance can be considered on appeal from the board.⁸² Neither line of authority has clearly raised or come to grips with the above objections. New York and Rhode Island have led in taking the position that the validity of an ordinance cannot be considered on appeal from the board, but the reason earlier given in New York,⁸³ and followed in Rhode Island,⁸⁴ was that the litigant, having applied for a variance, is seeking relief *under* the ordinance and is therefore conceding its validity for the purpose of the proceeding before the board and for the purpose of any appeal from the board.

When New York substituted its article 78 proceeding⁸⁵ for the old SZEAL certiorari review of the board,⁸⁶ the situation became even more confused. There were many nonzoning cases holding that an article 78 proceeding is not the proper method for testing the validity of a legislative action, but these cases rest on the same objection as is generally advanced against certiorari review of legislative action—a court cannot act on the record prepared in a nonjudicial proceeding.⁸⁷

⁸⁰ 3 R. ANDERSON, *supra* note 33, §16.12. As any other "aggrieved person," it may participate and present its views to the board. It may also appeal the granting of a variance. *Id.* §21.11.

⁸¹ See text accompanying notes 34-36 *supra*.

⁸² See 3 R. ANDERSON, *supra* note 33, §21.20.

⁸³ See *Holy Sepulchre Cemetery v. Board of Appeals*, 271 App. Div. 33, 60 N.Y.S.2d 750 (1946); 2 A. RATHKOFF, *supra* note 78, at 36-11 to -16.

⁸⁴ *Madden v. Zoning Bd. of Review*, 89 R.I. 131, 151 A.2d 681 (1959).

⁸⁵ N.Y. CIV. PRAC. LAW §§7801-06 (McKinney 1963).

⁸⁶ The current provisions are N.Y. TOWN LAW §267(7) (McKinney 1965) and N.Y. VILLAGE LAW §179-b (McKinney 1966). These substitutions were made by Law of Apr. 17, 1952, ch. 771, §1, [1952] N.Y. Laws 1649, and Law of Apr. 4, 1956, ch. 329, §1, [1956] N.Y. Laws 1015, respectively.

⁸⁷ *Lakeland Water Dist. v. Onondaga County Water Auth.*, 24 N.Y.2d 400, 407, 248 N.E.2d 855, 858, 301 N.Y.S.2d 1, 5-6 (1969) (citing a long line of authorities).

On review of the zoning board under article 78, however, the courts were specifically authorized to take additional evidence.⁸⁸ Yet the view persisted that an unsuccessful applicant for a variance cannot question the validity of the ordinance in an article 78 proceeding but must start a separate action for a declaratory judgment. The dilemma in which the litigants were placed was severely criticized in an early article by Justice Meyer.⁸⁹ In *Linder v. Chave*, he reversed the denial of a variance in an article 78 proceeding, finding the underlying ordinance invalid as applied.⁹⁰ His view may have been approved by the New York Court of Appeals in *Fulling v. Palumbo*,⁹¹ where, on appeal from an article 78 proceeding, the court appeared to have reached the constitutionality of the ordinance as applied, although it remanded the case to the lower court for a further hearing.⁹² But the court did not, in its opinion, expressly address itself to the question whether such a course was proper under article 78. Recent decisions suggest further confusion in this matter. In *Overhill Building Co. v. Delany*,⁹³ the court again held that article 78 proceedings cannot be utilized to challenge the validity of a zoning ordinance and distinguished *Fulling* as follows: "The question presented in *Fulling* was not whether the zoning ordinance was unconstitutional, but whether it had been applied to the property therein in an unconstitutional manner."⁹⁴ If the courts seek to draw a distinction between challenge to an ordinance on its face and challenge to an ordinance as applied, they will find that distinction is elusive in zoning cases⁹⁵ and that it will create serious problems in the future. Furthermore, the court in *Overhill* emphasized⁹⁶ that the governing body is not a party to an article 78 review of the board and that the validity of its ordinance cannot be considered in its absence—a point which is equally true when the validity of the ordinance as applied is questioned. Finally, the opinion of the appellate division in *Golden v. Planning Board of Ramapo* suggests⁹⁷ that the governing

⁸⁸ N.Y. TOWN LAW §267(7) (McKinney 1965); N.Y. VILLAGE LAW §179-b (McKinney 1966).

⁸⁹ Meyer, *Zoning Procedure: A Suggestion for Revision*, 34 N.Y.S.B.J. 350 (1962).

⁹⁰ *Linder v. Chave*, 50 Misc. 2d 392, 270 N.Y.S.2d 489 (Sup. Ct. 1966), *rev'd*, 29 App. Div. 2d 778, 290 N.Y.S.2d 539 (1968).

⁹¹ 21 N.Y.2d 30, 233 N.E.2d 272, 286 N.Y.S.2d 249 (1967).

⁹² The appellate division, in reversing Justice Meyer's holding in *Linder*, seems to have read *Palumbo* to require the court to hold a hearing and take additional evidence. *Linder v. Chave*, 29 App. Div. 2d 778, 778, 290 N.Y.S.2d 539, 540 (1968).

⁹³ 28 N.Y.2d 449, 271 N.E.2d 537, 322 N.Y.S.2d 696 (1971).

⁹⁴ *Id.* at 458, 271 N.E.2d at 542, 322 N.Y.S.2d at 703.

⁹⁵ See text accompanying notes 109-15, 191-204, 294-307 *infra*.

⁹⁶ 28 N.Y.2d 449, 458, 271 N.E.2d 537, 542, 322 N.Y.S.2d 696, 702 (1971).

⁹⁷ 37 App. Div. 2d 236, 324 N.Y.S.2d 178 (1971), *rev'd on other grounds*, 30 N.Y.2d 359, 285 N.E.2d 291, — N.Y.S.2d — (1972); see note 8 *supra*.

body cannot be made a party to an article 78 proceeding without its consent.⁹⁸

Obviously, a procedure which requires the litigant to apply for a variance before he can challenge the validity of an underlying ordinance but then leaves him uncertain whether he should appeal the denial of the variance or start a new proceeding for a declaratory judgment, or both, is unbearable.⁹⁹

3. Standing

It should be clear that standing to challenge the validity of an ordinance has nothing to do with standing to secure a variance. The original jurisdiction of the courts to void an unconstitutional ordinance cannot be affected by rules that apply to administrative relief that may be available under the statute. Only the pervasive misunderstanding of the exhaustion rule compels me to make so obvious a point.

The proposition that one who has standing to apply for a variance may not challenge an ordinance in court until he has exhausted that remedy has somehow led to the inexcusable conclusion that no one has standing to challenge an ordinance unless he has all or most of the qualifications of the person who has standing to apply for a variance. The qualifications of the latter are to a certain extent prescribed by the SZEA. The board is authorized to grant a variance only on appeal from the action of the "administrative officer."¹⁰⁰ A reasonable conclusion, therefore, would seem to be that the applicant must be a person who (a) has submitted some plans to the "administrative officer," and (b) has the requisite proprietary interest to proceed with construction or change of use.¹⁰¹

Actually, the courts have gone beyond these two permissible conclusions regarding standing to secure a variance, to make some curious law of their own. They have denied standing to a contract purchaser whose agreement to purchase is conditioned on his ability to secure a

⁹⁸ The court was prepared to reach the validity of a zoning ordinance in an article 78 proceeding because "the Town Board has consented to appear in this action and subject itself to this court's jurisdiction," *id.* at 239, 324 N.Y.S.2d at 181.

⁹⁹ Illinois has experienced a similar problem. See Note, *The State of Zoning Administration in Illinois: Procedural Requirements of Judicial Intervention*, 62 Nw. U.L. Rev. 462 (1967). Where the litigant is required to commence a separate action for a declaratory judgment, the question has arisen whether he must first further exhaust his remedies by seeking review of the denial of his request for a variance. Professor Anderson suggests that such an additional step in the exhaustion game may be required, 3 R. ANDERSON, *supra* note 33, §24.06, at 666. The Florida Supreme Court in *Thompson v. City of Miami*, 167 So. 2d 841 (Fla. 1964), however, squarely held that an appeal from the board to the court of first instance is not required by the exhaustion principle.

¹⁰⁰ SZEA, *supra* note 5, §7.

¹⁰¹ See text accompanying note 116 *infra*.

variance, on the ground that he has not ventured anything and therefore cannot claim a "hardship"¹⁰²—a nonsensical conclusion which forces the purchaser to negotiate for his seller's participation in the application and often serves only to catch the applicant by surprise in the first case in which it is announced.¹⁰³ When the purchaser has taken the risk of closing on his purchase before he has secured a variance, the courts have turned around and rejected him as a candidate for a variance on the grounds that his hardship is "self-inflicted."¹⁰⁴ If the purchaser has paid a speculative price in the hope of getting the variance, the price he has paid should be rejected as evidence of his hardship, but the fact he has paid it should be no reason for rejecting him altogether as a candidate for the variance. What the courts are doing in such cases is letting their sense of moral outrage get the better of their judgment. A court has no authority to regard variances as illegitimate invasions of the local zoning scheme, which should therefore be available, if at all, only to the long term resident of the municipality:

This sort of reasoning is bad enough when a court is interpreting a statutory standard for securing a variance; it is inexcusable when it is allowed to control the standing of persons who are seeking to challenge an ordinance on constitutional grounds. Consider, for example, the effect of the position taken by the Illinois Supreme Court¹⁰⁵ that a purchaser whose agreement to purchase is conditioned on his successful

¹⁰² *Minney v. City of Azusa*, 164 Cal. App. 2d 12, 330 P.2d 255 (1958); *Parise v. Zoning Bd. of Review*, 92 R.I. 338, 168 A.2d 476 (1961). It is possible, however, that *Parise* rested on what is, to me, a more acceptable argument: that there was no proof that the real owner in interest had consented to the application. See *Tripp v. Zoning Bd. of Review*, 84 R.I. 262, 123 A.2d 144 (1956).

¹⁰³ The courts have treated purchase into the zoning as a disqualifying circumstance only when the applicant is a current or recent purchaser. See note 104 *infra*. Thus the seller would not be disqualified unless he too is a recent purchaser. Accordingly, unless there is some question whether the seller has consented to the purchaser's application, it makes no sense to disqualify the purchaser merely because the seller's name does not appear on the application. While there may be a question whether the optionee has his seller's consent to the application, see note 102 *supra*, there can be no question whatever that the purchaser whose contract to purchase is expressly conditioned on a successful application has his seller's consent to it. This argument was held to be persuasive in favor of giving standing to a purchaser in *Babitzke v. Village of Harvester*, 32 Ill. App. 2d 289, 177 N.E.2d 644 (1961), and to a tenant in *Richman v. Zoning Bd. of Adjustment*, 391 Pa. 254, 137 A.2d 280 (1958). This argument was ignored, however, in *Sposato v. Radnor Twp. Bd. of Adjustment*, 440 Pa. 107, 270 A.2d 616 (1970). See text accompanying notes 135-37 *infra*.

¹⁰⁴ This view has held sway principally in New York. For a critical analysis see 2 A. RATHKOFF, *supra* note 78, 48-6 to -20 (3d ed. 1972). For an analysis of other jurisdictions that follow this view, see 3 R. ANDERSON, *supra* note 33, §16.11. Pennsylvania appears to have adopted this view in *Sposato v. Radnor Twp. Bd. of Adjustment*, 440 Pa. 107, 270 A.2d 616 (1970).

¹⁰⁵ *Clark Oil & Ref. Corp. v. City of Evanston*, 23 Ill. 2d 48, 177 N.E.2d 191 (1961). Incidentally, the appellate court's reasoning in *Babitzke v. Village of Harvester*, 32 Ill. App. 2d 289, 177 N.E.2d 644 (1961), *supra* note 103, appears to be inconsistent with *Clark Oil*.

challenge of a zoning ordinance does not have standing to challenge the ordinance because he has ventured nothing. I have noted that the solution to such a rule is to negotiate for the seller's participation in the litigation. Such cooperation, however, may be difficult to obtain. If the seller is a respectable longtime resident of the community, he may be reluctant to participate in some types of challenge, particularly those which are perceived as threatening the "character" of the community. The consequence is to shelter snob restrictions from attack, and perhaps that is what the courts want. In the shuffle, however, the forgotten person is the ultimate consumer of the developer's product—the housing consumer.¹⁰⁶

Returning to the two requirements which may legitimately be imposed in the variance case—(a) that the applicant must submit some plans for a specific development and (b) that he must demonstrate that he has the requisite proprietary interest and is prepared to proceed with the proposed construction or change of use—the question arises whether either or both should control standing on constitutional issues. Clearly, neither can control standing when the constitutional issues presented do not require that the plaintiff show any interest in a particular piece of land. I will not discuss the reasons which support standing of non-residents to raise issues of equal protection and due process, a topic extensively treated elsewhere.¹⁰⁷ I am concerned here with the more familiar due process-property right type of challenge, where the claim is unlawful invasion of a property interest, and the challenger must therefore demonstrate that he has such an interest. Must he show, however, that he has a specific development or use in mind and that he is prepared to go ahead with it, as in the case of a variance? Obviously, if a court will not permit him to proceed with his challenge unless he first applies for a variance, the question has been answered by

¹⁰⁶ It is not without significance that Pennsylvania, which has produced such leading cases on exclusionary residential zoning as *Concord Twp. Appeal*, 439 Pa. 466, 268 A.2d 765 (1970), *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970), and *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965), has recognized that the purchaser whose contract is conditioned on a change in zoning has standing to challenge the constitutionality of the zoning ordinance (this was a contested point in the *National Land* case). I doubt that *Kit-Mar* or *National Land* would have seen the light of day under the Illinois standing rule.

¹⁰⁷ See, e.g., Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *Extending Standing to Nonresidents—A Response to the Exclusionary Effects of Zoning Fragmentation*, 24 VAND. L. REV. 341 (1971); Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970). The recent landmark decision of the Supreme Court of California in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), is bound to have a lasting influence on the equal protection arguments against exclusionary zoning.

indirection.¹⁰⁸ But the real question—whether the requirements should be applied in the name of ripeness and justiciability—must be confronted more directly.

4. Ripeness and Justiciability¹⁰⁹

How does a court reach a decision when it is asked by a particular landowner to lift the restrictions from his property on the ground that they do not bear any reasonable relationship to the proper objectives of the police power? Since the decision of the Supreme Court in *Village of Euclid v. Ambler Realty Co.*,¹¹⁰ it has been said that courts are not prepared to entertain challenges to an ordinance on the basis of the law and the undisputed facts, but rather require that the landowner demonstrate that the ordinance is unreasonable as applied to his property. I think there is a more accurate way of explaining the decision-making process. First, courts are not prepared, and perhaps have no power, to enter a broad decree in favor of one landowner which will, in effect, invalidate the ordinance as to all other landowners subject to the same restriction. Second, since the decree will focus on a single property, courts generally find it impossible to determine whether the restrictions are unreasonable unless the landowner presents persuasive evidence that some other alternative use or development of his property is reasonable. There are some exceptions that prove the rule. It may be clear in a case that no alternative development can reasonably be allowed, for example, because of the inherent danger of allowing any development on a flood plain, so that the issue is purely one of "taking."¹¹¹ The recent decision of the Supreme Court of Pennsylvania in *Girsh Appeal*¹¹² furnishes another example. The court held an ordinance which failed to provide for apartment living to be inherently

¹⁰⁸ See note 111 *infra*.

¹⁰⁹ The doctrines of ripeness, justiciability, and standing serve to draw the boundaries that control the reach of the judicial power in our society. They are, therefore, as elusive of definition as is the consensus of our society on this matter at any particular time. They are "doctrines serving the same general purpose of assuring that the courts pass only on questions which are raised in actual cases or controversies and which are ripe and appropriate for judicial determination. They are, therefore, doctrines between which no clear distinction is generally found." *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 928 n.13 (2d Cir. 1968). If ripeness differs from justiciability, I suppose that the difference is that the former emphasizes the question whether the controversy has matured sufficiently to call for judicial intervention, whereas the latter emphasizes the question whether the judiciary is competent to resolve the controversy, having regard to the practical limitations of the judicial process as well as the theoretical limitations imposed upon the judicial power by our form of constitutional government.

¹¹⁰ 272 U.S. 365 (1926).

¹¹¹ *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963), may be an example.

¹¹² *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970).

unreasonable. That *Girsh* should not be read to have invalidated the entire ordinance is suggested by a crucial footnote¹¹³ which states that the township's opportunity to prove plaintiff's property unsuitable for apartments was not foreclosed by the court's decision, because that question was not before the court "as long as the zoning ordinance in question is fatally defective on its face."¹¹⁴ I believe this statement in the footnote merely means that evidence that the plaintiff intended to build an apartment, taken together with the fact that the ordinance made no provision for apartments, was sufficient to establish the invalidity of the ordinance *as applied to plaintiff's property*, without requiring any further evidence which would engage the court in a comparison of the value of the single-family restriction on that particular site with the value of plaintiff's apartment proposal. *Girsh* nonetheless represents an extraordinary departure on the merits. No other court has been prepared to hold that failure to provide for a particular use can be found unreasonable only because there is a general need for such a use. In the ordinary case, a court has no way of determining whether a restriction on a particular parcel of ground is unreasonable unless it considers the merits of some other alternative use or development *at that site*. The controversy is simply not justiciable unless the plaintiff comes forward with some evidence in support of an alternative use or development. How much evidence the parties must present and how precisely the alternative must be described depends on the circumstances in each case.

But is a court ever justified in establishing an invariable rule that requires a plaintiff to present plans for an alternative which are of the quality and detail that would entitle them to approval on the local level? A court does this whenever it requires that the plaintiff exhaust his local remedy by applying for a variance. Such a requirement cannot be defended on the ground that a challenge to the ordinance is not justiciable without the detail that goes into the alternative proposal for a variance; it can only be defended on the ground that the controversy is not ripe for adjudication because plaintiff has an even chance of getting what he wants from the local board, or from the court on review of the board. But consider cases where, for example, the plaintiff is a widow who merely wants to sell her land most advantageously (that is, without a certain restriction imposed by an ordinance) to a friend who wants to hold it for investment purposes. Such plaintiffs may be required to present to the court some plans and some evidence concerning an alternative development, on the ground that the controversy is not

¹¹³ *Id.* at 246 n.6, 263 A.2d at 399 n.6.

¹¹⁴ *Id.*

otherwise ripe for adjudication. But a requirement that they apply for a variance or that they present final detailed plans to the court cannot be justified unless it be supposed that the protection of the Constitution extends only to landowners who can demonstrate that they are prepared to develop the land immediately. I doubt that such a supposition can be defended.¹¹⁵

5. Definitive Relief

The question whether the litigant must submit plans describing his alternative development is related to the question whether, having submitted such plans, he can secure from the courts relief that speaks directly to his alternative development.

a. *Variances*

Under the SZEA, a request for a variance to the board is made on appeal from the action of the "administrative officer."¹¹⁶ Oddly enough, the statute is silent on who he is or what he does. As it happened, however, there was one officer in most communities who stood in the way of most changes in the use of land: the building permit officer. Hence the conclusion was reached that one who seeks a variance involving construction must apply for a building permit and that the "action" that triggers the appeal is the denial of the permit. When the board refuses the request for a variance in such a case, its order typically reads: "the action of the building inspector in denying the building permit is affirmed." When the court reverses the board, the decree often reads simply: "the order of the Board is reversed." The effect of this decree would seem to be that the building permit must

¹¹⁵ The New York Court of Appeals had this problem clearly in mind in *Dowsey v. Village of Kensington*, 257 N.Y. 221, 177 N.E. 427 (1931). With the exception of a small area which was designated for commercial use, the zoning ordinance placed the entire village in one district permitting only single-family homes, churches, schools, libraries, and public museums. Plaintiff's property was situated on the edge of the village facing other commercial uses in the adjacent municipality. She brought an action to have the ordinance declared invalid. The village argued that plaintiff "should have filed her plans with the village and requested permission to build and, if permission was denied, exhaust [*sic*] her remedies before the Board of Appeals," *id.* at 222 (points of counsel, not reported in N.E.). The court disagreed: "She may desire to sell her property rather than to erect a business building on it and the existence [of the ordinance] . . . must seriously affect the present market value of her property." *Id.* at 228, 177 N.E. at 429. It has been said that the *Dowsey* case and others following it stand for the proposition that when the challenge is to the entire ordinance and not to the ordinance as applied to plaintiff's land, submission of plans and exhaustion of administrative remedies will not be required. See 3 R. ANDERSON, *supra* note 33, § 24.06, at 669. I believe, however, that these cases stand for the proposition that when the plaintiff is not a developer or about to build and the alleged impact of the ordinance is sufficiently outrageous so that a court can determine whether it is unreasonable without considering detailed evidence concerning an alternative development, the plaintiff is entitled to such a determination.

¹¹⁶ See text accompanying note 32 *supra*.

issue; indeed, some courts are prepared to add this directive to their order.¹¹⁷ Obviously, this conclusion would be improper if the applicant has not met some other requirement of the local control system which is not properly before the court, for example, if he has not submitted his plans for subdivision and site planning approval.

Assuming that there is no such other requirement, the question is whether a court is empowered simply to reverse the board and order the building permit to issue. A careful analysis of the statutory standards for a variance suggests that a court may be overstepping the bounds of judicial power in making such an order. Under the statutory standards for a variance, once the applicant makes out his claim of hardship, he is entitled only to the *minimum* departure from the applicable zoning restrictions necessary to remove the hardship, consistent with the preservation of neighboring property values.¹¹⁸ When an applicant requests an excessive departure, his greed tends to turn the board against him on the hardship question. Typically, however, the board will not articulate this fact in its opinion, leaving the record ambiguous. Furthermore, having determined to deny the variance, it will not have considered any other less disruptive alternatives. Thus, a court that orders approval of the applicant's proposal must be making its own determination that his proposal is the minimum departure necessary to remove his hardship. It is difficult to explain how a court can reach that conclusion on the record before it.¹¹⁹

b. *Void Ordinance*

When a court voids the restrictions imposed by an ordinance, the considerations which affect its power to order approval of the development significantly differ from those that apply in the variance case.

¹¹⁷ See, e.g., *Sposato v. Radnor Twp. Bd. of Adjustment*, 56 Del. Co. 292, 296-97 (Pa. C.P. 1969), *rev'd*, 440 Pa. 107, 270 A.2d 616 (1970). See text accompanying note 166 *infra*.

¹¹⁸ I think that was the intent of the draftsmen of the SZEA in their provision that variances should issue only when "a literal enforcement of the provisions of the ordinance will result in unnecessary hardship . . . so that the spirit of the ordinance shall be observed." SZEA, *supra* note 5, § 7 (emphasis added). For their discussion of this and similar standards, see Bassett & Williams, *supra* note 31, at 13-14, 22.

¹¹⁹ Some support for the courts' arriving at this conclusion may be found in SZEA, *supra* note 5, § 7, which does not appear to provide for a remand to the board on the merits: "The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review." However, the courts have used the device of remand for the taking of additional evidence and for curing procedural defects. 3 R. ANDERSON, *supra* note 33, § 21.21. Since courts have generally been prepared simply to reverse the board, one obvious conclusion is that they do not agree with my suggestion that the variance was intended to produce a minimum departure consistent with removing the hardship. Indeed, Professor Anderson treats this limitation as if it were an additional standard, not contained in the statute: see 3 R. ANDERSON, *supra* note 33, § 14.81 (citing *Bellamy v. Board of Appeals*, 32 Misc. 2d 520, 223 N.Y.S.2d 1017 (Sup. Ct. 1962)). This standard is now contained in § 912(5) of the MPC, PA. STAT. ANN. tit. 53, § 10,912(5) (Supp. 1972).

In one respect, however, they are similar. I have noted that a court cannot order the building permit to issue if there are requirements of other sources of control involved which the applicant has not satisfied. This problem is not encountered as frequently in the variance case as it is in the case where the zoning ordinance itself is challenged. The reason is that a variance case often involves a single building on an already subdivided and improved lot, so that the only local sources of control remaining are the building code and the zoning ordinance. The variance, if granted, would moot the constitutional objections to the zoning ordinance, and the fact that the variance comes up on appeal from the denial of a building permit obviates, through estoppel, objections based upon the building code. Note that estoppel must be the court's justification for ordering the issuance of a building permit. When the building inspector denies the building permit because of the zoning ordinance, he does not in so many words say that there are no violations of the building code, but the court justifiably can conclude that the building inspector is estopped from raising other objections because he has had every opportunity to raise them at the hearing before the board.

A zoning challenge, on the other hand, most often involves an undeveloped piece of ground and a project that requires subdivision or site planing approval. If, prior to commencing his zoning challenge, the landowner has filed a subdivision or site planning application with the appropriate local agency, it is possible that an estoppel argument similar to the one involving the building code under the variance, could be made against any further restrictive exercise of these controls. If there is an estoppel on the building code in a variance case, however, it is because the appeal to the board is from the denial of the building permit, and the building code is thus fairly put in issue. I doubt that a challenge to a zoning ordinance fairly puts the subdivision approval in issue, unless the appropriate local authority is specifically notified.¹²⁰ Furthermore, because the building code typically deals with self-administering rules,¹²¹ the court may give the landowner the right to proceed without further approval so long as he meets the requirements of the code. This analysis of what a court may do when ordering approval of a variance is not applicable in the case of subdivision controls because the latter typically call for the exercise of judgment and discretion by the approving agency.

Thus, where several different sources of control are involved but only one of them is before a court for review, it is difficult for the court

¹²⁰ See text accompanying notes 249-52 *infra*.

¹²¹ See note 28 *supra*.

to order approval of the project in toto. Some issues usually remain to be considered by the various regulatory agencies involved. This, however, is no excuse for refusing to grant definitive relief with regard to the controls that are properly before the court. The basic question is this: when a court determines that the restrictions from one source of control (zoning, for example) are void, does it have the power to order approval, subject to compliance with all other valid laws, of a specific alternative development?

In *Sinclair Pipe Line Co. v. Village of Richton Park*,¹²² the Supreme Court of Illinois took the position that by "framing its decree with reference to the record before it,"¹²³ the court could order, at least to that extent, the approval of a specific proposal for development. The court noted that most cases involving an attack on a zoning ordinance are tried in the light of a specific alternative proposal presented by the developer, and reasoned:

Because zoning cases are tried in this manner, two equally undesirable consequences may ensue if, following the approach of the *La Salle Bank case*, the property is left unzoned as the result of a decree declaring a zoning ordinance void. The municipality may rezone the property to another use classification that still excludes the one proposed, thus making further litigation necessary as to the validity of the new classification. . . . The present case illustrates the other possibility:—that a decree which was induced by evidence which depicted a proposed use in a highly favorable light would not restrict the property owner to that use, and he might thereafter use the property for an entirely different purpose.¹²⁴

No one can doubt that these are extremely undesirable results, but as the court recognized, the scope of judicial power cannot be determined solely by the possibility of such results. The court went on to draw analogies to the powers exercised in variance cases and in cases involving mandamus. The variance case, however, is not an apt analogy—indeed, I have suggested earlier that the power which some courts purport to exercise in such cases may itself be suspect.¹²⁵ The analogy to mandamus begs the question. First, mandamus is not an appropriate remedy if other sources of control continue in force and compliance with them still remains to be determined. Second, even if the court, rightly or wrongly, is prepared to make the determination

¹²² 19 Ill. 2d 370, 167 N.E.2d 406 (1960).

¹²³ *Id.* at 379, 167 N.E.2d at 411.

¹²⁴ *Id.* at 378-79, 167 N.E.2d at 411.

¹²⁵ See text accompanying notes 118-19 *supra*.

itself, the question remains whether it must, in deference to the legislative prerogative, give the local government an opportunity to rezone. That such deference is likely to be abused by the local government is not alone a sufficient basis for disregarding its legislative prerogative. A sufficient basis does, however, exist in those cases where the court has before it all of the possible alternatives the local government might have considered. Such a case would arise, for example, where the developer is attacking the minimum lot size requirement but making no challenge to the validity of the use restrictions. If the court orders approval of the developer's plans involving one-acre lot size as opposed to a four-acre requirement prescribed by the challenged ordinance, it is possible to say that the court held *both* that the four-acre requirement is invalid *and* that no lot size greater than one acre could possibly be sustained as reasonable. The court could come to this conclusion on the record before it because the testimony in favor of the four-acre requirement and the testimony against it and in favor of the one-acre proposal arguably deal with all of the "in-betweens." If the case involves highrise apartments versus single-family detached housing, however, I doubt that the testimony on either side will deal with all of the "in-betweens" (garden apartments, duplexes, townhouses, and so forth), nor with a host of other alternatives (neighborhood shopping centers, other commercial or industrial uses, and so forth). The court cannot confidently say that it has considered all of the other alternatives and that no use restriction contemplating something other than or less than the developer's proposal can possibly be sustained.

This thought returns me to the analogy of the variance cases. The variance, in theory, is a statutory mechanism for relief designed to give the landowner no more than the *minimum* departure from existing zoning requirements necessary to avoid unique hardship. A court that orders that a variance issue approving a proposed development without considering other alternatives and without giving the local board an opportunity to consider them is arguably exceeding the authority conferred upon it by statute. A court that voids an ordinance on constitutional grounds is, I think, in a different position. As already noted, a court cannot adequately consider the validity of existing zoning requirements except in the context of a specific development which conflicts with them.¹²⁶ The landowner cannot hope to win his case unless he persuades the court that the development he proposes is reasonable in relationship to the valid objectives of the local government's police power. Even though other, different, and possibly less intensive development would be preferred by the local government, and even

¹²⁶ See text accompanying notes 110-13 *supra*.

though the local government could validly restrict the land to such development if it were given the opportunity to do so, a court is not necessarily required to extend this opportunity. The local government has had one bite at the apple. Indeed, if it felt so strongly about the other possible uses, it could have amended its ordinance during the course of the legal proceedings, thus forcing the landowner to contend with its preferred alternative.¹²⁷ At the hearings, the local government has had every opportunity to persuade the court of the undesirability of the proposed development. A court order requiring the local government to allow the development defined in this adversary proceeding is hardly an invasion of the legislative prerogative. The police power is not intended to be employed so as to restrict each landowner to the minimum use mandated by the Constitution. On the contrary, every landowner has a right to attain the best and highest use for his land unless validly restrained.

Because the Illinois Supreme Court did not articulate any persuasive reasons for its decision in *Sinclair*, much confusion followed.¹²⁸

¹²⁷ While there are some cases indicating that an amendment during the pendency of an action cannot be considered on review of the board of adjustment, 3 R. ANDERSON, *supra* note 33, §21.22, a court obviously cannot order approval of a development that is not permitted by the amendment unless it considers and invalidates the amendment. See text accompanying notes 249-52 *infra*.

¹²⁸ The issues became confused in *Treadway v. City of Rockford*, 24 Ill. 2d 488, 182 N.E.2d 219 (1962), because the court failed to note that the action before it was one in which neighboring property owners were seeking to invalidate an amendment that had approved a development. The lower court had sustained the amendment but in addition had imposed a number of planning and design conditions on the project. Clearly, the justifications for the power of the court to approve a specific project at the instance of the *landowner* who has succeeded in invalidating the zoning restrictions applicable to his own land, do not apply in the case of the neighboring challenger who is seeking to invalidate a use permit given to another. Failing to notice this, the court in *Treadway* gave the wrong reason for reversing the lower court. It suggested that courts do not have the power to grant specific relief unless the invalidation of the ordinance leaves the property unzoned. The court added that the invalidation of the instant ordinance would not have left the property unzoned since, because an amendment was being challenged, its invalidation would have restored the prior classification. *Id.* at 492, 182 N.E.2d at 222. In my view, while this sort of reasoning is difficult enough to accept in the law of wills (I am referring to the doctrine of "dependent relative revocation"), it is nonsensical when applied to zoning amendments since (unlike the case of a codicil which is improperly executed) there can be no question that the amendment is the "act" of the legislature, no question at all that the legislature intended the amendment, and therefore no excuse for assuming that it intends to return to the former classification if the amendment were invalidated. It is true that in *Commercial Properties, Inc. v. Peternel*, 418 Pa. 304, 211 A.2d 514 (1965), the court employed this assumption to grant mandamus to a developer whose proposed shopping center project was precluded by an amendment which reclassified his property from "neighborhood shopping" to "Residential (R-1)." But *Peternel* was a unique case in that the developer filed plans for his project while it was zoned for "neighborhood shopping" and the local authorities led him on for several months (requesting various modifications in his plans, all of which he made) before they rezoned his property. In such a case, the developer should be entitled to proceed under the prior classification, not because the invalidation of the amendment restores the prior classification, but because all of the equities suggest a vested right to the prior classification. See notes 146-53 *infra* & accompanying text.

I think the court was right, however, that the judiciary does have the power to grant definitive relief in zoning cases.

II. THE PENNSYLVANIA PROCEDURES

To understand the recent Pennsylvania developments we must briefly review the unique Pennsylvania procedures that developed under the Standard Acts.

A. Under the Standard Acts

Initially, Pennsylvania procedure appeared consistent with the original intent of the draftsmen of the SZA. In *Taylor v. Haverford*

In the ordinary case, the "restoration" doctrine makes no sense at all. See *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 559-60, 193 A.2d 232, 243-44 (1963). The "restoration" doctrine relied upon in *Treadway* contributed to the confusion that occurred in *Fiore v. City of Highland Park*, 76 Ill. App. 2d 62, 221 N.E.2d 323 (1966). In that case, plaintiffs applied for a change in zoning, for the most part, from single-family detached residential use to apartment use. The city was slow in responding to the petition, and plaintiffs instituted a suit seeking a declaratory judgment that the zoning as applied to their property was invalid. The city then rezoned plaintiffs' land to office and research (O & R) use. Even though plaintiffs brought suit before the O & R rezoning, it rendered any further attempts to secure apartment zoning futile, and therefore plaintiffs had in effect exhausted their administrative remedies and could challenge the restrictions directly in court. See note 52 & text accompanying notes 72-73 *supra*. The trial court held the O & R zoning unreasonable and invalid. Aware that the "restoration" doctrine in *Treadway* might operate to restore the former single-family restrictions, it went on to hold those equally unreasonable and invalid. The appellate court affirmed that part of the decree which invalidated the O & R zoning but reversed that part which invalidated the former single-family classification, holding that the trial court had no power to reach the former classification. In doing so, it indicated dissatisfaction with the "restoration" doctrine (for the same reasons that I have urged it to be untenable). The city took the hint and promptly rezoned the plaintiff's land to the single-family classification. The trial court, which had the case before it on remand, held the single-family classification invalid and ordered approval of the plaintiff's apartment proposals as set forth in the record of the trial. The city appealed this decree on the ground that such an order, though clearly authorized by the *Sinclair* opinion, constituted a usurpation by the judiciary of legislative powers. The appellate court then held squarely that framing relief in terms of the alternative uses that had been presented in the record is within the judicial power. *Fiore v. City of Highland Park*, 93 Ill. App. 2d 24, 235 N.E.2d 23 (1968), *cert. denied*, 393 U.S. 1084 (1969). Again, no clear reasons were given for this holding.

It seemed that the matter had been settled in Illinois. See, e.g., *Schultz v. Village of Lisle*, — Ill. App. 2d —, 273 N.E.2d 89 (1971). However, in *First Nat'l Bank v. Village of Northbrook*, — Ill. App. 2d —, 278 N.E.2d 533 (1971), some of the old doubts may have been restored. On a superficial reading, the court appears to hold that when the plaintiff's proposal (apartments) is separated from the challenged zoning classification (R-2 single-family) by several intermediate categories (namely R-3 through R-5, all single-family categories of ascending densities), and there is nothing in the record showing that the intermediate categories would be *unreasonable*, a court may not approve the proposed use. On a closer reading, however, the court actually seems to have been impressed by the fact that plaintiff failed to make an affirmative showing that the apartment use would be *reasonable*. Indeed, plaintiff's own experts testified that apartments would have an adverse impact on the surrounding uses. Thus, at most, this case indicates that there are exceptions to the view I have expressed in the text. See text accompanying notes 110-13, 126 *supra*. Sometimes it is possible to invalidate a zoning classification without affirmatively establishing the value and reasonableness of one's preferred alternative, although, I would venture to add, such cases are rare.

Township,¹²⁹ plaintiff was the owner of a small lot zoned for residential purposes which he sought to sell or develop for commercial purposes. He applied for and was denied a variance. Rather than appeal the denial, he commenced an action in court under the Uniform Declaratory Judgments Act seeking that the ordinance be declared invalid as applied to his lot. The trial court ruled the ordinance to be unreasonable, confiscatory, and invalid as applied. The township appealed, claiming, among other things, that plaintiff had misconceived his remedy and that he should have appealed the denial of a variance. The Supreme Court of Pennsylvania affirmed the decision of the trial court on the merits and disposed of the township's procedural objections as follows:

In making that application [for a variance], plaintiff, for then present purposes, had to assume the constitutionality of defendant's zoning ordinance. He could not make his application under the ordinance and at the same time attack its validity; hence nothing which then took place would bar him from subsequently raising, in another and appropriate proceeding, the constitutional issue of confiscation now before us. An appeal from the decision of the board of adjustment would not have been appropriate to that end; for, had plaintiff, on such appeal, attempted to raise the issue of the invalidity of defendant's ordinance, as confiscatory of his property, he would have been met by the proposition that he was attacking the validity of the very legislation under which, in the same proceeding, he had asked relief, and by the rule that such course was not permitted.¹³⁰

Note the facts of the case. Had the plaintiff sought to go directly to court, he probably would have been met with the objection that he should have attempted to exhaust his remedies with the board, a variance on a small lot on the edge of commercial development certainly being within the range of the board's powers. Because the plaintiff did apply to the board, that objection could not have been made. Instead the objection was that he should have raised his constitutional arguments on appeal from the board instead of by a separate proceeding for a declaratory judgment. The court's view that an appeal from the board would not have been the proper mode for raising the constitutional objections, while theoretically correct, has lingered on in only a few jurisdictions, notably Rhode Island and New York.¹³¹ Most jurisdictions allow the appellant to raise his constitutional objections on appeal from the board, the theoretical objections being dispelled by the

¹²⁹ 299 Pa. 402, 149 A. 639 (1930).

¹³⁰ *Id.* at 408-09, 149 A. at 642.

¹³¹ See text accompanying notes 78-84 *supra*.

fact that the SZEA does authorize the court to take additional evidence on such an appeal. None of the other jurisdictions, however, prohibits the plaintiff from commencing a new proceeding. Nor do they require that the plaintiff apply to the board when the challenge presented to the ordinance would demand relief tantamount to a rezoning, a power the board does not possess. Pennsylvania, however, ended up doing just that. This is how it happened.

In *Taylor v. Moore*,¹³² the Supreme Court of Pennsylvania reversed its prior decision in the *Haverford Township* case. Except for the fact that plaintiff sought to challenge the zoning ordinance by an action for mandamus against the building inspector to issue a permit, rather than by seeking a declaratory judgment, the facts in *Moore* were in all respects similar to those in the *Haverford Township* case. Again plaintiff sought to build a gas station on a small residential lot on the corner across from other commercial uses, again he applied for a variance and the variance was denied, and again the township argued that he should have raised his objections to the ordinance by appeal from the board's decision. This time the court held that an appeal from the decision of the board is the *exclusive* mode for raising constitutional objections to the ordinance. The plaintiff had applied for a variance as he would undoubtedly have been required to do by the exhaustion principle:¹³³ one could not have said that the court in *Moore* required an application to the board in cases where the board would be powerless to grant relief. Nevertheless, the court in *Jacobs v. Fetzer*¹³⁴ did say just that—or rather it said either that there are no limits on the board's power to grant relief or that the plaintiff must apply to the board whether or not it could grant relief.

It seems fairly clear to me that the court did not say then, nor has it since, that the board can issue a variance in all conceivable cases. It did say recently, in *Sposato v. Radnor Township Board of Adjustment*,¹³⁵ that the size of the area involved is not an appropriate criterion.¹³⁶ Prior to *Sposato* there was no reason to suppose that the board could validly grant a variance involving such a large piece of land.¹³⁷ Frankly, I doubt that the court will adhere to its position the

¹³² 303 Pa. 469, 154 A. 799 (1931).

¹³³ See text accompanying note 70 *supra*.

¹³⁴ 381 Pa. 262, 112 A.2d 356 (1955).

¹³⁵ 440 Pa. 107, 270 A.2d 616 (1970).

¹³⁶ *Id.* at 111-12, 270 A.2d at 618. The court mistakenly relied on *Jacobs v. Fetzer*, 381 Pa. 262, 112 A.2d 356 (1955). See note 138 *infra*.

¹³⁷ In *Lukens v. Ridley Twp. Zoning Bd. of Adjustment*, 367 Pa. 608, 613-14, 80 A.2d 765, 767 (1951), the court clearly stated that a "variance" on 16 acres (from Residential "A" to Residential "B") would constitute a rezoning and therefore lie outside the board's jurisdiction. The lower courts in Pennsylvania have followed this holding. See R. RYAN, *supra* note 33, § 6.4.2.

next time this question arises, especially if the variance happens to be for even larger acreage than was involved in either *Sposato* or *Fetzer*.

It should be stressed that the court in *Fetzer* never did say that the board could have granted a variance. What it did say was that the procedure prescribed by the SZEA for appeals to and from the board is the exclusive method of challenging the constitutionality of an ordinance.¹³⁸ Justice Bell tried vainly to persuade the court that it could not say this without implying that the board has power to grant relief in all cases.¹³⁹ But the majority paid no heed, nor did they give any good reason why they favored the procedure which they had established. I believe the following reasons were behind the court's decision: (1) sending all zoning challenges to the board would eliminate the prevailing uncertainty about where a particular case should be taken in the first instance; (2) having the board hold the evidentiary hearing and make a record for review by the courts would save valuable court trial time; (3) the local board might have a better sense of the local conditions; (4) the local government should be given the opportunity, through its board, to find the facts and interpret its zoning policy; and (5) the prerequisites for taking an appeal to the board might serve to assure the court that the matter is ripe for adjudication.¹⁴⁰ None of these reasons, however, was articulated in *Fetzer*. Consequently, the decision launched a procedure that simply careened on, driven by its own uninformed logic, creating more problems than it solved. We should consider these problems carefully.

1. Problem 1: Zoning Matters: Exhaustion and Exceptions to the Rule of *Jacobs v. Fetzer*¹⁴¹

One obvious advantage of the procedure established in *Fetzer* was that attorneys were no longer required to guess whether they should take their case directly to court or first apply to the board. Unfortunately, this is not the only problem that the attorney confronts under the bifurcated procedure prevailing in other jurisdictions. One ordinarily does not decide to litigate until one's request for an amend-

¹³⁸ "It is plain enough that the procedure statutorily prescribed for testing the validity of substantive provisions of a zoning ordinance or the method of its administration is through an application to the board of adjustment by one aggrieved by the decision of a borough administrative officer" *Jacobs v. Fetzer*, 381 Pa. 262, 265, 112 A.2d 356, 357 (1955). The court said nothing about an application for a variance, but rather was thinking of the appeal allowed from the administrative officer and overlooking the fact that only *his* "errors" are appealable.

¹³⁹ *Id.* at 268, 112 A.2d at 359 (Bell, J., dissenting).

¹⁴⁰ See text accompanying notes 170-83 *infra*.

¹⁴¹ Exhaustion is related to the issues, discussed in Problem 6, raised by the exercise of development controls other than zoning. See text accompanying notes 205-08 *infra*.

ment has been denied. By sending all litigants to the board, the Pennsylvania procedure forced most litigants into a multiplicity of hearings: a hearing before the local governing body on a request for an amendment (typically a full-scale evidentiary hearing), another full-scale evidentiary hearing before the board, and, finally, a hearing before the court. There were certain exceptions to the rule in *Fetzer*.

a. *Defects in the Process of Enactment*

Challenges to an ordinance based on alleged defects in the process of enactment (notice, hearing, advertising, and so forth) have always been cognizable in a proceeding commenced directly in court. This exception to the procedure established in *Fetzer* rested on certain statutes, and its development, as well as its current status, is discussed in a later portion of this Article.¹⁴² Suffice it to say here that it is consistent with the unarticulated reasons which most likely led the court in *Fetzer* to channel most zoning matters to the board. Consideration of procedural defects does not call for extensive evidentiary hearings, and more importantly, invalidation of an ordinance on procedural grounds does not disrupt the local zoning policy, since the ordinance may be reenacted by following the required procedures.

b. *Collateral Attack on the Ordinance Not Involving Local Zoning Policy*

If the reasons suggested above for the procedure in *Fetzer* had been better understood, the lower court in *Sgarlat v. Kingston Borough Board of Adjustment*¹⁴³ would not have mistakenly held that the validity of a zoning ordinance cannot be considered for purposes of valuation in a condemnation proceeding until the condemnee has raised the question before the board. There might be some excuse for this view if the condemning authority were subject to local zoning and if a holding that the zoning is invalid for purposes of valuation necessarily implies that the zoning restrictions are lifted as to the condemning authority, a conclusion which is doubtful unless the condemning authority joins the landowner on this issue. When the condemning authority would not in any event be subject to local zoning, as was the case in *Sgarlat*,¹⁴⁴ a court's holding the ordinance invalid as to the con-

¹⁴² See text accompanying notes 257-68 *infra*.

¹⁴³ 407 Pa. 324, 180 A.2d 769 (1962).

¹⁴⁴ The condemnor was the Water and Power Resources Board, an agency of the Commonwealth of Pennsylvania operating within the Department of Forests and Waters, PA. STAT. ANN. tit. 71, § 12 (1962). As such an agency, it was not subject to local zoning laws: *Harward v. Haas*, 59 Pa. D. & C. 658 (Dauphin County C.P. 1947).

demnee for purposes of valuation certainly does not disrupt the local zoning scheme. Therefore, resort to the board for a local view of the facts and of the zoning policy is irrelevant. Certainly no court time can be saved by channeling the zoning issue separately through the board of adjustment when it must enter into the valuation matters that are tried to a board of view.¹⁴⁵ The court in *Sgarlat* made it clear that the validity of the zoning ordinance should have been considered in the condemnation proceeding.

c. *Amendments That "Slam the Door" on an Application for Development*

The cases falling under this exception are more difficult to explain. They have one feature in common: at the time when the landowner first applied for permission to develop, the proposed development was clearly authorized by the ordinance and no amendment was then pending¹⁴⁶ that might disentitle the applicant to approval or to the issuance of the necessary permits. For example, in *Commercial Properties, Inc. v. Peternel*,¹⁴⁷ the land had been zoned for neighborhood shopping for a number of years. Commercial Properties submitted site plans for approval of a shopping development and a request for grading and building permits to commence the necessary site improvements and construction. The township led the applicant on, requesting a number of changes in its plans, with each of which it dutifully complied. After several months of this negotiation, the township rewarded the developer's efforts by rezoning the property to R-1, a single-family residential classification. Commercial Properties then instituted mandamus proceedings directly in court against the building officer for an order to issue the necessary permits. The court invalidated the amendatory ordinance and ordered the grading and building permits to issue; the Supreme Court of Pennsylvania affirmed. *Peternel* was not an isolated case; the court had already approved a similar course of action in a mandamus proceeding in *Verratti v. Ridley Township*.¹⁴⁸

The fact that the court was willing to consider the validity of the amendatory ordinance in a mandamus proceeding without remanding the matter for a determination by the board led some practitioners to conclude that the validity of any zoning ordinance may be tested by

¹⁴⁵ The Pennsylvania condemnation procedure is governed by PA. STAT. ANN. tit. 26, § 1-101 to -903 (Supp. 1972).

¹⁴⁶ It is clear in Pennsylvania that 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. See *Baron Oil Co. v. Kimple*, 1 Pa. Commw. 55, 275 A.2d 406 (1970) (citing numerous cases).

¹⁴⁷ 418 Pa. 304, 211 A.2d 514 (1965).

¹⁴⁸ 416 Pa. 242, 206 A.2d 13 (1965).

mandamus filed directly from the denial of a building permit in court. That was a mistake, as the court recently pointed out in *Unger v. Hampton Township*.¹⁴⁹

Peternel and *Verratti* were cases involving permits that should have been issued as a purely ministerial matter under the zoning and building requirements as they existed at the time of application. Thus, but for the supervening amendment, in both cases the court arguably had mandamus jurisdiction. As I have noted earlier, the case where the existing zoning favors a proposed development is rare. Indeed, it is possible that *Peternel* and *Verratti* may persuade local officials never to zone in favor of new development until an applicant comes forward with a specific request for an amendment. When the applicant's request for an amendment is rejected and his permit denied because it is contrary to existing zoning, mandamus is hardly the appropriate remedy. Indeed, I have some doubt whether mandamus was the appropriate remedy in *Peternel*, because there were still some discretionary matters—approval of final subdivision and site plans—left for approval by the local government before a permit could issue.¹⁵⁰ Fortunately, the court could disregard this element in the light of the fact that the applicant made numerous changes in its site plans in response to specific requests by the governing body. Thus the court was justified in concluding that the governing body was estopped from claiming that anything further remained to be done. In such cases, in my view, it would be safer to appeal the denial of a building permit to the board and thence to the court. *Shapiro v. Zoning Board of Adjustment*¹⁵¹ and the recent decision in *Limekiln Golf Course, Inc. v. Zoning Board of Adjustment*¹⁵² indicate that an amendment designed to “slam the door” on the applicant after his application has been filed and is awaiting action by the board will be reviewed by the courts without recourse to a new proceeding to challenge the amendment.

¹⁴⁹ 437 Pa. 399, 263 A.2d 385 (1970).

¹⁵⁰ Cf. *Rose Tree Media School Dist. v. Department of Pub. Instruction*, 431 Pa. 233, 244 A.2d 754 (1968) (citing numerous cases).

¹⁵¹ 377 Pa. 621, 105 A.2d 299 (1954).

¹⁵² 1 Pa. Commw. 499, 275 A.2d 896 (1971). In *Shapiro*, the landowner appealed the denial of a permit to the board and, after an adverse decision by the board, appealed that decision to the court. The amendment was adopted while the matter was pending before the court. *Limekiln* involved a request for a special exception. The amendment was adopted while the matter was pending before the board. The landowner apparently raised the question of the validity of the amendment during the proceedings before the board, but the board did not take any evidence on that question. The last full paragraph in the opinion of the commonwealth court suggests that the landowner should formally object to the amendment if the matter is before the board, *id.* at 514, 275 A.2d at 905, but it is clear from the opinion as a whole that the landowner need not commence a new proceeding to challenge the amendment nor present any evidence concerning its validity—the court in effect being prepared to hold it invalid as a matter of law.

Why have the courts proved willing to review a supervening amendment in such cases without remanding the question of its validity for determination by the board? I believe the answer is relatively easy when we bear in mind the reasons for resorting to the board. I think that in these supervening amendment cases the court is not interested in determining whether the amendment is reasonable on the facts or how it fits in with the local zoning policy. The court knows that only a short while ago the local zoning policy, as expressed by the ordinance, was to permit the development which is before it. Why bother to inquire whether the change is in order, particularly when it is adopted in haste and aimed at a particular applicant? In effect, the court is holding that an amendment is invalid on these facts alone, regardless of its merits. Note that the attitude of the courts here is wholly different than that in other spot amendment cases that are *favorable* to the applicant. In these cases brought by neighboring property owners, courts are interested in the planning merits of the amendment and they will not review it without resort to the board.¹⁵³

2. Problem 2: Zoning Matters: Scope of Review

It should be recalled that under the SZEA courts were authorized to take additional evidence, although the mode of judicial review of the board was labelled certiorari.¹⁵⁴ Even though the Pennsylvania version of the SZEA contained the same provision, a curious rule grew up. If the court took additional evidence, it was free to make its own findings of fact regardless whether the new findings were based solely on additional evidence or on the record made before the board. If the court did not take additional evidence, the findings of the board were binding on the court unless contrary to the manifest weight of the evidence on the record.¹⁵⁵ Attorneys who thought that they could obtain a more favorable determination from the court would therefore make every effort to persuade it to take additional evidence. The court's power to make new findings could apparently be triggered by any evidence (an engineer's report, for example).

This odd rule, combined with the procedure established in *Jacobs v. Fetser*¹⁵⁶ for raising constitutional and other substantive challenges to the ordinance, led to the next bit of confusion. Consider the case where the landowner believes that he can get a variance and it does not occur to him that he might wish to attack the validity of the ordinance

¹⁵³ R. RYAN, *supra* note 33, § 3.4.11.

¹⁵⁴ See notes 26-35 *supra*.

¹⁵⁵ R. RYAN, *supra* note 33, § 9.5.10.

¹⁵⁶ 381 Pa. 262, 112 A.2d 356 (1955).

as well. He applies for a variance which is denied by the board. At this point he decides that he must attack the validity of the ordinance. *Taylor v. Moore*¹⁵⁷ and *Fetser* tell him that he can attack the validity of the ordinance only on appeal from the decision of the board. He therefore appeals the decision and he seeks on this appeal both review of the denial of the variance and a declaration that the ordinance is invalid on constitutional grounds. The question then arises whether the court is bound to make its own determination of the facts that are relevant to the constitutional objection and, therefore, whether it is bound to take additional evidence. Since the provisions of the SZEA were never designed to handle constitutional objections to the ordinance, the decision whether additional evidence will be taken is left to the discretion of the courts. Not surprisingly, considering the backlog of pending cases, some common pleas courts have taken the position that they will never take additional evidence. In theory, if the court takes no additional evidence on the constitutional objections, it should not consider the constitutional issues unless they were duly raised before the board. Only in this manner will the local government and other parties be given an opportunity to counter the landowner's objections by introducing appropriate evidence before the board.

In *Wynnewood Civic Association v. Board of Adjustment*,¹⁵⁸ the Supreme Court of Pennsylvania indicated that it might be persuaded by this argument.¹⁵⁹ The case, however, involved a challenge by persons who were objecting to an ordinance permitting apartments on the land of another, and the proponent of the apartments would probably be deprived of an opportunity to defend the validity of the ordinance if the issue had not been raised by the protestants themselves before the board. Where the proponent of the development (the "landowner") is the one who wishes to attack the ordinance, the facts which he will present on the application for a variance are practically identical to those he would present on a challenge to the ordinance. Consequently, the opportunity the local government has to counter the presentation on the variance issue before the court is usually an adequate opportunity to address the constitutional issues as well. This is, in effect, what the court said in *Eller v. Board of Adjustment*.¹⁶⁰ *Eller*, however, should not be read as reversing *Wynnewood*, because *Eller* is a "landowner" case and *Wynnewood* is a protestant case. It is essential to keep this distinction in mind.

¹⁵⁷ 303 Pa. 469, 154 A. 799 (1931).

¹⁵⁸ 406 Pa. 413, 179 A.2d 649 (1962).

¹⁵⁹ *Id.* at 419-21, 179 A.2d at 652-53.

¹⁶⁰ 414 Pa. 1, 198 A.2d 863 (1964).

Although *Eller* solved the obvious problem by holding that a landowner who thought he could obtain a variance before the board may shift to a constitutional attack on appeal to the court, it left two knotty problems: (1) whether the court that does not take any additional evidence can make its own findings of "constitutional fact,"¹⁶¹ and (2) whether it is bound to do so. In *Kit-Mar*, the common pleas court made its own findings even though it did not take additional evidence. The Supreme Court of Pennsylvania first noted that the common pleas court was wrong in doing so, but then it affirmed the decree of the lower court by holding that Concord Township's two- and three-acre zoning had an "exclusionary purpose" and was therefore unconstitutional. If this were a finding of "fact," as I suspect it must have been, there was no such correlative finding made by the board. On the contrary, the board found that the zoning was designed to accommodate the expected future population of the township and that traffic, sewer, water runoff, and other threats to health, safety, and welfare posed by the proposed development fully justified the zoning ordinance as applied.¹⁶² I doubt that one could say that these findings were contrary to the manifest weight of the evidence. In other words, I suspect that the court made its own findings of "constitutional fact," as I think a court ought to be free to do. Unfortunately, the court did not acknowledge this freedom but, on the contrary, disapproved a similar liberty taken by the common pleas court.

3. Problem 3: Estoppel to Raise Constitutional Objections

Consider the landowner who, thinking he could obtain a variance, did not raise a constitutional challenge to the ordinance before the board. Suppose he continues to think that he can get a reversal from the court without raising the constitutional issues. In fact, since the issues are similar, he might expect that the court will reflect its feelings about the constitutionality of the ordinance in its decision on the variance. Indeed, that is probably why the New York procedure¹⁶³ is not as onerous as might appear: even though the landowner may not be allowed to raise the constitutional issues on appeal from the board, the appeal probably serves that purpose in fact. Moreover, in New

¹⁶¹ While the doctrine of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920), may have become dormant in the federal system, the Supreme Court of Massachusetts has refused to agree that it is dead. See *Opinion of the Justices*, 328 Mass. 679, 106 N.E.2d 259 (1952). Bearing in mind how partisan the local factfinders often are, the Massachusetts rule seems particularly sensible in zoning cases.

¹⁶² Record, vol. 3, at 480a-85a, *Concord Twp. Appeal*, 439 Pa. 466, 268 A.2d 765 (1970).

¹⁶³ See text accompanying notes 83-97 *supra*.

York it is clear that he can always start a new proceeding to attack the ordinance, even after he has taken the variance case all the way to the highest court.¹⁶⁴

In Pennsylvania the situation is otherwise. *Sposato v. Radnor Township Board of Adjustment* illustrates the problem.¹⁶⁵ Sposato applied for, and was denied, a variance. He appealed the denial to the common pleas court but he did not make any constitutional attack on the ordinance. The common pleas court ordered the variance to issue on the ground, among others, that the parcel was practically useless as zoned.¹⁶⁶ (If this finding were supported by the evidence, *Sposato* would be a classic "taking" case.) The township appealed and made two arguments: (a) that the parcel in question was too large to justify a variance, and (b) that the plaintiff had purchased into the hardship. The supreme court reversed, basing its decision on (b). I have already explained why I think that (b) was the less defensible of the two grounds.¹⁶⁷ In any event, the plaintiff was caught totally by surprise.

Could such a plaintiff, if he wished, start a new proceeding to challenge the ordinance on constitutional grounds? In my opinion, a landowner should not be estopped on his constitutional objections because he chooses to pursue his administrative remedies all the way to the highest court. The fact that he purchased into zoning would not affect his standing on the constitutional claims; the Pennsylvania Supreme Court has confirmed standing in such cases.¹⁶⁸ It is true that he might have to start again before the board, since the time for appeal (on the constitutional issues) of the original decision has run. If this seems a futile thing to do—since the same evidence and the same parties are likely to be involved—it is so because of a fundamental inconsistency between *Eller* and *Sposato*. In *Eller*,¹⁶⁹ it will be recalled, the Pennsylvania Supreme Court held that the landowner may raise the constitutional objections for the first time on appeal to the common pleas court and that the court can consider them even though it does not take any additional evidence. I have attempted to defend this view on the ground that the variance proceedings before the board provide all parties with an adequate opportunity to present the facts relevant to the constitutional claims. If that is true, however, then the landowner should be permitted to make his constitutional claims at any appellate

¹⁶⁴ See notes 76-78 *supra* & accompanying text.

¹⁶⁵ 440 Pa. 107, 270 A.2d 616 (1970).

¹⁶⁶ Note 117 *supra*.

¹⁶⁷ Text accompanying notes 102-06 *supra*.

¹⁶⁸ *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965).

¹⁶⁹ 414 Pa. 1, 198 A.2d 863 (1964).

level, since the same record is involved throughout. The plaintiff in *Sposato* did, in fact, try to defend the decision of the common pleas court—that the property was useless as zoned—on constitutional grounds. The supreme court ignored the constitutional claims, presumably because they were not raised in the initial appeal to the common pleas court. But why should that be relevant if the common pleas court itself need not take any additional evidence on the constitutional claims? I believe that the supreme court should have reached the constitutional issues in *Sposato* but should have declared for all future cases that constitutional questions cannot be considered unless they are raised in the last proceedings where the parties have a right to present evidence on these questions (in effect, reversing *Eller*).

4. Problem 4: Zoning Matters: Standing, Ripeness, Justiciability

Earlier, in the general discussion of these principles, I noted how their application differs according to whether the issue is standing to secure a variance or standing to challenge the validity of an ordinance, and in the latter case, how different considerations might apply to traditional property rights-due process claims as opposed to a broader challenge to the entire planning system, particularly on due process grounds. *Fetzer* further confused this distinction.¹⁷⁰ By holding that a proceeding before the board is an indispensable step in a challenge to the zoning ordinance,¹⁷¹ the supreme court may have overlooked the fact that access to the board, under the SZEA, is available only on appeal from the action of an administrative officer. That administrative officer, through sheer historical accident, came to be identified as the building permit officer.

Thus, in *Home Life Insurance Co. of America v. Board of Adjustment*,¹⁷² the court was forced to hold that one cannot challenge the constitutionality of an ordinance unless one first applies for a building permit. This requirement makes some sense when applied to the particular facts of *Home Life*, where a developer sought to build *one apartment* in a single-family district. The requirement that he apply for a building permit could have been justified on the ground of justiciability: the court could not determine the validity of the ordinance until it knew exactly what sort of apartment the plaintiff proposed to build. That an application for a building permit is an unnecessarily onerous requirement for this purpose, that this requirement would pose difficulties when a plaintiff proposed to build a series of buildings at

¹⁷⁰ *Jacobs v. Fetzer*, 381 Pa. 262, 112 A.2d 356 (1955).

¹⁷¹ *Taylor v. Moore*, 303 Pa. 469, 154 A. 799 (1931).

¹⁷² 393 Pa. 447, 143 A.2d 21 (1958).

differing times, that this requirement would make no sense when an ordinance is challenged for reasons other than the type of building permitted (for example, the minimum acreage of lot sizes)—none of these occurred to the court. Why should they have? The court was intent on sending every challenger to the board and the only pretext for doing so was to hold that, under the statute, every challenger must apply for a building permit. Not only did the court's argument assume its conclusion, but in the court's haste to reach that predetermined conclusion, it neglected to note that the jurisdiction of the board on appeal from an "administrative officer" was limited to correcting his "errors."¹⁷³ I do not know by what stretch of the imagination one can say that a building inspector who refuses a building permit for an apartment in a single-family district has committed an "error."

Although the procedure established in *Fetzer* and *Home Life* is indefensible as a matter of statutory construction, it is not necessarily indefensible in practice. Using the board as a kind of master in chancery might not be such a bad idea, except when one considers how partisan the local "independent" boards frequently are. If the board were constituted on the county or regional level, the idea would certainly be worth considering: indeed, I have urged this approach elsewhere.¹⁷⁴

In the traditional property rights-due process case, the principle of justiciability assures the court that it will not deal in mere generalities.¹⁷⁵ Indeed, the court in *Home Life* stated that it could not decide such a case "in vacuo."¹⁷⁶ But requiring application for a building permit is the least desirable manner of avoiding this problem. I am not concerned so much with the fact that the procedure assumes that the plaintiff is a builder or is dealing with a builder.¹⁷⁷ Even if this is the case, a requirement that he apply for a building permit simply does not serve to define the controversy when the proposed development involves several buildings that may be very different, or

¹⁷³ PA. STAT. ANN. tit. 53, §58,107 (1957) (First Class Township Code), as amended, PA. STAT. ANN. tit. 53, §11,201(3) (Supp. 1972). *Home Life* arose in Lower Merion Township, a township of the first class. The court's decision might have been a little more defensible had the case arisen in a second class township, because the Second Class Township Code, uniquely, provided for appeals to the board by any person aggrieved "by any provision of the zoning ordinance or by any decision . . . of the administrative officer . . ." PA. STAT. ANN. tit. 53, §67,007 (1957), as amended, PA. STAT. ANN. tit. 53, §11,201(5) (Supp. 1972) (emphasis supplied). I think that the reference to "zoning ordinance" was never meant to give the board jurisdiction to consider the validity of the ordinance. Its powers under the old code were still confined to "errors" of the administrative officer and to variances.

¹⁷⁴ Krasnowiecki, *supra* note 13, §§ 403, 502 & commentary.

¹⁷⁵ See text accompanying notes 110-15 *supra*.

¹⁷⁶ 393 Pa. 447, 452, 143 A.2d 21, 24 (1958).

¹⁷⁷ See note 115 *supra*.

when the attack on the ordinance has nothing to do with the type of building permitted.

*National Land & Investment Co. v. Easttown Township Board of Adjustment*¹⁷⁸ demonstrated how townships could exploit the *Fetzer* requirement to discourage developers. The plaintiff sought to challenge the four-acre minimum lot size requirement of a single-family residential district as it applied to its eighty-five-acre tract. Since its proposal was to build single-family detached homes on one-acre lots, its challenge did not raise the issue of the type of buildings permitted in the zoning district. Nonetheless, plaintiff, following what it believed to be the prescribed procedures, applied for a building permit for one house on a one-acre lot. When this was denied, plaintiff appealed to the board. The board quashed plaintiff's appeal on two grounds: first, that it should have applied for final subdivision approval before requesting the permit, and second, that the board lacked jurisdiction either to decide the ordinance's constitutionality or to change the minimum lot size on such a large tract of land.¹⁷⁹

As a matter of policy the board's first reason was probably sound. A subdivision plan would have shown the arrangement of the one-acre lots, the location of streets, and the effect of the plan's adoption on such matters as traffic and water runoff. Consequently, it would have been much more helpful than an application for a building permit in determining the merits of the plaintiff's challenge. But to demand that the plaintiff submit *final* plans, as Easttown Township did, was an unnecessarily onerous requirement. Evidently the township was anxious to delay matters.¹⁸⁰ The plaintiff had in fact submitted some preliminary subdivision plans. This, surely, was enough to focus the issues.

The board was right that it had no power to grant relief in a case involving so large a parcel of land and that it probably did not have the power to declare the ordinance void. In any other jurisdiction these would have been sufficient reasons why the board should decline jurisdiction and why the plaintiff should go directly to court. I am at a loss to explain how the board could have thought them sufficient or appropriate in Pennsylvania, unless it intended to make that mistake.

¹⁷⁸ 419 Pa. 504, 215 A.2d 597 (1965).

¹⁷⁹ Decision of the board (undated), rendered shortly after the hearing on Dec. 7, 1962, copy on file with the author.

¹⁸⁰ Other stratagems are open to a township which wants to delay development. For example, several requests for modifications of the subdivision plans lengthen a developer's timetable. By denying approval of the final plans, a township can maneuver a developer into a costly and lengthy appeal to what was, at the time of *National Land*, the court of quarter sessions. See note 45 *supra*.

On appeal to the common pleas court, an order was issued directing the board to hear the matter, in conformity with *Fetzer*.¹⁸¹ Even so, the board continued to raise the same objections all the way to the Pennsylvania Supreme Court, which, of course, was also baffled by its own procedural rescripts. It was clear that final subdivision approval would be an impossible requirement. But, instead of saying that a sketch plan would raise the issues adequately, it confirmed the building permit requirement, though obviously unconvinced by its own position.¹⁸² The reason for this lack of conviction was that an application for a building permit for one lot had nothing to do with the real issues. Fortunately, the court shrank from requiring the plaintiff to apply for building permits on all eighty or so proposed homes, and from requiring application for final subdivision approval. In effect, the court stopped short of taking *Fetzer* to its ultimate conclusion: applying the same requirements to an attack on an ordinance as to a request for a variance. Nevertheless, the requirement that a plaintiff must apply for a building permit for at least one building confused many of the issues related to standing, ripeness, and justiciability. Obviously, the plaintiff must be someone who is a builder or who is dealing with a builder. Furthermore, the suggestion is clear that he must be a person who has a proprietary interest in a particular parcel of ground or a particular building entitling him to proceed with the construction once the appropriate approvals are obtained. Fortunately, the court in *National Land* did confirm that an equitable interest is sufficient, even one which is conditioned on success in the zoning challenge.¹⁸³ This position gave partial recognition to the interests of future potential residents in the community, but it still required them to find a site and a builder who would represent those interests.

5. Problem 5: Zoning and Other Matters: Scope of Relief

National Land also highlights how ineffective judicial relief has been. The common pleas court, reversing the decision of the board, did not say whether the building permit must issue.¹⁸⁴ The board had argued that the case was not ripe for judicial consideration because the building inspector could not have issued a building permit until final subdivision approval had been given for the entire project. The supreme court rejected the board's ripeness argument by noting that an

¹⁸¹ Appeal of National Land & Inv. Co. (No. 1), 11 Ches. Co. 436 (Pa. C.P. 1963).

¹⁸² 419 Pa. 504, 514-18, 215 A.2d 597, 603-05 (1965).

¹⁸³ *Id.* at 513-14, 215 A.2d at 603.

¹⁸⁴ Appeal of National Land & Inv. Co., 13 Ches. Co. 4, 23 (Pa. C.P. 1964).

application for final subdivision approval would have been futile because it would have been rejected for failure to comply with the existing zoning.¹⁸⁵ However, the court stressed that a decision invalidating the zoning restrictions does not deprive the township of its right to review the development subsequently for conformity with its subdivision regulations. The court confined itself merely to affirming the decision of the common pleas court.¹⁸⁶ If its decree had the effect of requiring that a building permit be issued on the one lot, thus depriving the township of an opportunity to consider the location of that home in the context of the entire subdivision plan, the court was unaware of the problem. In *Kit-Mar*,¹⁸⁷ the court once again ignored the problem of judicial relief even where the question was more squarely raised, the common pleas court having actually ordered the building permit to issue.¹⁸⁸

As I have argued earlier, a court is not justified in ordering the issuance of a building permit when the right to a building permit is conditioned on other prior approvals which have not been given and which are not properly before the court, unless there is a clear case of estoppel.¹⁸⁹ In any event, even if *National Land* and *Kit-Mar* properly resulted in the issuance of the building permit for a single lot, they clearly did not result in the issuance of building permits for the entire project. Indeed, in *National Land* the township threatened to rezone to three-acre minimum lot sizes, reading the Pennsylvania Supreme Court's decree narrowly as affecting only four-acre minimum lot sizes. Rather than face another protracted court battle, *National Land* settled the dispute by accepting a two-acre minimum lot size.¹⁹⁰

A similar fate befell the owners of the property involved in *Girsh Appeal*.¹⁹¹ Shortly after that decision, the township amended its zoning ordinance, creating a new apartment district and reclassifying several properties to the new apartment category. However, the amendatory ordinance specifically reenacted the R-1 single-family classification for the *Girsh* property.¹⁹² The township's position is that, in doing so, it has fully satisfied the supreme court's mandate. The

¹⁸⁵ 419 Pa. at 514-18, 215 A.2d at 603-05.

¹⁸⁶ *Id.* at 533, 215 A.2d at 613.

¹⁸⁷ Concord Twp. Appeal, 439 Pa. 466, 268 A.2d 756 (1970).

¹⁸⁸ Appeal of *Kit-Mar Builders, Inc.*, 55 Del. Co. 364, 382 (Pa. C.P. 1968).

¹⁸⁹ See text accompanying notes 120-27 *supra*; 245-52 *infra*.

¹⁹⁰ Telephone interview with Holbrook M. Bunting, Jr., counsel for National Land and Investment Co.

¹⁹¹ 437 Pa. 237, 263 A.2d 395 (1970). See text accompanying notes 112-13 *supra*. Joseph Girsh, the original plaintiff, died. The subsequent litigation is being conducted by his successors in interest, the Altmans.

¹⁹² Nether Providence Twp., Pa., Ordinance 434, May 14, 1970.

court's opinion left it unclear whether the ordinance was invalid in its application to the entire township or only as applied to the Girsh property. The court certainly said that it was not prepared to pass on the question whether the single-family classification was unreasonable as to the Girsh property, but it was satisfied that the ordinance was invalid so long as it made no provision for apartments—whether as applied to the Girsh property or to all properties in the township, it did not say.¹⁹³ Assuming that the decision invalidated the ordinance in its applicability to all properties in the township, the subsequent amendment can probably be treated as a reenactment of the ordinance, except that the township followed the procedures prescribed for amendments and not those prescribed for original enactment of an ordinance.¹⁹⁴ The present owners of the Girsh property have challenged the amendment on these and other procedural grounds;¹⁹⁵ at the present writing, that challenge remains pending before the trial court.

The present owners of the Girsh property have also pursued an alternative course. Before the litigation commenced, Joseph Girsh submitted certain preliminary site and building plans and an application for a building permit. The plans were not in final form but were sufficient to be passed upon by the building permit officer, and did, in fact, secure a denial of the permit, so that an appeal could be taken to the board.¹⁹⁶ On November 13, 1970, after the decision in *Girsh* and after the subsequent amendment, the present owners of the Girsh property brought an action in mandamus against the building permit officer to compel him to issue the permit.¹⁹⁷ The plaintiffs apparently are relying on *Verratti v. Ridley Township*,¹⁹⁸ *Commercial Properties, Inc. v. Peternel*,¹⁹⁹ and the recent decision in *Linda Development Corp. v. Plymouth Township*.²⁰⁰ In all of those cases, however, the permit should have been issued under the zoning ordinance as it stood on the date of application, but was not issued or was revoked because of a supervening amendment. The plaintiffs' argument is that the *Girsh* decision relates back to the date of the application, so that on that date

¹⁹³ See text accompanying note 113 *supra*.

¹⁹⁴ The amendments of May 14, 1970, were subject to the procedures prescribed by the MPC, which became effective on Jan. 1, 1969. Compare PA. STAT. ANN. tit. 53, §10,607 (Supp. 1972) (original enactment) with *id.* §10,609 (amendments).

¹⁹⁵ *Altman v. Township of Nether Providence*, Del. Co. Civil No. 6485 (Pa. C.P., filed June 17, 1970).

¹⁹⁶ Complaint ¶¶ 6-7, *Altman v. Township of Nether Providence*, Civil No. 72-917 (E.D. Pa., filed May 10, 1972).

¹⁹⁷ *Altman v. Luglio*, Del. Co. Civil No. 12,204 (Pa. C.P., filed Nov. 13, 1970).

¹⁹⁸ *Verratti v. Ridley Twp.*, 416 Pa. 242, 206 A.2d 13 (1965).

¹⁹⁹ *Commercial Properties, Inc. v. Peternel*, 418 Pa. 304, 211 A.2d 514 (1965).

²⁰⁰ *Linda Dev. Corp. v. Plymouth Twp.*, 3 Pa. Commw. 334, 281 A.2d 784 (1971).

there was no valid zoning on the property, thus entitling plaintiffs to a permit as of that date.²⁰¹ Under this argument the subsequent amendment, which reconfirmed the R-1 classification for the Girsh property, was merely a supervening amendment, and therefore, similar in its bearing on plaintiffs' right to a permit to the amendments invalidated in *Verratti*, *Peternel*, and *Linda*. This argument, however, is at variance with what the supreme court said it was doing in *Girsh*, for it clearly said that it was not deciding the question whether apartments are appropriate on the Girsh property. Although I have argued that courts have the power to order the approval of an alternative development even in the absence of specific statutory authority,²⁰² the court in *Girsh* did not do so; on the contrary, it refused to do so.^{202a}

Thus, the owners of the Girsh property, like the developer in *National Land*, won only a Pyrrhic victory. Their mandamus action, like their challenge to the subsequent amendment, is still pending. A new development in their case, however, has taken place: on April 13, 1972, the township instructed its counsel to take all steps necessary to condemn the Girsh property for a public park.²⁰³ The present owners have countered by commencing an action in federal court challenging all of the above dilatory tactics of the township on due process and equal protection grounds. I will say no more; my point is made. Obviously, if judicial review of local zoning actions is to result in anything more than a farce, the courts must be prepared to go beyond mere invalidation and grant definitive relief. I will add by way of further illustration only that it was not until late May, 1972, more than

²⁰¹ The fact that the original plans were not in final form makes that argument all the more difficult to maintain.

²⁰² See text accompanying notes 116-28 *supra*. Statutory authority to this effect was conferred on the courts by §§ 802 and 1009(2) of the MPC, effective Jan. 1, 1969. PA. STAT. ANN. tit. 53, §§ 10,802, 11,009(2) (Supp. 1972). The decision and order of the trial court in *Girsh* was entered prior to the effective date of the MPC. That order confirmed the validity of the ordinance. The order of the Pennsylvania Supreme Court reversing the trial court's order was entered after the effective date of the MPC, but § 1009(2) probably could not have been employed by the court because plaintiff would not have followed the procedure prescribed in § 802 when the matter was up before the trial court in the first instance. See text accompanying notes 248-52 *infra*.

^{202a} Since this Article was set in print, the owners of the Girsh property have succeeded in their attempts to obtain a clarification from the Pennsylvania Supreme Court of its original order in *Girsh*. On Aug. 29, 1972, the court entered a clarifying order directing the building inspector to issue "a building permit to petitioners to construct apartments upon petitioner's filing of appropriate building plans, drawings and specifications in compliance with the Township Building Code." Order No. MP-12,271 (Aug. 29, 1972), *enforcing* *Girsh* Appeal, 437 Pa. 237, 263 A.2d 395 (1970). Petitioners are not out of the woods yet, however, because of the threat of condemnation.

²⁰³ Complaint ¶ 16, *Altman v. Township of Nether Providence*, Civil No. 72-917 (E.D. Pa., filed May 10, 1972).

two years after the decision in *Kit-Mar*, that the plaintiff finally received subdivision approval.²⁰⁴ This brings me to the last problem.

6. Problem 6: Subdivision and Other Matters: Exhaustion, Standing, Ripeness: Effects of a Divisive Approach to Land Use Control

When Kit-Mar Builders began its challenge to the two- and three-acre minimum lot requirements, the township introduced, and subsequently adopted, a new subdivision ordinance, one so detailed and complicated as to exceed in length the zoning ordinance. Kit-Mar did attempt to challenge the ordinance on the ground, among others, that many of its provisions conferred arbitrary discretion on the approving authority. The court dismissed the complaint on this as well as on all other questions relating to the validity of the ordinance, holding that questions of substantive validity (as opposed to defects in the process of enactment) could not be considered until Kit-Mar applied for and was denied approval of its subdivision plan.²⁰⁵ This view is

²⁰⁴ Telephone interview with Harry F. Dunn, Jr., counsel for Kit-Mar Builders, June 6, 1972.

²⁰⁵ *Kit-Mar Builders, Inc. v. Township of Concord*, 56 Del. Co. 240 (Pa. C.P. 1968). Kit-Mar Builders brought its action under a provision of the Second Class Township Code which authorized challenges to the "legality" of an ordinance within thirty days after the ordinance takes effect. PA. STAT. ANN. tit. 53, § 65,741 (1957). Similar provisions can be found in the First Class Township Code, *id.* § 56,502 (1957), and in the Borough Code, *id.* § 46,010 (1966). The Pennsylvania courts have consistently held that their jurisdiction under these provisions is limited to a consideration of procedural defects in the enactment of an ordinance and that questions of substantive validity cannot be considered. *See, e.g.,* *McArthur v. Mount Lebanon Twp.*, 402 Pa. 78, 165 A.2d 630 (1960); *Griffith v. McCandless Twp.*, 366 Pa. 309, 77 A.2d 430 (1951); *Weaver v. East Brandywine Twp.*, 15 Ches. Co. 221 (Pa. Ct. Q. Sess. 1967). The construction given to the above provisions may have been affected by the fact that they referred the challenger to the court of quarter sessions, a court of limited jurisdiction. That court, however, was abolished by the constitutional revision of 1968 and its jurisdiction transferred to the court of common pleas, PA. CONST. art. 5, § 5 (effective Jan. 1, 1969). Nevertheless, it is clear that the Supreme Court of Pennsylvania is not disposed to expand the scope of the review available under the above provisions. *See* *Roeder v. Hatfield Borough Council*, 439 Pa. 241, 245, 266 A.2d 691, 694 (1970).

In any event, Kit-Mar Builders walked right into this problem when it sought to challenge the subdivision ordinance under PA. STAT. ANN. tit. 53, § 65,741 (1957), in what was then the quarter sessions court, on the grounds that it was vague and conferred arbitrary discretion on the approving authority. Yet the challenge could not have been simply dismissed on grounds that involved matters of substantive validity. At that time, the court of quarter sessions was also the court which was given exclusive jurisdiction to review any *denial* of a subdivision approval. *See* note 45 *supra*. And there was a number of cases which had come up on appeal from the denial of *final* subdivision approval, where the court of quarter sessions reversed the denial on the grounds that the provision of the ordinance relied upon was arbitrary, unreasonable, and therefore in excess of the police power. *See, e.g.,* *Smith Appeal*, 1 Pa. D. & C.2d 93 (Montgomery County Ct. Q. Sess. 1954); *Girard Trust Corn Exch. Appeal*, 85 Pa. D. & C. 6 (Delaware County Ct. Q. Sess. 1953). These cases at least stand for the proposition that there was no inherent lack of jurisdiction in the quarter sessions court to invalidate ordinance provisions on constitutional grounds. In dismissing plaintiff's complaint, the court in *Kit-Mar*, therefore, had to hold that the matter was not ripe for adjudication until Kit-Mar Builders applies

unacceptable when applied to a claim that the ordinance on its face is vague and confers arbitrary discretion on the approving authorities.²⁰⁶ In general, courts should not demand that an applicant expend large sums of money on a subdivision application in order to prove that the arbitrary discretion plain on the face of the ordinance will, in fact, be exercised arbitrarily in his particular case. Moreover, Kit-Mar Builders' application for subdivision approval would not even have served to test the discretionary elements of the subdivision ordinance, because its application would have been disapproved as contrary to existing zoning. Kit-Mar might have appealed the dismissal of its attempt to challenge the discretionary elements of the subdivision ordinance but, by that time, it was involved in a challenge to a threshold obstacle, the three-acre minimum lot requirement. It dropped the subdivision challenge, presumably hoping that success in its zoning litigation would make the local authorities less intractable. Apparently, that was not the case.²⁰⁷

Unless courts are prepared to review subdivision, planned unit, and other discretionary controls on something much less than full prior application to the local authorities, those controls will be employed in place of zoning as a means of bringing development to a complete halt.²⁰⁸ Nor will speedy review of discretionary planning controls be effective unless similar review is available for all other sources of development control: building codes, health codes, sewer codes, and so forth. These considerations clearly point to complete reform of the system in the direction of removing from the local authorities much if not all of their power over development controls. I leave this to the architects of reform; my Article assumes that little will happen to change the basic pattern, which leaves the power primarily in local hands.

B. *The Municipalities Planning Code*

The MPC has done little to change this basic pattern.²⁰⁹ In its original form it did attempt to accomplish procedural reforms, but

and is turned down for final subdivision approval. Such a view is unbearable when the challenge is that the ordinance is vague and confers arbitrary discretion on the approving authority. See text accompanying note 323 *infra* for the change that has been made by the new article X of the MPC in regard to the subdivision ordinance in particular, and text accompanying notes 273-91 *infra*, discussing the new approach to ripeness and justiciability in general.

²⁰⁶ See text accompanying notes 55-60 *supra*.

²⁰⁷ See note 204 *supra*.

²⁰⁸ See text accompanying notes 52-60 *supra*. For the changes that have been made in Pennsylvania by the new article X of the MPC, see text accompanying notes 273-91, 323 *infra*.

²⁰⁹ See text accompanying notes 3-6 *supra*.

because its original provisions have now all been modified by the new amendments, I will not dwell on them at great length.

1. Problems 1 and 6: Exhaustion: Zoning and Other Matters

For litigants wishing to challenge *any*²¹⁰ ordinance or map, section 910 of the MPC²¹¹ attempted to restate the rule in *Fetzer* to make clear that the only reasons for going to the board are to afford the local government an opportunity to put its own construction on the challenged ordinance and make its own findings of fact, and to provide a forum for making a complete record on the matter without burdening the courts with evidentiary hearings.²¹² Section 910 defined the board's jurisdiction as follows:

The board may hear all challenges wherein the validity of the ordinance or map presents any issue of fact or of interpretation, not hitherto properly determined at a hearing before another competent agency or body, and shall take evidence and make a record thereon as provided in section 908. At the conclusion of the hearing, the board shall decide all contested questions of interpretation and shall make findings on all relevant issues of fact which shall become part of the record on appeal to the court.²¹³

The reference to "any issue of fact or of interpretation" was not perhaps the most felicitous way of capturing the spirit of *Fetzer*,²¹⁴ since even procedural challenges to an ordinance might involve an issue of fact (for example, whether notice was given). Section 910 tried to make clear, in an earlier general statement of purpose, that resort to the board was intended to be limited to cases where the issues of fact and of interpretation "lie within the special competence of the board." Nevertheless, uncertainty surrounded the question whether any particular challenge should go directly to court or be considered by the board. The confusion was heightened by the fact that section 910 spoke in permissive terms, thus suggesting that the board's jurisdiction was not intended to be exclusive.

Even greater difficulty was experienced with the language of section 910, which excepted from the board's jurisdiction cases where the facts had already been "determined at a hearing before another com-

²¹⁰ See note 215 *infra* & accompanying text.

²¹¹ PA. STAT. ANN. tit. 53, §10,910 (Supp. 1972), as amended, Act No. 93, §14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972).

²¹² See text accompanying notes 134-46 *supra*.

²¹³ PA. STAT. ANN. tit. 53, §10,910 (Supp. 1972), as amended, Act No. 93, §14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972) (footnote omitted).

²¹⁴ See text accompanying notes 134-46 *supra*.

petent agency or body." Perhaps the meaning of this exception would have been clearer had it been generally understood that section 910 was attempting to define the board's jurisdiction in relation to "any ordinance or map." These words refer to all regulatory measures authorized by the MPC, including not only the zoning ordinance but also the subdivision and land development ordinance, the planned residential development ordinance, and the official map.²¹⁵ The draftsmen were evidently aware that, in the case of some of these other measures, a sufficient hearing might already have been held.

It should be noted that in repealed article X, dealing with "zoning appeals," the draftsmen confirmed the prior law that a court may, but need not, take additional evidence.²¹⁶ It would have been reasonable to conclude, therefore, that the "other hearings" referred to in section 910 must be evidentiary hearings resulting in an appropriate record upon which a court could review the validity of an ordinance without taking additional evidence. Such hearings were, in fact, required by sections 708 and 709²¹⁷ in all cases involving applications for planned residential development. An evidentiary hearing, though not required by article V of the MPC, might also be held on a subdivision application, and section 508(2)²¹⁸ does require that a decision on an application for subdivision approval be rendered in writing giving reasons. Both of these hearings would be conducted by the governing body, and are probably the source of the reference in section 910 to a hearing before some other agency "or body." Unfortunately, because both of these cases were again specifically covered in section 911,²¹⁹ section 910 was open to the construction that any hearing before any agency or body would suffice. Thus, some practitioners believed that they could by-pass the board if there had been a hearing before the governing body on a proposed amendment to the zoning ordinance. This view was encouraged to some extent by the fact that section 1001²²⁰ defined

²¹⁵ That intention was clear from the opening paragraph of old §801 of the MPC, PA. STAT. ANN. tit. 53, § 10,801 (Supp. 1972). Although the whole of article VIII of the MPC has been repealed by Act No. 93, § 13 (Pa. Legis. Serv. 246 (1972)) (effective Aug. 1, 1972), new § 1001 makes clear that references to "an ordinance or map" throughout the new article X on "Appeals" are references to "any ordinance . . . adopted . . . pursuant to this act." *Id.* § 19 (Pa. Legis. Serv. 248 (1972)).

²¹⁶ PA. STAT. ANN. tit. 53, § 11,009 (Supp. 1972), as amended, Act No. 93, §§ 18-19 (Pa. Legis. Serv. 248, 252 (1972)) (effective Aug. 1, 1972).

²¹⁷ PA. STAT. ANN. tit. 53, §§ 10,708-09 (Supp. 1972).

²¹⁸ *Id.* § 10,508(2).

²¹⁹ *Id.* § 10,911, as amended, Act No. 93, § 15 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972).

²²⁰ *Id.* § 11,001, as amended, Act No. 93, §§ 18-19 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972).

“zoning appeals” as including merely appeals from the board, suggesting that many other types of appeals are possible.

a. *Exceptions to the Board's Jurisdiction*

As the MPC stood prior to the recent changes, the legislative hearings on an amendment were not, in my opinion, an appropriate basis for judicial review either of the existing ordinance or of the amendment. The parties at the hearings are not ordinarily on notice that the validity of the existing ordinance is in issue, so that, if the request for the amendment is denied and the applicant attacks the validity of the existing ordinance in court, the record on the amendment may not fairly represent the evidence on that issue. Conversely, if the amendment is adopted, the parties who would have opposed its validity may have been caught off guard if they relied, as they probably did, on the good sense of the governing body not to adopt it. Finally, and perhaps more important, though evidence may be taken at legislative hearings, there is no right to present evidence, testimony need not be under oath, and there is no right to cross-examination.

Some of these objections, I recognize, would be equally applicable to the specific provisions concerning direct review by a court of a planned residential development ordinance and a subdivision and land development ordinance in section 911.²²¹ The hearings on an application for a planned residential development would probably not be addressed to the validity of the ordinance itself, an issue more likely to be raised after the governing body has acted on the application. The objections would be applicable even more clearly in the case of the subdivision and land development ordinance, since a request for subdivision or land development approval would not usually involve a hearing in the above sense at all.²²²

Whatever may be said concerning the wisdom of these exceptions,²²³ I feel certain that the draftsmen of the original MPC did not

²²¹ *Id.* § 10,911, as amended, Act No. 93, § 15 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972).

²²² In the absence of any evidentiary hearings, the record on a subdivision application is likely to be very insubstantial. In *Brauns v. Swarthmore Borough*, 4 Pa. Commw. 627, 288 A.2d 830 (1972), the commonwealth court frowned upon the lower court's practice of refusing to take additional evidence:

We suggest that in the future the courts of common pleas in this Commonwealth exercise their discretion and cause an adequate record to be built so as to facilitate a proper review by an appellate court.

Id. at 632, 288 A.2d at 833.

²²³ Under prior law, there was some doubt whether protestants would have standing to complain about subdivision matters. See text accompanying notes 388-92 *infra*. Thus the draftsmen of § 911 of the MPC might have given no thought to whether their viewpoint would be adequately represented on the record typically made in an application for subdivision approval. Lack of concern for the protestants'

intend to provide for direct review of an ordinance after a legislative hearing on an amendment. Indeed, the commonwealth court has recently so held in *Levitt & Sons, Inc. v. Kane*.²²⁴ It rested its decision, however, on the absence of any findings of fact, rather than on the objections raised above.

By restating the jurisdiction of the board in terms of "issues of fact or of interpretation" which "lie within the special competence of the board,"²²⁵ I believe that the draftsmen intended to provide direct access to the courts in cases where an ordinance is subject to attack on the law alone or on the law and the undisputed facts, including facts which may be judicially noticed. An example would be an attack on a subdivision ordinance or a special exception provision of a zoning ordinance on the grounds that it is vague and confers arbitrary discretion on the approving authority. I believe that another case similar to *Girsh*²²⁶ might also come up directly, if the court meant to hold there that an ordinance is invalid when it does not provide for apartments, regardless of the facts that may affect the municipality involved.²²⁷

Similarly, if my explanation of the prior cases is correct,²²⁸ supervening amendments which "slam the door" on previously permissible development would continue to be reviewable without reference to the board. Indeed, the commonwealth court has twice confirmed this conclusion under the MPC.²²⁹

It is clear that the other exceptions developed under the prior law—collateral challenges not involving local planning policy,²³⁰ and challenges to an ordinance on procedural grounds²³¹—were also intended to be saved. Unfortunately, under the MPC there was some confusion about challenges on procedural grounds because of a mis-

position is explained by the fact that, in the past, the important controls from their point of view were all contained in the zoning ordinance. Note how the court treats their interests in *Brauns*. With the advent of the new "flexible" zoning devices, the focus of land use control may shift to subdivision and site planning matters. The new procedural provisions of the MPC properly assume that protestants may have the same interest in these matters as they have in zoning. See text accompanying notes 475-77, 494-96 *infra*.

²²⁴ 4 Pa. Commw. 375, 389-90, 285 A.2d 917, 924 (1972).

²²⁵ See text accompanying note 213 *supra*.

²²⁶ *Girsh* Appeal, 437 Pa. 237, 263 A.2d 395 (1970).

²²⁷ See text accompanying notes 113, 190-202 *supra*. But in *Beaver Gasoline Co. v. Osborne Borough*, 445 Pa. 571, 285 A.2d 501 (1971), the court appears to explain its decision in *Girsh* as a matter of burden of proof, or rather burden of going forward. *Id.* at 574-75, 285 A.2d at 503-04.

²²⁸ See text accompanying notes 146-52 *supra*.

²²⁹ *Linda Dev. Corp. v. Plymouth Twp.*, 3 Pa. Commw. 334, 281 A.2d 784 (1971); *Limekiln Golf Course, Inc. v. Zoning Bd. of Adjustment*, 1 Pa. Commw. 499, 275 A.2d 896 (1971).

²³⁰ See text accompanying notes 143-45 *supra*.

²³¹ See text accompanying note 142 *supra*.

placed timing provision in section 915(1). This, as well as some of the other exceptions, is best discussed further in that part of this Article which deals with the recent changes.²³²

2. Problems 2 and 3: Scope of Review: Estoppel on Constitutional Objections

To the extent that section 910 sent most of the challenges through the board, the MPC made no change in the problems outlined under these headings. Section 1009²³³ merely repeated the rule of prior cases concerning the taking of additional evidence by the court.

3. Problems 4 and 6: Standing, Ripeness, and Justiciability: Zoning and Other Matters

Sections 909, 910, 911, 503(1), and 712, taken together with section 801, sought to change the rules governing these questions. Section 910²³⁴ defined the board's jurisdiction so as to eliminate the reason which led the court in *National Land* and *Home Life* to require an application for a building permit. In giving the board original jurisdiction over challenges that present an issue of "fact or interpretation" section 910, whatever its deficiencies, clearly provided a reason for appearing before the board, independent of any application to an administrative officer. Indeed, as if to ensure that an appearance before the board does not require application to any administrative officer, section 909 clearly provided that appeals from an administrative officer are confined to cases where it is alleged that such officer has "failed to follow prescribed procedures or has misinterpreted or misapplied any provision of a *valid ordinance*."²³⁵ The MPC, therefore, made it impossible for any court to say that application to the administrative officer and appeal from his determination to the board is the exclusive mode for challenging an ordinance.

While section 910 eliminated the confusion over application for building permits, section 801 addressed itself to the central problems of exhaustion and ripeness for adjudication. Section 801(1) attempted to restate the exhaustion principle by providing that the challenger is required to make an "application for development" only when a local agency has the power to grant him relief and the application is neces-

²³² See text accompanying notes 257-68 *infra*.

²³³ PA. STAT. ANN. tit. 53, § 11,009 (Supp. 1972), as amended, Act No. 93, §§ 18-19 (Pa. Legis. Serv. 248, 252 (1972)) (effective Aug. 1, 1972).

²³⁴ *Id.* § 10,910, as amended, Act No. 93, § 14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972).

²³⁵ *Id.* § 10,909 (emphasis supplied).

sary to a decision upon the appropriate relief.²³⁶ In dispensing with the requirement in other cases, section 801(1) was quite broad, since section 107(2)²³⁷ defined "application for development" to include any plans and specifications, including building, subdivision, planned unit, and other plans. If section 801 had stopped here, no one would have been required to file any plans to challenge a zoning ordinance unless a variance could issue in his case. Section 801(2), however, reinstated the requirement in some cases by providing that an application for development may also be required when it is "necessary to define the controversy and to aid in its proper disposition."²³⁸ This phrase obviously attempted to capture the spirit of ripeness and justiciability.²³⁹ It was too vague, however, and left too many questions unresolved.²⁴⁰

Section 801²⁴¹ of the MPC also compromised some questions of standing²⁴² by referring to the challenger as a "landowner." Fortunately, this term was defined in section 107(12)²⁴³ to include an equitable owner, even one who has an option or a contract conditioned

²³⁶ *Id.* § 10,801(1), as amended, Act No. 93, § 13 (Pa. Legis. Serv. 246 (1972)) (effective Aug. 1, 1972).

²³⁷ *Id.* § 10,107(2).

²³⁸ *Id.* § 10,801(2), as amended, Act No. 93, § 13 (Pa. Legis. Serv. 246 (1972)) (effective Aug. 1, 1972).

²³⁹ See text accompanying notes 109-15 *supra*.

²⁴⁰ Section 801(2), PA. STAT. ANN. tit. 53, § 10,801(2) (Supp. 1972), as amended, Act No. 93, § 13 (Pa. Legis. Serv. 246 (1972)) (effective Aug. 1, 1972), went on to give several examples:

An application for subdivision approval or for a building permit is not necessary to define the controversy or to aid in its proper disposition within the meaning of this subsection when the challenge is addressed solely to a minimum lot size or maximum density requirement. Nor shall an application relating to buildings be required when the challenge is confined to site planning or subdivision improvement matters, nor shall a subdivision application be required when the challenge is confined to building or land use matters.

This language was evidently aimed at the unreasonable requirements established in *Home Life Ins. Co. of America v. Board of Adjustment*, 393 Pa. 447, 143 A.2d 21 (1958), and *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965). See text accompanying notes 172-83 *supra*. Unfortunately, the examples still failed to clarify when an "application for development" might be required. For example, it left unclear whether one challenging a single-family district classification but proposing to build apartments must submit an application for building permits. Does such a challenge involve "density" or does it involve "buildings"? This same ambiguity was present in the distinction drawn between building and land use matters on the one hand and subdivision and site planning matters on the other. If the challenger proposes buildings different in type from those authorized by the challenged restrictions, and the subdivision ordinance simply does not address itself to such buildings or to such development, does his challenge involve "site planning or subdivision improvement matters"? Should he really be entitled to litigate the prohibition against such buildings without showing how they will be located or how the site will be improved and serviced? Finally, if some plans were required, the reference to "application for development" offered no standard or any certainty as to how detailed or final they were to be. PA. STAT. ANN. tit. 53, § 10,107(2) (Supp. 1972).

²⁴¹ *Id.* § 10,801, as amended, Act No. 93, § 13 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972).

²⁴² See text accompanying note 299 *infra*.

²⁴³ PA. STAT. ANN. tit. 53, § 10,107(12) (Supp. 1972).

on success in the zoning challenge. But the same definition restricted unjustifiably the standing of a tenant by requiring that he be one who has a remaining term of not less than forty years. This happened because the definition of "landowner" was erroneously borrowed from a model planned unit statute,²⁴⁴ where it had been used to describe persons who would be entitled to develop a planned unit community.

4. Problem 5: Scope of Relief

Section 802²⁴⁵ together with section 1009²⁴⁶ of the MPC attempted to do something about the inconclusive result obtained in cases such as *National Land* and *Kit-Mar*.²⁴⁷ The draftsmen of section 802 attempted to build on the estoppel argument²⁴⁸ to give the court the power to order approval of the proposed development not only as to matters contained in the challenged provisions of the ordinance, but also as to matters governed by other provisions and other sources of control. Section 802 provided that a landowner who desires to secure such relief

may elect to file a complete application for development, either preliminary or final, with the appropriate agency or officer and demand that such agency or officer decide in what respects the application accords with the provisions of the governing ordinance or map and in what respects it conflicts therewith.²⁴⁹

As a way of estopping the local government from later claiming that the proposed development does not meet its requirements, this provision would have worked best in the context of the facts as they existed in *National Land*. When *National Land* first proposed its single-family detached home development on one-acre lots, the Easttown Township zoning ordinance did contain a district (R-1) in which such homes were authorized, and its subdivision ordinance did

²⁴⁴ That definition was borrowed from Babcock, Krasnowiecki & McBride, *Part II—Suggested Legislation With Commentary*, in LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT § 11, at 82 (Urban Land Institute Tech. Bull. 52, 1965). This section became PA. STAT. ANN. tit. 53, § 10,107(12) (Supp. 1972). See note 325 *infra* for the consequences of changes made by Act No. 93, § 13 (Pa. Legis. Serv. 246 (1972)) (effective Aug. 1, 1972).

²⁴⁵ PA. STAT. ANN. tit. 53, § 10,802 (Supp. 1972), *as amended*, Act No. 93, § 13 (Pa. Legis. Serv. 246 (1972)) (effective Aug. 1, 1972).

²⁴⁶ *Id.* § 11,009(2), *as amended*, Act No. 93, §§ 18-19 (Pa. Legis. Serv. 248, 252 (1972)) (effective Aug. 1, 1972).

²⁴⁷ Concord Twp. Appeal, 439 Pa. 466, 268 A.2d 765 (1970); *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965). See text accompanying notes 178-207 *supra*.

²⁴⁸ See text accompanying notes 120-27, 189 *supra*.

²⁴⁹ PA. STAT. ANN. tit. 53, § 10,802 (Supp. 1972), *as amended*, Act No. 93, § 13 (Pa. Legis. Serv. 246 (1972)) (effective Aug. 1, 1972).

contain regulations which would apply to such a development. Had the MPC been effective at that time, National Land could have served a demand on the township supervisors requesting that they specify in what respects its preliminary plans did or did not meet the requirements of the subdivisions and zoning ordinances. Section 802 would have required the supervisors to specify in what respects the subdivision requirements were or were not met, despite the fact that the zoning ordinance did not authorize the proposed one-acre lot size, since the subdivision ordinance was applicable to one-acre lot developments as well as four-acre ones. The term "governing ordinance" in section 802 might further have been read to refer to the zoning ordinance, thus requiring that the supervisors specify whether, if the existing restrictions should be held invalid, the proposed development would or would not meet the R-1 district regulations (that is, the regulations most appropriate to the proposed development).

Continuing the estoppel approach to the problem, section 802(2)²⁵⁰ prescribed the following course: upon receiving the determination from the local authorities called for by section 802(1), the landowner was directed to "immediately pursue the administrative and judicial proceedings available to challenge the provisions found to be in conflict with his application." The reference to "administrative and judicial proceedings" was intended to refer to the possibility that a direct action in court might be authorized where no issue of fact or of interpretation was involved; otherwise, the proper approach would be to proceed before the board under section 910.²⁵¹ If he chose to pursue definitive judicial relief, the landowner was instructed by section 802(2) that he might serve notice on the governing body that he does intend ultimately to request such relief from a court under section 1009(2).²⁵² Section 802(2) then gave the governing body sixty days within which to cure the challenged ordinance by adopting appropriate amendments. If it chose to stand on the provisions of the challenged ordinance, and a court found the challenged provisions invalid, the court was authorized "to approve the landowner's application as filed." This language, of course, might still leave some matters for final determination by the local authorities; for example, if the application were a preliminary one, a final application would have to be submitted and approved.

²⁵⁰ *Id.* § 10,802(2), as amended, Act No. 93, § 13 (Pa. Legis. Serv. 246 (1972)) (effective Aug. 1, 1972).

²⁵¹ *Id.* § 10,910, as amended, Act No. 93, § 14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972).

²⁵² *Id.* § 11,009(2), as amended, Act No. 93, § 18-19 (Pa. Legis. Serv. 248, 252 (1972)) (effective Aug. 1, 1972).

On the whole, the approach of section 802 was unduly complicated and unduly timid. The sixty-day *locus poenitentiae* afforded the local governing body was not necessary to justify the power given to the court under sections 802(2) and 1009(2). Furthermore, the estoppel approach missed the mark where the local government has no provisions governing the proposed development—for example, where the proposal is to build apartments and there are no provisions either in the zoning ordinance or the subdivision ordinance relating to apartments. In such a case, the local government could not be asked to determine whether the apartment plans conform to the appropriate provisions of its ordinances without inviting the justifiable response that none are appropriate because none exist. In considering such a case, a court should not order approval of the apartment plans without giving the local government an opportunity to devise appropriate regulations for apartments. Even so, the local government may react by exercising any of its existing discretionary control powers so as to prevent or unduly burden the proposed development. A better approach is to give the court continuing jurisdiction over the development as it is processed to final approval, with power to issue supplementary orders to prevent the local authorities from denying effect to the court's opinion and decree. This is the approach taken in the new article X.

C. *The New Article X* ²⁵³

The new article X of the MPC, together with certain changes in article IX and in section 609, which became effective on August 1, 1972, represents a significant advance toward solving most of the procedural problems discussed above. Unlike the old provisions, the new article X brings together in one place all of the procedures for "securing review of any ordinance, decision, determination or order of the governing body of the municipality, its agencies or officers adopted or issued pursuant to this act." ²⁵⁴

Perhaps the most notable aspect of article X is that it draws a clear distinction between the procedures to be followed by the "landowner" who complains of restrictions applicable to his land, and those to be followed by "persons aggrieved" by a development or use permitted on the land of another. Thus sections 1004 and 1006 ²⁵⁵ deal

²⁵³ Act No. 93, §§ 18-19 (Pa. Legis. Serv. 248-53 (1972)) (effective Aug. 1, 1972), repeals the whole of former article X of the MPC and substitutes a new article X.

²⁵⁴ Act No. 93, § 19 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §§ 11,001-12 (Supp. 1972).

²⁵⁵ *Id.* (Pa. Legis. Serv. 248-51 (1972)).

with the former and sections 1005 and 1007²⁵⁶ with the latter. In addition, the new article X distinguishes between challenges addressed to the substantive validity of an ordinance or map (sections 1004 and 1005) and proceedings to secure review of a decision or order not involving the validity of the governing ordinance or map (sections 1006 and 1007). While this distinction might be thought to create problems where one seeks to challenge both the ordinance and a decision thereunder, the separate provisions are so interrelated that no such problem should arise.

There are two types of cases which have been noted only in passing before, which I should discuss now before considering how the new article X deals with the various problems that have occupied stage center thus far: challenges to an ordinance on procedural grounds and appeals of errors of the administrative officer.

1. Challenges to an Ordinance on Procedural Grounds: Section 1003²⁵⁷

Prior to the enactment of the MPC the practice was well established that objections to an ordinance addressed to the procedure followed in its enactment (improper notice, defective hearings, failure to refer the ordinance to a planning agency for comment, and the like) had to be raised directly in court.²⁵⁸ This practice developed under certain provisions of the Township and Borough Codes which gave to the court of quarter sessions the power to review an ordinance upon complaint filed within thirty days after the ordinance took effect.²⁵⁹ Because these provisions were contained in those portions of the Township and Borough Codes which dealt with ordinances in general, they were not repealed by the MPC. By a strange mistake, however, section 915(1)²⁶⁰ directed that no issue of alleged defect in the process of enactment of an ordinance could be raised in a proceeding filed with the board later than thirty days after the effective date of the ordinance, thus creating the impression that procedural objections now had to be taken to the board. It took two cases, *Roeder v. Hatfield Borough Council*²⁶¹ and *Linda Development Corp. v. Plymouth Town-*

²⁵⁶ *Id.* (Pa. Legis. Serv. 249-51 (1972)). These provisions are discussed in Part II of this paper.

²⁵⁷ *Id.* (Pa. Legis. Serv. 248 (1972)).

²⁵⁸ See text accompanying note 142 *supra*.

²⁵⁹ PA. STAT. ANN. tit. 53, §46,010 (1966) (Borough Code); *id.* §56,502 (1957) (First Class Township Code); *id.* §65,741 (1957) (Second Class Township Code). See note 205 *supra*.

²⁶⁰ *Id.* §10,915(1) (Supp. 1972), as amended, Act No. 93, §17 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972).

²⁶¹ 439 Pa. 241, 266 A.2d 691 (1970). The point was made *obiter* in a footnote, *id.* at 246 n.1, 266 A.2d at 694 n.1.

ship,²⁶² to make clear that section 915(1) should be disregarded as an irrelevant timing provision and that the existing provisions of the Township and Borough Codes still applied to require that procedural defects be raised directly in court within thirty days of the effective date of the ordinance.

That procedural defects should be considered waived unless raised within a short period after enactment was reasonable, but the requirement that they should be raised in the court of quarter sessions made no sense at all. When that court was a separate court, this requirement clearly meant, in effect, that a landowner who had both substantive and procedural objections to an ordinance could not, even by securing a continuance on his procedural objections, hope to consolidate that matter for trial with his substantive objections, since the latter would ultimately be determined by the court of common pleas. The problem was not serious in those cases where, because of the tendency of courts to decide cases on procedural grounds and avoid the substantive issues, the landowner would have been ill-advised in any event to combine procedural objections with substantive objections. But it was a serious problem for the landowner when he had secured a favorable amendment to the ordinance and the substantive and procedural challenges were coming from protestants. In such a case, unavailability of a mechanism under which the two challenges could be consolidated meant that the landowner could be forced to contest the procedural challenge separately.²⁶³ Although the court of quarter sessions was abolished by the constitutional revision of 1968 and its jurisdiction transferred to the court of common pleas,²⁶⁴ the practice has apparently continued to docket the procedural challenges to an ordinance in the criminal division of the court,²⁶⁵ this being the division which has taken over the jurisdiction of the old court of quarter sessions. Thus the old problems seem to have survived the abolition of that court.

The question now is whether the new section 1003 solves these problems. It clearly provides that all procedural challenges must be taken to the common pleas court within thirty days of the effective date of the ordinance. Coincidentally, the old section 915(1) has been deleted,²⁶⁶ thus eliminating the confusing reference to the board. It would seem reasonable to conclude that section 1003 creates an inde-

²⁶² 3 Pa. Commw. 334, 343-45, 281 A.2d 784, 789-90 (1971).

²⁶³ Cf. text accompanying notes 506-14 *infra*.

²⁶⁴ See PA. CONST. art. 5, § 5 (effective Jan. 1, 1969).

²⁶⁵ *Linda Dev. Corp. v. Plymouth Twp.*, 3 Pa. Commw. 334, 345, 281 A.2d 784, 790 (1971).

²⁶⁶ Act No. 93, § 17 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972), amending PA. STAT. ANN. tit. 53, § 10,915 (Supp. 1972).

pendent source of jurisdiction in the court of common pleas over procedural challenges to any ordinance governed by the MPC. In its original bill form, the new law would have made it clear that section 1003 replaces the old provisions of the Township and Borough Codes by partial repeal, insofar as those provisions apply to zoning and planning ordinances governed by the MPC.²⁶⁷ A last-minute amendment of the bill in the Senate throws some doubt on this conclusion.²⁶⁸

2. Errors of the Administrative Officer: Section 909²⁶⁹

Section 909 of the MPC continues the board's appellate jurisdiction over the administrator's "errors" but, to make quite clear that this jurisdiction will not again be misinterpreted to require an application for a building permit before the validity of an ordinance may be brought into question, the "errors" which the board has power to correct under section 909 are those which are alleged to have been made under a *valid ordinance*. This does not mean, of course, that one is precluded from challenging an ordinance on appeal from the action of an administrative officer; what it does mean is that one is not required to do so under section 909, which is wholly irrelevant to any case where the validity of an ordinance is in question. That point is established beyond any doubt by section 910 which, in its original as well as in its current version,²⁷⁰ invests the board with the power to hear zoning challenges without regard to any appeal from any administrative officer.

A word of warning should be entered at this point, however. Under prior law, failure to appeal the denial of a building permit within the time specified by the rules of the board could, at least for a time, estop the landowner from attacking the ordinance.²⁷¹ That rule has been continued by the first sentence of section 1004(2)(b)²⁷² of the new article X. The landowner is not required to make any application

²⁶⁷ House Bill 1129, 1971 Sess., § 103, would have left the matter generally open for construction.

²⁶⁸ The Senate amendment added the following language:

The provisions of other acts relating to municipalities and townships are made a part of this act and this code shall be construed to give effect to all provisions of other acts not specifically repealed.

Act No. 93, § 1 (Pa. Legis. Serv. 239 (1972)) (effective Aug. 1, 1972).

²⁶⁹ PA. STAT. ANN. tit. 53, § 10,909 (Supp. 1972). For a discussion of prior law, see text accompanying notes 101, 170-83 *supra*. The meaning of "errors of the administrative officer" is further discussed in text accompanying notes 347-52, 468-69 *infra*.

²⁷⁰ Act No. 93, § 14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972), amending PA. STAT. ANN. tit. 53, §§ 10,906, 10,908, 10,910 (Supp. 1972).

²⁷¹ See text accompanying notes 163-69 *supra*.

²⁷² Act No. 93, § 19 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §§ 11,001-12 (Supp. 1972).

for a building permit or for any other administrative approval prior to commencing his attack on the ordinance, and he may attack the ordinance at any time after its adoption. But if he does make an application for a building permit or some other administrative approval and this is denied on the basis of the ordinance, he must commence his attack on the ordinance within the time provided for appeal from the denial of the permit.

3. Substantive Challenge to an Ordinance: Sections 1004, 609.1, 910, 913.1, and 1008-11

a. *Exhaustion of Local Remedies: Ripeness for Adjudication and Justiciability*

Section 1004(1) provides two alternative avenues to the courts on questions involving the substantive validity of an ordinance. Before taking the matter to court, section 1004(3)²⁷³ requires that the landowner must either (a) present his challenge to the board under sections 910 or 913.1, or (b) present it to the governing body together with a request for a curative amendment under section 609.1.

Alternative (b) recognizes, for the first time, that most attacks on an ordinance start with a request to the governing body for an amendment and that such requests typically involve an extensive evidentiary hearing. A requirement that the landowner repeat the same presentation before the board, when he has been unsuccessful before the governing body, is unreasonable. In the past, however, any attempt to by-pass the board presented two serious difficulties: because the public hearings on a request for an amendment were treated as purely legislative, there was, first, no requirement that an official stenographic record be kept of the proceeding or that exhibits be preserved and their admission or rejection noted in the record, and second, no guarantee that parties would be entitled to present evidence or cross-examine witnesses. Furthermore, notice of the hearing on the amendment would not necessarily alert adverse parties that the validity of the existing ordinance was in question.

²⁷³ *Id.* Section 910 (referred to in alternative (a)) has been modified. The old confusing reference to matters of "fact or of interpretation not hitherto determined by another competent agency or body" has been dropped. PA. STAT. ANN. tit. 53, § 10,910 (Supp. 1972), as amended, Act No. 93, § 14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972). Instead the new § 910 gives jurisdiction to the board over all challenges to an ordinance or map except as indicated in § 1003 and in § 1004(1)(b) (*i.e.*, alternative (b) discussed in the text accompanying this note). Section 913.1 (also referred to in alternative (a)) is a new provision discussed in text accompanying note 328 *infra*. Section 609.1 (referred to in alternative (b)) is discussed in text accompanying notes 275-79 *infra*.

The new provisions offer a unique solution to these problems. When a landowner elects to challenge an ordinance by way of alternative (b), he must present a curative amendment to the governing body. Under section 1004(2)(a)²⁷⁴ the request for an amendment must include notice to the legislative body that he is challenging the validity of the existing ordinance. Under section 609.1²⁷⁵ the hearing is both on the curative amendment and on the challenge, and section 1004(2)(e)²⁷⁶ provides that notice of the hearing must include notice that the validity of the existing ordinance is in issue. Most important, section 609.1 provides that the hearings by the governing body must be conducted in accordance with the provisions of sections 908(4)-(8),²⁷⁷ which prescribe the administrative hearing procedures that must be followed by the board. Thus all the rules relating to parties, attendance and cross-examination of witnesses, evidence, the record, and ex parte communications, prescribed for the conduct of the administrative hearings before the board, are made applicable to the governing body's legislative hearing under section 609.1. As I have urged elsewhere, such requirements are much more in keeping with the real nature of any amendment sought by a particular landowner than our blind adherence to its "legislative" categorization would allow.²⁷⁸ Indeed, I have argued that such hearings should be required in all cases involving a particularized amendment.²⁷⁹ Section 609.1, however, applies only to cases in which the landowner has notified the governing body that he is challenging the existing ordinance.

It should be noted that the reference in section 609.1 to section 908 deliberately excludes any reference to subsections (1), (2), (9), and (10). Subsection (1) of section 908 governs notice of the proceedings before the board. To avoid confusion, notice under section 609.1 is the same as that required for any other amendment to an ordinance but includes the special requirements of section 1004(2)(e). The other excluded subsections—(2), (9), and (10) of section 908—require the board to enter a written decision and make written findings of fact. Apparently, this was thought to be an inappropriate requirement to impose upon a legislative body. As a result, it is possible that

²⁷⁴ Act No. 93, §19 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §§11,001-12 (Supp. 1972).

²⁷⁵ *Id.* §10 (Pa. Legis. Serv. 245 (1972)), amending PA. STAT. ANN. tit. 53, §10,609 (Supp. 1972).

²⁷⁶ *Id.* §19 (Pa. Legis. Serv. 249 (1972)), formerly PA. STAT. ANN. tit. 53, §§11,001-12 (Supp. 1972).

²⁷⁷ *Id.* §14 (Pa. Legis. Serv. 246 (1972)), amending PA. STAT. ANN. tit. 53, §§10,906, 10,908, 10,910 (Supp. 1972).

²⁷⁸ See Krasnowiecki, *supra* note 7.

²⁷⁹ See Krasnowiecki, *supra* note 13, §208 & commentary.

the governing body might give no indication at all of its action after the hearings have been concluded. Section 1004(4)(iii)²⁸⁰ solves this problem by providing that, if the local governing body fails to act on the landowner's request, it is deemed to have been denied on the thirtieth day after the close of the hearings, unless the time is extended by mutual consent between the municipality and the landowner.

Following the approach of alternative (b), the landowner, under section 1004(3),²⁸¹ is given a direct appeal from the action of the governing body to court, though the absence of any written decision or findings may create problems when the matter is brought up on appeal. Under prior law the court might have refused either to take additional evidence or make findings, and remanded the matter to the board. Section 1010²⁸² changes the law in this regard by providing that there shall be no remand in cases coming up under section 1004 or 1005 (cases in which the substantive validity of an ordinance is in issue). Thus the court is obliged to make its own findings based on the record or it may take additional evidence. This solution seems entirely proper; first, it preserves the integrity of the local governing body, and second, it refuses to permit a court to rely on local findings of fact when the constitutionality of an ordinance is in issue.²⁸³

Finally, alternative (b) is designed to make it unnecessary for the landowner to present substantially the same evidence to two local bodies. He should not be discouraged, however, from going before the board in cases where it could grant relief. Accordingly, section 1004(3)²⁸⁴ provides that failure to appeal the governing body's action to court will not preclude the landowner from commencing a challenge de novo before the board under alternative (a), and he may do so at any time after the governing body's action if the challenge would be timely as a matter raised de novo before the board.

Under new section 1004(2)(b)²⁸⁵ a challenge to an ordinance may be commenced by the landowner under either alternative (a) or (b) of section 1004(1) at any time after the ordinance takes effect, but as I have cautioned the reader earlier, if a permit or other approval has been denied pursuant to such ordinance, section 1004(2)(b) does require that the challenge be commenced within the time provided for appeal from such denial. An illustration will help explain these pro-

²⁸⁰ Act No. 93, § 19 (Pa. Legis. Serv. 249 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §§ 11,001-12 (Supp. 1972).

²⁸¹ *Id.*

²⁸² *Id.* (Pa. Legis. Serv. 252 (1972)).

²⁸³ See notes 154-62 *supra* & accompanying text.

²⁸⁴ Act No. 93, § 19 (Pa. Legis. Serv. 249 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §§ 11,001-12 (Supp. 1972).

²⁸⁵ *Id.* (Pa. Legis. Serv. 248-49 (1972)).

visions. Assume that a restrictive ordinance is adopted and goes into effect. The landowner may commence a challenge to it at any time after its effective date, but if he applies for a building permit and the permit is denied because of the restrictions, he must commence an attack on the restrictions within the time prescribed for appeal from the denial of the building permit, normally thirty days. If he elects to take the matter to the governing body under alternative (b), and does so within the thirty days allowed for appeal from the denial of a building permit, it is clear that his challenge is timely and that he is not precluded from returning to the board *de novo* on the same challenge merely because the time for appealing the denial of the permit to the board has run. Any other conclusion would be inconsistent with section 1004(3),²⁸⁶ which permits him to start a challenge *de novo* before the board at any time after the governing body has acted adversely on his request. Section 1004(2)(b)²⁸⁷ does address itself specifically to one aspect of this problem in providing that the time for appealing the denial of the building permit to the board *on issues other than validity of the ordinance* shall not run until the request to the governing body (on the questions of validity under alternative (b)) is finally disposed of. This provision was clearly designed to cover the case in which the denial of a permit rests both on a proper application of the challenged provisions of an ordinance and on the improper application of other provisions which are not challenged; the intent was obviously to preserve the landowner's right to appeal the latter while he is challenging the former.

Justiciability. While the denial of a permit under an ordinance marks the beginning of the period within which a challenge to the ordinance must be commenced before the governing body under alternative (b) or before the board under alternative (a) of section 1004(1), the new article X makes very clear that the landowner is not required to apply for a building permit or for any other formal approval as a condition of commencing his challenge. As already noted, section 910²⁸⁸ gives the board jurisdiction to consider a zoning challenge as an original matter, and not, as under prior law, only on appeal from the action of an "administrative officer," and section 609.1²⁸⁹ confers original jurisdiction on the governing body. The new section 1004(2) sets forth its own independent requirements governing the submissions which must

²⁸⁶ *Id.* (Pa. Legis. Serv. 249 (1972)).

²⁸⁷ *Id.* (Pa. Legis. Serv. 248-49 (1972)), amending PA. STAT. ANN. tit. 53, § 11,004 (Supp. 1972).

²⁸⁸ *Id.* § 14 (Pa. Legis. Serv. 247 (1972)), amending PA. STAT. ANN. tit. 53, § 10,910 (Supp. 1972).

²⁸⁹ *Id.* § 10 (Pa. Legis. Serv. 245 (1972)), amending PA. STAT. ANN. tit. 53, § 10,609 (Supp. 1972).

accompany the landowner's request for a hearing on his challenge, whether it be made to the board under alternative (a) of section 1004(1) or the governing body under alternative (b). Section 1004(2)(c)²⁹⁰ provides that such a 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.

To make doubly certain that this provision will not be interpreted to require any more than what is reasonably necessary to put the case in a justiciable posture, subsection (c) goes on to provide that

[s]uch 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.

b. *Standing Under Section 1004 and Exceptions*

While the above standard is clearer than the old standard which required an "application for development" if it is "necessary to define the controversy and to aid in its proper disposition,"²⁹¹ and while the new standard can be met by someone who is not a builder and is not dealing with a builder, the provisions of the new section 1004 are still weighted in favor of the "landowner." The definition of "landowner" in section 107(12)²⁹² has been modified to eliminate the unjustifiable limitations placed on leasehold tenants, but the main part of the definition requiring him to have some interest in a particular parcel of land remains intact. Thus the procedures of section 1004 are still primarily designed for the traditional property rights-due process type of challenge.

I do not think, however, that these procedures preclude a broader challenge. Section 1004 is, in effect, an "exhaustion" provision. The courts cannot refuse to hear plaintiffs who do not come within the description of section 1004 if their standing is compelled by the Constitution.²⁹³

²⁹⁰ *Id.* § 19 (Pa. Legis. Serv. 249 (1972)), formerly PA. STAT. ANN. tit. 53, § 11,004 (Supp. 1972).

²⁹¹ See text accompanying notes 238-42 *supra*.

²⁹² Act No. 93, § 1 (Pa. Legis. Serv. 239 (1972)) (effective Aug. 1, 1972), amending PA. STAT. ANN. tit. 53, § 10,107(12) (Supp. 1972).

²⁹³ See text accompanying note 299 *infra*.

The scope of section 1004 needs further comment. The new article X commences with the statement that "[t]he proceedings set forth in this article shall constitute the exclusive mode for securing review of any ordinance . . . adopted . . . pursuant to this act."²⁹⁴ It will be recalled that the courts themselves made that statement about the procedures established under the old Standard Act²⁹⁵—procedures which were never designed to deal with questions concerning the validity of an ordinance. In doing so, they ousted themselves of jurisdiction in equity and under the Declaratory Judgments Act²⁹⁶ without giving any thought to the complications that would inevitably arise. By twisting the purposes of the old Standard Act, they painted themselves into a corner in a number of cases where the "exclusive" statutory procedure made no sense at all.²⁹⁷ This mistake should not be repeated.

The procedure of section 1004 is designed to deal with questions concerning the validity of an ordinance. But the courts should not again make the mistake of insisting that it applies to cases which were plainly outside the contemplation of the legislature. They must retain the jurisdiction in equity and by declaratory judgment to review the validity of an ordinance in such cases. The Statutory Construction Act²⁹⁸ requires the courts to remember that the legislature did not intend a result that is absurd or unreasonable and that it did not intend to violate the Constitution of the commonwealth or of the United States. Moreover, the intended coverage of the procedure prescribed in section 1004 is plain on its face. Both of the avenues to the courts available under section 1004 require that the challenger present some plans for an alternative use or development; both of them require a full scale evidentiary hearing and, while the alternative involving the governing body does not require findings of fact, it does require that the governing body consider an alternative ordinance. The case which the legislature has in mind, therefore, is a case where the ordinance is drawn into question as applied to a *particular site*, based upon evidence which bears upon *what the appropriate use of that site should be*. That is why section 1004 describes the plaintiff as a person who is complaining

²⁹⁴ Act No. 93, § 19 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,001 (Supp. 1972).

²⁹⁵ The opinion in *Jacobs v. Fetzer*, 381 Pa. 262, 268, 112 A.2d 356, 358 (1955), concludes with a quotation from *Taylor v. Moore*, 303 Pa. 469, 154 A. 799 (1931), to the effect that "where a remedy or method is provided . . . we have held that such remedy or procedure is exclusive."

²⁹⁶ PA. STAT. ANN. tit. 12, § 832 (Supp. 1972), provides: "Any person . . . whose rights, status, or other legal relations are affected by a . . . municipal ordinance . . . may . . . obtain a declaration of rights, status, or other legal relations thereunder."

²⁹⁷ See text accompanying notes 142-208 *supra*.

²⁹⁸ PA. STAT. ANN. tit. 46, § 552 (Supp. 1972).

of restrictions on land "in which he has an interest"—a "landowner," someone who has the requisite property interest to propose an alternative use or development on the site.

The legislature intended the procedure of section 1004 to be exclusive when the validity of an ordinance is drawn into question in this manner, and in this kind of case. Therefore, the procedure should not be blindly applied to cases which involve different issues and which arise in different manners, namely, cases (a) not involving a particular site, or (b) not involving issues that call for evidence concerning the appropriate use of a particular site, or (c) not seeking the removal of the restrictions on a particular site. Furthermore, it should not be applied when to do so would be oppressive or unconstitutional. Under these principles, the following exceptions should be recognized.

(i) Issues Not Involving a Particular Site

Plaintiffs who complain that the zoning policy of the local government denies them access to housing or employment within the community, in violation of their constitutional rights or in violation of state or federal legislation, cannot be denied standing in court solely on the ground that they have no "interest" in a particular site and are not prepared to follow the procedures prescribed in section 1004, unless the requirements of section 1004 are independently appropriate limitations on the rights which they assert.²⁹⁹

²⁹⁹ In *Commonwealth v. Bucks County*, 22 Bucks Co. 179 (Pa. C.P. 1972), the common pleas court dismissed a complaint in equity filed by low income residents of Bucks County and of the City of Philadelphia against all of the municipalities in Bucks County and against the county itself and its planning agency. The complaint was joined by the Commonwealth of Pennsylvania as plaintiff and alleged discriminatory zoning practices by all of the municipalities and the county in violation (among other statutory and constitutional grounds) of the equal protection clause of the United States Constitution as well as in violation of state policy as expressed in §701 of the MPC, PA. STAT. ANN. tit. 53, §10,701 (Supp. 1972). The complaint prayed for various types of relief, including an order requiring the Bucks County Planning Agency to prepare a plan for the allocation of low income housing to each municipality and an order requiring each municipality to implement such plan. The common pleas court dismissed the complaint on the following grounds: (1) that the court had no equity jurisdiction to declare zoning ordinances invalid, the statutory remedies being exclusive, (2) that the controversy was not ripe for adjudication because plaintiffs had no interest in a particular parcel of ground and had not applied for a building permit thereon, (3) that the controversy was not justiciable because it involved political questions, and (4) that the Bucks County Planning Agency had no statutory authority to dictate the zoning patterns within a community. A critical analysis of the court's opinion would require a separate article. However, I believe that the first ground is unacceptable and the remaining grounds cannot stand apart from the last. Under the MPC it is clear that the county planning agency is given only advisory powers, PA. STAT. ANN. tit. 53, §§10,304, 10,607 (Supp. 1972), the governing bodies of each municipality being free to accept or reject the recommendations of the agency. It is true that in *Bradley v. School Bd.*, 338 F. Supp. 67, 245 (E.D. Va.), *rev'd*, Nos. 72-1058, -1059, -1060, -1150 (4th Cir., June 5, 1972), the court ordered the separate school boards of the city and two suburban counties to create a single school division, but the order was also addressed to the local governing bodies and the state board of education, which appeared to have the statutory power to create such a division. VA. CODE ANN. §22-30 (1969).

(ii) Appropriate Use of Site Not in Issue

Even though the plaintiff was a landowner complaining about restrictions imposed against his site, there were cases under prior practice in which the courts were prepared to invalidate the restrictions without considering evidence of what the most appropriate use of that site would be. As I have indicated before, this was in essence what the courts did in the supervening amendment cases.³⁰⁰ Of course, in each of these cases there was a specific proposal for the development of the site pending and of record before the court. But when the courts invalidated the supervening amendments, they would do so not on the merits of the proposal as against the merits of the amendment, but solely on the grounds that the amendment was aimed at a particular applicant and designed to deprive him of an approval to which he was entitled under the regulations as they stood on the date the application was filed. Perhaps a better way to put it would be to say that courts were prepared to presume that the amendment was without merit from the circumstances surrounding its adoption—the fact that it was hastily enacted in response to the popular outcry of the moment.³⁰¹ But whichever way one puts it, evidence that the proposed use or development is the most appropriate use of that site, or that the new restrictions are unreasonable in light of the proposed use, was considered immaterial. Consequently, the matter was not referred to the local government for further consideration.

The same continues to be true under the new procedures of section 1004. If an application is denied or is not acted upon because of a

Thus, if the plaintiffs in the *Bucks County* case were asking the court to restructure local government by transferring powers from one unit to another, the court might have been justified in its abstention. But if the municipalities acted in concert to discriminate in housing, surely the courts would have power to order concerted action in the opposite direction, looking to the county plan as a reasonable measure for coordinating these efforts. Clearly, if there is no way in which a court can require coordination of efforts in favor of low income housing within the wider market area, there is some question whether it makes sense to intervene at all, except in favor of a particular project. I cannot do justice to this point here. But I note that in *Southern Burlington County NAACP v. Township of Mount Laurel*, 119 N.J. Super. 164, 290 A.2d 465 (L. Div. 1972), Judge Martino took the opposite point of view by ordering the one defendant township to prepare a satisfactory plan to house low income families and individuals. According to the order, the plan must be capable of meeting the needs of those low income families and individuals who now reside in the township, and those who do not now reside in the township but who either are now employed within the township or who are expected to be so employed in the future as a result of anticipated development within the township. It remains to be seen what will result from this order.

³⁰⁰ See text accompanying notes 146-52, 227 *supra*.

³⁰¹ When the amendment is preceded by some planning activity, however, the courts may be expected to stretch the point to hold that the amendment was "pending" when the application was filed. See *Boron Oil Co. v. Kimple*, 1 Pa. Commw. 55, 275 A.2d 406 (1970), *aff'd*, 445 Pa. 327, 284 A.2d 744 (1971). See also *Appeal of Key Realty Co.*, 408 Pa. 98, 182 A.2d 187 (1962) (holding that a rezoning which was obviously aimed at a particular developer was "in accordance with a comprehensive plan" because it extended to other properties as well).

supervening amendment, and the applicant is pursuing the appropriate remedies³⁰² to secure review and approval of his application, he should not be required to commence a new proceeding under section 1004 to challenge the amendment.

I have noted before that another case where the appropriate use of the property was not thought to be in issue was *Girsh*.³⁰³ The court there was prepared to invalidate the ordinance on the ground that it did not make provision for apartment living, but specifically denied that its decision in any way intimated the proper use of Girsh's site. For the owners of the site, the court's position created chaos.³⁰⁴ In my view, however, if an owner wants to challenge an ordinance solely because it does not make provision for a certain kind of living, he should be allowed to go directly to court. The consequence of doing so, however, will be for the landowner to get the kind of decision that Girsh got—one that says nothing about what he ought to be allowed to do. If he wants a decision that says something about the reasonableness of the restrictions applicable to his land, he must put this matter in issue by following the procedures in section 1004—by submitting proposals for an alternative use or development of his land and presenting evidence that demonstrates that it is appropriate for his site.³⁰⁵ He must cer-

³⁰² Section 909 of the MPC, PA. STAT. ANN. tit. 53, §10,909 (Supp. 1972), continues to provide that mandamus is an appropriate alternative remedy for testing the failure of the zoning officer to perform his ministerial duty. Therefore, in cases where the applicant can make out a clear right to a permit as of the date his application was filed, the courts should review a supervening amendment in an action for mandamus, as they have done hitherto. See *Commercial Properties, Inc. v. Peternel*, 418 Pa. 304, 211 A.2d 514 (1965); *Verratti v. Ridley Twp.*, 416 Pa. 242, 206 A.2d 13 (1965); *Linda Dev. Corp. v. Plymouth Twp.*, 3 Pa. Commw. 334, 281 A.2d 784 (1971). If the applicant is before the zoning hearing board for a special exception, or if he has elected to appeal the denial of a permit to the board under §909, he should not be required to commence a new proceeding to challenge the supervening amendment. *Shapiro v. Zoning Bd. of Adjustment*, 377 Pa. 621, 105 A.2d 299 (1954); *Limekiln Golf Course, Inc. v. Zoning Bd. of Adjustment*, 1 Pa. Commw. 499, 275 A.2d 896 (1971). *Limekiln*, however, suggests that the applicant should raise the question of validity before the board (if the supervening amendment is adopted before or during the hearings before the board) and offer evidence that it had the vices associated with special legislation—that it was conceived of and adopted after his application was filed and was aimed at him. *Id.* at 511, 275 A.2d at 903.

³⁰³ *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970). See text accompanying notes 226-27 *supra*.

³⁰⁴ See text accompanying notes 192-202 *supra*.

³⁰⁵ The odd posture in which the *Girsh* decision left the landowner in that case led to the confusion experienced in *Bucks County Investors v. Doylestown Twp.*, 21 Bucks Co. 217 (Pa. C.P. 1971). The township ordinance contained no provision for apartments. Investors desired to build an apartment on a specific site. Treating their case as a challenge to the validity of the ordinance, Investors took the matter before the zoning hearing board under §910 of the MPC. At the hearing, Investors quite properly submitted plans for its apartment project and extensive evidence relating to the suitability of the site and the merits of its project from the point of view of planning. See text accompanying notes 211-20 *supra*. The board approved the plans subject to a number of conditions, citing *Girsh*. The township appealed this decision,

tainly do this if he wants to secure the definitive relief that is now available under section 1011(2).³⁰⁶ The only other situation that comes readily to mind in which the appropriate use of a particular property is not in issue is the case where the landowner claims exemption from local regulations as a governmental agency or on some similar basis. That type of landowner, too, should have direct access to the courts to test this question by an action for a declaratory judgment.³⁰⁷

One point remains to be made under this heading. It is possible that, while the landowner is pursuing his preferred alternative development under the procedures prescribed in section 1004, the local government may adopt an amendment which changes the restrictions on his property, but not in favor of his alternative. There is nothing in section 1004 that would prohibit this result. Indeed, when the landowner elects to challenge the existing restrictions by submitting a "curative amendment" to the governing body, section 1004(4)(ii)³⁰⁸ anticipates this possibility by providing that the adoption of a different

arguing that the board had no power to decide the validity of the ordinance. Strictly speaking, that was true under §910 as it then stood. PA. STAT. ANN. tit. 53, §10,910 (Supp. 1971), provided that the board had no power to decide questions of validity. (That prohibition has now been deleted by Act No. 93, §14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972).) But the board did have the power to make findings of fact, and its decision should have been treated as a finding that, in the event the ordinance was invalid, Investors' proposed project was an appropriate use of the proposed site. Unfortunately, however, this approach to the board's decision might not have allowed the court to approve the project, since Investors might not have satisfied the old, confusing requirements of §802. See text accompanying notes 249-52 *supra*. The court solved this dilemma by treating the board's action as the grant of a variance. In a challenge to the validity of an ordinance under §§1004(1)(a), 910, Act No. 93, §§19, 14 (Pa. Legis. Serv. 248, 247 (1972)) (effective Aug. 1, 1972), amending PA. STAT. ANN. tit. 53, §§11,004(1)(a), 10,910 (Supp. 1972), the board now has power to decide all questions of fact and of law involved, and on appeal, the court has power to approve the plans which the landowner has submitted to the board. Act No. 93, §19 (Pa. Legis. Serv. 252 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §11,011 (Supp. 1972). See also text accompanying notes 318-20 *infra*. The old preconditions for such relief contained in §802 have been repealed. Accordingly, there is no need to resort to the variance analogy in order to reach the result in the *Investors* case. But unless the landowner follows the procedures of §1004(1)(a) or (b), which require that the landowner submit plans and evidence concerning his preferred alternative development on the site either to the board or to the governing body, a court cannot reach the merits of that alternative on the principle of *Girsh* alone. Noting the suggestion made in the *Investors* case, it seems clear that an application for a variance under §912 can be combined with a challenge to the ordinance under §1004(1)(a). Where the landowner has a strong case against the validity of the ordinance, however, there may be no sense in confusing the issues by a request for a variance (note the strict statutory standards imposed upon variances under §912), especially if the project involves a large area of land. See text accompanying notes 102-06, 165-67 *supra*.

³⁰⁶ See notes 318-20 *infra* & accompanying text.

³⁰⁷ *Duquesne Light Co. v. Upper St. Clair Twp.*, 377 Pa. 323, 105 A.2d 287 (1954). In that case a public utility commenced construction in order to raise the question by an action to enjoin the resultant criminal prosecution by the township.

³⁰⁸ Act No. 93, §19 (Pa. Legis. Serv. 249 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §11,004 (Supp. 1972).

amendment is deemed to be a denial of the landowner's request for purposes of an appeal to court.

If the governing body adopts such a different amendment prior to the hearing on the landowner's "curative amendment," or during the course of such hearing, it seems clear from section 1004(3) that the landowner cannot take an appeal until the hearing on his "curative amendment" has been concluded. In such a case, I believe that the landowner must shift his attack to take into account the new amendment and present evidence which is capable of overcoming it on the merits. This kind of amendment is not covered by the principle of the supervening amendment cases,³⁰⁹ since here the landowner is not entitled to the approval of his development under the existing zoning. It is, of course, possible that the courts will extend that principle to this kind of amendment. Unless they do, however, the landowner must assume that he is required to challenge the new amendment on the merits. If the amendment is adopted prior to the hearing or during the course of the hearing, it would be wise for him to request that the hearing be postponed or continued until new notice to the effect that he is challenging the amendment can be given as required in section 1004(2)(e).

If the hearings on the curative amendment have been concluded and the governing body then adopts a different amendment, section 1004(4)(ii)³¹⁰ clearly provides that an appeal will lie to court without any further local proceedings on the amendment. In this situation, therefore, the courts will have to consider the validity of the amendment on a record that does not address itself directly to that question. They may be willing to extend the principle of the "supervening amendment" cases to this situation and to act without taking further evidence. One thing, however, is clear: section 1010³¹¹ does not permit the court to remand the case for further hearings before "any body, agency or officer of the municipality." Accordingly, if the court is not prepared to hold the new amendment invalid without further evidence relating to its merits, it will have to take additional evidence. I think it will be justified in so doing. For, by adopting an amendment after a hearing on the existing zoning which is different from the proposal submitted by the landowner, the local government has indicated that it is not prepared to reach a compromise on the issue, and judicial review is

³⁰⁹ See note 302 *supra*; text accompanying notes 146-53 *supra*.

³¹⁰ Act No. 93, § 19 (Pa. Legis. Serv. 249 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,004 (Supp. 1972).

³¹¹ *Id.* (Pa. Legis. Serv. 252 (1972)), formerly PA. STAT. ANN. tit. 53, § 11,010 (Supp. 1972).

then appropriate. Further hearings on the local level are as superfluous as they are oppressive.

The same possibilities exist where the landowner has initially chosen to pursue the other alternative avenue for challenging the existing ordinance, by going to the board under section 1004(1)(a). Here again, the governing body might amend the ordinance before, during, or after the hearing by the board. Here again, if the amendment is adopted before or during the hearings, the landowner should challenge the amendment by presenting evidence as to its invalidity. If the amendment is adopted after the hearings, section 1004(4)(ii) does not explicitly govern, but the same principle should apply and the landowner should then be entitled to go directly to court.

(iii) Cases Not Calling for Removal of Restrictions

The type of case I have in mind here—a case like *Sgarlat v. Kingston Borough Board of Adjustment*³¹² where the validity of the ordinance is raised in a condemnation case for purposes of valuation—has been discussed earlier.³¹³

c. Scope of Review

No change has been made in the old law governing scope of review on appeals from the board. Under section 1010 the court may still rely on the findings of the board and need not take additional evidence.³¹⁴ On appeal from the governing body under section 1004(3),³¹⁵ however, the situation has changed. The governing body is not required to make findings or write an opinion when it denies a request under sections 1004(1)(b)³¹⁶ and 609.1;³¹⁷ possibly, it is not authorized to do so. Thus, a court may have to make its own findings and it may have to take additional evidence in order to do so, although section 1010 does not require the latter. Furthermore, section 1010 does not permit the court to remand the case to the board if the appeal questions the validity of an ordinance under section 1004 or 1005.

³¹² 407 Pa. 324, 180 A.2d 769 (1962).

³¹³ See text accompanying notes 143-45 *supra*.

³¹⁴ Act No. 93, § 19 (Pa. Legis. Serv. 252 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,010 (Supp. 1972).

³¹⁵ *Id.* (Pa. Legis. Serv. 249 (1972)), formerly PA. STAT. ANN. tit. 53, § 11,004 (Supp. 1972).

³¹⁶ *Id.* (Pa. Legis. Serv. 248 (1972)), formerly PA. STAT. ANN. tit. 53, § 11,004 (Supp. 1972).

³¹⁷ *Id.* § 10 (Pa. Legis. Serv. 245 (1972)), amending PA. STAT. ANN. tit. 53, § 10,609 (Supp. 1972).

d. *Relief*

Section 1011(2)³¹⁸ takes the simple, direct approach to this problem I have advocated earlier.³¹⁹ The court is empowered to order approval of any plans that have been submitted and rejected in the local action being appealed, including, for example, the plans required under section 1004(2)(c).³²⁰ In fact, section 1011(3) expressly provides that the plans need not be in the form required for final approval and that "the court may act on preliminary or sketch plans by framing its decree to take into account the need for further submissions before final approval is granted." Recognizing that such further submissions may be employed as an excuse by the local authorities to hold the proposed development in abeyance indefinitely, section 1011(2) provides that

[t]he court shall retain jurisdiction of the appeal during the pendency of any such further proceedings 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.³²¹

e. *Exhaustion: Matters Other Than Zoning*

As I have noted,³²² the exhaustion principle has been abused in its application, for example, to subdivision and planned unit development ordinances by the requirement of submission of final plans. If the subdivision ordinance or the planned unit ordinance contains discretionary provisions which expose the landowner to the unbridled discretion of the local government, the new procedure of section 1004(1)(b)³²³ offers relief. The landowner can first request a curative amendment, and then appeal directly to court, attacking the ordinance on the grounds that it is vague and confers arbitrary discretion. The courts have not been quick to accept such cases, preferring that the landowner pursue an application with the local government until a precise interpretation of the discretionary provision is defined by a final decision of the local agency in his case.³²⁴ The unconscionable burden of this abstemious

³¹⁸ *Id.* § 19 (Pa. Legis. Serv. 252 (1972)), formerly PA. STAT. ANN. tit. 53, § 11,011 (Supp. 1972).

³¹⁹ See text accompanying notes 116-28 *supra*.

³²⁰ Act No. 93, § 19 (Pa. Legis. Serv. 249 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,004 (Supp. 1972).

³²¹ *Id.* (Pa. Legis. Serv. 252 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,011 (Supp. 1972).

³²² See text accompanying notes 56-60, 107-15, 206-08 *supra*.

³²³ Act No. 93, § 19 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,004 (Supp. 1972). See text accompanying note 273 *supra*.

³²⁴ Cf. notes 56-64 *supra* & accompanying text.

attitude of the courts is alleviated by the new provisions dealing with landowner appeals from adverse decisions or orders of the local government, its agencies and officers.

4. Review of Orders and Decisions, Not Involving the Validity of an Ordinance: Section 1006³²⁵

It is extremely important to understand that section 1006 does not preclude a landowner from combining the procedures of section 1004³²⁶ with its own procedures. The reference in the title is misleading on this point, but the text of section 1006(1) makes clear what is intended. The procedures and requirements of section 1006 apply to cases where review of a decision or order is sought "on the grounds that such decision or order is not authorized by or is contrary to the provisions of an ordinance or map" ³²⁷ This does not mean that the landowner cannot combine a challenge to the ordinance with a challenge to the decision or order in one proceeding, if he meets the requirements both of section 1006 and section 1004. He most assuredly can: if the provisions of both sections are studied carefully, it will be discovered that they are interrelated in such a way that a suitable strategy can readily be devised.

For example, a landowner may apply for the approval of his plans under a subdivision and land development control ordinance. If the municipality provides a procedure—formal or informal—for the submission of preliminary or tentative plans, section 1006(1)(a) provides that "an adverse decision thereon shall, at the landowner's election, be treated as final and appealable."³²⁸ Thus, if he is faced with an ordinance which confers arbitrary discretion, he can secure an appealable interpretation of it without proceeding with final plans. The appeal from that decision lies either directly to court or the board under section 913.1.³²⁹ That section provides that, whenever the board has jurisdiction of any matter pertaining to a development plan or development

³²⁵ Act No. 93, § 19 (Pa. Legis. Serv. 250 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,006 (Supp. 1972).

³²⁶ See note 273 *supra* & accompanying text.

³²⁷ Act No. 93, § 19 (Pa. Legis. Serv. 250 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,006 (Supp. 1972).

³²⁸ *Id.*

³²⁹ *Id.* § 16 (Pa. Legis. Serv. 247 (1972)), amending PA. STAT. ANN. tit. 53, § 10,913 (Supp. 1972).

under sections 909 through 912, it may hear *all* matters pertaining to such plan or development, even though they may involve other ordinances not governed by the MPC, such as the building code or the health code. Thus, our landowner may now combine a direct attack on the subdivision ordinance itself under section 1004(1)(a) with an appeal from the decision thereunder in one proceeding. After the decision of the board he can appeal both matters to court. If he decides to take this course, he must start the section 1004(1)(a) proceeding before the board within the time allowed for appeal from the decision on the subdivision plan.³³⁰

Moreover, an alternative course is open to him by virtue of the last sentence of section 1004(2)(b). He can challenge the ordinance before the governing body by submitting a curative amendment under sections 1004(1)(b) and 609.1. Since section 1006(b) allows an appeal directly to court from an adverse decision on the subdivision application, and since the last sentence of section 1004(2)(b)³³¹ postpones the running of the time within which the appeal must be taken until a final decision is rendered on the challenge to the ordinance under sections 1004(1)(b) and 609.1, the landowner can recombine the two issues when the governing body has acted adversely on his curative amendment by appealing that action under section 1004(3), along with the adverse decision on his subdivision application under section 1006(1)(a) (such appeal being timely under the tolling provision of section 1004(2)(b)).

Under section 1006(1)(b), a similar procedure is available in cases involving a planned unit ordinance. In this case, however, the landowner cannot secure an appealable decision *under* the ordinance until he has gone through the hearings required for "tentative" approval under sections 707-09. He may, of course, try an earlier attack on the ordinance itself under section 1004 if he thinks that some provisions are clearly arbitrary upon their face, but the chances of success are slight because of the current attitude of the courts on this matter.

In addition to the strategies made possible by virtue of section 913.1 (if a proceeding is pending before the board), and by virtue of section 1004(2)(b) (if the board's decision *under* the ordinance is to be held in abeyance until the governing body has acted on the challenge to the ordinance), section 1006 also permits the standard strategy, an application for a variance or special exception together with an attack on the ordinance before the board.

³³⁰ *Id.* §19 (Pa. Legis. Serv. 248 (1972)), formerly PA. STAT. ANN. tit. 53, §11,004 (Supp. 1972). See text accompanying notes 285-87 *supra*.

³³¹ See text accompanying note 287 *supra*.

PART 2: PROCEDURE FOR THE PERSON AGGRIEVED BY A USE OR
DEVELOPMENT OF LAND PERMITTED ON THE LAND OF ANOTHER
BY THE PUBLIC ACTION OR INACTION IN QUESTION

The cases considered under this heading are sometimes described in Pennsylvania as "protestants' appeals." I hesitate to add "public inaction" as a material element of the heading because its presence may beg one of the fundamental questions I wish to raise concerning the purpose of land use control—whether public authorities have an affirmative obligation to restrict the use or development of one parcel of land in favor of another.³³² However, inaction of public officials can be the cause of a complaint without raising this question. For example, section 508(3)³³³ of the MPC provides that failure of the governing body or planning agency to act on a subdivision application within forty days after the application is filed is deemed an approval. A protestant who complains that the resulting approval is contrary to the provisions of the governing ordinance is, in a very real sense, complaining about development which has been permitted by public inaction.

Like the procedures established for the "landowner," the new Pennsylvania procedures for the "protestant" build on past experience under the Standard Acts both in Pennsylvania and in other jurisdictions. Accordingly, I shall follow the same pattern here as I did in the first part of this Article, considering first the problems that arose under the Standard Acts and then the recent Pennsylvania reforms.

I. PROCEDURE UNDER THE STANDARD ACTS

A. *The Statutory Framework*

The scheme established by the SZE and SPEA has been described in the opening sections of this Article. Certain elements of the scheme were peculiarly significant to the protestant.

1. The SZE³³⁴

The SZE furnished three powers to the board of adjustment: the power to correct "errors" of the "administrative officer"; the power to grant variances on appeal from him; and the power to grant special exceptions when authorized by ordinance.³³⁵ It is obvious that the variance or special exception was not designed to offer relief to the

³³² See text accompanying notes 363-74 *infra*.

³³³ PA. STAT. ANN. tit. 53, § 10,508(3) (Supp. 1972).

³³⁴ See note 5 *supra*.

³³⁵ See notes 27-33 *supra* & accompanying text.

person seeking to prevent development proposed by another. Thus the board has only one power that could serve as a source of relief to the protestant, namely the power to correct errors of the administrative officer. The SZEA made this relief available in favor of "any person aggrieved or . . . any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer."³³⁶

The same persons who could seek correction of administrative errors before the board were given the right to appeal *any* decision of the board to court. But here the SZEA added one class of appellants who had not been mentioned before: in addition to "persons aggrieved" and officers of the municipality, the appeal from the board to the court could be taken by "any taxpayer."³³⁷

Most jurisdictions have retained intact the provisions relating to aggrieved person appeals to and from the board. Fully eighteen, however, have dropped the reference to "any taxpayer" from the provision dealing with appeal from the board to the court.³³⁸ A few have changed the provision relating to appeals from the board to the court by adding the requirement that the appellant must have been a *party* before the board, a requirement which has created problems in the absence of any clear definition of "party."³³⁹

The SZEA contained one additional provision that has had an important bearing on the role of the protestant in development matters. An appeal from the administrative officer would effect an automatic stay in the action of the officer. An appeal from the decision of the board, on the other hand, would not stay the action of the board, and the appellant would be required to apply to the court for appropriate relief. Most jurisdictions, including Pennsylvania, adopted these provisions relating to stays.³⁴⁰ In other jurisdictions the automatic stay on appeal to the board did not play a significant role in zoning litiga-

³³⁶ SZEA, *supra* note 5, § 7.

³³⁷ *Id.* See also note 360 *infra*.

³³⁸ For a collection of statutory citations to all jurisdictions, see ALI MODEL LAND DEVELOPMENT CODE 207-08 (Tent. Draft No. 1, 1968). The collection indicates which jurisdictions have dropped reference to "any taxpayer" and which have not, as well as those jurisdictions which have added a provision requiring that the appellant be a "party" before the board. On the latter point, see note 358 *infra*.

³³⁹ *Id.* See note 358 *infra* & text accompanying note 363 *infra*.

³⁴⁰ SZEA, *supra* note 5, § 7 provided:

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property.

The same section went on to provide that on appeal from the board "[t]he allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order." See 3 R. ANDERSON, *supra* note 33, § 16.06.

tion because the courts there have recognized that the protestant is improperly before the board as a moving party unless he is complaining of an administrative error. In Pennsylvania, however, because of the peculiar procedures established under the SZEA, the stay provision created complex problems, as we shall see.³⁴¹

2. The SPEA ³⁴²

As the earlier discussion of the SPEA indicated, the draftsmen refrained from establishing any procedure for the review of subdivision control activities, either in favor of the landowner or in favor of the protestant.³⁴³ A few jurisdictions did include some provision for review. Pennsylvania provided for an appeal to the court of quarter sessions, but it was available only to a person aggrieved by a *disapproval* of a subdivision plan.³⁴⁴ An appeal by protestants therefore seemed to be precluded. New Jersey, on the other hand, provided for an appeal to the governing body from any action of the planning board, whether it be an approval or a disapproval,³⁴⁵ but no provision was made for further appeal thence to the courts.

B. *The Problems in Other Jurisdictions*

1. Exhaustion

a. *Zoning*

The courts in all other jurisdictions have recognized that the protestant is improperly before the board of adjustment unless he is complaining of an administrative error. He may, of course, participate in opposition to an application for a variance or a special exception before the board, and he may appeal its decision to court; but, if his objections relate to the validity of the governing ordinance, it is clear that he must proceed directly to court, because there is nothing the board is empowered to do for him.³⁴⁶

³⁴¹ See text accompanying notes 417-33 *infra*.

³⁴² See note 5 *supra*.

³⁴³ See text accompanying note 44 *supra*.

³⁴⁴ PA. STAT. ANN. tit. 53, § 58,066(f) (1957) (first class townships); *id.* § 66,256(f) (second class townships); *id.* § 46,607(f) (1966) (boroughs). All of the foregoing provisions relating to subdivision control have been repealed by the MPC and replaced by article V of the MPC (effective Jan. 1, 1969), PA. STAT. ANN. tit. 53, §§ 10,501-16 (Supp. 1972), *as amended*, Act No. 93, §§ 4-7 (Pa. Legis. Serv. 242-44 (1972)) (effective Aug. 1, 1972).

³⁴⁵ N.J. STAT. ANN. § 40:55-1.19 (1967).

³⁴⁶ The conclusion is so obvious that no case has ever arisen in which it was questioned. Indeed, even in cases where the "administrative officer" has committed an "error" (*e.g.*, by issuing a permit for development which is in violation of the zoning ordinance), the courts have been prepared to exercise concurrent jurisdiction

(i) Errors of the Administrative Officer

There are several questions associated with the jurisdiction of the board to correct administrative errors. It is clear that an appeal to the board is limited to zoning matters—in the language of the SZEA, to errors “in the enforcement of this act or of any ordinance adopted pursuant thereto.”³⁴⁷ From the protestant’s viewpoint the appeal certainly covers the case where a building permit officer issues a permit for a use or development which is in clear violation of the zoning ordinance or in clear violation of an order issued by the board granting a variance or special exception. The appeal probably also covers the case where the officer issues a permit for a use or development which is *arguably* in violation of the ordinance. It is evident, however, that there was no intention to allow an appeal in the case where the officer’s action accords with the ordinance or governing order of the board, and the claim is that the ordinance itself is invalid. This point, though never doubted in any other jurisdiction, is worth emphasizing because of a contrary conclusion reached by the Pennsylvania courts.³⁴⁸

The question that has remained in some doubt in other jurisdictions, as well as in Pennsylvania, is whether an appeal to the board is the exclusive remedy for correcting an administrative permit authorizing a use or development that violates the existing zoning. The question usually arises in this manner: there is a time limitation on appeal to the board (usually thirty days), and protestants who realize approval has been granted too late for an appeal often seek an injunction to halt further development and to require demolition of the violative improvements. The Supreme Judicial Court of Massachusetts in *Brady v. Board of Appeals*³⁴⁹ took the position that no one acquires a right to build in violation of the zoning ordinance merely because he has secured a permit, and, accordingly, that injunctive relief is always available, subject to the doctrine of laches. On the other hand, the Pennsylvania Supreme Court in *Upper Moreland Township v. Meade*,³⁵⁰ implied in dictum that it would not entertain an injunctive suit unless the issuance of the permit had been appealed within the

with the board by entertaining a direct action for an injunction to prevent the development at the instance of protestants. Aside from the peculiar rule established in Pennsylvania, *see* text accompanying notes 403-10 *infra*, I know of only one other jurisdiction where protestants may be required to appeal questions involving the validity of an ordinance to the board of adjustment (board of appeals)—Anne Arundel County, Maryland, where the power to amend a zoning ordinance is vested in a “zoning hearing officer” and appeals from his determination lie to the board. *See* note 32 *supra*.

³⁴⁷ SZEA, *supra* note 5, § 7.

³⁴⁸ *See* text accompanying notes 172-75 *supra*; R. RYAN, *supra* note 33, § 9.5.4.

³⁴⁹ 348 Mass. 515, 521, 204 N.E.2d 513, 517 (1965).

³⁵⁰ 420 Pa. 613, 617, 218 A.2d 271, 274 (1966).

thirty days allowed for appeal to the board (in which case the statute itself would have effected an automatic stay of the permit), but it did enjoin the actual construction because it violated the terms of the permit granted. Neither court drew any distinction between development which is arguably in violation of the ordinance and development which is clearly so. I suspect that Massachusetts courts would support the developer if the development were arguably in compliance, rather than clearly in violation, and I feel sure that Pennsylvania courts would issue the injunction in a case of clear violation, the above dictum in *Meade* to the contrary notwithstanding.³⁵¹ Finally, the thirty-day time limitation on appeals to the board is itself subject to some extension if the protestant can make out a convincing case of lack of notice³⁵²—that is why the better course for the developer is always to bring the heavy equipment onto the site immediately after the issuance of the permit, rather than wait the thirty days until the appeal period has expired.

(ii) Special Exceptions and Other “Departures”

Although a protestant may challenge a standard zoning ordinance or amendment directly in court, he will probably encounter the same problem as the landowner³⁵³ if he wishes to challenge those provisions of a zoning ordinance that authorize some departure from the standard restrictions. For example, an attack on the special exception provision of an ordinance will probably be rejected as premature by the courts until a special exception is granted. The same will no doubt be true of cluster or locally-devised planned unit development provisions, although I cannot point to any cases in which this question has arisen. The reason for this is not hard to find. Most protestants do not realize the full implications of such special provisions until a specific development has been approved under them, and those who do are likely to conclude that they can obtain more leverage by waiting until they can catch the developer on the threshold of development, when he has financial commitments that may expire before he has an opportunity to cure the alleged defect in the ordinance. The protestant, therefore, is generally concerned with the question how late, and not the question how early, he can attack the ordinance.

³⁵¹ See *Burne v. Kearney*, 424 Pa. 29, 225 A.2d 892 (1967); cf. *Lynch v. Gates*, 433 Pa. 531, 252 A.2d 633 (1969); R. RYAN, *supra* note 33, § 9.1.10. For an analysis of other jurisdictions, see 3 R. ANDERSON, *supra* note 33, §§ 16.05, 23.03.

³⁵² See *Pansa v. Damiano*, 14 N.Y.2d 356, 200 N.E.2d 563, 251 N.Y.S.2d 665 (1964); R. RYAN, *supra* note 33, § 9.5.3.

³⁵³ See text accompanying notes 56-62 *supra*; text accompanying notes 380-81 *infra*.

Both these related questions of when an attack may be commenced have nothing to do with exhaustion. When a court will not entertain a challenge to the ordinance until a development has been approved under it, its abstention cannot properly rest on the ground that the protestant ought to exhaust his "remedy" of opposing the specific project before the approving agency, since that is hardly a remedy in the legal sense. Its abstention can only rest on considerations of ripeness and justiciability. Accordingly, the questions of timing raised here are discussed below under those headings.

b. *Subdivision and Site Planning Controls*

The foregoing discussion of the problems confronting the protestant challenging special exceptions and other departures authorized under the zoning ordinance is equally applicable to the subdivision control ordinance.

2. Appeal from the Board

a. *Validity of the Ordinance*

Since, in jurisdictions other than Pennsylvania, the protestant is not required to exhaust any remedies before the board of adjustment prior to challenging the governing ordinance in court, the question whether he can combine an appeal from the board with a challenge to the ordinance seldom arises. In other jurisdictions, appealing a special exception is the only case where I can imagine a protestant seeking both review of the board's decision and invalidation of the governing ordinance, on the ground, for example, that the special exception provisions give the board unbridled discretion. As in the case of the landowner, most jurisdictions permit a combination of the appeal from the board and the challenge to the ordinance by consolidation or otherwise.³⁵⁴ In New York, however, the challenge to the ordinance may require a separate proceeding.³⁵⁵

b. *Decisions of the Board*

Where no challenge to the ordinance is involved, decisions of the board, of course, are reviewable at the instance of "persons aggrieved."³⁵⁶ From the viewpoint of the protestant, these decisions include (a) cases where the board grants a variance or special exception, and (b) cases where the board decides that there has been no "error"

³⁵⁴ See text accompanying notes 74-86 *supra*.

³⁵⁵ See text accompanying notes 85-97 *supra*.

³⁵⁶ See text accompanying notes 336-38 *supra*.

on the part of an administrative officer in granting a permit for a particular use or development. Note that in (b), but not in (a), the protestant is probably the moving party throughout, both on appeal to the board and from the board. In those cases where the protestant is not the moving party before the board, the question has arisen whether, in order to appeal to the courts, he must be a party in any sense. Most jurisdictions permit the protestant to appeal without any appearance before the board or any other sort of participation in the board's proceedings.³⁵⁷ Indeed, Massachusetts prescribes this result by statute.³⁵⁸ Most jurisdictions, however, require some showing of special injury to some proprietary interest of the protestant before qualifying him as a "person aggrieved."³⁵⁹ This is true even of those jurisdictions whose statutes still contain the old language giving standing to "any taxpayer."³⁶⁰ Most jurisdictions exclude certain interests from consideration, such as the interest of a competitor.³⁶¹ The interpretations given by the courts of the various jurisdictions to the terms "persons aggrieved" and "any taxpayer" have been thoroughly canvassed by other writers,³⁶² and I shall not dwell on them here.

3. Standing

Standing to attack the validity of a zoning or subdivision control ordinance is a different matter. The statutory language "persons aggrieved" and its interpretations do not in themselves define the pro-

³⁵⁷ See, e.g., KY. REV. STAT. § 100.347 (1971).

³⁵⁸ MASS. ANN. LAWS ch. 40A, § 21, as amended, MASS. ANN. LAWS ch. 40A, § 21 (Supp. 1971). Some courts have taken the position that the protestant is not aggrieved unless he has become a party to the proceedings before the board. This in turn has created the question what participation before the board will qualify the protestant as a party. See *Hertelendy v. Montgomery Co. Bd. of Appeals*, 245 Md. 554, 567, 226 A.2d 672, 680 (1967) (protestant qualified as a party by sending a letter to the board which was accepted into evidence, even though he did not appear personally); *DuBay v. Crane*, 240 Md. 180, 185, 213 A.2d 487, 489 (1965) (protestant must show peculiar damages not suffered by the community as a whole and the record must show he was a party to the proceeding before the board); *Abrams v. Gearhart*, 184 N.E.2d 411 (Ohio App. 1961) (protestant must appear before the board); *Roper v. Board of Appeals*, 115 Ohio App. 62, 67, 184 N.E.2d 439, 443 (1961) (protestant who appeared personally before the board with his attorney, who advised the board he would appeal if a variance were granted, qualified as a party). Pennsylvania has recently limited appeals to parties before the board. See text accompanying notes 443-44, 481-82 *infra*.

³⁵⁹ See, e.g., *DuBay v. Crane*, 240 Md. 180, 185, 213 A.2d 487, 489-90 (1965) (party must show peculiar damages not suffered by the whole community).

³⁶⁰ See 3 R. ANDERSON, *supra* note 33, §§ 21.08-.09; note 338 *supra*. But see *Scott v. Board of Adjustment*, 405 S.W.2d 55 (Tex. 1966) ("Any taxpayer" means any taxpayer, regardless of whether such taxpayer has suffered any special damages to his property interests.).

³⁶¹ 3 R. ANDERSON, *supra* note 33, § 21.09.

³⁶² See, e.g., Note, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 MICH. L. REV. 1070 (1966); Note, *The "Aggrieved Person" Requirement in Zoning*, 8 WM. & MARY L. REV. 294 (1967).

testants who have standing to challenge an ordinance. This is so, as I have been at pains to demonstrate, because the statutory language is applicable only to appeals *to* and *from* the board of adjustment, neither of which is involved when the protestant brings his challenge directly in court, as, indeed, he is required to do in all jurisdictions except Pennsylvania.

Despite the facts that the protestant is relying on some original equitable or prerogative jurisdiction of the courts³⁶³ and that there is no statute describing him as a proper plaintiff, our courts have always assumed that standing to challenge an ordinance ought to be accorded on the same principles as standing to secure review of the board of adjustment. I find this to be one of the most interesting aspects of our zoning system. I think it evidences a deepseated distrust of the quality and fairness of our zoning administration coupled with a belief that land use controls should serve as an extension of individual property interests rather than as an instrument of public policy. I have discussed my views on this matter at length before,³⁶⁴ and do not intend to repeat them here.

I have since come across a case, however, where these issues were raised squarely. In *Chayt v. Maryland Jockey Club*,³⁶⁵ the City of Baltimore, at the club's request, rezoned some parcels adjacent to the club's race track from residential to commercial. Protestants, neighboring residential property owners, brought an action in equity seeking a decree invalidating the amendatory ordinance and an injunction against the issuance of any permits. The trial court denied relief. On appeal, the protestants urged four objections: (1) that the city failed to hold a proper hearing on the amendment, (2) that the amendment was spot zoning, (3) that the city failed to refer the proposed amendment to the planning commission for its recommendations as required by city charter, and (4) that the amendment did not promote the public health, safety, and welfare, nor bear any reasonable relation to this purpose. The Maryland Court of Appeals considered and rejected the first three objections on the merits. It held that the hearing reasonably complied with the statute, that the amendment was not spot zoning because it merely confirmed a preexisting nonconforming use, and that the city charter was inapplicable because the amendment in question was introduced prior to its effective date.³⁶⁶ It is important to note that these three objections rested on statutory or charter requirements.

³⁶³ See text accompanying notes 47, 49-50 *supra*.

³⁶⁴ Krasnowiecki, *supra* note 16, at 55-63.

³⁶⁵ 179 Md. 390, 18 A.2d 856 (1941).

³⁶⁶ *Id.* at 393-94, 18 A.2d at 857-58.

(This point is obvious as to requirements (1) and (3), and the spot zoning objection is clearly related to the statutory requirement that zoning be "in accordance with a comprehensive plan," though, even today, it remains unclear whether the objection rises to a constitutional level.³⁶⁷) In any event, the only objection which was then thought to rest squarely on general constitutional principles was the fourth. The court refused to reach this objection on the merits, holding that the constitutional limitations on the police power apply "for the protection of the property restricted and not to give protection to surrounding property."³⁶⁸

This view is reminiscent of a leading English decision in which the court held that neighboring property owners must find their protection in the common law of nuisance. "The scheme of the Town and Country Planning legislation," the court said, "is to restrict development for the benefit of the public at large and not to confer new rights on any individual members of the public" ³⁶⁹ This viewpoint, which I find rather compelling in its simplicity, did not survive long in the United States. Our prevailing position found expression in *Wakefield v. Kraft*,³⁷⁰ which reversed *Chayt* with the following perfunctory statement:

Zoning is legislative action, passed in an effort to bring about the greatest good for the greatest number. Thus, when a legislative body in this collective, communal lawmaking restricts the use of property, those restricted are entitled to the reliance that all others similarly situated will be similarly restricted. A zoning ordinance may not do violence to this principle. This is to say that such an ordinance must not be unreasonable or discriminatory, or deny equal protection of law. Such an ordinance must not amount to the granting of a special privilege.³⁷¹

³⁶⁷ 1 R. ANDERSON, *supra* note 33, §§ 5.04-13. In *Kane v. Montgomery Twp. Bd. of Supervisors*, 93 Montg. Co. 275, 281 (Pa. C.P. 1970), *rev'd sub nom. Levitt & Sons, Inc. v. Kane*, 4 Pa. Commw. 375, 285 A.2d 917 (1972), the court does suggest that spot zoning may violate the state constitutional prohibition against "special legislation." This view, of course, would invalidate virtually all zoning amendments. In Pennsylvania, it has sometimes been employed to invalidate a zoning amendment that is designed to *stop* a proposed development. See *Commercial Properties, Inc. v. Peternel*, 418 Pa. 304, 211 A.2d 514 (1965); *Shapiro v. Zoning Bd. of Adjustment*, 377 Pa. 621, 105 A.2d 299 (1954). *Kane, supra*, is the first case that advances this constitutional objection to a zoning amendment designed to permit a proposed development.

³⁶⁸ 179 Md. 390, 395, 18 A.2d 856, 858 (1941).

³⁶⁹ *Buxton v. Minister of Housing & Local Government*, [1961] 1 Q.B. 278, 283 (1960). For a discussion of the case, see Krasnowiecki, *supra* note 16, at 62 n.39.

³⁷⁰ 202 Md. 136, 96 A.2d 27 (1953).

³⁷¹ *Id.* at 143, 96 A.2d at 29-30.

As I have noted earlier,³⁷² I believe that our entire zoning and planning system operates on a quota principle: it is a system which grants or withholds a license to monopolize the market. If we can abandon the myth that it is not, perhaps we can then devise a system that will serve the public interest. Meanwhile, our courts continue to accord standing to protestants, not because they are the appropriate guardians of the interests of the public at large,³⁷³ but because—and this has become the prevailing requirement of standing—they are injured “in a manner which is different from the adverse effects suffered by the public at large.”³⁷⁴

4. Ripeness and Justiciability: Time Limitations on Appeal to and from the Board of Adjustment

a. *Zoning Matters*

The SZEA prescribes a thirty-day time limitation on appeal from the decision of the board of adjustment and authorizes the board to adopt an appropriate time limitation for appeals to the board from the decision of the administrative officer.³⁷⁵ Typically, the time limitation prescribed by the board is thirty days. Courts have always been willing to extend these periods in favor of protestants who are able to demonstrate a compelling reason why their appeal was not timely filed—for example, some failure of notice.³⁷⁶ Furthermore, courts may be prepared to enjoin a development pursuant to an administrative permit but contrary to the ordinance even though the time for appeal to the board has expired.³⁷⁷

b. *Challenges to the Validity of an Ordinance*

In other jurisdictions, the time limitations on appeal to and from the board have no bearing on the proper timing of a protestant's challenge to the validity of an ordinance, since the board has no power to grant him any relief. In Pennsylvania, these statutory time limitations have played a very important role in zoning litigation because its courts took the extraordinary view that challenges to the validity of an ordi-

³⁷² See text accompanying notes 8, 13 *supra*.

³⁷³ This, in my view, would be a defensible position. See Krasnowiecki, *supra* note 16, at 55-63.

³⁷⁴ E.g., Bryniarski v. Montgomery County Bd. of Appeals, 247 Md. 137, 144, 230 A.2d 289, 294 (1967). See also notes 360, 362 *supra*.

³⁷⁵ SZEA, *supra* note 5, §7.

³⁷⁶ See text accompanying note 352 *supra*.

³⁷⁷ See text accompanying notes 349-51 *supra*.

nance must be presented initially to the board.³⁷⁸ Thus, in most jurisdictions, a challenge to the validity of an ordinance calls for the exercise of original jurisdiction by the courts, either by an action in equity or by a declaratory judgment. The statutes and rules of practice governing equitable actions and declaratory judgment proceedings do not contain any instructions concerning the proper timing of such actions as they relate to a zoning ordinance, subdivision ordinance, or any amendatory ordinance.³⁷⁹ So far as the statutory or procedural rules are concerned, the action may be commenced at any time, if it is otherwise timely and appropriate under general principles of law. What are these principles?

c. *How Early Can the Action Be Commenced?*

To put this question more specifically, may the protestant commence his action immediately after the effective date of the ordinance or amendment, or must he wait until some plans for a particular development are approved under the challenged provisions of that ordinance?

(i) "Discretionary" Controls

I have noted that if the challenged provisions call for the exercise of discretion or judgment, as opposed to a simple ministerial application of specific rules, after the submission of plans for a development, courts tend to delay review until plans have been submitted and some final action taken by the local government. In my earlier discussion of "landowner" complaints, I criticized the courts for their failure to recognize that there is no valid excuse for postponing review other than on the ground of ripeness and justiciability. A landowner should not be required to apply for a special exception, for subdivision approval, or for some other "option," if his claim is that the mandatory conditions contained in the ordinance are unreasonable or unauthorized by statute, or that the ordinance confers unbridled discretion on the approving authority. Certainly he should not be required to test the scope of the discretion by proceeding to formulate and submit final

³⁷⁸ See text accompanying notes 407-10 *infra*.

³⁷⁹ As previously noted, note 50 *supra*, in New Jersey, uniquely, the proper action is an action in lieu of prerogative writ, and the New Jersey rules do provide that this action must be commenced within 45 days "after the accrual of the right to review." N.J. CIV. PRAC. R. 4:69-6(a). A New Jersey court has held that this requires commencement of the action within 45 days after the zoning amendment becomes effective. *Kent v. Borough of Mendham*, 111 N.J. Super. 67, 267 A.2d 73 (App. Div. 1970). The scope of this decision, however, remains unclear.

plans when there is ample evidence of arbitrary treatment at some preliminary stage.³⁸⁰

These observations apply with equal if not greater force to the protestant. A court that refuses to review a special exception or some other optional provision of the zoning ordinance until a development is approved obviously overlooks the fact that potential development can cause immediate and irreparable harm to a neighboring property owner if, for example, he must sell or mortgage his property before such development materializes. I believe that there are few cases on this subject because most protestants do not appreciate the danger until the special exception or other departure is at the point of approval. There is, however, one case that demonstrates the problem. In *Cochran v. Planning Board*,³⁸¹ the protestant sought review of a comprehensive plan which showed the property adjacent to his as a commercial site, although the site was then zoned for single-family residential use. The court refused to review the plan on the ground that it was merely an advisory document which might never result in the actual rezoning of the adjacent property. The court stated that the protestant did not suffer a present injury, but this statement appears to have been made as a conclusion of law, and not of fact, since the protestant had shown that a mortgage company would consider the mortgage value of his property to be reduced.³⁸² Assuming that protestants ought to be given standing to protect their private property rights (an assumption with which I personally have little sympathy³⁸³), I cannot understand the rationale of the *Cochran* case although I can understand the result if what the court really intended to do was to grant a summary judgment on the merits. (That, of course, is the true explanation of many otherwise inexplicable decisions.)

(ii) Standard Zoning

The above analysis is even more compelling when applied to standard zoning. Since standard zoning restrictions are designed to be self-administering, it should not be difficult to predict accurately what sort of development might occur under them. Furthermore, most protestant litigation involves amendments to the zoning ordinance adopted shortly before litigation commences, since, as I have noted, most significant development occurs not under long-standing restrictions but under an amendment granted on the threshold of develop-

³⁸⁰ See text accompanying notes 56-60 *supra*.

³⁸¹ 87 N.J. Super. 526, 210 A.2d 99 (L. Div. 1965).

³⁸² *Id.* at 538, 210 A.2d at 106.

³⁸³ Krasnowiecki, *supra* note 16.

ment.³⁸⁴ Most amendments, in turn, involve an interested developer who appears at the hearing with plans designed to show his development in the best possible light. Clearly, therefore, there is no reason to postpone review until plans are approved and ground is broken if the protestants desire to secure it immediately. I believe that courts in most jurisdictions are prepared to review zoning amendments whether or not any plans have been presented or approved, although I cannot state this conclusion with complete confidence because protestants typically either do not appreciate their danger until some final plans are approved and ground is broken, or they prefer to wait until the last minute for the bargaining advantage it gives them over developers struggling to meet deadlines. As a result, the cases are generally concerned with how late—not how early—the attack can be launched.

d. *How Late Can the Action Be Commenced?*

It is in permitting very late challenges to ordinances that our willingness to give standing to practically anyone who has the funds to hire counsel has its major impact on the quality and cost of development. The courts have proved unwilling to foreclose protestants even though they do not challenge the ordinance immediately after its adoption. The reason is that protestants are thought to be persons who have difficulty in visualizing the development or recognizing their peril until they see actual plans, and ground being broken.

(i) "Discretionary" Controls

If the protestant's objection to some discretionary control relates to matters which could well be resolved in his favor, there is some merit in postponing review until an application has been presented and there is an adequate indication of the form the local approval will take. In the case of a special exception, that point is not reached until final plans have been submitted to the board and it has issued its decision. In the case of other discretionary controls—certain subdivision or site planning controls, cluster and planned unit controls, and so forth—there are generally several stages in the approval process, each requiring progressively greater detail. There is no excuse in such cases for allowing the protestants to postpone their challenge to the governing ordinance until final approval is granted, if the preliminary approvals clearly present the issues the protestants wish to raise, unless the final

³⁸⁴ See text accompanying notes 8-13 *supra*.

approvals raise new issues—for example, where there is a material intervening modification in the plans.³⁸⁵

(ii) Standard Zoning

In light of the fact that most litigation involves controversial amendments to the zoning ordinance adopted after hearings which typically involve presentation of plans by a developer who is the moving force behind the amendment, it is hard to understand why the protestants should be allowed to postpone their challenge until building permits have been issued and ground has been broken. Yet the prevailing rule in most jurisdictions is that the action may be commenced within some reasonable time after building permits are issued, the time being measured by balancing the expenditures incurred by the developer against an apparent presumption that the protestants are not really aware of what is going on, in what amounts to the application of some vague principle of estoppel or laches.³⁸⁶ I think the main reason for the deference shown to the protestant's interests lies in the fact that many developers present one set of plans for purposes of securing the amendment and another for purposes of securing the permits. There is no question that the uncertainty created by the prevailing rule places unconscionable burdens on developers, those who finance them, and those called upon to underwrite their risks. The only question is whether there is a better way of handling the problem, so that the legitimate interests of protestants may be protected. I believe that the recent Pennsylvania reforms solve this problem well.³⁸⁷

II. THE PENNSYLVANIA PROCEDURES

A. *Under the Standard Acts*

1. Subdivision Control

Under the Pennsylvania version of the SPEA any person aggrieved by a decision disapproving a subdivision plan was given an appeal to the court of quarter sessions,³⁸⁸ but persons aggrieved by a decision approving a plan were overlooked. Apparently, from the

³⁸⁵ See text accompanying notes 403-10 *infra*.

³⁸⁶ See *Mazzara v. Town of Pittsford*, 34 App. Div. 2d 90, 93, 310 N.Y.S.2d 865, 869 (1970); *Toomey v. Norwood Realty Co.*, 211 Ga. 814, 818-19, 89 S.E.2d 265, 269 (1955). There are few cases on the subject, presumably because protestants generally do commence actions shortly after the amendment has been adopted or ground has been broken. With the exception of a single case in New Jersey, see note 379 *supra*, I can find no case requiring that the action be commenced immediately after the amendment is adopted.

³⁸⁷ See text accompanying notes 486-502 *infra*.

³⁸⁸ See text accompanying note 45 *supra*.

enactment of the appeal provision until its repeal by the MPC, no protestant was sufficiently aggrieved by an approval granted under a subdivision ordinance or by the subdivision ordinance itself to challenge this oversight. The dearth of cases on the point might lead one to conclude that protestants had standing neither to secure review of an approval nor to challenge the validity of a subdivision ordinance. Certainly, until *Taylor v. Moore*³⁸⁹ was decided in 1931, protestants could have argued that they may bring an independent action in equity under the Declaratory Judgments Act to challenge the validity of a subdivision ordinance. But *Moore* held that the powers of equity and other powers of the courts to issue prerogative writs did not enable courts to review a zoning ordinance, and that the statutory appeal to and from the board is the exclusive mode of review.

The failure of the statute to provide any appeal for the protestant could have been considered either a legislative denial of standing or a legislative oversight which left equity relief open. It is, however, not difficult to guess why I cannot find a Pennsylvania case in which these alternatives were argued. The standard subdivision ordinance contains little that could serve as a basis upon which protestants could attack its validity. All the important provisions from their point of view—for example, provisions relating to use and lot sizes—have traditionally been included in the zoning ordinance. Obviously, the recent movement in favor of cluster and planned unit development has undermined the validity of this conclusion. Consider, for example, the planned unit ordinance approved in *Cheney v. Village 2 at New Hope, Inc.*:³⁹⁰ should it be classified as a zoning ordinance or a subdivision and site planning ordinance, or both? Certainly, it gave the planning commission broad powers within ranges prescribed by the ordinance to decide where on a given site various uses would be located and what the lot sizes would be. The court ultimately sustained this zoning approach, not so much on the basis of the zoning statute as on the basis of the powers given to the planning agency under the subdivision control statute.³⁹¹ It is noteworthy that even in other states where equitable or declaratory relief has always been available to challenge the subdivision control powers there was no litigation until the powers

³⁸⁹ *Taylor v. Moore*, 303 Pa. 469, 154 A. 799 (1931).

³⁹⁰ 429 Pa. 626, 241 A.2d 81 (1968).

³⁹¹ *Id.* at 637-41, 241 A.2d at 87-89. In fact, protestants in *Cheney* sought direct review of the ordinance in equity as well as by appeal to the board from the issuance of a building permit. Direct review in equity had been foreclosed, so far as zoning ordinances were concerned, in *Krup v. City of Philadelphia*, 386 Pa. 350, 126 A.2d 399 (1956). One can only surmise that the protestants in *Cheney* were confused by the ambiguity of the ordinance, which rested both on zoning and on subdivision control powers.

came to be used to promote "flexibility" in the form of planned unit or cluster developments.³⁹²

2. Zoning

*Moore*³⁹³ ultimately resulted in the odd Pennsylvania rule that the landowner could not attack the validity of a zoning ordinance on substantive grounds except by pursuing an appeal to, and then from, the board. But this rule was not clearly understood until *Jacobs v. Fetzer* (1955)³⁹⁴ and *Home Life Insurance Co. v. Board of Adjustment* (1958),³⁹⁵ where the Pennsylvania Supreme Court confirmed it, and finally, in *Home Life*, explained how the landowner who is not seeking a variance is supposed to come before the board: he must wait until a building permit is denied. This was the "action of the administrative officer" the court selected (incorrectly, in my opinion) as a prerequisite for appealing to the board.³⁹⁶ The progress from *Taylor v. Haverford Township*³⁹⁷ to *Moore* and then through *Fetzer* and *Home Life* to *National Land & Investment Co. v. Easttown Township Board of Adjustment*³⁹⁸ is marked by the confusion which inevitably results when the courts see merit in an idea and attempt to pursue it despite the absence of a statutory scheme that will accommodate it and without any clear understanding of the policy or practical problems involved.³⁹⁹ The meritorious idea, of course, was to create an expert, impartial agency to serve as a type of master in chancery to hear the facts, make the initial findings, and prepare a suggested opinion for consideration by the courts. Unfortunately, the board of adjustment was sadly miscast in that role, and the statutory scheme of the Standard Act was never designed to accommodate that role.

The same faulty reasoning that took the courts from *Haverford Township* and *Taylor v. Moore* through *Jacobs v. Fetzer* and *Home Life* to *National Land* also took them from *Huebner v. Philadelphia Savings Fund Society*⁴⁰⁰ through *Knup v. Philadelphia*⁴⁰¹ to *Roeder*,

³⁹² See, e.g., *Chrinko v. South Brunswick Twp. Planning Bd.*, 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963); *Hiscox v. Levine*, 31 Misc. 2d 151, 216 N.Y.S.2d 801 (Sup. Ct. Suffolk Co. 1961).

³⁹³ 303 Pa. 469, 154 A. 799 (1931).

³⁹⁴ 381 Pa. 262, 112 A.2d 356 (1955).

³⁹⁵ 393 Pa. 447, 143 A.2d 21 (1958).

³⁹⁶ *Id.* at 453, 143 A.2d at 24.

³⁹⁷ 299 Pa. 402, 149 A. 639 (1930).

³⁹⁸ 419 Pa. 504, 215 A.2d 597 (1965).

³⁹⁹ See text accompanying notes 129-208 *supra*.

⁴⁰⁰ 127 Pa. Super. 28, 192 A. 139 (1937).

⁴⁰¹ 386 Pa. 350, 126 A.2d 399 (1956).

and most recently, to *Levitt & Sons, Inc. v. Kane*.⁴⁰² In *Huebner*,⁴⁰³ decided after *Moore*, the protestants took a standard zoning district amendment directly to court in an action in equity. PSFS, which was the beneficiary of the amendment, argued that plaintiffs had no standing because the statute gives standing to "persons aggrieved" only when there has been an error by an administrative officer or when the board grants a variance or a special exception. The action of the city council is not reviewable, PSFS argued, because "an owner of a property may devote it to any legitimate use he sees fit, subject to restriction by the public authorities under the police power."⁴⁰⁴ Therefore, "plaintiffs' standing to complain is confined to an unreasonable restriction upon their own property."⁴⁰⁵ Instead of rejecting this argument on the basis of a broad policy statement similar to that embraced by the Maryland court when it overruled *Chayt*⁴⁰⁶ in *Wakefield v. Kraft*,⁴⁰⁷ the Pennsylvania court employed a different theory to grant standing. The board, the court noted, is an agency of the city. If the legislature intended to grant standing to secure review of the actions of the agent (the board), it obviously intended to accord standing to secure review of the actions of the principal (the city council). By this dubious bit of reasoning, Pennsylvania law was brought into conformity with the prevailing opinion that protestants have standing to attack legislative zoning decisions.

So matters stood until *Fetzer*⁴⁰⁸ began to channel all litigation to the board. A year later, in *Knup v. Philadelphia*,⁴⁰⁹ the court held that the protestants must wait until a change in zoning manifests itself in some action of the "administrative officer" before they can challenge the change and that such action must first be appealed to the board. Interestingly, the court in *Knup* thought that a clerk's action in recording the change on the city zoning map would constitute sufficient action to trigger the appeal.⁴¹⁰ This suggestion passed unnoticed by most practitioners—probably because outside Philadelphia no formal steps are taken to conform the zoning map—and in the suburban areas the practice grew up of waiting until the building permit issued.

⁴⁰² 4 Pa. Commw. 375, 285 A.2d 917 (1972).

⁴⁰³ 127 Pa. Super. 28, 192 A. 139 (1937).

⁴⁰⁴ *Id.* at 32, 192 A. at 140.

⁴⁰⁵ *Id.*

⁴⁰⁶ 179 Md. 390, 18 A.2d 856 (1941).

⁴⁰⁷ 202 Md. 136, 142-43, 96 A.2d 27, 29-30 (1952). See text accompanying notes 370-71 *supra*.

⁴⁰⁸ 381 Pa. 262, 112 A.2d 356 (1955).

⁴⁰⁹ 386 Pa. 350, 126 A.2d 399 (1956).

⁴¹⁰ The court in *Knup* refers with approval, *id.* at 356, 126 A.2d at 401-02, to *Barth v. Gorson*, 383 Pa. 611, 119 A.2d 309 (1956), which held that the clerk's action triggers the appeal.

As I have noted, the idea of sending litigants to the board was not necessarily a bad one, although it would have been much better if the board had more expertise and represented a broader constituency. The requirement that the protestants wait until the building permit issues, however, made very little sense. Although the protestants' problems under the Pennsylvania procedure have a very different character from those of the landowner, the landowner's problems analyzed in my earlier discussion provide a useful framework for comparison.

3. Problem 1: Zoning Matters: Exhaustion

I would not wish to pass judgment on the motives of most protestants, but developers generally view them as persons who have no better purpose than to stop all development and who utilize the law's delay as a method for achieving that end. If that is their sole motive, the procedure in *Knupp* did not aid them because it did not significantly lengthen the period during which the developer would be involved in litigation, measured from the date the proceedings are commenced before the board to the date when a final decision is rendered by the court of first instance (the court of common pleas). If anything, the evidentiary hearing can be commenced earlier and concluded more rapidly before the board, and the court can therefore decide the case earlier, unless it is prepared to take extensive additional evidence. The fact that the proceeding before the board could not be commenced until a building permit had been issued did expose the developer to unwarranted delay and uncertainty in some cases.⁴¹¹ But the building permit rule did not create any greater delay or uncertainty than the prevailing rule in other jurisdictions that a challenge to the substantive validity of an ordinance may be commenced by protestants in court at any time, subject only to some vague principle of laches.⁴¹² Indeed, the Pennsylvania rule was superior because it set an outside limit for commencement of an action by making it subject to the thirty-day limitation for taking an appeal to the board from the issuance of the building permit (the "action of the administrative officer").

While the rule in *Knupp* did not significantly alter the uncertainties and period of time involved in settling challenges and, therefore, did not aid those protestants intent on delay, it worked the same disservice to the protestant's interests as it did to the landowner's in that it would frequently require the protestants to present their case twice—once at the hearing on an amendment, and once later before the board. This

⁴¹¹ See text accompanying notes 417-19 *infra*.

⁴¹² See note 386 *supra* & accompanying text.

was so because protestant litigation invariably involves a zoning amendment and not some longstanding zoning provision.⁴¹³

4. Problem 2: Appeal from the Board: Scope of Review

Unlike the landowner, who may frame his case before the board as a request for a variance only to discover later that he has a meritorious challenge to the validity of the underlying ordinance,⁴¹⁴ the protestant who comes before the board generally knows that his complaint draws the validity of the ordinance into question. There is one exception. Many Pennsylvania municipalities now utilize a two-step approach in authorizing the types of uses—for example, apartments—protestants find most objectionable. They will amend their ordinance to permit the use only by special exception. It is conceivable in such a case that protestants will put on evidence at the hearing on whether to grant a special exception but neglect to indicate that they are challenging the validity of the underlying amendment. If the board, on such a record, grants the special exception and the protestants appeal, and if the court does not take additional evidence, *Wynnewood Civic Association v. Board of Adjustment*⁴¹⁵ suggests that the court cannot consider the validity of the ordinance. I have indicated earlier why that suggestion makes a good deal of sense, particularly when applied in the protestants' case.⁴¹⁶ (I do not think that the problem considered here is likely to arise in a variance case since, in such a case, the protestant usually appears to defend the existing zoning restrictions and to oppose the variance.)

5. Problem 3: Estoppel to Raise Constitutional Objections

This problem is also likely to arise only in a special exception case. Even there, it is highly unlikely that a protestant would think it worth his while to appeal the grant of a special exception without, at the same time, raising his objections to the underlying ordinance, nor is it likely that he would overlook the existence of such an objection.

6. Problem 4: Waiting Until the Building Permit Issues: Standing, Ripeness, and Justiciability

The rule established in *Knup*⁴¹⁷ certainly vindicated the reasons given in *Huebner*⁴¹⁸ for granting protestants standing to challenge a

⁴¹³ See text accompanying notes 8-13, 384 *supra*.

⁴¹⁴ See text accompanying notes 163-69 *supra*.

⁴¹⁵ 406 Pa. 413, 419-21, 179 A.2d 649, 652-53 (1962).

⁴¹⁶ See text accompanying notes 159-60 *supra*.

⁴¹⁷ *Knup v. City of Philadelphia*, 386 Pa. 350, 126 A.2d 399 (1956).

⁴¹⁸ See text accompanying notes 403-07 *supra*.

zoning ordinance or, in the far more common case, a zoning amendment. By requiring that protestants wait until the amendment manifests itself in an "action of the administrative officer" and then appeal that action to the board, the court conferred the status of "persons aggrieved"⁴¹⁹ and the right to appeal upon the protestants *sub silentio*. This sort of reasoning is typical of the Pennsylvania cases in this area.

I have noted⁴²⁰ that, in other jurisdictions, the time limitations for appeal to and from the board have no bearing on the timing of the protestants' challenge to the validity of a zoning ordinance, except in the case where the challenge is addressed to the special exception provisions of an ordinance and the protestants have waited, or were required to wait, until a special exception was granted. In such a case the thirty-day period prescribed for the statutory appeal from the board's decision might be applied to the claims of invalidity, at least in those jurisdictions whose courts are prepared to consider the validity of an ordinance in the same proceeding. In Pennsylvania, of course, the time limitations for appeal to and from the board became automatically applicable to all challenges involving the substantive validity of a zoning ordinance. Thus they came to control both questions, discussed earlier, of how early and how late the challenge may or ought to be commenced.

a. *How Early May a Challenge Be Commenced?*

(i) Subdivision and "Discretionary" Zoning Controls

For the reasons discussed earlier,⁴²¹ there is no Pennsylvania decision indicating whether protestants have standing to challenge the substantive validity of a subdivision control ordinance, or if they do, whether they must wait until a subdivision is approved and a building permit issued and then appeal to the board. In theory, the board had no jurisdiction over any matters that did not arise under the SZEA or the zoning ordinance.⁴²² Subdivision matters, therefore, would have been outside its jurisdiction, and it would have made no sense at all for the Pennsylvania courts to extend to subdivision matters the requirement that protestants wait until the building permit issued. One can certainly argue that it is difficult for the courts to come to grips with the objections until some plans are approved, particularly if the ordinance involves considerable discretion and the protestants' case is addressed more to the quality of the permissible development than to the absence of adequate standards. Subdivision and land development

⁴¹⁹ See text accompanying notes 336, 358-62 *supra*.

⁴²⁰ See text accompanying notes 379-86 *supra*.

⁴²¹ See text accompanying notes 388-92 *supra*.

⁴²² See note 347 *supra* & accompanying text.

controls, however, now frequently involve several stages at which extensive plans are considered and preliminary or tentative approvals granted. A protestant who is satisfied that he has a case on the basis of the preliminary or tentative approval should not be required to wait until final approval is granted or until a building permit issues, the latter having nothing to do with the subdivision or land development control ordinance. Similarly, the developer should not be exposed to the threat of a protestant's challenge up to the time he commences construction unless there is a good reason for such a rule.

Very similar observations apply to cluster and planned unit zoning controls. If there is a procedure requiring the developer to present preliminary plans for approval, and the protestants want to commence a challenge to the ordinance when the preliminary plans have been approved, there is little excuse for making them wait until final plans are approved, and no excuse whatever for making them wait until a building permit issues. Yet, under the old Pennsylvania procedure, they were required to wait until the building permit issued because there was supposedly no other excuse for sending the case to the board. Why could not a preliminary approval have been considered the "action of the administrative officer" necessary for an appeal? No case deals with this question in any intelligent manner, but I can offer the following analysis: preliminary approvals in a discretionary zoning framework generally involve site planning matters. It might therefore have been argued that site planning matters arise under the subdivision enabling legislation, not the SZEA, so that these approvals cannot constitute "actions of the administrative officer" which the board has jurisdiction to review under the latter statute. The obvious weakness of this argument is that the building permit, which has been considered the one administrative action sufficient to allow an appeal, itself represents an action taken under a source of regulatory power other than the SZEA.

The ordinary exception case is different: there is typically no preliminary approval, and the first official action comes when the board grants the special exception after a hearing on the final plans. Arguably, therefore, an attack on the special exception provision must await this action.

(ii) Standard Zoning

While review of discretionary controls may arguably be postponed until a development has been given some official approval to ensure ripeness, there is little excuse for postponing review of a standard zoning amendment. The courts should have no problem in visualizing the

type of development that is authorized. Yet, under the Pennsylvania procedure, the building permit again became decisive because there was no other "action of the administrative officer" from which an appeal could be taken to the board.

b. *How Late May the Challenge Be Commenced?*

(i) Subdivision and "Discretionary" Zoning Controls

In the preceding paragraphs, I have made the point that when preliminary or tentative plans sufficient to define the controversy have been approved and the protestants are prepared to challenge the governing ordinance, there is no good reason for requiring them to wait until final plans are approved. It does not follow, however, that protestants should be *required* to challenge the governing ordinance at a preliminary approval stage if they are unwilling to do so. Where the ordinance is not self-administering but calls for some further interpretation, or the exercise of discretion upon submission of plans for a specific development, the reasons for allowing protestants to wait until some plans are approved are twofold: (1) to give the local authorities an opportunity to define the scope and meaning of the ordinance provisions in a particular case so as to put those provisions in a reviewable posture, and (2) to ensure that the protestants have had adequate notice of the existence of the ordinance and understand its scope and meaning as it affects their interests.

Reason (1) is the same reason why protestants should not be allowed to challenge the ordinance before some plans are approved, involving the questions of ripeness and how early a challenge may be commenced. Reason (2) governs the question of how late the challenge may be commenced, and its central concern is notice. Protestants should not be cut off unless they have had actual or constructive notice of the nature and extent of their peril. I have noted that subdivision control ordinances have not come before the courts in Pennsylvania because they have not hitherto involved any flexibility on the issues involving the allocation of a site to various permitted uses that most concern the protestant. These issues are more likely to arise under the planned unit development approach, and I shall discuss the timing problems associated with it later.⁴²³ I think these problems will be better understood if we apply the rationale of reason (2) to the standard subdivision control ordinance and its approval procedures, even though some uses permitted thereunder are not those protestants ordinarily desire to attack. Would reason (2) be satisfied if the protestant

⁴²³ See text accompanying notes 425, 452-55, 486-93 *infra*.

were required to attack a subdivision control ordinance within thirty days of a preliminary approval? Obviously not. Under the laws of most jurisdictions, including Pennsylvania,⁴²⁴ there is no statutory requirement that standard subdivision or site planning approval be administered in stages running from submission of sketch plans through final plans. Many local governments (some, I believe, with the express intention of wearing the developer down to a compromise) have adopted ordinances requiring application at several stages preceding final approval. The important point, however, is that these stages are not prescribed by statute (if, indeed, they are authorized at all) and therefore there is no uniformity as to what degree of specificity is required in the plans at each stage, and, more importantly, there is no uniform requirement that final plans accord with the plans that were approved at a preliminary stage. There is always the possibility that the plans given final approval will incorporate a substantial intervening modification. If, therefore, protestants are to be given actual or constructive notice of the nature and extent of the ordinance and of the peril to which their interests have been exposed, it could make sense in the standard subdivision and site planning control case to postpone the date when time begins to run on their complaint, until final approval is given.

The same observations apply to planned unit developments that are put together under the Standard Acts. Ordinarily, the zoning ordinance will leave considerable choice to the approving authority as to the precise character and extent of the permitted uses and their precise location on the site. Ordinarily, too, the first permit will issue when only a small portion of the development has been reduced to final plans, the balance of the development having been approved on the basis of some preliminary plans. This was the case in *Cheltenham Township Appeal*.⁴²⁵ The protestants challenged the validity of an ordinance permitting a planned unit development on a floating zone basis. Their attack relied on *Eves v. Zoning Board of Adjustment*,⁴²⁶ which appeared to hold that floating zones are not authorized by the SZA. But the protestants did not commence their attack on the ordinance until the first residential section had almost been completed and permits were issued for the second section, a shopping center. The

⁴²⁴ Unlike article VII (Planned Unit Development), PA. STAT. ANN. tit. 53, §§ 10,701-12 (Supp. 1972), article V of the MPC, which deals with standard subdivision and site planning controls, does not require a two-stage, preliminary-final approach to plan approval. Section 503(1) merely authorizes such an approach. *Id.* § 10,503(1). Furthermore, there is no requirement that any notice be given of a request for the approval of plans or that any hearing be held on such approval. See *id.* § 10,508, as amended, Act No. 93, § 4 (Pa. Legis. Serv. 243 (1972)) (effective Aug. 1, 1972).

⁴²⁵ 413 Pa. 379, 196 A.2d 363 (1964).

⁴²⁶ 401 Pa. 211, 164 A.2d 7 (1960).

court found that the development was a unified scheme in which each section was related to the others, and held that the protestants' failure to appeal the issuance of the building permit for the first section precluded them from challenging the ordinance. This extension of the building permit rule was fair enough if the protestants had adequate notice of the permitted development from the approved preliminary plans that were on file when the first building permit issued, and if the plans were not, in fact, materially altered through final approval.⁴²⁷ But it seems harsh to apply the rule where the plans are materially altered because protestants might have difficulty in visualizing what alternatives are authorized under the ordinance, particularly when the possibilities are many and complex. However, it should not be forgotten that protestants are given standing to challenge an ordinance primarily to afford them protection against the adverse impact of improperly authorized development.⁴²⁸ If a change in the plans does not significantly alter the originally expected impact of the development in that regard, it should not be considered material for purposes of allowing a belated challenge to the ordinance.

(ii) Standard Zoning

Potential protestants should not experience difficulty visualizing what sort of development may occur under a standard zoning classification, and, therefore, there is no reason to require that protestants postpone their challenge until some further action—usually the issuance of a building permit—is taken toward development. But is there any sense in *allowing* them to wait until the building permit issues? Delay can only be justified when its purpose is to give the protestant an opportunity to become aware of the nature and extent of the peril to which his interests are exposed. The building permit is hardly an appropriate device for this purpose.

One of the weaknesses of the building permit rule is that notice of the issuance of the permit is not required to be given. (It seems strange that the Pennsylvania courts have been able to overlook this

⁴²⁷ In fact *physical* changes on subsequent sections were not made in *Cheltenham*. The protestants apparently believed, on the basis of the testimony given at the hearings on the preliminary plans, that the proposed stores in the shopping center would be occupied by companies other than those which ultimately occupied them. This raises the interesting question whether the individual characteristics of the intended occupants are legitimate considerations in the zoning and planning process and therefore legitimate elements of a claim that the plan has been substantially modified. In principle, zoning and planning are not supposed to deal with the personal characteristics of the users. See note 9 *supra*. I wonder, however, if that is true in fact. If the court was aware of the protestants' real concerns, it preferred not to address itself to them.

⁴²⁸ See text accompanying note 374 *supra*.

obvious deficiency.) As I have argued, the zoning system in general is not designed to encourage development. Most development, particularly intensive development of the sort suburban protestants abhor, occurs only as a result of a change made on the threshold of development. Zoning changes that are objectionable to protestants are generally accompanied by such a furor that protestants might well be expected to anticipate the subsequent issuance of a building permit. This excuse for the building permit rule, of course, does not work in the case of the "midnight amendment." These are rare situations because developers and local authorities know that the strength of their case in court depends in part on giving the amendment some semblance of regularity and an aura of deliberation. Moreover, there is every reason to believe that courts will extend the time for protestants who can demonstrate that they had little or no opportunity to learn of the amendment.⁴²⁹ Thus the Pennsylvania courts have been justified in expecting that protestants will anticipate the issuance of the building permit. From the developer's point of view, the building permit rule has one advantage over the estoppel rule which prevails in other jurisdictions:⁴³⁰ it gives him a relatively reliable indication of the period during which he may be exposed to suit.

Nevertheless, the building permit rule represents a very crude resolution of the problem, from both the developer's and protestant's perspectives. To illustrate: consider first the case of an amendment that rezones a small parcel of ground for a single apartment building. The parcel fronts on improved public streets and is fully serviced by public water and sewer so that little or nothing need be done to it by way of subdivision (or, rather, site planning) improvement or approval before the building permit issues. At the hearing on the amendment the developer presents sketch plans and a three-dimensional model of his building, designed to show his proposed project in the best light possible. I have argued that if protestants are prepared to challenge the amendment on this basis they should be allowed to do so, but the fact is that the developer is not bound by his sketch plans and model once he secures the amendment. I have said elsewhere that an inexcusable feature of our zoning system is that it prefers to disregard the reality in favor of a myth that amendments are general and impersonal.⁴³¹ Because of the possibility that the actual apartment

⁴²⁹ See text accompanying note 352 *supra*.

⁴³⁰ For a discussion of the estoppel rule, see note 386 *supra* & accompanying text.

⁴³¹ See Krasnowiecki, *supra* note 7, at 6-7, 10-11. The proposals made there have been incorporated in Krasnowiecki, *supra* note 13, §208(2) (read together with §206, particularly §§206(9), (11), (12)) & commentary.

building will be different from the one presented at the hearing on the amendment, there is some excuse for allowing the protestants to wait until the actual design of the apartment is known. The courts, of course, prefer to take the case in this posture, because what they are usually doing in such a case is making an emotive judgment about how good or bad the actual apartment is.⁴³²

Next consider the case where the rezoning involves a larger project containing several buildings, calling for new streets, sewer and water facilities, extensive grading, and other site planning improvements. If, as often happens, the developer cannot obtain a building permit until he has secured final subdivision approval, recorded final plans, and posted appropriate bonds or cash escrows for the subdivision improvements, is there any sense in the building permit rule here? In my opinion, there is none whatever. Granted, the local public authorities might be prepared to aid the developer by allowing him to secure final subdivision approval on a small section of his project and issuing a building permit for one building, but in that case the building permit requirement does not have the desired effect of giving protestants an adequate perception of what all the relevant portions of the project are going to look like.

The triggering mechanism for a protestant's suit must be one which establishes a reasonable compromise between the legitimate interests of the developer and the need to give protestants adequate notice of what the actual development on the site will be. In establishing the mechanism that ought to start the time for appeal running, it is important to keep in mind that each type of zoning involves different issues. For example, plans for one single-family detached home are hardly relevant to the issues that are raised when a community rezones eight hundred acres from R-1 (one-acre minimum lot) to R-2 (one-half-acre minimum lot). Yet recently the Montgomery County Common Pleas Court refused to consider a protestant's challenge to such a rezoning until the permit for one house had issued.⁴³³ It is in this area that the new Pennsylvania procedural reform has made the greatest improvement.

⁴³² If the developer can use the building plans on any other site, the building permit requirement does not appear too onerous. But surely it does have an adverse effect on the quality of design. Why should a sensible developer invest in a unique design that relates only to a particular site before he feels reasonably safe from legal attack? That is why I have argued that the standing which we so readily accord protestants does have a bearing on the quality of development. See Krasnowiecki, *supra* note 16. Professor Mandelker, for all his technical criticisms of my views on this subject, see D. MANDELKER, *THE ZONING DILEMMA: A LEGAL STRATEGY FOR URBAN CHANGE* 80-84 (1971), has not addressed this consideration.

⁴³³ *Kane v. Montgomery Twp. Bd. of Supervisors*, 93 Montg. Co. 275 (Pa. C.P. 1970), *aff'd on this point sub nom. Levitt & Sons, Inc. v. Kane*, 4 Pa. Commw. 375, 285 A.2d 917 (1972).

B. *The Municipalities Planning Code*

I shall not dwell at length on the changes made in the above procedures by the original provisions of the MPC. As already noted, section 910⁴³⁴ provided an independent reason for requiring a litigant to take his substantive objections to an ordinance before the zoning hearing board. Since appeal from the errors of the "zoning officer" was clearly limited to errors under a *valid* ordinance,⁴³⁵ the rationale for requiring that protestants postpone challenges to the ordinance until the zoning officer acts was gone. Furthermore, since the MPC created a separate office of the "zoning officer," any relationship between what he does and a building permit became entirely accidental.⁴³⁶

Section 915(2) of the MPC, however, did contain a provision relating to the proper time for commencing a proceeding before the zoning hearing board, stating that no one may commence such a proceeding

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 a reversal or to limit the approval in any manner.⁴³⁷

This was clearly directed toward the protestant's suit, since the landowner would not wish to limit his own approval. An "application for development" was defined broadly by section 107(2) to include any application, preliminary or final, required to be filed and approved prior to start of construction or development, including not only building permits but also subdivision or site planning approvals.⁴³⁸

The intent of section 915(2) was, I believe, to cover the case of the project that needs subdivision or site planning approval. The intent was to start the thirty-day period running at the time of the earliest approval, which in most cases would be when a preliminary site planning approval was granted, since a successful attack on the zoning ordinance would invariably negate such an approval. In a project

⁴³⁴ PA. STAT. ANN. tit. 53, §10,910 (Supp. 1972), as amended, Act No. 93, §14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972). See notes 211-20 *supra* & accompanying text.

⁴³⁵ PA. STAT. ANN. tit. 53, §10,909 (Supp. 1972).

⁴³⁶ *Id.* §10,614, as amended, Act No. 93, §12 (Pa. Legis. Serv. 245 (1972)) (effective Aug. 1, 1972). For a discussion of problems in defining the role of the "administrative officer" under the SZEA, see notes 27-36 *supra* & accompanying text.

⁴³⁷ PA. STAT. ANN. tit. 53, §10,915(2) (Supp. 1972) (emphasis added). Act No. 93, §17 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972) has modified this provision. See text accompanying notes 489-92 *infra*.

⁴³⁸ PA. STAT. ANN. tit. 53, §10,107(2) (Supp. 1972).

where no preliminary site planning approval is necessary, the time would start running upon final approval, and in a project where no site planning approval whatever is required, the time would start running from the issuance of the building permit, which, presumably, would be the next relevant "approval." I do not think that the language "preliminary or final" was intended to give the protestants a choice between the two, since the test of section 915(2) is whether the proceeding commenced by them is designed to limit or reverse "the approval" (referring to both the preliminary and the final approvals). A suit commenced thirty days after a final approval, in a case where a preliminary approval has already been granted, is clearly designed to limit or reverse that preliminary approval, a result which section 915(2) prohibits.

Section 915(2) was applicable only to cases which should be taken to the zoning hearing board under the standards established in section 910, which identified two types of cases that should circumvent the board and go directly to court: (1) those in which there is no disputed question of fact or interpretation, and (2) those in which the disputed questions of fact or of interpretation have been "hitherto properly determined at a hearing before another competent agency or body."⁴³⁹ I have already discussed the uncertain meaning of these exceptions;⁴⁴⁰ suffice it to say that, if there were cases that could be taken directly to court, there was no provision in the MPC governing the earliest or the latest time at which the challenge could be filed in court. Section 915(2) was operative only when the challenge was within the jurisdiction of the board under the standards set forth in section 910. Matters were further confused by the fact that, despite the direct appeals contemplated by section 910, old article X simply ignored the possibility that any case might come to court other than on appeal from the board.⁴⁴¹

The effects of the original provisions of the MPC upon the problems that existed under prior Pennsylvania procedure may be analyzed as follows.

1. Problem 1: Exhaustion

The problem of exhaustion was exacerbated because now no one was certain whether he should go before the board under section 910, or try his fortunes directly in court.

⁴³⁹ *Id.* § 10,910, as amended, Act No. 93, § 14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972).

⁴⁴⁰ See text accompanying notes 211-27 *supra*.

⁴⁴¹ See text accompanying note 220 *supra*.

2. Problems 2 and 3: Review of the Board: Estoppel

The landowner's problems here—whether he should raise his constitutional objections to the ordinance before the board, and whether he may be estopped if he does not raise them on appeal to the court—have not been serious ones in the case of the protestant,⁴⁴² and the MPC made no change in the prior law on these two questions. The MPC, however, did make one change that was significant: section 1003⁴⁴³ limited appeals from the board to the court to “any party before the board.” Unlike some statutes in other jurisdictions that have adopted this limitation, the MPC made an effort in section 908(3)⁴⁴⁴ to describe how one becomes a “party” before the board.

3. Problem 4: Waiting Until the Building Permit Issues: Standing, Ripeness, and Justiciability

Though there were now some cases that could be taken directly to court, there was again no provision regarding what plaintiffs would have standing. Section 914,⁴⁴⁵ however, did describe the plaintiffs who could challenge the validity of an ordinance in a proceeding before the board under section 910, and that description included “persons aggrieved.” It should have been clear from sections 914 and 910 (if not from section 909) that an appeal from the administrative officer was no longer necessary for protestants to challenge an ordinance before the board. Thus the last remaining reason for the building permit requirement was gone. But in *Roeder v. Hatfield Borough Council*,⁴⁴⁶ the Pennsylvania Supreme Court proved that it, too, was confused by the changes made by the MPC. In *Roeder*, the plaintiffs challenged the rezoning of a small parcel to an apartment classification on spot zoning grounds. They did not wait for a building permit or for any other approval (such as a site planning approval) but went directly to the zoning hearing board under section 910. The board dismissed the proceedings on the ground that no issue of fact or interpretation was

⁴⁴² See text accompanying notes 414-16 *supra*.

⁴⁴³ PA. STAT. ANN. tit. 53, § 11,003 (Supp. 1972), as amended, Act No. 93, § 18 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972). The new law, however, has reenacted the limitation in §§ 1005(c), 1007, and has clarified the definition of “parties” in § 908(3) by requiring appearance in writing on a form prescribed by the board.

⁴⁴⁴ PA. STAT. ANN. tit. 53, § 10,908(3) (Supp. 1972), as amended, Act No. 93, § 14 (Pa. Legis. Serv. 246 (1972)) (effective Aug. 1, 1972).

⁴⁴⁵ *Id.* § 10,914, as amended, Act No. 93, § 17 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972).

⁴⁴⁶ 439 Pa. 241, 266 A.2d 691 (1970).

involved.⁴⁴⁷ This was sheer nonsense, since the spot zoning objection usually cannot be disposed of by consideration of the zoning ordinance on its face. The protestants appealed this ruling to the court of common pleas, and that court held that the appeal was not timely because it should have been commenced within thirty days of the effective date of the ordinance, relying upon section 1010 of the Borough Code.⁴⁴⁸ This was also nonsense, because section 1010 dealt with challenges relating to the process of enactment (for example, lack of either proper advertising or proper hearing)—a type of challenge, incidentally, which the MPC mistakenly appeared to channel to the zoning hearing board in section 915(1).⁴⁴⁹ The protestants' challenge in *Roeder* had nothing to do with the process by which the zoning amendment was enacted. Therefore, on appeal, the Pennsylvania Supreme Court vacated the decision of the common pleas court, but did not remand the case to the court for entry of a decision ordering the zoning hearing board to hear the complaint on the merits. On the contrary, it held that "this controversy will not be ripe for adjudication until either someone is granted a building permit pursuant to Ordinance No. 191 [the challenged ordinance] or action is taken pursuant to MPC, § 801."⁴⁵⁰ The reference to section 801, which concerns landowner appeals, was clearly a general comment on procedure and not relevant to the protestants' procedural posture in *Roeder*.⁴⁵¹ Thus, the holding amounts to a reinstatement of the building permit rule for protestants. But if protestants had waited for the issuance of a building permit, the developer might have had a perfect defense under the thirty-day limitation (measured from the date of any approval) set forth in section 915(2). This anomaly did not occur in *Roeder* only because the court tacitly, and I think, erroneously, accepted the board's refusal to hear the case under section 910. Probably the best judicial resolution of the problem would have been a holding that the case would be ripe for adjudication when a building permit was issued under ordinance 191 or when an approval was obtained as provided in section 915(2).

Reliance on section 915(2) if that section were interpreted as I have argued it should be,⁴⁵² would have made it possible for the developer to trigger the running of the protestant's appeal period by

⁴⁴⁷ The board was relying on the language of PA. STAT. ANN. tit. 53, § 10,910 (Supp. 1972). See text accompanying notes 211-13 *supra*. This has now been changed. See note 471 *infra*.

⁴⁴⁸ PA. STAT. ANN. tit. 53, § 46,010 (1966), as amended, PA. STAT. ANN. tit. 53, § 46,010 (Supp. 1972).

⁴⁴⁹ See text accompanying notes 466-67 *infra*.

⁴⁵⁰ 439 Pa. at 249, 266 A.2d at 696.

⁴⁵¹ See text accompanying notes 236-42 *supra*.

⁴⁵² See text accompanying notes 437-38 *supra*.

securing a preliminary site planning approval for his apartment, and without having to go to the final approval or the building permit stage. As it was, *Roeder* caused the common pleas court in *Kane v. Montgomery Township Board of Supervisors*,⁴⁵³ to place Levitt and Sons in the unenviable position of not being able to trigger an appeal to test its eight-hundred-acre single-family detached housing project until it could secure the issuance of a building permit for one home, an event which could not take place until final subdivision plans had been drawn for the entire project and extensive subdivision improvements had been made or guaranteed. *Roeder*, of course, also compromised any arguments that might have been made to the effect that protestants must challenge a planned residential development ordinance within thirty days of a preliminary plan approval.⁴⁵⁴ Section 711 of the MPC clearly requires that, unless the final plans accord with the preliminary plans, another evidentiary hearing must be held.⁴⁵⁵ To permit protestants to wait until final approval or until the first building permit issues places an inexcusable burden on the developer. The protestants should be foreclosed if they do not challenge the ordinance on the basis of the preliminary plan, unless the plan is substantially modified later.

4. Problem 5: Protestants Intent on Delay: Stays and Preliminary Injunctions

I have not discussed this problem before although it was present under the old practice under the Standard Acts. It was noted earlier that Pennsylvania had adopted the provisions of the SZEAA which worked an automatic stay in the action of the "administrative officer" when that action was appealed to the board of adjustment.⁴⁵⁶ By channeling all zoning challenges through the board, the Pennsylvania courts gave protestants intent on stopping construction an advantage: they could avail themselves of the automatic stay while the matter was pending before the board without having to seek a preliminary injunction which would require posting of bond.⁴⁵⁷

Although section 916⁴⁵⁸ of the MPC continued the old provision for automatic stay, it made an effort to protect the developer against

⁴⁵³ 93 Montg. Co. 275 (Pa. C.P. 1970), *aff'd on this point sub nom. Levitt & Sons, Inc. v. Kane*, 4 Pa. Commw. 375, 285 A.2d 917 (1972).

⁴⁵⁴ See text accompanying notes 424-28 *supra*.

⁴⁵⁵ PA. STAT. ANN. tit. 53, § 10,711 (Supp. 1972).

⁴⁵⁶ *Id.* § 58,107 (1957) (first class townships); *id.* § 67,007 (1957) (second class townships); *id.* § 48,207(e) (1966) (boroughs). All of the foregoing provisions relating to stay on appeal to the board were repealed and replaced by § 916 of the MPC, effective Jan. 1, 1969, *id.* § 10,916 (Supp. 1972).

⁴⁵⁷ PA. R. CIV. P. 1531.

⁴⁵⁸ PA. STAT. ANN. tit. 53, § 10,916 (Supp. 1972).

challenges by protestants merely intent on delay. An applicant whose permission to develop has been stayed by protestants who have filed a proceeding before the board was given the right to petition the court having jurisdiction over zoning appeals for an order requiring the protestants to post bond as a condition of continuing the proceeding. Whether the petition should be granted and the amount of the bond were questions left to the discretion of the court. As a method of policing the insubstantial and capricious challenge, the bonding provision of section 916 raises serious constitutional questions since, if the court acts favorably on the developer's petition, it cuts off the right to a hearing before the board in the event protestants cannot post bond.⁴⁵⁹ In any event, a court can be expected to call for an extensive evidentiary hearing before acting on the petition, and the resulting delay is likely to be greater than if the developer simply submitted to the hearing before the board, particularly if his petition is denied. If it

⁴⁵⁹ See *Lindsey v. Normet*, 405 U.S. 56 (1972); *Williams v. Shaffer*, 222 Ga. 334, 149 S.E.2d 668 (1966), *cert. denied*, 385 U.S. 1037 (1967). Both cases involved the constitutionality of state statutes governing summary landlord and tenant eviction procedures. In *Williams*, a Georgia statute authorized a justice of the peace to issue a warrant of possession without according any hearing to the tenant unless the tenant was able to tender bond. Certain tenants challenged the statute as applied to them on equal protection grounds, alleging that they were unable to post the required bond because of poverty. The Supreme Court of Georgia dismissed their appeal on the grounds that the issues were moot, the tenants having moved. The United States Supreme Court denied certiorari, but Justice Douglas filed a dissenting opinion in which he was joined by Chief Justice Warren. 385 U.S. 1037. In their view, the issues were not moot and they felt that the Georgia statute was bad because its "effect . . . is to grant an affluent tenant a hearing and to deny an indigent tenant a hearing. The ability to obtain a hearing is thus made to turn on a tenant's wealth." *Id.* at 1039. Douglas then cited *Griffin v. Illinois*, 351 U.S. 12 (1956).

I have argued that a state could constitutionally close the doors of the courts to protestants who complain about the zoning applicable to another's land. See *Krasnowiecki*, *supra* note 16; text accompanying notes 373-74 *supra*. For a contrary view, see D. MANDELKER, *supra* note 432. But my argument, if accepted, would not parry the thrust of the dissenting opinion in *Williams*, which points out: "Though a State may not constitutionally be required to afford a hearing before its process is used to evict a tenant, having provided one it cannot discriminate between rich and poor." 385 U.S. at 1040. However, protestants in zoning cases typically are not among the ranks of the poor, and the Supreme Court has not been prepared to declare a statute invalid on its face merely because, in some cases, it may disadvantage the poor. See *Swarb v. Lennox*, 405 U.S. 190 (1972). Yet in *Lindsey v. Normet*, 405 U.S. 56 (1972), it did strike down an appeal bond which was fixed by statute at twice the amount of the rent expected to accrue during the appeal, as unduly burdensome to the poor. The Court pointed out that the fixed amount of the bond is unrelated to the merits of the case "for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Id.* at 78.

Since § 916, PA. STAT. ANN. tit. 53, § 10,916 (Supp. 1972), leaves the question whether a bond should be required and the amount of the bond to the discretion of the judge, it does not seem to be subject to this objection. However, *Lindsey* involved an appeal bond required after a full evidentiary hearing before a justice of the peace. A bond designed to cut off a frivolous claim *before* a full evidentiary hearing is held on the merits (such as is contemplated by § 916), may be a different matter. Indeed, I doubt that any judge would be prepared to rule on the bond except after a substantial evidentiary hearing, which is why I argue in the text that the approach in § 916 is useless for avoiding delay.

is granted, protestants might still be able to post bond, or alternatively, appeal the court's order on constitutional grounds.

The wiser course for the developer, therefore, would be to submit to the stay and the hearing before the board. The developer could find nothing further in the original provisions of the MPC that might offer protection against the insubstantial and capricious challenge. He could expect that after the hearing before the board the protestants would appeal to court. Indeed, such an appeal was almost inevitable since, under the original section 910⁴⁶⁰ of the MPC, the board was given no power to decide the validity of the challenged ordinance, but only the power to find the relevant facts. To be sure, original section 1008⁴⁶¹ followed the prior law to the effect that an appeal from the board would no longer operate to stay an approved development and that protestants would have to request a supersedeas and post bond to accomplish a stay, but the developer could take little comfort in this fact. The Supreme Court of Pennsylvania has squarely held that failure to request a supersedeas cannot prejudice the protestants on the merits of the appeal, even if the developer goes ahead and builds in the interim.⁴⁶² Although I believe that continuing construction is likely to influence the court in favor of the developer on the merits and that the above statement, while legally correct, is not necessarily accurate in fact, few developers can be expected to test my belief in this matter—I doubt even that I would have the courage to test my belief by professional advice to that effect. In a typical case, furthermore, the decision whether to go ahead rests not with the developer but with his mortgagees, and they are not accustomed to taking this sort of risk. Therefore, without any additional help from protestants by way of injunction or supersedeas, development usually comes to a standstill when a zoning challenge is filed, and it stays that way until all appeals have been exhausted.

Thus, the original provisions of the MPC did little to prevent protestants from coercing the developer through delay—indeed, it provided some new modes of coercion. Although it was clear before that protestants had to take their challenge to the board in all cases, this became less clear because of the peculiar language of section 910 discussed earlier.⁴⁶³ Protestants could exploit this uncertainty by filing a

⁴⁶⁰ PA. STAT. ANN. tit. 53, § 10,910 (Supp. 1972), *as amended*, Act No. 93, § 14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972).

⁴⁶¹ *Id.* § 11,008, *as amended*, Act No. 93, § 18 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972).

⁴⁶² *Riccardi v. Plymouth Twp. Bd. of Adjustment*, 393 Pa. 337, 142 A.2d 289 (1958).

⁴⁶³ *See* text accompanying notes 439-41 & discussion of *Roeder* and *Kane* in text accompanying notes 446-53 *supra*.

direct appeal in court, thus provoking lengthy arguments with the developer as to whether the case should be before the court or before the board, as in *Roeder* and *Kane*.

As we shall see, the new article X of the MPC again makes clear that protestants must take *all* their substantive objections to an ordinance first to the board. A developer should therefore never join issue with the protestants on substantive questions raised in court unless they have first been considered in a hearing before the board; *Roeder*⁴⁶⁴ and *Kane*⁴⁶⁵ are striking examples of what happens otherwise.

C. The New Article X

The reader may wish to review the introductory discussion of the new article X in part 1 of this Article, which is assumed in the following analysis.

1. Challenges to an Ordinance on Procedural Grounds: Section 1003

The omission of section 915(1) from new section 915⁴⁶⁶ and the adoption of section 1003⁴⁶⁷ make clear that questions of an alleged defect in the process of enactment do not go to the board but directly to court, and that they must be raised by appeal filed not later than thirty days from the effective date of the ordinance.

2. Errors of the Administrative Officer: Section 909

The new article X and other conforming revisions do not change section 909,⁴⁶⁸ nor do they alter the point, which should have been taken into consideration in *Roeder*,⁴⁶⁹ that appeals from the zoning officer are not designed to test the validity of the ordinance under which he operates, but merely to correct his errors under that ordinance.

3. Substantive Challenge to an Ordinance: Section 1005

Section 1005,⁴⁷⁰ when read together with the changes made in section 910, abandons the attempt to draw any distinction between chal-

⁴⁶⁴ *Roeder v. Hatfield Borough Council*, 439 Pa. 241, 266 A.2d 691 (1970).

⁴⁶⁵ *Levitt & Sons, Inc. v. Kane*, 4 Pa. Commw. 375, 285 A.2d 917 (1972).

⁴⁶⁶ Act No. 93, §17 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972), amending PA. STAT. ANN. tit. 53, §10,915(1) (Supp. 1972).

⁴⁶⁷ *Id.* §19 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §11,003 (Supp. 1972).

⁴⁶⁸ PA. STAT. ANN. tit. 53, §10,909 (Supp. 1972). See notes 434-35, 211-35 *supra* & accompanying text.

⁴⁶⁹ 439 Pa. 241, 266 A.2d 691 (1970).

⁴⁷⁰ Act No. 93, §19 (Pa. Legis. Serv. 249 (1972)), formerly PA. STAT. ANN. tit. 53, §11,005 (Supp. 1972).

lenges which are addressed to the validity of an ordinance on its face and those which involve disputed questions of fact or of interpretation. Under section 1005, protestants must submit all substantive attacks on an ordinance to the zoning hearing board for a report thereon, and section 910⁴⁷¹ instructs the board to hear such submissions, to decide all contested questions of interpretation, and to make findings on all relevant issues of fact for the purpose of completing a record for appeal. After submitting their challenge to the board, protestants may take the matter to court by appeal filed not later than thirty days after notice of the report of the board is issued.⁴⁷²

Thus, unlike section 1004,⁴⁷³ which allows the landowner to go directly to court after his request for a curative amendment is denied, protestants who object to an ordinance, including a curative amendment that has been granted, are required to proceed first before the board, thus restoring the old Pennsylvania procedure. Section 1005, however, does make an effective effort to solve the old problems associated with that procedure.

4. Problem 1: Exhaustion

By restoring the old Pennsylvania procedure, section 1005, of course, has avoided the uncertainty which the intervening law created about whether a direct appeal to the court would lie. This also restored an old problem: if protestants present evidence at a hearing on a proposed amendment through counsel, the time and expense involved would be lost if the amendment is adopted, because the presentation would have to be repeated in a subsequent challenge before the board. This problem, I think, takes on more serious proportions in two types of cases. The first is the case of the planned unit residential development where, even under the revised procedures, the protestants are permitted to wait until the conclusion of the evidentiary hearings on the preliminary plans for a development. Although the original version of section 910 sought to allow a direct appeal to the courts, now, under section 1005, this type of case goes first to the board. The second type is the case where the landowner has applied for a curative amendment

⁴⁷¹ PA. STAT. ANN. tit. 53, §10,910 (Supp. 1972), as amended, Act No. 93, §14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972), was amended by dropping the language which gave jurisdiction to the board when the validity of the ordinance involved an "issue of fact or interpretation." The new language simply states that the board has jurisdiction over any appeal under §1005. For a discussion of the problem posed by the old language in *Roeder*, see text accompanying note 447 *supra*.

⁴⁷² Act No. 93, §19 (Pa. Legis. Serv. 250 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §11,005 (Supp. 1972).

⁴⁷³ See text accompanying notes 273-90 *supra*.

in accordance with section 1004(1)(b), which under section 609.1 calls for a full-scale evidentiary hearing before the governing body.⁴⁷⁴ If the governing body denies the amendment, the landowner can appeal this action directly to court, but if the governing body grants the amendment, the protestant must take the matter to the board under section 1005.

I believe the reason for this result is twofold. If the purpose of postponing review in favor of protestants is to give them an opportunity to recognize the nature and extent of their peril, the hearing on the preliminary plans under section 708 (PRD)⁴⁷⁵ or the hearing on the curative amendment under sections 1004(1)(b) and 609.1⁴⁷⁶ arguably does not suffice, since the protestants who appear at those hearings, it might be argued, are still hopeful that approval will be denied or that the amendment will not be adopted. The new article X, in section 1010,⁴⁷⁷ continues the old rule that a court need not take additional evidence. To require protestants to go directly to court from a PRD approval or from the adoption of a curative amendment might therefore have the effect of foreclosing them from presenting any further evidence, evidence which, though material, they had failed to marshal at the hearings below because they were still hopeful of a favorable political resolution of the question. In light of my general attitude toward the protestants' role in zoning matters, I do not subscribe to this reasoning, but I can see its appeal. The second reason for directing protestants to the board in every case is that it is then possible to state an understandable rule regarding the proper timing of their challenge.

In any event, section 1005⁴⁷⁸ attempts to eliminate unnecessary repetition of evidence which has already been incorporated in the record of a hearing under section 708, or at a hearing on a curative amendment under section 1004(1)(b). Upon the motion of any party, the board is authorized to accept such record as part of the record before it, but such acceptance does not preclude the board from taking additional evidence. It is to be hoped that the board will not reject additional material evidence or refuse to call a witness up for cross-examination by any new party, because if it does so an objection

⁴⁷⁴ See text accompanying notes 273, 275-77 *supra*.

⁴⁷⁵ PA. STAT. ANN. tit. 53, § 10,708 (Supp. 1972).

⁴⁷⁶ See text accompanying notes 273, 275-77 *supra*.

⁴⁷⁷ Act No. 93, § 19 (Pa. Legis. Serv. 252 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,010 (Supp. 1972).

⁴⁷⁸ *Id.* (Pa. Legis. Serv. 250 (1972)), formerly PA. STAT. ANN. tit. 53, § 11,005 (b) (Supp. 1972).

based on principles of due process may conceivably arise as to the validity of the procedure authorized under section 1005(c).

5. Problems 2 and 3: Review of the Board: Estoppel

As already noted, protestants have not encountered serious problems in these areas.⁴⁷⁹ The new provisions have made only one change in prior practice. The original provisions of the MPC limited standing to appeal from the board to "parties before the board."⁴⁸⁰ Original section 908(3) attempted to define "parties" in a way which proved confusing in practice. The new law continues the requirement that the appellant must have been a "party" before the board,⁴⁸¹ but it modifies section 908(3) so as to avoid the confusion produced by the language of the original provision.⁴⁸²

6. Problem 4: Waiting Until the Building Permit Issues: Standing, Ripeness, and Justiciability

The fact that original section 910 of the MPC, which gave jurisdiction to the zoning hearing board over most substantive challenges to an ordinance, did not describe such challenges as appeals, the fact that section 914, which gave standing to "persons aggrieved," did not describe such challenges as appeals but rather as "proceedings to challenge an ordinance under section 910," the fact that section 909, which did speak of appeals from the zoning officer, plainly limited such appeals to errors not including the validity of an ordinance—all these facts

⁴⁷⁹ See text accompanying notes 414-16, 442 *supra*.

⁴⁸⁰ See note 443 *supra* & accompanying text.

⁴⁸¹ Act No. 93, § 19 (Pa. Legis. Serv. 250-51 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §§ 11,005(c), 11,007 (Supp. 1972), describes appellants as "parties aggrieved" by the decision of the board.

⁴⁸² The change made in original § 908(3), PA. STAT. ANN. tit. 53, § 10,908(3) (Supp. 1972), may be indicated as follows (deletions in brackets, additions in italics):

(3) The parties to the hearing shall be *the municipality*, any person [who is entitled to notice under clause (1) without special request therefor] *affected by the application* who has made timely appearance of record before the board, and any other person *including civic or community organizations* permitted to appear by the board. *The board shall have power to require that all persons who wish to be considered parties enter appearances in writing on forms provided by the board for that purpose.*

Aside from providing a way of identifying the parties in the last sentence, I doubt that the changes represent any significant substantive change. The reference to civic and community organizations, however, suggests that they may now be able to pursue an appeal without joining an individual property owner, if the board allows them to appear as such; otherwise, the presence of an individual property owner who is "affected" may be required. Compare *Cleaver Appeal* (No. 1), 11 Ches. Co. 236 (Pa. C.P. 1961), with *Bern Twp. Citizens Ass'n v. Zoning Bd. of Adjustment*, 60 Berks Co. 85 (Pa. C.P. 1968). I suspect that the courts will construe "affected" in the same manner as "aggrieved," in view of the fact that new §§ 1005(c) & 1007 still refer to appellants as "parties aggrieved." See R. RYAN, *supra* note 28, § 9.4.2 (discussing standing under the "aggrieved" characterization).

failed to persuade the court in *Roeder*⁴⁸³ that the old building permit requirement no longer has any statutory basis and that it should be discarded.

Furthermore, the court ignored the provisions of section 915(2),⁴⁸⁴ which, unless the party has not had adequate notice, precludes any proceeding before the board designed to reverse or limit any approved "application for development, preliminary or final" unless commenced within thirty days after approval. "Application for development" includes not only an application for a building permit but also applications for subdivision and site planning approval dealt with in sections 107(2), (7), (11), (16), and (21).⁴⁸⁵ A challenge to the zoning ordinance will invariably reverse or limit a subdivision or site planning approval given on the basis of the challenged zoning. And it is surely possible to argue that an attempt to reverse or limit a final subdivision or site planning approval automatically constitutes an attempt to reverse or limit a preliminary approval if the final approval is not materially different from the preliminary approval. I shall note some difficulties with this argument shortly. In any event, the court in *Roeder* did not advert to section 915(2), possibly because the board, believing that the plaintiffs should go directly to court, had refused to take jurisdiction. The defendant developer did not urge the court otherwise, thus taking his case outside the purview of section 915(2), which was applicable only to proceedings before the board.

The new section 1005⁴⁸⁶ and the revised section 910⁴⁸⁷ now make clear that all protestants must first proceed before the board. Accordingly, all protestant challenges are now governed by the time limitations prescribed in section 915.⁴⁸⁸ Further, section 915 has been amended. Subsection (1), which limited the time for raising procedural objections to an ordinance, has been reenacted in modified form as section 1003. This change recognizes that subsection 915.1 was in the wrong place, since procedural objections to an ordinance go directly to court and not to the board under article X.

Subsection 915(2) (new section 915) has been substantially modified. As already noted, the original language of subsection 915(2),

⁴⁸³ See text accompanying notes 446-51 *supra*.

⁴⁸⁴ See text accompanying notes 437-38 *supra*.

⁴⁸⁵ PA. STAT. ANN. tit. 53, §§10,107(2), (7), (11), (16), (21) (Supp. 1972), as amended, Act No. 93, §1 (Pa. Legis. Serv. 239 (1972)) (effective Aug. 1, 1972).

⁴⁸⁶ Act No. 93, §19 (Pa. Legis. Serv. 249-50 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §11,005 (Supp. 1972).

⁴⁸⁷ *Id.* §14 (Pa. Legis. Serv. 247 (1972)), amending PA. STAT. ANN. tit. 53, §10,910 (Supp. 1972).

⁴⁸⁸ *Id.* §17 (Pa. Legis. Serv. 248 (1972)), amending PA. STAT. ANN. tit. 53, §10,915 (Supp. 1972).

which has not been modified by the current revision, could have been interpreted to require that protestants file their challenge to the governing ordinance within thirty days of any preliminary subdivision or site planning approval, including any preliminary approval of a PRD.⁴⁸⁹ The difficulty with this interpretation, however, is that standard subdivision or site planning approval procedures do not call for any notice of the approval and, more importantly, do not require that the final plans necessarily conform to the preliminary plans. A requirement that protestants challenge the governing zoning ordinance on the basis of plans which need not be noticed and which may be modified substantially before final approval seems harsh as a matter of fair play, if not due process. This objection, however, does not apply to the preliminary planned residential development plan which has been approved under section 709, because notice and a hearing thereon are mandatory under section 708, and under section 711 the final plans must accord with the preliminary plans unless a new hearing is held.⁴⁹⁰ Accordingly, the revised section 915 provides that failure of anyone other than the landowner (that is, failure of the protestants) to appeal the preliminary approval of a PRD precludes him from appealing the final approval "except in the case where the final submission substantially deviates from the approved tentative or preliminary approval."⁴⁹¹

The PRD case is unique, however, because of the formal procedure for preliminary approval required by the MPC. Thus the question would still remain whether, in a standard zoning, subdivision, or land development case, the challenge can be triggered by a preliminary subdivision or site planning approval or by any other preliminary approval short of the issuance of a building permit. Accordingly, the new section 1005(b)⁴⁹² establishes its own triggering mechanism. It provides that the landowner who is uncertain whether the ordinance under which he proposed to build will escape challenge may advance the date from which time for challenging the ordinance will run by submitting plans to the zoning officer for his preliminary opinion as to their compliance with the ordinance. If the zoning officer's preliminary opinion is that the plans will comply, notice of this fact must be published for two successive weeks, describing the proposed development in general terms and identifying the site. In addition, it must inform

⁴⁸⁹ See text accompanying notes 437-38 *supra*.

⁴⁹⁰ PA. STAT. ANN. tit. 53, §§ 10,708-09, 10,711 (Supp. 1972).

⁴⁹¹ The word "tentative" is used because in article VII (Planned Residential Development), PA. STAT. ANN. tit. 53, §§ 10,701-12 (Supp. 1972), preliminary approvals are referred to as "tentative" approvals, whereas in article V (Subdivision and Land Development), *id.* §§ 10,501-16, and elsewhere in the MPC, the word "preliminary" is used.

⁴⁹² Act No. 93, § 19 (Pa. Legis. Serv. 250 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,005 (Supp. 1972).

the public of the place and times where the plans and other materials submitted may be examined. Section 1005(b) concludes by providing, when read together with section 915, that time begins to run on any challenge to the ordinance from the second publication date of the notice and that, upon expiration of thirty days, protestants are precluded from challenging the ordinance unless the plans that are finally approved substantially deviate⁴⁹³ from the plans originally submitted to the zoning officer.

From the developer's point of view, the most important part of section 1005(b) is the paragraph which provides that the plans that will trigger the running of the challenge period "shall not be required to meet the standards prescribed for preliminary, tentative or final approval or for the issuance of a building permit so long as they provide reasonable notice of the proposed use or development and a sufficient basis for a preliminary opinion as to its compliance" with the ordinance in question.

Two matters deserve further mention. First, section 1005⁴⁹⁴ and article X throughout refer to an "ordinance or map" as the subject matter of any challenge. Section 1001⁴⁹⁵ makes clear that the ordinance or map referred to in other parts of article X means an ordinance or map adopted pursuant to the MPC, including subdivision and land development ordinances and planned unit residential development ordinances as well as zoning ordinances. Under prior law it was unclear whether protestants had standing to challenge a subdivision ordinance;⁴⁹⁶ section 1005 gives them standing by virtue of the words "ordinance or map." It should also be noted that section 913.1⁴⁹⁷ allows the board of zoning appeals to hear challenges to other ordinances pertaining to the same development. In view of the facts that section 913.1 is specifically mentioned in section 1004(1)(a) dealing with "landowner appeals" but is not mentioned in section 1005 dealing with "aggrieved persons'" appeals, and that it refers to the plaintiff before the board as "the applicant," presumably meaning the applicant for development, I doubt that it extends to protestants' appeals.

Second, in section 1005, protestants are described more precisely as "persons aggrieved by a use or development permitted on the land of another," thus depending on prior case law relating to who qualifies

⁴⁹³ The words "substantially deviates" should, I suggest, be interpreted in the light of the discussion in the text accompanying note 428 *supra*.

⁴⁹⁴ Act No. 93, § 19 (Pa. Legis. Serv. 249-50 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,005 (Supp. 1972).

⁴⁹⁵ *Id.* (Pa. Legis. Serv. 248 (1972)), amending PA. STAT. ANN. tit. 53, § 11,001 (Supp. 1972).

⁴⁹⁶ See text accompanying notes 388-90 *supra*.

⁴⁹⁷ Act No. 93, § 16 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972).

as a "person aggrieved."⁴⁹⁸ Section 1005 does not mention officers or agencies of the municipality as proper plaintiffs before the board, although section 914⁴⁹⁹ does. This omission is not important under section 1005, since it is unlikely that an officer of the municipality would ever be motivated or given standing to challenge one of its ordinances. However, it should be noted that the old Standard Act provisions of the Second Class Township Code gave standing to any "officer of the township affected,"⁵⁰⁰ which could have been read to give standing to an officer of an adjacent municipality. Since section 914 does not include the word "affected," the standing of an adjacent municipality will, in any event have to be established, if at all, under the broader designation of "persons aggrieved."⁵⁰¹

One further word is necessary about the definition of the plaintiffs—"persons aggrieved by a use or development permitted on the land of another"—given in section 1005. This definition obviously includes the landowner who is complaining about an ordinance that allows a use or development on the land of another which he perceives to affect adversely the value or enjoyment of his own neighboring land. The definition, however, could be interpreted to include residents and non-residents who are complaining about permitted development on some or all of the land owned by others in the municipality on the ground that it does not make provision for certain types of housing, and such persons could conceivably obtain standing under section 1005 on the ground that they are seeking such housing. I doubt, however, that section 1005 adds anything to the arguments that can be made in favor of standing for such persons *dehors* the statute.⁵⁰²

7. Review of Orders and Decisions, Not Involving the Validity of an Ordinance: Section 1007⁵⁰³

Protestants seeking "review or correction of a decision or order of the governing body or of any officer or agency of the municipality

⁴⁹⁸ See R. RYAN, *supra* note 33, §9.4.2 (1970).

⁴⁹⁹ Act No. 93, §17 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972), amending PA. STAT. ANN. tit. 53, §10,914 (Supp. 1972).

⁵⁰⁰ Law of May 27, 1949, No. 569, art. 31, §3107, [1949] Pa. Laws 2122 (repealed 1968).

⁵⁰¹ Standing of an adjacent municipality has been denied in *City of Greenbelt v. Jaeger*, 237 Md. 456, 206 A.2d 694 (1965). *But cf.* *Maryland-Nat'l Capital Park & Planning Comm'n v. McCaw*, 246 Md. 662, 229 A.2d 584 (1967); *Town of Somerset v. County Council*, 229 Md. 42, 181 A.2d 671 (1962). The question was left open in *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954), but recently answered in favor of standing in *Borough of Roselle Park v. Township of Union*, 113 N.J. Super. 87, 272 A.2d 762 (L. Div. 1970).

⁵⁰² See text accompanying notes 294-99 *supra*.

⁵⁰³ Act No. 93, §19 (Pa. Legis. Serv. 251 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §11,007 (Supp. 1972).

. . . on the ground that such decision or order is not authorized by or is contrary to the provisions of an ordinance or map" are instructed to submit their objections to the board, unless the board itself has made the decision or order in question, in which case an appeal lies to the court. Because protestants are required to submit questions of validity of an ordinance (other than questions of procedural defects) to the board under section 1005, there should be no difficulty whatever in integrating the objections raised in the rare case where protestants object both to an ordinance and to a decision made under it. Section 1007 makes clear that the timing provisions of section 915⁵⁰⁴ apply. Thus, for example, when the landowner has employed the triggering procedure of section 1005(b),⁵⁰⁵ the protestants may challenge both the validity of the ordinance and the preliminary opinion of the zoning officer in one proceeding before the board, within the same time limitations prescribed under section 915. Of course, if the landowner has employed the triggering procedure of section 1005(b), protestants cannot wait for the issuance of a building permit or for some final approval before raising the question of validity of the ordinance before the board. They could, under section 1007, however, still appeal a subsequent approval of plans or the issuance of a building permit if such approval is unauthorized or contrary to the provisions of the ordinance, even though they could not challenge the ordinance itself unless the subsequently approved plans substantially deviate from those which had been submitted under section 1005(b).⁵⁰⁶

8. Problem 5: Protestants Intent on Delay: Stays, Supersedeas, and Defects in the Process of Enactment

Section 916 of the MPC, which provides for an automatic stay in development while a proceeding is pending before the board, has not been changed, and the original provision allowing the developer to petition the court for a bond remains intact. As already noted, that provision does little to prevent insubstantial and capricious challenges.⁵⁰⁷ However, new section 1008(4)⁵⁰⁸ extends the bonding provision of section 916 to appeals from the board to the court. When protestants

⁵⁰⁴ *Id.* §17 (Pa. Legis. Serv. 248 (1972)), amending PA. STAT. ANN. tit. 53, §10,915 (Supp. 1972). See text accompanying notes 488-92 *supra*.

⁵⁰⁵ Act No. 93, §19 (Pa. Legis. Serv. 250 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §11,005 (Supp. 1972). See text accompanying note 492 *supra*.

⁵⁰⁶ See text accompanying note 493 *supra*.

⁵⁰⁷ See text accompanying notes 455-65 *supra*.

⁵⁰⁸ Act No. 93, §19 (Pa. Legis. Serv. 251-52 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, §11,008 (Supp. 1972).

appeal the decision of the board, the developer is given the right to petition the court for an order requiring them to post bond, whether or not they seek a stay. The doubts I have voiced about the constitutionality of the bonding provision in section 916 do not seem to apply to section 1008(4),⁵⁰⁹ because it comes into play after protestants have had an opportunity for a full-scale evidentiary hearing before the board. Furthermore, section 910 has been amended so that the board is now required to decide all questions, including questions of constitutional or other substantive validity of the ordinance.⁵¹⁰ The court will thus have the benefit of that decision as well as a full record and findings of fact by the board when it exercises its discretion under section 1008(4).

Sections 1005⁵¹¹ and 1007⁵¹² clearly require that protestants take all substantive complaints to the board, thus eliminating the confusion as to where such complaints must start. If protestants now raise substantive questions regarding the validity of an ordinance or any administrative action thereunder directly in court, the local government and developer should not join issue with protestants on these questions, since to do so will only bring about further delay and an inevitable remand to the board. There may be one exception: despite the language of section 1007, it probably leaves intact the original jurisdiction of the courts to enjoin development which is in clear violation of an ordinance or order.⁵¹³

9. Insubstantial Procedural Challenges Under Section 1003⁵¹⁴

Section 1003 confirms the old practice that defects in the process of enactment of an ordinance must be raised directly in court within thirty days of its effective date. Protestants have been known to take advantage of this practice by filing a "procedural" challenge to the ordinance and securing a preliminary injunction against the issuance of building permits or other approvals, thus making it impossible for the developer to trigger their inevitable substantive appeal until the procedural challenge has been disposed of. A court should not permit this to happen. It should not issue any injunction that would prevent the local government and the developer from taking action (for example, issuing a building permit or giving a preliminary opinion on

⁵⁰⁹ See note 459 *supra*.

⁵¹⁰ Act No. 93, § 14 (Pa. Legis. Serv. 247 (1972)) (effective Aug. 1, 1972), amending PA. STAT. ANN. tit. 53, § 10,910 (Supp. 1972).

⁵¹¹ See text accompanying notes 470-71 *supra*.

⁵¹² See text accompanying note 503 *supra*.

⁵¹³ See text accompanying notes 350-51 *supra*.

⁵¹⁴ Act No. 93, § 19 (Pa. Legis. Serv. 248 (1972)) (effective Aug. 1, 1972), formerly PA. STAT. ANN. tit. 53, § 11,003 (Supp. 1972).

plans under the new provisions of section 1005(b)) sufficient to trigger a substantive challenge. At the same time, upon the request of the local government or the developer, the court should continue the procedural challenge until the developer and the local government have taken the action necessary to trigger the substantive challenge and, if such a challenge is filed, until the board has heard and decided it, so that on appeal the whole matter can be consolidated for trial.⁵¹⁵

CONCLUSION

Our present system of land use control is based on two assumptions: first, that decisions about land use are best made on the local level, and second, that wisdom and certainty are best secured by requiring each local government to promulgate a set of self-administering rules which will control the development of the community into a remote future. This is not the place to quarrel with the first assumption. I do not, however, share the confidence of many others that extensive centralization will produce better or more humane results. Given the first assumption, the second is untenable. Local officials cannot be expected to follow that path. As a result, very little land is ever zoned to make development economically feasible. Most development is, in fact, produced by a series of changes and relaxations in the preestablished rules. Yet the distribution of powers and functions on the local level is geared to the opposite assumption, as are the procedures and substantive standards of judicial review. It makes sense to treat zoning changes as legislative in nature if they are infrequent occurrences representing a major change in policy governing a broad class of landowners, but it makes no sense to do so if zoning changes are the regular medium through which most new development occurs and are probably not changes in policy but merely expressions of a policy which remains unstated. It makes sense to give standing to persons who wish to protest a zoning change if development can readily take place under the existing zoning. It makes less sense to do so if most development requires such changes, since it exposes most new development to two risks: the risk of nonpersuasion on the political level, and the risk of a lawsuit at the hands of those, no matter how few, who remain unpersuaded. Under these circumstances the expense of displeasing any segment of the local community is so great that few can be expected to incur it. It makes sense to assign control

⁵¹⁵ I hope that the new provisions will not be interpreted so as to continue the old practice of requiring that procedural challenges to a zoning ordinance be docketed in the criminal division of the common pleas courts. See text accompanying notes 264-68 *supra*. Even if that practice is continued, the courts should not pose any obstacles to consolidation of procedural and substantive challenges.

of various elements of development (height, bulk, and use; buildings and materials; site planning and improvement) to several separate agencies on the local level if those elements frequently occur in isolation. It makes no sense if they commonly occur in a single development package, and require a change in the local governing rules to boot. More important, it makes no sense to subject the decisions of each agency to separate procedures under standards which assume that they all play separate roles.

This is not the place to expand on some ideas I have about how the existing system might be reformed. In general, I would abandon the idea that development should be controlled by self-administering rules looking to a remote future. Instead, I would authorize local governments to do what they really want to do and what they are in fact doing under the present system: employ quotas, phase their growth, and defer decisions upon much of the detail of development until they have had an opportunity to examine each particular proposal. This would require local governments to articulate the policies and standards under which they really operate. Indeed, I would go further and prohibit or restrict their authority to employ the self-administering type of control, so that local governments would be forced to make their policies and standards explicit. It seems to me that this in itself would force local governments to coordinate their respective planning efforts because, in the absence of such coordination, it will become very difficult to defend the rationality of any particular policy or set of standards. So far as judicial review is concerned, I would consider creating an expert reviewing agency with a state or regional planning base, but for various practical reasons I would start by employing that agency as an arm of the local trial courts to act as a referee in cases of regional import.

The current Pennsylvania reforms bring the procedures for judicial review more nearly in line with the realities of modern development. But it is probably vain to hope that judicial review can have a significant impact on the character of land use control so long as the basic system remains unchanged.

APPENDIX

Reproduced below are selected provisions of the Municipalities Planning Code Amendments, Act No. 93, House Bill No. 1129, Printer's No. 2639 (effective Aug. 1, 1972), *amending* Pennsylvania Municipalities Planning Code (MPC), PA. STAT. ANN. tit. 53, §§ 10,101-11,202 (Supp. 1972). The amendments are reported in full in Pennsylvania Legislative Service 238-53 (1972). The citations in brackets are to the forthcoming (1973) codification.

Section 10. The act is amended by adding a section to read:

Section 609.1 [PA. STAT. ANN. tit. 53, § 10,609.1]. Procedure Upon Curative Amendments.

A landowner who desires to challenge on substantive grounds the validity of an ordinance or map or any provision thereof, which prohibits or restricts the use or development of land in which he has an interest may submit a curative amendment to the governing body with a written request that his challenge and proposed amendment be heard and decided as provided in section 1004. The governing body shall commence a hearing thereon within sixty days of the request as provided in section 1004. The curative amendment shall be referred to the planning agency or agencies as provided in section 609 and notice of the hearing thereon shall be given as provided in section 610 and in section 1004. The hearing shall be conducted in accordance with subsections (4) to (8) of section 908 and all references therein to the zoning hearing board shall, for purposes of this section be references to the governing body.

Section 14. [Section 910 of the act is amended to read:]

Section 910 [PA. STAT. ANN. tit. 53, § 10,910]. Board Functions: Challenge to the Validity of Any Ordinance or Map.

The board shall hear challenges to the validity of a zoning ordinance or map except as indicated in section 1003 and subsection (1) (b) of section 1004. In all such challenges, the board shall take evidence and make a record thereon as provided in section 908. At the conclusion of the hearing, the board shall decide all contested questions and shall make findings on all relevant issues of fact which shall become part of the record on appeal to the court.

Section 16. The act is amended by adding a section to read:

Section 913.1 [PA. STAT. ANN. tit. 53, § 10,913.1]. Unified Appeals.

Where the board has jurisdiction over a zoning matter pursuant to sections 909 through 912, the board shall also hear all appeals which

an applicant may elect to bring before it with respect to any municipal ordinance or requirement pertaining to the same development plan or development. In any such case, the board shall have no power to pass upon the nonzoning issues, but shall take evidence and make a record thereon as provided in section 908. At the conclusion of the hearing, the board shall make findings on all relevant issues of fact which shall become part of the record on appeal to the court. The provisions of this section shall not apply to cities of the first and second class.

Section 17. [Section 915 of the act is amended to read:]

Section 915 [PA. STAT. ANN. tit. 53, § 10,915]. Time Limitations; Persons Aggrieved.

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.

The failure of anyone other than the landowner to appeal from an adverse decision on a tentative or preliminary plan pursuant to section 709 or from an adverse decision by a zoning officer on a challenge to the validity of an ordinance or map pursuant to section 1005(b) shall preclude an appeal from a final approval except in the case where the final submission substantially deviates from the approved tentative or preliminary approval.

Section 18. Article X of the act is repealed.

Section 19. The act is amended by adding an article to read:

ARTICLE X

Appeals

Section 1001 [PA. STAT. ANN. tit. 53, § 11,001]. Zoning Appeals.

The proceedings set forth in this article shall constitute the exclusive mode for securing review of any ordinance, decision, determination or order of the governing body of a municipality, its agencies or officers adopted or issued pursuant to this act.

Section 1002 [PA. STAT. ANN. tit. 53, § 11,002]. Venue.

Appeals to a court shall be taken to the court of common pleas of the county in which the land involved is located.

Section 1003 [PA. STAT. ANN. tit. 53, § 11,003]. Validity of Ordinance; Procedural Questions.

Questions of an alleged defect in the process of enactment or adoption of any ordinance or map shall be raised by an appeal taken directly from the action of the governing body to the court filed not later than thirty days from the effective date of the ordinance or map.

Section 1004 [PA. STAT. ANN. tit. 53, § 11,004]. Validity of Ordinance; Substantive Questions; Landowner Appeals.

(1) A landowner who, on substantive grounds, desires to challenge the validity of an ordinance or map or any provision thereof which prohibits or restricts the use or development of land in which he has an interest shall submit the challenge either:

(a) To the zoning hearing board for a report thereon under section 910 or 913.1; or

(b) To the governing body together with a request for a curative amendment under section 609.1.

(2) The submissions referred to in subsection (1) shall be governed by the following:

(a) The landowner shall make a written request to the board or governing body that it hold a hearing on his challenge. The request shall contain a short statement reasonably informing the board or the governing body of the matters that are in issue and the grounds for challenge.

(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.

(c) The 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. 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. Nothing contained herein shall preclude the landowner from first seeking a final permit or approval before submitting his challenge to the board or governing body.

(d) If the submission is made to the governing body under subsection (1)(b), the request shall be accompanied by an amendment or amendments to the ordinance proposed by the landowner to cure the alleged defects therein.

(e) Notice of the hearing required by sections 609.1, 910, or 913.1, whichever is applicable, shall include notice that the validity of the ordinance or map is in question and shall give the place where and the times when a copy of the landowner's request, including the plans submitted pursuant to subsection (2)(c) and the proposed amendments, if any, submitted under subsection (2)(d) may be examined by the public.

(f) The board or the governing body, as the case may be, shall hold a hearing upon the landowner's request pursuant to sections 609.1, 910, or 913.1, whichever is applicable, commencing not later than sixty days after the request is filed unless the landowner requests or consents to an extension of time.

(3) After submitting his challenge to the board or governing body as provided in subsections (1) and (2) of this section, the landowner may appeal to court by filing same within thirty days (i) after notice of the report of the board is issued, or (ii) after the governing body has denied the landowner's request for a curative amendment as provided in subsection (4).

Failure to appeal the denial of a request for a curative amendment under clause (ii), shall not preclude the landowner from thereafter presenting the same validity questions by commencing a proceeding as provided in subsection (1)(a) of this section.

(4) For purposes of subsection (3)(ii), the landowner's request for a curative amendment is denied when (i) the governing body notifies the landowner that it will not adopt the amendment, or (ii) the governing body adopts another amendment which is unacceptable to the landowner, or (iii) the governing body fails to act on the landowner's request, in which event the denial is deemed to have occurred on the thirtieth day after the close of the last hearing on the request unless the time is extended by mutual consent between the landowner and the municipality.

Section 1005 [PA. STAT. ANN. tit. 53, § 11,005]. Validity of Ordinance; Substantive Questions; Appeals by Persons Aggrieved.

Persons aggrieved by a use or development permitted on the land of another by an ordinance or map or any provision thereof who desire to challenge its validity on substantive grounds shall first submit their challenge to the zoning hearing board for a report thereon under section 910.

The submission to the board shall be governed by the following:

(a) The aggrieved person shall submit a written request to the board that it hold a hearing on the challenge. The request shall contain a short statement reasonably informing the board of the matters that are in issue and the grounds for the challenge.

(b) The request shall be submitted within the time limitations prescribed by section 915. 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: (i) The landowner may submit plans and other materials describing his proposed use or development to the zoning officer for a preliminary opinion as to their compliance with the applicable ordinances and maps. 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 building permit so long as they provide reasonable notice of the proposed use or development and a sufficient basis for a preliminary opinion as to its compliance. (ii) If the zoning officer's preliminary opinion is that the use or development complies with the ordinance or map, notice thereof shall be published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall include a general description of the proposed use or development and its location, by some readily identifiable directive, and the place and times where the plans and other materials may be examined by the public. The favorable preliminary opinion of the zoning officer shall be deemed to be a preliminary approval under section 915 and the time therein specified for commencing a proceeding with the board shall run from the time when the second notice thereof has been published.

(c) The board shall hold a hearing upon the aggrieved person's request pursuant to section 910, commencing not later than sixty days after the request is filed. If a hearing has been held by the governing body covering the same matters, at which a stenographic record has been taken, the board shall upon motion of any party accept said record as the record in the case before the board but the board shall not be precluded from taking additional evidence, unless such evidence ought to be excluded under section 908(6).

After submitting his challenge to the board, as provided in clauses (a) and (b), any party aggrieved may take the same to court by appeal filed not later than thirty days after notice of the report of the board is issued.

Section 1006 [PA. STAT. ANN. tit. 53, § 11,006]. Applications, Decisions and Orders Not Involving the Validity of an Ordinance; Landowner Appeals.

(1) A landowner who desires to file a zoning application or to secure review or correction of a decision or order of the governing body or of any officer or agency of the municipality which prohibits or restricts the use or development of land in which he has an interest on the grounds that such decision or order is not authorized by or is contrary to the provisions of an ordinance or map shall proceed as follows:

(a) From a decision of the governing body or planning agency under a subdivision or land development ordinance the landowner may appeal directly to court or to the zoning hearing board under section 913.1 in cases where that section is applicable. If the municipality provides a procedure, formal or informal, for the submission of preliminary or tentative plans an adverse decision thereon shall, at the landowner's election, be treated as final and appealable.

(b) From the decision of the governing body or planning agency denying tentative approval of a development plan under section 709(3) or, if tentative approval has been granted, from any adverse decision on an application for final approval, the landowner may appeal directly to court or to the zoning hearing board under section 913.1 in cases where that section is applicable.

(c) To the extent that the board has jurisdiction of the same under section 909 all other appeals shall lie exclusively to the zoning hearing board.

(d) Applications under sections 912 and 913 shall be made exclusively to the zoning hearing board.

(2) Appeals to the zoning hearing board pursuant to subsections (1)(a) and (1)(c) shall be filed within thirty days after notice of the decision is issued, or, if no decision is made, within thirty days from the date when a decision is deemed to have been made under this act.

(3)(a) Appeals to court may be taken by the landowner from any decision of the governing body or planning agency under subsections (1)(a) and (1)(b), by appeal filed within thirty days after notice of the decision is issued or, if no decision is made, thirty days after the date when a decision is deemed to have been made under this act.

(b) Appeals to court from any decision of the zoning hearing board may be taken by any party aggrieved by appeal filed within thirty days after notice of the decision is issued.

Section 1007 [PA. STAT. ANN. tit. 53, § 11,007]. Decisions and Orders Not Involving the Validity of an Ordinance; Appeals by Persons Aggrieved.

Persons aggrieved by a use or development permitted on the land of another who desire to secure review or correction of a decision or order of the governing body or of any officer or agency of the municipality which has permitted the same, on the grounds that such decision or order is not authorized by or is contrary to the provisions of an ordinance or map shall first submit their objections to the zoning hearing board under sections 909 and 915. The submission shall be governed by the provisions of section 1005.

Appeals to court from the decision of the zoning hearing board may be taken by any party aggrieved by appeal filed not later than thirty days after notice of the decision is issued.

Section 1008 [PA. STAT. ANN. tit. 53, § 11,008]. Appeals to Court; Commencement; Stay of Proceedings.

(1) Zoning appeals shall be entered as of course by the prothonotary or clerk upon the filing of a zoning appeal notice which concisely sets forth the grounds on which the appellant relies. The appeal notice need not be verified. The zoning appeal notice shall be accompanied by a true copy thereof.

(2) Upon filing of a zoning appeal, the prothonotary or clerk shall forthwith as of course, send to the governing body, board or agency whose decision or action has been appealed, by registered or certified mail, the copy of the zoning appeal notice together with a writ of certiorari commanding said governing body, board or agency within twenty days after receipt thereof to certify to the court its entire record in the matter in which the zoning appeal has been taken, or a true and complete copy thereof, including any transcript of testimony in existence and available to the governing body, board or agency at the time it received the writ of certiorari.

(3) If the appellant is a person other than the landowner of the land directly involved in the decision or action appealed from, the appellant, within seven days after the zoning appeal is filed, shall serve a true copy of the zoning appeal notice by mailing said notice to the landowner or his attorney at his last known address. For identification of such landowner, the appellant may rely upon the record of the municipality and, in the event of good faith mistakes as to such identity, may make such service nunc pro tunc by leave of court.

(4) The filing of an appeal in court under this section, shall not stay the action appealed from but the appellants may petition the court having jurisdiction of zoning appeals for a stay. If the appellants are persons who are seeking to prevent a use or development of the land

of another, whether or not a stay is sought by them, the landowner whose use or development is in question may petition the court to order the appellants to post bond as a condition to proceeding with the appeal. The question whether or not such petition should be granted and the amount of the bond shall be within the sound discretion of the court.

Section 1009 [PA. STAT. ANN. tit. 53, § 11,009]. Intervention.

Within the thirty days first following the filing of a zoning appeal, if the appeal is from a board or agency of a municipality, the municipality and any owner or tenant of property directly involved in the action appealed from may intervene as of course by filing a notice of intervention, accompanied by proof of service of the same upon each appellant or each appellant's counsel of record. All other intervention shall be governed by the Rules of Civil Procedure.

Section 1010 [PA. STAT. ANN. tit. 53, § 11,010]. Hearing and Argument of Zoning Appeal.

If upon motion it is shown that proper consideration of the zoning appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence or may remand the case to the body, agency or officer whose decision or order has been brought up for review or may refer the case to a referee to receive additional evidence provided that appeals brought before the court pursuant to sections 1004 and 1005 shall not be remanded for further hearings before any body, agency or officer of the municipality. If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence. If the record does not include findings of fact, or if additional evidence is taken by the court or by a referee, the court may make its own findings of fact based on the record below as supplemented by the additional evidence, if any.

Section 1011 [PA. STAT. ANN. tit. 53, § 11,011]. Judicial Relief.

(1) In a zoning appeal the court shall have power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal.

(2) If the court finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by

the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or failure to act is in question on the appeal, it 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. The court shall retain jurisdiction of the appeal during the pendency of any such further proceedings 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.

(3) The fact that the plans and other materials referred to in subsection (1) * are not in a form or are not accompanied by other submissions which are required for final approval of the development or use in question or for the issuance of permits shall not prevent the court from granting the definitive relief authorized in subsection (1) * and the court may act upon preliminary or sketch plans by framing its decree to take into account the need for further submissions before final approval is granted.

* The reference should be to subsection (2).