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SUBSTANTIVE VALIDITY CHALLENGES UNDER THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE: THE PRACTITIONER AND THE NEW PROCEDURES

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I. INTRODUCTION

IN 1972, THE PROCEDURES governing the litigation of substantive validity challenges to zoning ordinances were significantly changed by amendments to the Pennsylvania Municipalities Planning Code (MPC).¹ These amendments have altered the procedures in substantive validity challenges in three fundamental respects: first, they have created a more complex set of applications which must be filed and requirements that must be met in order to commence a challenge; second, they have created for the challenging landowner a choice of forums to hear and decide the challenge initially; and third, they have drastically changed the respective roles of the courts,² zoning hearing boards, and municipal governing bodies in validity challenges. It is the purpose of this article to examine the implications of these changes for the practitioner who must be aware of the statutory and jurisdictional requirements for initiating a challenge, for the landowner who must select a forum for the challenge, and for the municipal solicitor who should be aware of the various strategic and tactical possibilities which flow from the challenger's choice of forum.

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1. PA. STAT. ANN. tit. 53, §§ 10101-11202 (1972), *amending* Act of July 31, 1968, No. 247, [1968] Pa. Laws 805.

2. Even prior to the 1972 amendments, several decisions by the Supreme Court of Pennsylvania had already initiated a trend toward greater judicial involvement in zoning matters. *See* National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965); Concord Twp. Appeal, 439 Pa. 466, 268 A.2d 765 (1970); Beaver Gas. Co. v. Osborne Borough, 445 Pa. 571, 285 A.2d 501 (1971). *See also* cases cited in note 63 *infra*.

Prior to the 1972 amendments to the MPC, the procedure for filing validity challenges was relatively simple. The MPC provided that only a court of law could decide a challenge to the validity of a zoning ordinance on the merits.³ Such challenges could be initiated at any time before the court, or before the zoning hearing board.⁴ However, in the latter case, the zoning hearing board acted only as a hearing master to take testimony and make findings on contested issues of fact;⁵ the power to decide the ultimate issue of the validity or invalidity of the challenged ordinance was expressly withheld from the zoning hearing board by the MPC.⁶ Prior to the new procedures, the governing body had no place in the process of validity challenges; however upon notice that such a challenge had been filed, the governing body could have acted within 60 days to render the challenge moot by amending the ordinance to meet the challenger's objections.⁷

The procedures established by the 1972 amendments appear simple. Under the new procedures, a landowner can challenge the validity of a zoning ordinance either by filing a challenge with the zoning hearing board⁸ or, in an entirely new and unique proceeding, by filing a challenge together with a proposed "curative amendment" with the governing body of the municipality.⁹ In either case a public hearing must be held, a record made, and a decision rendered on the validity of the ordinance.¹⁰ If an adverse decision on validity is rendered by

3. See *Unger v. Hampton Twp.*, 437 Pa. 399, 263 A.2d 385 (1970). In *Unger*, the court explained the role of the zoning hearing board prior to the 1972 amendments to the MPC:

Section 910, read in its entirety, evinces a legislative intent to preclude the board from making a determination of the legal validity of the ordinance; it appears that the legislature believed the resolution of a legal challenge of this sort would be better made initially by a court. But the section does not eliminate all functions of the board in such appeals; rather, it transforms the function into one of fact-finding, preparatory to a court determination as to validity.

Id. at 405-06, 263 A.2d at 389, *construing* Act of July 31, 1968, No. 247, § 910, [1968] Pa. Laws 841, *as amended*, PA. STAT. ANN. tit. 53, § 10910 (1972).

4. Act of July 31, 1968, No. 247, § 910, [1968] Pa. Laws 841, *as amended*, PA. STAT. ANN. tit. 53, § 10910 (1972).

5. *Unger v. Hampton Twp.*, 437 Pa. 399, 405-06, 263 A.2d 385, 389 (1970).

6. The Municipalities Planning Code, prior to the 1972 amendments, provided in pertinent part: "[T]he board shall have no power to pass upon the validity of any provision of an ordinance or map adopted by the governing body." Act of July 31, 1968, No. 247, § 910, [1968] Pa. Laws 841, *as amended*, PA. STAT. ANN. tit. 53, § 10910 (1972).

7. Act of July 31, 1968, No. 247, § 802(2), [1968] Pa. Laws 837, *as amended*, PA. STAT. ANN. tit. 53, § 11006 (1972).

8. PA. STAT. ANN. tit. 53, § 11004(1)(a) (1972). The board conducts a hearing pursuant to section 908 and makes findings in accordance with sections 910 or 913.1 of the MPC. *Id.*; see *id.* §§ 10908, 10910, 10913.1.

9. *Id.* § 11004(1)(b).

10. See notes 42-44 and accompanying text *infra*.

either the zoning hearing board or the governing body, an appeal can be taken to the court of common pleas which has the power to review the decision of the zoning hearing board or governing body.¹¹ However, as actual cases have arisen and as the intricacies of the new procedures have become apparent, it is clear that a Pandora's box of problems, alternatives, and possibilities has been opened to challenging landowners, municipalities, and the courts.

II. THE FORM OF THE CHALLENGE

Section 1004 of the MPC sets forth the basic procedure for instituting a challenge to the substantive validity of a zoning ordinance. Before proceeding to the complex question of where the challenge should be filed, the requirements of the form of the challenge before each available forum should be examined.

To initiate a challenge under section 1004, the landowner must file a written application, the specific requirements of which are set forth in the statute: 1) "a written request to the board or governing body that it hold a hearing on his challenge";¹² 2) "a short statement reasonably informing the board or the governing body of the matters that are in issue and the grounds for the challenge";¹³ 3) "[t]he request shall be accompanied by plans and other materials describing the use or development proposed by the landowner in lieu of the use or development permitted by the challenged ordinance or map."¹⁴ If the challenge is submitted to the zoning hearing board under section 1004(1) (a), the above three submissions are sufficient. If, however, the challenge is to be submitted to the governing body under section 1004(1) (b) as a "curative amendment request" a fourth item must be submitted in addition to the above three: 4) "an amendment or amendments to the ordinance proposed by the landowner to cure the alleged defects therein."¹⁵

The written application containing the items listed above is crucially important to a successful application for two reasons: first, it institutes the challenge and establishes the jurisdiction of the board or governing body, and later the court to decide the challenge on the merits; and second, it establishes the parameters of relief to be granted to the landowner.¹⁶ The importance of these requirements and the reasons for them cannot be overemphasized — the field is strewn with

11. PA. STAT. ANN. tit. 53, § 11004(3) (1972).

12. *Id.* § 11004(2)(a).

13. *Id.*

14. *Id.* § 11004(2)(c).

15. *Id.* § 11004(2)(d).

16. See notes 59-68 and accompanying text *infra*.

cases in which the courts have never reached the merits due to the parties' failure to comply with the application requirements.¹⁷

Prior to the enactment in the 1972 amendments of the statutory application requirements, the field of zoning litigation was not one to which the subtleties of pleading were common. The present provisions of the MPC relating to variances,¹⁸ special exceptions,¹⁹ or even appeals from the zoning officer,²⁰ contain no such requirements. The new procedures for substantive validity challenges, however, have become the answers to a scrivener's prayer. The courts have consistently held that the form of the challenge determines the jurisdiction of the governing body or zoning hearing board to entertain the challenge initially, and the jurisdiction of the court on appeal.

For example in *Board of Supervisors of Ferguson Township v. Strouse*,²¹ one of the first appellate cases involving the curative amendment procedures, the Commonwealth Court of Pennsylvania held that its jurisdiction to hear the case was premised solely upon the existence of a challenge which fully complied with the procedural provisions of the MPC.²² Similarly, in *Greensburg Planning Commission v. Cabin Hills, Inc.*²³ a challenge was summarily dismissed on the ground that it was a simple request for rezoning; the court noted that had the landowner initiated the challenge in the prescribed manner, the lower court would have had jurisdiction to hear and decide the case on the merits.²⁴ In *Phelan v. Zoning Hearing Board of Lower Merion Township*,²⁵ compliance with the application requirements of section 1004 was similarly demanded in a challenge directed to a zoning hearing board.²⁶

In *Rallis v. Supervisors of College Township*,²⁷ the court sustained a municipality's preliminary objections to an appeal, holding

17. See notes 21-29 and accompanying text *infra*.

18. PA. STAT. ANN. tit. 53, § 10912 (1972).

19. *Id.* § 10913.

20. *Id.* § 10909.

21. 16 Pa. Cmwlth. 143, 328 A.2d 177 (1974).

22. *Id.* at 147, 328 A.2d at 179.

23. 19 Pa. Cmwlth. 324, 339 A.2d 594 (1975).

24. *Id.* at 326 n.2, 339 A.2d at 595 n.2; see *Penn Twp. Bd. of Supervisors v. DeRose*, 18 Pa. Cmwlth. 626, 339 A.2d 859 (1974), where the court, relying on section 1001, PA. STAT. ANN. tit. 53, § 11001 (1972), held that the only avenues open to a landowner seeking to challenge the substantive validity of a zoning ordinance are to submit the matter to the zoning hearing board for report or to the governing body for an amendment to the ordinance under § 1004(1)(b). The former course of action was attempted by plaintiffs; however, the court found that the applicants had "failed to follow the proper procedure under either method." 18 Pa. Cmwlth. at 629, 339 A.2d at 860.

25. 19 Pa. Cmwlth. 63, 339 A.2d 612 (1975).

26. See text accompanying notes 51-54 *infra*.

27. 10 CENTRE COUNTY LEGAL J. 505 (C.P. Centre County 1975).

that the form of the original application did not comply with section 1004. The court conveyed the rationale of its holding in terms which clearly manifest the importance of complying with the application requirements and the triumph of procedural form over content:

While we feel quite certain that both parties involved knew and understood what the appellants were attempting to challenge, nevertheless we feel it better strategy for the appellant to comply strictly with the newly established appellate court guidelines so that when the issue is finally determined it will not be bottomed on a technical point.²⁸

The Commonwealth Court of Pennsylvania has described the effect of the new procedures in more eloquent terms:

[T]he battleground between those who would build apartments and those who would resist their construction has shifted from the heights of constitutional debate . . . to the beachheads of local administrative procedures. This case also illustrates the importance to persons engaging in zoning litigation of careful attention and adherence to the comprehensive procedural provisions of the Pennsylvania Municipalities Planning Code.²⁹

In light of these warnings and results, this article will examine in detail each of the requirements for an application to initiate a substantive validity challenge.

A. *The Request for Hearing*

The request for hearing must be in writing and must request that the governing body or zoning hearing board, as the case may be, hold a hearing on the challenge.³⁰ The zoning hearing board is granted the authority to hold hearings by section 910 of the MPC,³¹ which sets forth the board's functions in validity challenges,³² or according to section 913.1,³³ which would allow a non-zoning issue to also be heard by the board where the board already has jurisdiction under

28. *Id.* at 507.

29. *Larwin Multihousing Pa. Corp. v. Commonwealth*, 19 Pa. Cmwlth, 181, 183, 343 A.2d 83, 84 (1975) (citations omitted). It is provided in 1004(2)(a) that the request for the amendment must include notice to the governing body that the landowner is challenging the validity of the existing ordinance. PA. STAT. ANN. tit. 53, § 11004(2)(a) (1972). When the landowner is proceeding under section 609.1 the hearing is both on the curative amendment and on the challenge to the constitutionality of the ordinance; it is for this reason that section 1004(2)(e) provides that the notice of the hearing "shall include notice that the validity of the ordinance or map is in question." *Id.* § 11004(2)(e).

30. PA. STAT. ANN. tit. 53, § 11004(2)(a) (1972).

31. *Id.* § 11004(1)(a).

32. *Id.* § 10910.

33. *Id.* § 11004(1)(a).

section 910.³⁴ Section 910 also provides that the hearing itself shall be conducted in accordance with section 908³⁵ which sets forth certain requirements to be followed by the board in the taking of evidence and the production of a record. If the challenge is directed to a governing body, the hearing would be held according to section 609.1³⁶ of the MPC.³⁷ Only subsections 4 through 8 of section 908 governing the conduct of hearings are applicable to hearings before the governing body.

The submission of a written request for hearing on the validity challenge is the first step in invoking the provisions of section 1004 before the zoning hearing board or the governing body. Its fundamental importance lies in providing notice that a challenge is being made. It is of vital importance to a governing body to know whether the requested rezoning is a simple petition to legislative wisdom or whether it is a challenge to the validity of an ordinance.³⁸ In the case of a simple request for rezoning, although the governing body must hold a hearing before voting on the amendment,³⁹ there are no time limits within which a decision must be rendered,⁴⁰ and neither action nor failure to act on the part of the governing body is reviewable.⁴¹ However, if a validity hearing is requested, the governing body is required to hold a public hearing on the challenge within 60 days,⁴² must provide that a stenographic record be made of the hearing,⁴³ and may render a decision on the rezoning within 30 days of the hearing; a failure to act within 30 days will constitute a denial of the request for a curative amendment.⁴⁴ The denial of the challenge by the governing body is then reviewable by the appropriate court of common pleas.⁴⁵

A request for hearing, directed to a zoning hearing board, serves to distinguish a challenge to the substantive validity of an ordinance

34. *Id.* § 10913.1.

35. *Id.* § 10908.

36. *Id.* § 10609.1.

37. *Id.* § 11004(2) (b).

38. *See* Appeal of Merlino, 19 Pa. Cmwlth. 143, 339 A.2d 642 (1975); Board of Comm'rs v. Beho Dev. Co., Inc., 16 Pa. Cmwlth. 448, 332 A.2d 848 (1975); Board of Supervisors v. Strouse, 16 Pa. Cmwlth. 143, 328 A.2d 177 (1974).

39. PA. STAT. ANN. tit. 53, § 10609 (1972).

40. *See* Morrisville Bank v. Township of Falls, 20 Pa. Cmwlth. 149, 152-53, 341 A.2d 258, 259 (1975).

41. Greensburg Planning Comm. v. Cabin Hills, Inc., 19 Pa. Cmwlth. 324, 339 A.2d 594 (1975).

42. PA. STAT. ANN. tit. 53, §§ 10609.1, 11004(2) (f) (1972).

43. *Id.* §§ 10609.1, 10908(7).

44. *Id.* § 11004(3).

45. *Id.* § 11004(3). If the proposed curative amendment is not adopted, the landowner may submit the validity challenge to the zoning hearing board for a de novo hearing rather than appeal to the court of common pleas. *Id.*

from a variance request.⁴⁶ It also determines what time periods are applicable, since the zoning hearing board must render a written decision within 45 days after the last hearing before the board or officer in the case of a variance request,⁴⁷ and within 60 days after the request is filed for hearing in the case of a challenge to the validity of an ordinance.⁴⁸

B. *The Grounds of the Challenge*

The request for a hearing on the validity challenge must contain "a short statement reasonably informing the board or governing body of the matters that are in issue and the grounds for the challenge."⁴⁹

The wording of this requirement in the MPC unquestionably makes it possible to be read as a fundamental pleading requirement which must be filed by the challenger at the outset, binding him or her to the grounds originally asserted.⁵⁰ No case has yet directly addressed the issue of whether a challenger will be bound by the grounds initially stated within the request for hearing, nor has any decision resolved the problem of whether grounds of invalidity which become apparent during the course of a hearing, but which were not asserted by the challenger in the initial application may be recognized.

*Phelan v. Zoning Hearing Board of Lower Merion Township*⁵¹ dealt with a closely related issue. In *Phelan*, the applicant had received a cease and desist order from the township zoning officer which he appealed to the zoning hearing board along with a request for a variance. During the course of his testimony, the applicant also contended that the zoning ordinance in question was discriminatory. The zoning hearing board sustained the order of the zoning officer and denied the variance, but stated that it could not rule on the validity of the ordinance because the challenge had not been made in the manner required by the MPC.⁵² The court of common pleas reversed the zoning hearing

46. See *Phelan v. Zoning Hearing Bd.*, 19 Pa. Cmwlth. 63, 339 A.2d 612 (1975).

47. PA. STAT. ANN. tit. 53, § 10908(9) (Supp. 1975).

48. *Id.* § 11004(2)(f) (1972).

49. *Id.* § 11004(2)(a).

50. The identical wording also appears in section 1005 of the MPC, which establishes the procedure in substantive validity appeals by persons aggrieved by a use or development permitted on the land of another. *Id.* § 1005. There is a strong argument that a landowner would have a right to enforce the requirement upon such persons to state the grounds of the challenge, and to hold an aggrieved person to the grounds stated in the initial challenge under section 1005. Of course, if the requirement is held to be applicable to the protester in section 1005(a), the same requirement would logically be binding upon a landowner challenging the substantive validity of an ordinance under section 1004(2)(a).

51. 19 Pa. Cmwlth. 63, 339 A.2d 612 (1975).

52. *Id.* at 66, 339 A.2d at 614.

board, and held the ordinance unconstitutional.⁵³ On appeal, the commonwealth court reversed the lower court and upheld the zoning hearing board's refusal to decide the validity challenge on the basis that the application requirements of section 1004(2) had not been met by the challenger's oral assertion that the ordinance was unconstitutional.⁵⁴ Thus the court seems to have held that a validity challenge cannot be commenced except by formal application, which includes the statement of the grounds of the challenge and the matters in issue.⁵⁵

Of course, it is vitally important for zoning hearing boards, and especially governing bodies, to know what procedures are being invoked by citizens, and what relief is being requested. It is submitted, however, that formal pleading requirements should not be utilized to exclude otherwise sufficient challenges to the validity of a zoning ordinance. Since the vast majority of zoning actions are instituted and heard without the presence of attorneys, it would seem better policy for attorneys, courts, and zoning bodies to direct their attention as much as possible to the merits of each case, penalizing the parties for procedural errors only when clearly prejudicial to the other party or when necessary for the hearing body to maintain its dignity and integrity.

C. *Plans for Proposed Development*

The third requirement⁵⁶ for completing an application in a substantive validity challenge is set forth at length in the statute:

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.⁵⁷

53. *Id.* at 66-67, 339 A.2d at 615.

54. *Id.* at 69, 339 A.2d at 616.

55. In two cases arising under section 1005, a similarly worded section of the MPC, the courts have strictly construed the requirement that the notice of appeal from a zoning hearing board's decision to a court of common pleas must include a statement which concisely sets forth the grounds on which the appellant relies. The court held in both cases that a failure to specify any grounds of appeal warrants dismissal of the appeal. *Lyons v. Zoning Bd. of Adjustment*, 20 Pa. Cmwlth. 165, 168, 340 A.2d 585, 586 (1975); *Kreitz v. Zoning Bd. of Adjustment*, 4 Pa. Cmwlth. 602, 608-09, 287 A.2d 884, 887 (1972).

56. See text accompanying note 14 *supra*.

57. PA. STAT. ANN. tit. 53, § 11004(2)(c) (1972).

The preparation of detailed architects' plans can be an expensive undertaking for a landowner, especially when the risk that the plans will never be utilized is great. Therefore, the statute requires only such plans as would give the zoning hearing board or governing body reasonable notice of the proposed development and an adequate basis to review the ordinance in light thereof.⁵⁸

However, in addition to providing the governing body with a set of plans against which to measure the applicability and validity of the ordinances, the plans also furnish a basis for relief if the landowner is ultimately successful in the challenge, at least in exclusionary zoning challenges. Since the case of *Girsh Appeal*,⁵⁹ which granted definitive relief to a landowner who had successfully challenged an ordinance,⁶⁰ the importance of the plans and proposals submitted with a challenge has grown from a simple requirement of pleading to the fundamental prayer for relief. Section 1011(2)⁶¹ of the MPC provides that when a court finds a zoning ordinance to be unlawfully restrictive it may order that the landowner be permitted to develop the land in accordance with the plans which were submitted with the challenge. The MPC vests a great deal of discretion in the courts to determine whether the landowner's plans should be approved in full or in part and whether the municipality should be permitted to impose any restrictions on the development which the court has ordered approved. One court discussing section 1011 has stated:

[O]nce the court has concluded that the zoning ordinance unlawfully prohibits or restricts the landowner's proposed development, then the landowner should be permitted to proceed with his proposed development subject to those reasonable zoning regulations, restrictions and codes applicable to the class of usage proposed by the land developer.⁶²

58. *Id.*

59. 437 Pa. 237, 240, 263 A.2d 395, 396 (1970).

60. See *Casey v. Zoning Hearing Bd.*, ___ Pa. ___, 328 A.2d 464, 468 (1974), citing Order No. MP-12,271 (Pa. Sup. Ct., August 29, 1972), enforcing *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970); see note 63 *infra*.

61. PA. STAT. ANN tit. 53, § 11011(2) (1972). Section 1011(2) provides:

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.*

Id. (emphasis added).

62. Appeal of Olson, 19 Pa. Cmwlth. 514, 522, 338 A.2d 748, 752 (1975).

It is clear from both statutory and case law⁶³ that the relief granted to the challenging landowner is to be based upon the plans which were submitted by the landowner when the challenge was instituted.

If a landowner successfully challenges the validity of an ordinance, and it is invalidated by the zoning hearing board, or by the court on appeal from the board or governing body, the only bases of relief are the plans and proposals submitted with the landowner's challenge.⁶⁴ If the governing body acknowledges the invalidity of its ordinance, it may grant relief by adopting the requested curative amendment,⁶⁵ however, if the governing body adopts an amendment to its ordinance which is different in any way from the requested amendment, the issue of the validity of the adopted amendment can be measured only by how it affects the challenger's proposed plans.⁶⁶

Of course, if the challenge is originally submitted to the zoning hearing board, a curative amendment is not required.⁶⁷ In this context the board, or the court on appeal, may consider only the legality or the constitutionality of the municipality's zoning ordinance; if it is found to be invalid, the court may order specific relief by permitting the challenger to develop his or her land as proposed in the "plans and other materials" submitted with the challenge.⁶⁸

63. The Supreme Court has held that when an ordinance is found invalid due to its exclusionary effect, the challenging landowner should be permitted to develop the land in accordance with the proposed plans. *Township of Williston v. Chesterdale Farms, Inc.*, 341 A.2d 466, 468-69 (Pa. Sup. Ct. 1975); *Casey v. Zoning Hearing Bd.*, ___ Pa. ___, 328 A.2d 464, 469-70 (1974). This form of relief was first formulated by the Pennsylvania Supreme Court in an order issued in 1972, subsequent to a decision which ruled the zoning ordinance of Nether Providence Township unconstitutional because it failed to provide for apartment buildings within the municipality. *Girsh Appeal*, 437 Pa. 237, 240, 263 A.2d 395, 396 (1970). After the township excluded the Girsh tract from the area rezoned for apartment use, the landowners petitioned the court for enforcement of its decision. The Pennsylvania Supreme Court ordered that petitioners be granted a building permit upon their compliance with the township's building code. Order No. MP-12,271 (Pa. Sup. Ct., August 29, 1972), *enforcing Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970), and cited in *Casey v. Zoning Hearing Bd.*, ___ Pa. ___, 328 A.2d 464, 468 (1974). [Editor's Note] Although the challenges involved in these cases were instituted prior to 1972, it is submitted that they were actually decided in light of the 1972 amendments. See *Township of Williston v. Chesterdale Farms, Inc.*, *supra* at 468-69; *Casey v. Zoning Hearing Bd.*, *supra* at ___, 328 A.2d at 467 n.6, 468 & n.10, 469-70. While *Casey* held that a landowner successfully challenging an ordinance would not be deprived of meaningful relief, the court recognized that such relief could be granted only to the extent that it is reasonable. *Id.* at ___, 328 A.2d at 469.

64. *Gorski v. Township of Skippack*, 19 Pa. Cmwlt. 346, 351, 339 A.2d 624, 627 (1975).

65. PA. STAT. ANN. tit. 53, § 10609 (1972).

66. See *Kaufman & Broad, Inc. v. Board of Supervisors*, 20 Pa. Cmwlt. 116, 340 A.2d 909 (1975).

67. See PA. STAT. ANN. tit. 53, § 11004(2)(a)-(d) (1972).

68. *Appeal of Olson*, 19 Pa. Cmwlt. 514, 522, 338 A.2d 748, 752 (1975); see notes 56-58 and accompanying text *supra*.

Two problems however, remain unresolved by the courts. First, while the requirement of providing plans and proposals for development may not impose a great burden on the large land developer, in other situations it may be a procedural burden. Professor Krashowiecki has noted the inequities that may be created by this requirement:

[C]onsider 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.⁶⁹

In this situation, the same commentator maintains that the requirement of providing plans and proposals for development cannot be justified, unless "the protection of the Constitution extends only to landowners who can demonstrate that they are prepared to develop the land immediately."⁷⁰

The *Rallis* case⁷¹ provides an example of another facet of the same problem. Although it is not stated in the lower court's opinion, that case involved a piece of land which was expected to be condemned for a state highway.⁷² Obviously its zoning, as far as use was concerned, was irrelevant, since no landowner would have planned a new structure on it. However, it was subject to a rezoning by the municipality which substantially reduced its value for condemnation purposes. The landowners clearly stated this in their request for a curative amendment in which they sought to restore the previous zoning. The court, however, held that the application was not complete.⁷³ In such a case, what type of plans could a landowner submit?

A second problem involving plans is the extent to which they may exceed the restrictions of the challenged ordinance. In *Kaufman & Broad, Inc. v. Board of Supervisors of West Whiteland Township*⁷⁴ this issue was raised by a landowner who challenged the ordinance alleging that it excluded townhouses, condominiums, and fourplexes; the municipality stipulated that the ordinance was "unconstitutionally exclusionary when applied to townhouses."⁷⁵ The landowner, how-

69. Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029, 1058 (1972).

70. *Id.* at 1059.

71. See text accompanying notes 27 & 28 *supra*.

72. The authors reside in State College Borough and were apprised of the status of the land which was the subject of the challenge in *Rallis*.

73. 10 CENTRE COUNTY LEGAL J. at 507.

74. 20 Pa. Cmwlth. 116, 340 A.2d 909 (1975).

75. *Id.* at 120, 340 A.2d at 911.

ever, had submitted plans describing its proposed use of the land as a planned residential development (PRD), including townhouses, fourplex units and recreational facilities; its curative amendment proposed that the ordinance be amended to include PRDs.⁷⁶ The court noted that while “[i]t would . . . seem unjust to allow [the landowner] to develop its land in this manner,”⁷⁷ the rule established in *Ellick v. Board of Supervisors of Worcester Township*⁷⁸ governed this situation:

“A municipality with the defective ordinance runs the risk that a landowner will successfully challenge the ordinance and be permitted to proceed with a development which may be quite contrary to the intent of the governing body, its defective ordinance and the comprehensive plan.”⁷⁹

Thus the curative amendment submitted by the challenging landowner “need not *strictly* confine itself to merely remedying the allegedly unconstitutional provisions”⁸⁰ relief may not be determined by the defect challenged, but by the plans submitted, even if such plans do not relate to the alleged defect. Thus it would appear that the large developer’s search for defects in a zoning ordinance may conceivably provide the challenger with a developmental *carte blanche*. In practice, however, the challenger’s ability to obtain authorization for his or her plans is circumscribed by the notion that any proposed use of the land must be reasonable. The *Kaufman* court adopted the following formulation of the proper procedures to be undertaken by the governing body in the event that there is a successful challenge to the validity of a zoning ordinance under section 1004:

[I]f a governing body determines that its ordinance is defective, because it totally prohibits the use proposed by the challenging landowner, then the governing body must permit the challenging landowner to develop his land as proposed in the “plans and other materials” submitted with the challenge, *provided, of course, that what is submitted is reasonable, and not injurious to the public health, safety, welfare and morals.*⁸¹

76. *Id.* at 119, 340 A.2d at 910.

77. *Id.* at 125, 340 A.2d at 913.

78. 17 Pa. Cmwlth. 404, 333 A.2d 239 (1975).

79. 20 Pa. Cmwlth. at 125, 340 A.2d at 913–14, *quoting* *Ellick v. Board of Supervisors*, 17 Pa. Cmwlth. 404, 417, 333 A.2d 239, 247 (1975).

80. *Kaufman & Broad, Inc. v. Board of Supervisors*, 20 Pa. Cmwlth. 116, 122, 340 A.2d 909, 912 (1975) (emphasis supplied by the court). The court observed, however, that considering the circumstances of the case, the landowner’s PRD proposal was overly broad, and that a proposed curative amendment merely providing for townhouses would have been much more appropriate. *Id.*

81. *Id.* at 124–25, 340 A.2d at 913, *quoting* *Ellick v. Board of Supervisors*, 17 Pa. Cmwlth. 404, 411–12, 333 A.2d 239, 244 (1975) (emphasis added).

Rather than determining the extent to which the landowner should be granted approval of his plans the court remanded the case to the court of common pleas. The lower court was directed to have the municipal governing body determine whether fourplex units were permitted within the township, and to otherwise "exercise its [the court's] broad supervisory powers of review over the submitted plans."⁸²

In order for a landowner to fully exploit a successful challenge, it would appear that the plans should be drawn to encompass each desired use of the challenger's land, but they must not be so broad as to be deemed unreasonable.⁸³

D. *The Curative Amendment*

The requirements of the fourth item⁸⁴ which must be submitted to complete a landowner's application to commence a validity challenge before the governing body raise more questions than do the other items. For this reason, a discussion of the confusion which the curative amendment procedure first created, and the court decisions which have attempted to explain it, is particularly appropriate. This will be followed by a discussion of specific problems posed in the drafting and submission of the curative amendment as part of an application to a governing body.⁸⁵

The confusion which has resulted from the adoption of the curative amendment procedure has been derived from several different sources. Practitioners, municipalities, and courts have all understood the basic nature of a validity challenge, which is nothing more than an allegation that the ordinance is in some manner unconstitutional. If the 1972 amendments to the MPC had merely granted to the zoning hearing boards the power to both hear and decide in the first instance all validity challenges, there would have been few problems. However, the Pennsylvania legislature decided to create two alternative procedures and forums to hear validity challenges. The confusion was to be expected.

Besides its novelty, among the foremost reasons for confusion surrounding the new curative amendment procedure were two misconceptions relating to its purpose. The first misconception arose from the conclusion that because the new procedure provided a new remedy, it also must have created a new right which this remedy was designed to enforce, or recognized a new wrong which it was designed to cor-

82. *Kaufman & Broad, Inc. v. Board of Supervisors*, 20 Pa. Cmwlth. 116, 128, 340 A.2d 909, 915 (1975).

83. See notes 61 & 62 and accompanying text *supra*.

84. See text accompanying note 15 *supra*.

85. PA. STAT. ANN. tit. 53, § 11004(2)(d) (1972).

rect. The second misconception was an extension of the logic of the first. Failing to find any new right created or wrong defined in the amended MPC, commentators and practitioners alike suggested that the curative amendment procedure provided a wide-open avenue for raising a challenge to any zoning ordinance merely by requesting a rezoning.⁸⁶ If the governing body rezoned in a manner unacceptable to the landowner, or failed to rezone to his or her satisfaction upon request, the new procedure suggested itself as a way to obtain judicial review of the entire zoning process. Even Professor Ryan, in his authoritative treatise, stated the same conclusion when he commented that as a result of the 1972 amendments to the MPC, a landowner "now has the option to present a plea for rezoning to the governing body, and appeal an adverse decision directly to the Court of Common Pleas."⁸⁷

In theory, at least, the new curative amendment procedure was not predicated upon the creation of new rights, nor upon the recognition of new wrongs. It was not designed to create new grounds upon which to attack the zoning process; substantive zoning law was to remain as before.⁸⁸ The only new element was that the landowner was offered an alternative forum in which to initiate a validity challenge. Where the landowner chose to submit a challenge to the governing body, that body would then have a chance to exercise first review of its own ordinance and to correct any defects without resort to judicial or quasi-judicial process.

What then is a curative amendment? One court has described a curative amendment as "merely an offer or suggestion to the governing body which will aid it in any attempt it may desire to make to cure a defective ordinance."⁸⁹ It appears that the curative amendment must be submitted as a separate document;⁹⁰ the practitioner must decide what is to be the scope or breadth of its content. Clearly, the curative amendment should be worded so that if the governing body adopts it, the developer can utilize the land in conformity with the proposed plans. On the other hand, according to the theory advanced in *Ellick*,

86. R. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE § 9.1.3 (1974).

87. *Id.* Although no changes were made in the text of section 9.1.3, Professor Ryan has supplemented the original text, adding several new sections explaining the procedures before municipal governing bodies. In discussing curative amendment applications, Professor Ryan acknowledged that, despite the "sometimes confusing innovation" and "rather cryptic language" of section 1004 of the MPC, the principles involved in validity challenges had not been changed by the 1972 amendments. *Id.* §§ 9.6.1-6.6 (Supp. 1976).

88. *Ellick v. Board of Supervisors*, 17 Pa. Cmwlth. 404, 410, 333 A.2d 239, 243 (1975).

89. *Id.* at 415, 333 A.2d at 246.

90. *Board of Comm'n'rs v. Beho Dev. Co., Inc.*, 16 Pa. Cmwlth. 448, 452 n.2, 332 A.2d 848, 851 n.2 (1975).

if the governing body proceeds in a manner unacceptable to the landowner, or refuses to enact a curative amendment, and the matter is appealed to the courts, the curative amendment is not at issue before the court.⁹¹ The court will decide only the validity of the zoning ordinance and if decided favorably to the landowner, the court may then grant specific and definitive relief to the challenger based upon the challenger's proposed plans.⁹² In light of this result, it would seem that once the governing body refuses to act favorably on the curative amendment proposal offered by the landowner, its scope or content would no longer be of any importance. Nevertheless, the scope or content of the curative amendment may plague the challenger throughout subsequent litigation, and indeed could ultimately defeat the validity challenge. To illustrate, consider the following problem. A landowner has a one-acre lot in a residential neighborhood completely surrounded by a large number of single-family homes in a district zoned for such. The landowner reviews the local zoning ordinance and discovers that it does not provide for apartment buildings anywhere in the municipality. The landowner then develops plans to build a multi-family, 10-story apartment building on his or her lot, and submits a challenge to the governing body along with a curative amendment which suggests that the lot be rezoned for apartment uses. The municipality, recognizing the exclusionary nature of its ordinance, adopts the landowner's curative amendment, and also amends its ordinance to allow apartment uses in certain designated districts.

Unfortunately, the landowner's acreage is not contiguous to any of the districts designated for apartment use, and the challenger's land now constitutes a small island of high-density, multi-family use in a district of low-density, residential use. One might conclude that the zoning ordinance adopted pursuant to the curative amendment procedure results in spot zoning. While there is no provision in the MPC for "persons aggrieved" or protesters⁹³ to appeal directly to a court from the adoption of a curative amendment under section 1004, the landowner may face a challenge from neighboring landowners who could attack, pursuant to section 1005,⁹⁴ the validity of the newly

91. 17 Pa. Cmwlth. at 415, 333 A.2d at 246.

92. Appeal of Olson, 19 Pa. Cmwlth. 514, 522, 338 A.2d 748, 752 (1975); Ellick v. Board of Supervisors, 17 Pa. Cmwlth. 404, 415-16, 333 A.2d 239, 246 (1975).

93. The authors utilize the term "protestors" to mean "persons aggrieved" within the language of section 1005 of the MPC. PA. STAT. ANN. tit. 53, § 11005 (1972); see note 137 *infra*.

94. PA. STAT. ANN. tit. 53, § 11005 (1972). Section 1005 provides in pertinent part: 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

adopted curative amendment as spot zoning.⁹⁵ The neighboring landowner and any other persons aggrieved by the construction of the apartment building may bring their challenge to the newly adopted zoning scheme before the zoning hearing board.⁹⁶ The dilemma thus created would not have existed had the original challenging landowner drawn the curative amendment to permit apartment buildings in the entire original R-1 district, rather than creating a new district of the lot for apartment uses. The lesson for the practitioner is simply that the governing body's adoption of a curative amendment which is drawn too narrowly may result in a Pyrrhic victory.

In drafting a curative amendment proposal, the practitioner must exercise a great deal of caution, for an overly broad proposal may also cause problems for the challenger. For instance in *Kaufman*, the governing body had refused to accept the plans or the proposed curative amendment of the challenger.⁹⁷ Despite extensive quotations from *Ellick* to the effect that on appeal "the curative amendment is no longer a viable matter at issue before the court,"⁹⁸ the *Kaufman* court carefully analyzed the scope and the subject matter of the challenger's curative amendment. The court found that the landowner had been "excessive by his curative amendment,"⁹⁹ and since the landowner's curative amendment submission was "overbroad,"¹⁰⁰ the court stated that it could not order its adoption.¹⁰¹

It appears, therefore, that an overly broad proposal may have the effect of prejudicing the court against the merits of an otherwise valid challenge, and thus may adversely affect the court's decision concerning adoption of the landowner's plans as submitted. Care must be exercised in the preparation of a proposed curative amendment. The amendment must be drafted so that it neither invites a counter challenge should the governing body adopt it, nor invokes the disapproval of a higher court if it is not adopted by the governing body.

validity on substantive grounds shall first submit their challenge to the zoning hearing board for a report thereon under section 910.

Id.

95. *See, e.g.*, *Pollock v. Zoning Bd. of Adjustment*, ___ Pa. Cmwlth. ___, 342 A.2d 815 (1975).

96. PA. STAT. ANN. tit. 53, § 11005 (1972).

97. 20 Pa. Cmwlth. at 119, 340 A.2d at 910.

98. *Id.* at 124, 340 A.2d at 913, quoting 17 Pa. Cmwlth. at 415, 333 A.2d at 246.

99. 20 Pa. Cmwlth. at 122, 340 A.2d at 912.

100. *Id.* at 123, 340 A.2d at 912. The court qualified its conclusion regarding the scope of the curative amendment by stating that "we of course are not setting any absolute limits for these submissions, as we believe that there is a definite need for flexibility in these cases." *Id.* at 122, 340 A.2d at 912 n.6.

101. *Id.* at 123, 340 A.2d at 912.

III. CHOICE OF FORUM

An important aspect of the 1972 amendments to the MPC is their creation of a choice of forums in which to initiate a validity challenge. The challenge may be presented to an appointed quasi-judicial body, the zoning hearing board, or may be directed to the very legislative body which enacted the ordinance that is the subject of the challenge.¹⁰² Due to the diverse characteristics of these two forums, the decision concerning the initial forums involves significant legal and tactical ramifications for the landowner, the municipality, and the protester.

A. *Applicable Time Periods*

The first consideration as to the choice of forum in validity challenges is whether certain time periods set forth in the statute have been made applicable by the denial of an application for a permit or an approval. Generally, a substantive validity challenge may be made at any time after an ordinance or map takes effect.¹⁰³ In the normal situation, therefore, the landowner may carefully prepare a case for presentation to whichever forum the landowner believes will be most receptive to the challenge. Section 1004(2)(b) requires, however, that if the landowner's application for a zoning permit, or for tentative approval of development plans has been denied, a challenge must be made within the same time period as is provided for an appeal from the denial, that is, within 30 days.¹⁰⁴ If the denial of the permit or approval is not challenged within that time period, all future rights to raise a substantive validity challenge to that restriction will be lost.

In addition to the time limit for filing a challenge after the denial of a permit or approval, there is a second time limit to consider. Upon the filing of a challenge to the validity of an ordinance, section 1004(2)(f)¹⁰⁵ provides that the zoning hearing board or the governing body must conduct a public hearing on the challenge within 60 days of the submission of the challenge. While the landowner may request or consent to an extension of time,¹⁰⁶ the denial of his or her request for a permit nevertheless commences the running of these two time periods. For a landowner who feels that the time provided by these

102. PA. STAT. ANN. tit. 53, § 11004 (1972); see notes 8-9 and accompanying text *supra*.

103. PA. STAT. ANN. tit. 53, § 11004(2)(b) (1972).

104. *Id.* § 11006(2). In *Phelan v. Zoning Hearing Bd.*, 19 Pa. Cmwlth. 63, 339 A.2d 612 (1975), one of the several deficiencies found by the court in the landowners' case was their failure to meet the specified time restrictions. *Id.* at 69-70, 339 A.2d at 616.

105. PA. STAT. ANN. tit. 53, § 11004(2)(f) (1972).

106. *Id.*

periods is not sufficient for the adequate preparation of his case, the choice of forums may be crucial. This is due to the different ramifications involved in the initiation of a challenge in the different forums. If the challenge is submitted to the zoning hearing board, the board's determination must be accepted or be appealed through the courts on the record made before the zoning hearing board, and on such additional evidence as a court of common pleas may be persuaded to accept.¹⁰⁷ This is not the situation, however, where the challenge has been filed under section 1004(1)(b) as a curative amendment. Section 1004(3) provides that failure to appeal the denial of a request for a curative amendment does not preclude the landowner from presenting the same questions concerning the validity of the ordinance in a new action before the zoning hearing board.¹⁰⁸ Section 1004(3) thus offers the curative amendment procedure to the landowner as a way of meeting the time periods triggered by the denial of a permit or approval without being permanently prejudiced by surprise. It meets the requirement of action within 30 days triggered by the denial, but does not commit the challenger to the choice of appealing an adverse decision to court or losing the right of appeal.

In addition to providing a convenient method for the timely filing of a validity challenge, the curative amendment procedure provides other procedural advantages. It is the ideal solution for the landowner who is hesitant about investing in a validity challenge which may ultimately progress all the way through the courts. The landowner may wish to take advantage of the opportunity to conduct a "dry-run" by presenting the challenge to the governing body. If, after presentation the landowner's case appears favorable, but the curative amendment is refused by the governing body, the landowner then has the option of taking an immediate appeal to court.¹⁰⁹ If, however, the challenge does not appear as though it will prevail, or if other difficulties confront the developer, such as a loss of financing, the challenger may choose not to appeal an adverse decision to court, and a wait either better preparation of the case, or better circumstances to present the case de novo to the zoning hearing board at a later time.

The governing body should be aware of this possibility. If a challenger fails to present a successful case for any reason that could be corrected in a second hearing of the case, the challenger may elect to bring a new challenge and may eventually prevail before the zoning hearing board.

107. *Id.* § 11010.

108. *Id.* § 11004(3).

109. *Id.*

Thus, for the landowner who for any reason does not want to make a major commitment to litigation, the curative amendment procedure is the preferable choice, and the governing body is the preferable forum in which to file the challenge. It allows the landowner the flexibility not only to attack the ordinance, but also, if the landowner does not prevail, to retire from the field and attack it another day. However, if the landowner has decided upon an all-out fight to the finish at the time the challenge is filed, there are other considerations which should be taken into account in choosing a forum as will be discussed in subsequent sections of this article.

B. *Validity Challenge or Variance Request?*

The second consideration as to choice of forum in validity challenges requires an analysis of the grounds for the challenge. The crucial inquiry is whether the grounds of the landowner's challenge could possibly be construed by a court at a later date as a variance request. If so, a landowner who files a subsequent validity challenge under section 1004 may risk having the case eventually dismissed, after the investment of considerable time and expense, for having chosen the wrong remedy. The choice of proper forum relative to the distinction between validity challenges and variance requests will be dependent upon the direction along which the present analysis of the courts will proceed.

Within a short period of time after the adoption of the 1972 amendments to the MPC, the confusion discussed earlier in this article concerning the uses of the curative amendment procedure¹¹⁰ had spawned a rash of challenges to municipal governing bodies. Imperative from the beginning, therefore, was a need to choose, or at least to narrow, the wide-open avenue which practitioners and commentators perceived in the new curative amendment procedure.¹¹¹

The first task which the commonwealth court set out to achieve was a clarification of the use of the curative amendment procedure to distinguish between variance requests and validity challenges. In the first case to arise under the new amendments, *Township of Neville v.*

110. See notes 84-88 and accompanying text *supra*.

111. One lower court pointed out:

[W]e note with some distress the apparent excesses exhibited by developers in the pursuit of selfish interests by way of attacks upon the constitutionality of local zoning ordinances. There has been a rash of so-called "curative amendments" presented to local governing bodies, thrust upon the municipalities, we believe, as a means to secure indirectly that which should be sought directly.

Sullivan v. Lower Makefield Twp. Bd. of Supervisors, 26 BUCKS CO. L. REP. 279, 282 (1975).

Exxon Corporation,¹¹² the court set forth (but failed to hold) what the authors believe to be the true basis of distinction between validity challenges and variance requests :

The variance function delineated in sections (sic) 912 of the MPC is exclusively a function of the zoning hearing board. As the appeal here was from the denial of a curative amendment by a "governing body" under section 1004, the court was without authority to grant the variance.¹¹³

This statement of the law, clearly setting forth the differences between variance requests and validity challenges based on the jurisdiction of the zoning hearing board and the jurisdiction of the governing body was not, unfortunately, followed in the *Neville* case or offered as a basis for decision in the cases which followed it. Instead, the court had introduced a different and potentially more confusing rationale under which validity challenges made with or in the context of variance requests have been or may be dismissed.

In a series of recent cases the courts have repeatedly stated that variance requests and substantive validity challenges are "mutually exclusive remedies."¹¹⁴ The first case in this series is *Robin Corporation v. Board of Supervisors of Lower Paxton Township*.¹¹⁵ In that case a landowner instituted a challenge to the governing body alleging that the zoning of his single tract constituted a confiscation of his property. The court characterized the landowner's challenge, not as a substantive validity challenge, but rather as a request for a variance, since the basis of the landowner's grievance related only to his particular tract, and not to the facial validity of the ordinance. In denying the landowner's appeal, however, the court did not advert to the lack of jurisdiction in the governing body to grant relief in the form of a variance, but instead stated the following rationale for its decision :

[S]ection 1004 "substantive challenges" and requests for variances are mutually exclusive remedies, a request for a variance being required whenever a landowner desires to challenge the zoning of his particular tract through a claim which, if established on the record, would warrant the granting of a variance.¹¹⁶

112. 14 Pa. Cmwlth. 225, 322 A.2d 144 (1974).

113. *Id.* at 230, 322 A.2d at 147 (citations omitted).

114. *Robin Corp. v. Board of Supervisors*, 17 Pa. Cmwlth. 386, 332 A.2d 841 (1975); *Shuttle Dev. Corp. v. Township of Upper Dublin*, ___ Pa. Cmwlth. ___, 378 A.2d 777 (1975); *Phelan v. Zoning Hearing Bd.*, 19 Pa. Cmwlth. 63, 339 A.2d 612 (1975).

115. 17 Pa. Cmwlth. 386, 332 A.2d 841 (1975).

116. *Id.* at 396, 332 A.2d at 847. One lower court in attempting to grapple with this problem referred to the difference as a "precarious distinction." *Perlstein v. Borough of Monroeville*, 123 PITTS. LEGAL J. 314, 319 (C.P. Allegheny County 1975).

The problem immediately arises as to whether this language in the court's decision should apply to all section 1004 validity challenges, including validity challenges filed to the zoning hearing board under section 1004(1)(a) or whether it applies only to variance requests and validity challenges filed to the governing body under section 1004(1)(b). The broad statement in the court's decision is not clear, and invites analysis.

Variance requests and validity claims are not mutually exclusive by nature. On the contrary, the court noted in *Robin* that if the landowner there had made proper application for his validity challenge under section 1004, "the substantive principles governing the granting of relief would closely parallel, if not be identical with the variance law."¹¹⁷ Indeed, the Pennsylvania Supreme Court, in a case decided prior to the adoption of the MPC had stated that "a challenge to the validity of a zoning ordinance is a natural and foreseeable outgrowth of a request for a variance."¹¹⁸

If variance requests and validity challenges are not by nature inconsistent, why have they been stated to be "mutually exclusive"? It is submitted that what the commonwealth court has actually been striving to achieve is simply to establish the rule that variance claims may not be made to a governing body. In *Robin*, the court discussed the policy reasons for such a rule immediately prior to stating that variance requests and validity challenges are "mutually exclusive":

[A]llowing a landowner [with a variance claim] to proceed pursuant to section 1004 would, as a practical matter, result in the placing of a great and undue burden on municipal governing bodies. If the landowner who has what is essentially a variance claim can short-cut the review process, by-pass the zoning hearing board, and go directly to the governing body for a disposition, the usefulness and legislatively intended function of local hearing boards would be greatly derogated.¹¹⁹

However, such a policy is already embodied in the MPC on the basis of jurisdiction. A landowner cannot file a variance request to a governing body in the guise of a validity challenge for the reason that only zoning hearing boards have jurisdiction to grant variances. Nowhere in the MPC is a governing body authorized to do so. Thus, if a landowner files a challenge to a governing body, but establishes only such facts as would entitle him to a variance, the appeal should be

117. *Id.* at 396 n.7, 332 A.2d at 847 n.7.

118. *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 512, 215 A.2d 597, 602 (1965).

119. 17 Pa. Cmwlth. at 395, 332 A.2d at 847 (footnote omitted).

dismissed not because the remedies are mutually exclusive, but because the governing body has no power to grant the relief, without regard to the extent to which a landowner may be entitled to a variance.

It is clear, therefore, that a validity challenge to a governing body excludes proof by the landowner that he or she is entitled to a variance. But does a variance request exclude an alternative claim before the zoning hearing board that the ordinance is invalid? The language used by the court in *Robin* was not simply that validity challenges to the governing body excluded variances, but that validity challenges under section 1004 which includes both the governing body and the zoning hearing board are *mutually* exclusive.

A zoning hearing board has jurisdiction to hear and decide both variance requests and validity challenges. Thus, while there is not a jurisdictional problem where a landowner files a substantive validity challenge to the zoning hearing board under section 1004(1)(a), and also files with it a variance request under section 912, there may still be a problem of the mutual exclusivity of remedies.¹²⁰ It may be argued that a request for a variance admits the validity of the ordinance, and seeks only to vary the application of its restrictions based on hardship. A validity challenge, of course, denies that there exists a valid ordinance from which to obtain a variance. The remedies could be held to be mutually exclusive on the simple basis that it is inconsistent to request a variance from an ordinance which is alleged to be invalid.

It is submitted, however, that in light of the fact that the substantive principles of variance law and validity challenges are closely parallel, if not identical, it would be procedurally unnecessary and burdensome to foreclose an appeal on both grounds as alternative theories before the zoning hearing board which has jurisdiction over both. To do so would simply result in successive appeals raising essentially the same issues on presentation of the same evidence. As the Pennsylvania Supreme Court noted in a case decided prior to the adoption of the MPC:

[I]f a request for a variance is denied, indicating that there is nothing about petitioner's land or his hardship that is any different than that of everyone else with land similarly zoned, then peti-

120. In one recent case, the court almost reached this issue. In *Phelan v. Zoning Hearing Bd.*, 19 Pa. Cmwlth. 63, 339 A.2d 612 (1975), a landowner had clearly instituted the action before the zoning hearing board as a variance request. At the hearing, however, he sought to present evidence that the ordinance was unconstitutionally discriminatory. While the court's opinion stated that a validity challenge may not "be pursued in the context of other kinds of applications, including the request for a variance," the *Phelan* court held that the applicant's validity challenge had not been properly or timely filed, and thus never directly confronted the problem of pleading in the alternative before the zoning hearing board.

tioner's most logical next step is to attack the validity of the ordinance as it applies to everyone. In other words, a challenge to the validity of a zoning ordinance is a natural and foreseeable outgrowth of a request for a variance.¹²¹

It would, therefore, seem that the most efficient procedure would be to allow both claims to be heard in a single hearing based upon alternative theories, rather than requiring them to be raised separately in successive hearings.

In terms of choice of forum, therefore, it is not clear whether the court will hold that variance requests and validity challenges filed before the zoning hearing board are mutually exclusive. Until that is decided, the municipality has the opportunity to argue that a landowner must choose his theory. In any event, it is clear that whatever rationale the courts proceed under, a landowner whose claim may after hearing be found to be a variance claim should not file it with the governing body under section 1004(1)(b), but with the zoning hearing board under section 1004(1)(a).

After having suggested that the substantive principles governing variances and validity claims are similar, the next logical question is how they shall be distinguished for the purpose of choosing the proper forum and procedure to obtain relief. In the *Robin* case the court set forth the following distinction :

Section 1004 is the proper section for a landowner to use when the validity of an entire zoning ordinance is challenged, such as in the case of an allegation of exclusionary zoning. A request for a variance pursuant to Section 912 is proper whenever a landowner desires to challenge the zoning of *his particular tract* through a claim which, if established on the record, would warrant the granting of a variance.¹²²

This distinction seems reasonable at first glance. Where one is challenging a provision of an ordinance which affects everyone (or at least everyone in the same zoning classification) a validity challenge is the proper remedy. Exclusionary zoning is the classic case of a facial challenge to an entire ordinance. On the other hand, if a provision of the zoning ordinance is not unfair as to others, but affects a particular tract in a discriminatory and confiscatory manner, the proper remedy is a variance. But a caveat is in order for the practitioner. The rule does not apply in all cases.

121. *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 512, 215 A.2d 597, 602 (1965).

122. 17 Pa. Cmwlth. at 396, 332 A.2d at 847.

Consider, for example, the problem of spot zoning. Spot zoning is, by definition, "the arbitrary and unreasonable classification and zoning of a small parcel of land."¹²³ If a single lot located in the center of an industrial park is rezoned to R-1, which permits only single-family detached dwellings, should the landowner request a variance pursuant to section 912, or file a challenge to validity under section 1004(1)(a) or (1)(b) on the basis of unconstitutional spot zoning? Clearly the landowner is challenging the zoning ordinance as it applies to his or her particular tract, but just as clearly, it is not a typical variance claim as defined by section 912 of the MPC.

On the other hand, the "validity variance" recognized in the *Neville* case affected only a particular tract of land; nevertheless, it was held to be a proper case for a section 1004 validity challenge.¹²⁴ This holding, which was approved by the court in the *Robin* case,¹²⁵ is especially interesting in light of the fact that the "validity variance" claim raised in *Neville* is analogous to the classic "property hardship" claim which has long been recognized as a traditional basis for a variance.¹²⁶

There is, however, a common element to these examples which will define a coherent or at least identifiable exception to the general rule. Normally, a spot zoning claim is not directed against the physical restrictions set forth in the ordinance, but to the uses permitted on the land which is spot zoned. And, the relief requested normally is to be zoned for the same uses as the surrounding land. Similarly, in *Neville*, the objection of the landowner was to the uses permitted on the land as it was zoned, coupled with a request to be zoned according to a different zoning classification. In both cases, the relief requested is to use the land for uses permitted in other lawful zoning classifications of the municipality. For the practitioner, anytime the issue

123. *Cleaver v. Board of Adjustment*, 414 Pa. 367, 379, 200 A.2d 408, 415 (1964).

124. 14 Pa. Cmwlth. 225, 230, 322 A.2d 144, 147 (1974).

125. 17 Pa. Cmwlth. 386, 393 n.4, 332 A.2d 841, 845-46 n.4 (1975). The court stated:

[I]n *Neville*, as in the instant case, relief was sought from a hardship that was allegedly imposed on a specific tract. Our statement in *Neville* regarding the availability of the curative amendment procedure in that case thus represents an interpretation which is still viable in light of the holdings we make in the instant case.

Id.

126. See, e.g., *Pfile v. Borough of Speers*, 7 Pa. Cmwlth. 226, 298 A.2d 598 (1972), where a variance was granted for a property which was zoned for single-family residence but was subject to a property hardship in that it was surrounded by Interstate 70 and a ramp with gasoline service stations; and *Filanowski v. Zoning Bd. of Adjustment*, 439 Pa. 360, 266 A.2d 670 (1970), in which a variance was granted for a lot zoned for single-family residences where the property in question was subject to a hardship in that it was surrounded by high-rise apartments.

involves a request by the landowner for some other lawful use than that for which the land is presently zoned, the exception to the rule must be thoroughly researched to determine whether the claim is a variance request or a validity challenge.

Thus, in determining the type of claim to file, and the forum in which to file it, the practitioner must be aware of the fundamental grounds of the claim. Does the claim involve a single tract or the entire ordinance, a use or a building restriction, a change of lawful uses or a prohibited use? Each of these is a factor in determining the nature of the claim and the forum in which it is filed.

C. *Findings of Fact and Conclusions of Law*

The third consideration as to choice of forum in validity challenges involves the matter of which forum makes the findings of facts and arrives at the conclusions of law. The rules as to these matters are not the same for zoning hearing boards and governing bodies.

The zoning hearing board is required under section 910¹²⁷ not only to hear validity challenges but also to take evidence, make a record thereon and generally to "make findings on all relevant issues of fact which shall become part of the record on appeal to the court."¹²⁸ Section 908(9) of the MPC requires the zoning hearing board to render a written decision or written findings within 45 days after a hearing.¹²⁹

The MPC does not, however, establish similar requirements for a governing body confronted with a validity challenge. While section 908(7)¹³⁰ requires both the zoning hearing board and the governing body to keep a stenographic record of each hearing, section 908(9) is not applicable to governing bodies.¹³¹ In addition, the MPC does not require the governing body to render a decision, written or otherwise, subsequent to the hearing. In fact, section 1004(4) defines the governing body's failure to render such a decision within 30 days after the hearing as a denial of the landowner's request.¹³²

Since an appeal from a negative decision of a governing body may thus present the court with a record which is entirely devoid of any findings of fact, conclusions as to credibility of witnesses, or any reconciliation of conflicting testimony, both the challenger and the

127. PA. STAT. ANN. tit. 53, § 10910 (1972).

128. *Id.*

129. *Id.* § 10908(9) (Supp. 1975).

130. *Id.* § 10908(7) (1972).

131. *See id.* § 10609.1.

132. *See Hess v. Upper Oxford Twp.*, 17 Pa. Cmwlth. 399, 402, 332 A.2d 836, 838 (1975); notes 42-44 and accompanying text *supra*.

municipality must look ahead to who will make the ultimate determination of the facts to which the law is applied. The problem was well described by one appellate court which refused to make findings in the exact situation in which most common pleas courts will find themselves on appeals from validity challenges originally decided by governing bodies under section 1004(1)(b) :

This Court will not rummage through the record, speculating upon the credibility and weight of the evidence before a finder of fact. Nor will we, with one hat on, make our own findings, and then don our appellate hat to determine whether our decision can be sustained.¹³³

Section 1010¹³⁴ of the MPC specifically forbids remand of validity challenges to the governing body for any purpose whatsoever. Thus, unless there are no contested issues of fact, or unless the lower court takes additional evidence so that it can judge the credibility and weight of the testimony, a very large margin for error may exist in validity challenges instituted before governing bodies pursuant to section 1004(1)(b). It is suggested that municipal solicitors encourage the governing bodies to make findings of fact and conclusions in such cases. However, the fact that a governing body may not assume this task should be considered by a challenging landowner in a decision as to choice of forum.

The challenging landowner must also consider the risk involved in allowing a governing body to utilize the opportunity to make findings of fact and conclusions to justify its own zoning ordinance. If, for example, a landowner wishes to challenge a certain zoning ordinance as spot zoning, or as exclusionary, alleging that a "token" zone has been created,¹³⁵ it may be wise to file the challenge to the zoning hearing board, thereby denying the governing body the opportunity to make findings of fact which would rationalize its previous zoning decisions. Of course, the members of a governing body may testify before a zoning hearing board as to their reasons for a certain zoning policy,

133. *Hess v. Upper Oxford Twp.*, 17 Pa. Cmwlth. 399, 403, 332 A.2d 836, 838-39 (1975). The *Hess* court noted that section 1010 of the MPC precludes a remand to the governing body in validity challenges under section 1004. Since the court cannot conduct a review of the governing body's actions without being apprised of the factual basis for the denial of a curative amendment, the court found that it was the duty of the lower court to make appropriate findings of fact where such had not been supplied by the governing body. These findings may be based either on the record constructed before the governing body or on additional evidence taken by the court. *Id.* at 838.

134. PA. STAT. ANN. tit. 53, § 11010 (1972).

135. *See Township of Willistown v. Chesterdale Farms, Inc.*, 341 A.2d 466 (Pa. 1975).

but unlike the procedure set forth in section 1004(1)(b), they will be subject to cross-examination, rather than act as finders of fact.¹³⁶

D. Protesters

One factor which must always be considered by a landowner in asserting a validity challenge is the possibility of protesters¹³⁷ prolonging litigation. In considering a choice of forum, there is one additional major concern with regard to protesters. Simply put, while a protester may appeal to court from the decision of a zoning hearing board in a validity challenge,¹³⁸ there is no provision for a protester to appeal directly to the courts from the decision of a governing body to adopt a curative amendment. A protester wishing to challenge the substantive validity of the curative amendment adopted may submit this challenge to the zoning hearing board.¹³⁹ However, once adopted, the curative amendment will be the beneficiary of all presumptions of validity, and the protester will carry a heavy burden in attempting to overcome the presumption.¹⁴⁰

136. The possibility that a governing body might justify its own zoning ordinance is illustrated by the court's opinion in *DeCaro v. Washington Twp.*, ___ Pa. Cmwlth. ___, 344 A.2d 725 (1975). There, the landowner had challenged a three-acre minimum lot size requirement in one of the residential zones. The board of supervisors had filed a report concluding: 1) the property in the challenged zone was suitable for development as zoned; 2) the land zoned for residential use was sufficient to meet projected population growth; and 3) sufficient land was zoned for small residential lots to accommodate the demand therefor. *Id.* at ___, 344 A.2d at 727. In affirming the lower court's dismissal of the landowner's appeal, the court stated:

[T]he function of the reviewing court is to examine the evidence submitted to the factfinder to determine whether the result is supported by the facts and the law. The question is not whether the appellate courts would have reached the same result, but, rather, whether the factfinder's determination was arbitrary and contrary to the weight of the evidence.

Id. at ___, 344 A.2d at 728. Moreover, in *Silver Appeal*, 63 Pa. D.&C.2d 408 (C.P. Bucks County 1973), the court indicated that it may be proper for the governing body, hearing a validity challenge under section 1004, independently to investigate and obtain testimony which bears upon the application for a curative amendment. *Id.* at 410-13.

137. The authors utilize the term "protesters" to mean "persons aggrieved" within the meaning of section 1005 of the MPC. See notes 93 & 94 and accompanying text *supra*. Township residents aggrieved by a use or development permitted within the township are aggrieved persons within the meaning of the statute. *Raum v. Board of Supervisors*, 20 Pa. Cmwlth. 426, 342 A.2d 450 (1975).

138. Protestors, or aggrieved persons, must be residents of the municipality, and must have appeared before the zoning hearing board at the hearings concerning the challenged amendment in order to have standing to appeal the board's decision. *Citizens For A Clean Environment v. Zoning Hearing Bd.*, ___ Pa. Cmwlth. ___, 350 A.2d 419 (1976); *Cablevision v. Zoning Hearing Bd.*, 13 Pa. Cmwlth. 232, 320 A.2d 388 (1974).

139. PA. STAT. ANN. tit. 53, § 11005 (1972).

140. See *Raum v. Board of Supervisors*, 20 Pa. Cmwlth. 426, 342 A.2d 450 (1975).

E. *Ancillary Matters*

When an applicant wishes to dispute certain non-zoning issues, such as building code provisions, as well as make validity challenges, he or she should consider the effect of new section 913.1 of the MPC which provides:

Where the board has jurisdiction over a zoning matter pursuant to section 909 through 912, the board shall also hear all appeals which the applicant may elect to bring before it with respect to any municipal ordinance or requirement pertaining to the same development plan or development.¹⁴¹

Therefore, if both zoning and non-zoning matters are at issue, the landowner has two choices. First, the landowner may elect to submit a validity challenge to the zoning hearing board instead of to the governing body so as to have both the zoning and non-zoning matters heard in a single hearing. Second, the landowner may elect to submit the validity challenge to the governing body under section 1004(1)(b). If the latter is preferred, three choices remain as to the non-zoning matters: first, the landowner may file a separate action directly in court, perhaps in the form of a request for declaratory judgment; second, the landowner may pursue a curative amendment, and if the governing body refuses it, he or she may commence a new challenge, together with the non-zoning matter, to the zoning hearing board under section 913.1, thus providing the landowner with two chances to attack the validity of the ordinance; third, the landowner may submit a request to the governing body, and from a denial thereof appeal to court under section 1004(3) consolidating therewith the ancillary non-zoning issues.¹⁴²

In choosing a forum, therefore, the landowner must weigh the convenience of settling all matters within a single proceeding against the opportunity to have more than one chance to establish a record in two separate hearings.

141. PA. STAT. ANN. tit. 53, § 10913.1 (1972). In such a case, however, the board has no power to pass upon the nonzoning issues; it merely takes evidence concerning these issues and makes a record thereon. *Id.*

142. Section 1004(2)(b) specifically provides that if an application for a zoning permit or approval is made and denied, and the landowner challenges the validity of the ordinance upon which the application for permit or approval was denied by submitting a challenge and request for curative amendment to the governing body, the time within which he may seek review of the denial based on ancillary issues shall not begin to run until the request to the governing body is disposed of. *Id.* § 11004(2)(b).

F. *The Nature of Relief*

The final consideration as to choice of forum in validity challenges is the different forms of relief available from each forum. Once a challenge is appealed from either body to a court, the nature of the available relief is clear.¹⁴³ However, there are two fundamental differences in the relief available from a zoning hearing board or a governing body in the first instance. First, the relief which may be granted by the governing body is fixed and certain. It is limited to the terms of the proposed curative amendment prepared by the challenger and submitted with the application.¹⁴⁴ If the governing body adopts any other amendment, the landowner has the option of accepting it, or of refusing to accept it, and appealing the challenge to court where the alternative amendment adopted by the governing body will not be considered.¹⁴⁵

On the other hand, the effect of the relief available from a zoning hearing board is not clear. There is no specific statutory provision indicating the powers of a zoning hearing board in this area. It would seem logical that if an ordinance is found to be invalid by the zoning hearing board, and the decision is not appealed to court by the municipality or by protesters, then the zoning hearing board would be the body to grant relief. Certainly, a challenger who is successful before the zoning hearing board ought not be required to appeal the favorable decision to a court in order to obtain relief on it. However, the logic raises other questions. For example, what are the limits of the zoning hearing board's power to set reasonable restrictions on the proposed development? If there is a dispute as to the reasonableness of the restrictions imposed, will an appeal remove the entire case to court, or will it only involve the restrictions questioned, leaving the landowner still at the mercy of the body whose restrictions were appealed? There are few answers to these questions, and only court decisions will

143. In *Ellick*, the court explained at great length the function of a court in granting relief on appeals involving validity challenges. The court noted that definitive relief must be granted in order to prevent the inequity which would result when a landowner who is successful is prohibited from the reasonable development of his or her land. 17 Pa. Cmwlth. at 415-16, 333 A.2d at 246, citing *Casey v. Zoning Hearing Bd.*, ___ Pa. ____, 328 A.2d 464, 469 (1974). The court may disapprove the plan presented by the landowner, or approve it in full or in part. See notes 59-66 and accompanying text *supra*. However, the opinion indicated that it would be improper for the courts to modify the plans or formulate restrictions. Therefore, the matter can be referred back to the municipality while the court retains jurisdiction until the case is settled. 17 Pa. Cmwlth. at 416, 333 A.2d at 246-47.

144. See notes 59-63 & 90-91 and accompanying text *supra*.

145. See *Gorski v. Township of Skippack*, 19 Pa. Cmwlth. 346, 339 A.2d 624 (1975).

establish the parameters of the zoning hearing board's power to grant relief.

Second, the relief available from a governing body, if granted in the form of the adoption of a curative amendment, cannot be appealed. The municipality, of course, cannot challenge its own ordinance and protesters, as discussed above, may not appeal the rezoning. As stated in *Raum v. Board of Supervisors of Tredyffrin Township*,¹⁴⁶

As a practical matter, many rezonings occur upon the request of a landowner, and these rezonings are not invalid so long as they do not amount to spot zoning or special legislation, and they otherwise conform with the spirit of the comprehensive plan.¹⁴⁷

Any determination by a zoning hearing board as to validity, however, will be appealable by protesters.¹⁴⁸ A landowner, therefore, who anticipates success before the zoning hearing board or governing body should, if there is any chance of protesters, choose to file the challenge with the governing body under section 1004(1) (b).

IV. CONCLUSION

In commencing a validity challenge, two matters must be initially considered before the challenge is commenced. First, the challenge must be in proper form, and carefully thought out so as to furnish the basis of jurisdiction over the challenge. Second, the 1972 amendments to the MPC have introduced a choice of forums in which to file a validity challenge. As we have attempted to show in this article, the choice by the landowner to file his challenge before the zoning hearing board or before the governing body is neither a neutral choice nor a choice without major procedural consequences.

146. 20 Pa. Cmwlth. 426, 342 A.2d 450 (1975).

147. *Id.* at 430, 342 A.2d at 455.

148. PA. STAT. ANN. tit. 53, § 11007 (1972).