



1981

The Impact of Act 249 of 1978 upon the Casey Pending Ordinance Doctrine in Pennsylvania Exclusionary Zoning Litigation

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THE IMPACT OF ACT 249 OF 1978 UPON THE CASEY
PENDING ORDINANCE DOCTRINE IN PENNSYLVANIA
EXCLUSIONARY ZONING LITIGATION

JOHN M. HYSON †

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I. INTRODUCTION

SINCE 1926, when the United States Supreme Court upheld the validity of zoning schemes,¹ communities have used zoning ordinances to prevent unwanted development. An effect of typical suburban zoning practices, whether intended or not, has been the exclusion of outsiders along racial, social, and economic lines.² Only in relatively recent years have some courts begun to invalidate "exclusionary zoning."³ And only very recently have these courts come to realize that mere judicial invalidation of an exclusionary zoning ordinance is not an adequate remedy.⁴ In Pennsylvania, the courts have focused upon exclusionary zoning challenges by landowners⁵ and have sought to devise an adequate remedy for a landowner who successfully contends that a challenged zoning ordinance is unconstitutionally exclusionary.

Act 249 of 1978⁶ is an attempt by the Pennsylvania Legislature to redefine the remedial rights of landowners who

1. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

2. See 2 R. ANDERSON, *AMERICAN LAW OF ZONING* § 8.01 (2d ed. 1976); *Developments in the Law — Zoning*, 91 HARV. L. REV. 1427, 1624 (1978).

3. The term "exclusionary zoning" has been applied to many different types of zoning practices, including minimum lot size, building size, and frontage requirements as well as prohibitions of apartments, townhouses and mobile homes. 1 P. ROHAN, *ZONING AND LAND USE CONTROLS* § 2.01, at 7-9 (1978); 2 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* §§ 62.01-65.04, at 607-86 (1974); Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475, 481-84 (1971). Other devices include limits on the number of bedrooms, age restrictions, regulations on cohabitation by unrelated persons, and prohibition of social welfare facilities, such as group homes. 1 P. ROHAN, *supra*, § 2.01, at 9-11.

There are many legal grounds for challenging such exclusionary zoning practices. See D. MOSKOWITZ, *EXCLUSIONARY ZONING LITIGATION* 81-178 (1977); *Developments in the Law — Zoning*, *supra* note 2, at 1624-94. I do not intend, in this article, to discuss the relative merits of the various legal arguments upon which courts have relied in discussing the validity of exclusionary zoning. Instead, this discussion will be limited to the question of the appropriate remedy once a court has determined, on whatever ground, that a zoning ordinance is unlawfully exclusionary.

4. See, e.g., *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977). In *Oakwood at Madison*, the Supreme Court of New Jersey began to struggle with the problem of how to fashion an appropriate remedy once a court has determined that a zoning ordinance is unlawfully exclusionary. *Id.* at 552-54, 371 A.2d at 1227-28. The remedy issue was all but ignored in the court's earlier landmark decision in *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

5. In Pennsylvania, only landowners may bring exclusionary zoning challenges. See notes 7, 14 & 313-14 and accompanying text *infra*.

6. Act of Oct. 5, 1978, Pub. L. No. 249, 1978 Pa. Laws 1067 (codified at PA. STAT. ANN. tit. 53, §§ 10101-11012 (Purdon Supp. 1980-81)) (amending various sections of the Pennsylvania Municipalities Planning Code, PA. STAT.

challenge exclusionary zoning ordinances.⁷ These rights had pre-

ANN. tit. 53, §§ 10101-11012 (Purdon 1972 & Supp. 1980-81). The Municipalities Planning Code [hereinafter "MPC"] contains the zoning enabling legislation for Pennsylvania municipalities other than the cities of Philadelphia and Pittsburgh and the County of Allegheny. PA. STAT. ANN. tit. 53, § 10107(13) (Purdon Supp. 1980-81).

7. In Pennsylvania, only persons who have an interest in property located in the zoning municipality may challenge exclusionary zoning legislation. Such challenges may not be brought by non-residents of the zoning municipality. See, e.g., *Lightcap v. Wrightstown Twp. Bd. of Supervisors*, 25 Bucks County L. Rep. 145 (C.P. 1974); *aff'd per curiam*, No. 1625 C.D. 1973, Oct. 18, 1974 (Pa. Commw. Ct.); *Commonwealth v. Bucks County*, 22 Bucks County L. Rep. 179 (C.P. 1972), *aff'd per curiam*, 8 Pa. Commw. Ct. 295, 302 A.2d 897 (1973), *cert. denied*, 414 U.S. 1130 (1974). In *Bucks County*, the commonwealth court, adopting the opinion of the lower court, dismissed, in a per curiam decision, an action in which non-residents of Bucks County challenged the validity of the zoning ordinances of all 54 municipalities in Bucks County. 8 Pa. Commw. Ct. at 298, 302 A.2d at 899. The apparent basis for the dismissal was the court's agreement with the lower court that the relief sought by the plaintiffs would require the court to undertake a nonjusticiable task. *Id.* In dismissing the sweeping challenge, President Judge Satterthwaite of the Bucks County Court of Common Pleas asserted:

In order to meet and resolve the problems posed by plaintiffs in their presently hypothetical, far-ranging and totally unparticularized context, the Court itself, directly, or indirectly through the requested mandates to and oversight of the County planning commission and the governing bodies of the fifty-four separate municipalities, would be required to assume the awesome task of becoming a superplanning agency, with no expertise in the field; and as such the Court would be required to make immediate and basic "initial policy determinations of a kind clearly for non-judicial discretion," and to carry out this tremendous responsibility with an entire "lack of judicially discoverable and manageable standards for resolving it," This responsibility we do not believe we are required to assume, and we therefore decline to do so.

302 A.2d 904-05 (lower court opinion reprinted in unofficial reporter), quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962). *Bucks County* thus seems to have been decided on constitutional grounds — i.e., that non-resident challenges are to be dismissed because they are nonjusticiable.

In *Lightcap*, a non-resident plaintiff submitted his challenge to the township's zoning hearing board in purported compliance with the procedures set forth in Art. X of the MPC. 25 Bucks County L. Rep. at 145. See PA. STAT. ANN. tit. 53, §§ 11001-012 (Purdon 1972 & Supp. 1980-81). The zoning hearing board rejected the non-resident's challenge on the ground that he had no "standing." 25 Bucks County L. Rep. at 145. On appeal, the court of common pleas affirmed, holding that 1) Article X of the MPC sets forth the exclusive procedures for challenging the validity of an ordinance; 2) such validity challenges can be brought only in accordance with either § 11004 or § 11005 of the MPC; 3) § 11004 was not available to the challenger because he was not a "landowner"; and 4) § 11005 was not available to the challenger because he was not a "person aggrieved". *Id.* at 146-47. Thus, *Lightcap* was decided on the ground that a non-resident lacks statutory "standing" under the MPC. For a critique of the lower court decision in *Bucks County* and the interpretation of Article X of the MPC adopted in *Lightcap*, see Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedure*, 120 U. PA. L. REV. 1029, 1101-03 (1972). For a discussion of non-resident challenges to exclusionary zoning laws, see D. MOSKOWITZ, *supra* note 3, at 17-63; Hyson, *The Problem of Relief in Developer-Initiated Exclusionary Litigation*, 12 URB. L. ANN. 21, 23-24 (1976); notes 313-33 and accompanying text *infra*.

viously been defined by the Supreme Court of Pennsylvania in *Casey v. Zoning Hearing Board*.⁸ There are three important aspects to the *Casey* decision. First, the supreme court adopted a "pending ordinance doctrine" for exclusionary zoning litigation under which a zoning amendment adopted subsequent to an exclusionary zoning challenge was to be disregarded unless the amendment had been publicly advertised prior to the commencement of the challenge.⁹ Second, the supreme court held that Pennsylvania courts had the power to grant "definitive" or "site-specific" relief¹⁰ to a developer-challenger who had persuaded a court that a challenged zoning ordinance was exclusionary.¹¹ Third, the supreme court defined, at least indirectly, the circumstances in which the award of site-specific relief to a successful challenger would be appropriate.¹²

8. 459 Pa. 219, 328 A.2d 464 (1974).

9. *Id.* at 226, 328 A.2d at 466-67. The *Casey* court stated: "While the facts presented herein distinguish the instant case from the typical 'pending ordinance' case, in that there existed no permissive zoning ordinance subsequently amended to effectively deny the application for the building permit, the same approach will be followed." *Id.*

The "pending ordinance doctrine" in Pennsylvania exclusionary zoning litigation, referred to variously as the "*Casey* pending ordinance doctrine" or "*Casey* doctrine," is the chief focus of this article. For a discussion of the nature, development and possible legal basis for this doctrine, see notes 42-142 and accompanying text *infra*.

10. 459 Pa. at 230, 328 A.2d at 469. The court used the term "definitive relief" which it borrowed from Professor Krasnowiecki. See *id.* See also Krasnowiecki, *supra* note 7, at 1059. See generally Comment, *Judicial Relief in Exclusionary Zoning Cases: Pennsylvania's Definitive Relief Approach*, 21 VILL. L. REV. 701 (1976).

Throughout this article, I use the term "site-specific relief" to describe judicial relief which, in one form or another, is directed to and benefits the land of the zoning ordinance challenger. See Hyson, *supra* note 7, at 21-22. See also *Developments in the Law - Zoning*, *supra* note 2, at 1695-99. I believe that the term "site-specific relief" is preferable to "definitive relief" because of its usefulness in indicating that the relief is directed to a particular parcel of land.

11. 459 Pa. at 230, 328 A.2d at 469. For a criticism of the rationale advanced by the *Casey* court in support of this holding, see Hyson, *supra* note 7, at 37-41. See also Comment, *supra* note 10.

Although the 1972 amendments to the MPC had specifically conferred upon Pennsylvania courts the power to grant site-specific relief, see PA. STAT. ANN. tit. 53, § 11011(2) (Purdon 1972), these amendments were not applicable in *Casey* because the landowner's challenge had been initiated prior to the effective date of the amendments. 459 Pa. at 227 n.6, 328 A.2d at 467 n.6.

12. 459 Pa. at 230-31, 328 A.2d at 469-70. The *Casey* court seemed to hold that, once a court has determined that a municipality's ordinance is unlawfully exclusionary, the court should order the municipality to allow the challenger to proceed with his proposed development to the extent that the developer's proposal complies with all unchallenged "administrative requirements of the zoning ordinance in effect on the date of the original application" *Id.* at 231, 328 A.2d at 469-70.

The *Casey* decision, and the pending ordinance doctrine in particular, forced much unwanted new construction upon suburban municipalities.¹³ Developers quickly discovered the three-step secret to success under *Casey*: 1) find a municipality with an exclusionary zoning ordinance; 2) acquire an interest in land located in the municipality;¹⁴ and 3) file a challenge to the municipality's zoning ordinance¹⁵ before the municipality has an opportunity to advertise

While the 1972 amendments to the MPC specifically conferred upon Pennsylvania courts the power to grant site-specific relief, *see* note 11 *supra*, they provided no guidance to the courts as to when such relief would be appropriate. However, in *Ellick v. Board of Supervisors*, 17 Pa. Commw. Ct. 404, 333 A.2d 239 (1975), the commonwealth court attempted to articulate guidelines for the granting of site-specific relief. This court stated:

If the court of common pleas determines that an ordinance is invalid as a matter of law, then it is the court's duty to review the governing body's action, if any, with respect to the "plans and other materials" submitted with the landowner's challenge. As the Supreme Court noted in *Casey*, . . . the courts must go beyond mere invalidation and grant definitive relief. . . . The court may order the plans submitted by the landowner approved as to all of its "elements", or order it approved as to some of them. It may refer some of the elements of the plans to the governing body and it may even disapprove the plan entirely. The court may even refer the "plans and other materials," or parts thereof back to the governing body for disposition; but it may not remand . . . , the challenge to the legality of the ordinance or the curative amendment. . . .

[I]t is not the responsibility of the courts of common pleas to modify or redesign landowners' plans, but rather only to rule upon what is presented to the court. . . . [T]he function of the court is to pass upon the reasonableness of the restrictions present in the record, including both the restrictions contained in the landowner's plans and the restrictions present in the ordinance which are applicable to the same class of usage or construction.

Id. at 415-16, 333 A.2d at 246-47. The commonwealth court further authorized the lower courts to impose otherwise legal zoning regulations on landowners' proposals as would be applicable. *Id.*, 333 A.2d at 247. For a general discussion of circumstances in which site-specific relief would be appropriate, *see* Hyson, *supra* note 7, at 41-48.

13. *See, e.g.*, *Board of Supervisors v. Barness*, 33 Pa. Commw. Ct. 364, 382 A.2d 140 (1978).

14. In Pennsylvania, only a "landowner" may challenge an exclusionary zoning ordinance. PA. STAT. ANN. tit. 53, §11004(1) (Purdon 1972). Under the MPC, a "landowner" is defined as "the legal or beneficial owner . . . of land including the holder of an option or contract to purchase . . . , a lessee if he is authorized under the lease to exercise the rights of the landowner, or other person having a proprietary interest in land" *Id.* §10107(12). *See* notes 5 & 7 *supra*. The terms "landowner" and "developer" will be used interchangeably throughout this article.

15. The MPC gives to a "landowner" the option of submitting his challenge to either the municipality's zoning hearing board or its governing body. PA. STAT. ANN. tit. 53, §11004(1). For a general discussion of these procedures as they operated prior to the amendments contained in Act 249, *See* Henszey & Novak, *Substantive Validity Challenges Under the Pennsylvania Municipalities Planning Code: The Practitioner and the New Procedures*, 21 VILL. L. REV. 187 (1976); Rosenzweig, *The Curative Amendment Procedure*

a proposed "curative" amendment which would eliminate the impermissible exclusionary character of the existing ordinance.¹⁶ This last step was crucial. If the developer filed his challenge *before* the advertisement of a proposed curative amendment, his challenge would be determined on the basis of the vulnerable ordinance in existence at the time of his challenge.¹⁷ If, however, the developer filed his challenge *after* the advertisement of a proposed curative amendment, his challenge would be reviewed on the basis of the usually invulnerable amended ordinance.¹⁸

Casey, in short, set up a race between developers and municipalities with exclusionary zoning ordinances. The outcome of the race, strictly speaking, decided only the appropriate focal point for resolution of the developer's challenge: the clearly exclusionary ordinance in effect at the time of the challenge or the amended ordinance if publicly advertised before the challenge. If, however, a court determined that the developer had won the race and that, under the *Casey* pending ordinance doctrine, it would look to the unamended ordinance for the purpose of determining the merits of a challenge, the court tended not only to declare the ordinance invalid, but also, almost as a matter of course, to grant site-specific relief to the challenger. For example, in *Board of Supervisors v. Barnes*,¹⁹ the commonwealth court, after ruling that a post-challenge amendment was to be disregarded (because it had not been advertised prior to the filing of the challenges),²⁰ held that seven separate developer-challengers were entitled to develop thousands of residential units in a rural Bucks County community.²¹

in Pennsylvania: The Landowner's Challenge to the Substantive Validity of Zoning Restrictions, 80 DICK. L. REV. 43 (1975).

16. See notes 3-4 and accompanying text *supra*.

17. *Casey v. Zoning Hearing Bd.*, 459 Pa. at 225, 328 A.2d at 466.

18. *Id.*

19. 33 Pa. Commw. Ct. 364, 382 A.2d 140 (1978).

20. *Id.* at 369-72, 382 A.2d at 142-44. In *Barnes*, seven different developers, who wished to develop some type of high-density residential use on seven separate parcels of land in the municipality, filed individual challenges (within a short period of time) to the municipality's zoning ordinance. *Id.* at 366-67, 382 A.2d at 141-42. At the time the challenges were filed, the municipality was considering amendments to its comprehensive land development plan which, if adopted and implemented by corresponding changes in the zoning ordinance, would cure most, if not all, of the defects in the existing exclusionary zoning ordinance. There was, however, no publicly advertised proposed amendment to the ordinance. *Id.* at 370-71, 382 A.2d at 143. A curative zoning amendment was adopted *after* the filing of the challenges. *Id.* at 371, 382 A.2d at 143.

21. *Id.* at 371-72, 382 A.2d at 144. The principal issue in *Barnes* was whether a post-challenge zoning amendment should be considered in ruling upon the merits of seven separate exclusionary zoning challenges. *Id.* The

The *Barness* case was the high water mark of developers' triumphs under *Casey*²² and set the stage for the enactment of Act 249.

There is no question but that Act 249 seeks to overturn, or at least modify, each of the three aspects of *Casey*²³ and, thereby, to

commonwealth court, relying upon the pending ordinance doctrine as developed in *Casey* and Appeal of Carr, 30 Pa. Commw. Ct. 342, 374 A.2d 735 (1977), held that the post-challenge amendment should be disregarded because there was not "sufficient public declaration of an intent to amend the existing ordinance" at the time the various challenges were filed. 33 Pa. Commw. Ct. at 371, 382 A.2d at 144, quoting *Casey v. Zoning Hearing Bd.*, 459 Pa. at 226, 328 A.2d at 467. The court in *Barness* concluded that "[t]hey [the seven challengers to the municipality's zoning ordinance] must therefore prevail and [they] must, upon their compliance with other appropriate township regulations, be issued permits to do what their plans and other materials filed proposed." *Id.*

With this language, the *Barness* court seems to have improperly blended together two separate questions: 1) whether, under the *Casey* pending ordinance doctrine, the post-challenge amendment was to be disregarded in ruling upon the merits of the seven challenges; and 2) whether, if the challengers prevailed on the merits of their exclusionary zoning challenge, site-specific relief should be awarded to each of the challengers. The failure to distinguish these two questions was improper because, although the court in *Barness* concluded that application of the *Casey* pending ordinance doctrine precluded consideration of the municipality's post-challenge amendment, it did not necessarily follow that any or all of the challengers should be awarded site-specific relief.

The language of *Casey*, however, affords some discretion to a court faced with the question of whether to grant site-specific relief. The *Casey* court observed: "To forsake a challenger's reasonable development plans after all the time, effort and capital invested in such a challenge is grossly inequitable." 459 Pa. at 230, 328 A.2d at 469 (emphasis added). Moreover, the apparently automatic award of site-specific relief in *Barness* seems to be inconsistent with the carefully articulated criteria for the award of site-specific relief which were set forth in *Ellick v. Board of Supervisors*, 17 Pa. Commw. Ct. 404, 333 A.2d 239 (1975). The *Ellick* court stated that courts should review the challenger's proposed plans for reasonableness before approving them. *Id.* at 415-16, 333 A.2d at 246-47, citing *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (1974); PA. STAT. ANN. tit. 53, § 11011 (Purdon 1972). See note 12 *supra*.

22. According to one newspaper account, the plans of the challengers called for 9,000 housing units which, if developed and occupied, would quadruple the population of the municipality. *Phila. Inquirer*, Nov. 1, 1976, § B, at 1, col. 2.

23. For a discussion of the extent to which Act 249 purports to overturn the pending ordinance doctrine, see notes 143-284 and accompanying text *infra*. That Act 249 also attempts to overturn, or at least modify, the other two aspects of the *Casey* decision is apparent from the language added to § 1011 of the MPC by Act 249. See PA. STAT. ANN. tit. 53, § 11011 (Purdon Supp. 1980-81). Indeed § 1011(2), as amended by Act 249, purports to dictate to the Pennsylvania courts when they may declare an ordinance invalid. *Id.* § 11011(1). Its constitutionality is dubious. Section 1011(2), as amended by the Act, lists various factors which the court shall consider in issuing any relief to a successful challenge. *Id.* § 11011(2). Finally, § 1011(4) precludes the award of judicial relief if the certification required by § 1004(2)(a) has not been made or is not "true and correct." *Id.* § 11011(4). See *id.* § 11004(2)(a). For a discussion of the certification requirement, see notes 242-84 and accompanying text *infra*.

Although beyond the scope of this article, it is at least questionable whether the Pennsylvania Legislature may, without infringing upon the inherent equity powers of the court, limit the circumstances in which a court may award site-specific relief once the court has determined that a challenged zoning ordinance is unconstitutionally exclusionary. In holding that Pennsylvania courts may

provide greater protection to Pennsylvania municipalities against the perceived ravages of court-imposed site-specific relief in exclusionary zoning litigation.²⁴ In this article I will consider only the impact of Act 249 upon the first of these three aspects — the pending ordinance doctrine. The pending ordinance doctrine is, in my view, the most significant of the three aspects of *Casey* because it increases the likelihood that a challenger will be successful with respect to the merits of his challenge.²⁵ Only if a challenger is successful on the merits is a court then required to deal with the issues treated in the other two aspects of *Casey*: whether the court has power to grant site-specific relief to a successful challenger and whether site-specific relief is appropriate in the particular case. In short, if Act 249 has effectively abolished the pending ordinance doctrine in exclusionary zoning litigation, making it less likely that developer-challengers will succeed on the merits of their challenges, it makes little or no difference whether and when a Pennsylvania court may grant site-specific relief.²⁶

award site-specific relief, the *Casey* court must have relied implicitly upon constitutional notions of the equity power of courts because the applicable zoning enabling legislation did not confer upon Pennsylvania courts the power to award site-specific relief. See note 11 *supra*. Section 1011 of the MPC, added by the 1972 amendments, conferred such power but, because the challenge in *Casey* was filed prior to the effective date of the 1972 amendments, the *Casey* court held that the 1972 amendments were not applicable. 459 Pa. at 227 n.6, 328 A.2d at 467 n.6. Thus, though I have previously criticized the *Casey* court's failure to articulate a satisfactory basis for its holding that Pennsylvania courts have the power to award site-specific relief, see Hyson, *supra* note 7, at 37-41, the fact remains that the supreme court did hold that, even absent legislative authorization, the Pennsylvania courts had the power to grant site-specific relief.

Did the court in *Casey* implicitly hold that site-specific relief was necessary in order to remedy adequately the constitutional violation — *i.e.*, the exclusionary character of the zoning ordinance? And if the *Casey* court did so hold, may the legislature limit the power of Pennsylvania courts to grant site-specific relief without, contrary to separation of powers concepts, infringing upon the inherent equity powers of the courts? These questions are similar to those which were raised when the Congress of the United States considered proposed legislation which would have prohibited federal courts from ordering busing in school desegregation cases. See generally G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 50-56, 773-74 (10th ed. 1980). For a discussion of the court's power to go beyond a declaration of invalidity and order site-specific relief, see Krasnowiecki, *supra* note 7, at 1060-65; Note, *Beyond Invalidation: The Judicial Power to Zone*, 9 URB. L. ANN. 159 (1975).

24. See notes 13-22 and accompanying text *supra*.

25. See notes 12 & 21 *supra*. Under *Casey*, the developer need not fear that a post-challenge amendment will moot his original challenge by requiring him to redirect his attack to the zoning ordinance as amended. See notes 17-18 and accompanying text *supra*.

26. Of course, a favorable determination on the merits is not worth much to a developer-challenger if it does not result in the award of site-specific relief. Nevertheless, a determination on the merits is sequentially prior to a determination of appropriate relief and, therefore, a favorable decision on the merits is a precondition to the award of any relief to the challenger.

In this article, I intend to describe first a conceptual difficulty which underlies the development of the pending ordinance doctrine in developer-initiated exclusionary zoning litigation.²⁷ Second, the origins of the pending ordinance doctrine in Pennsylvania exclusionary zoning litigation will be closely examined for the purpose of determining the legal basis for the doctrine.²⁸ Third, I will consider whether Act 249 purports to modify the *Casey* doctrine and, to the extent it does, whether such modification is constitutional.²⁹ Finally, I will suggest possible legislative solutions to the problem which gave rise to the *Casey* pending ordinance doctrine — the problem of post-challenge amendments in developer-initiated challenges.³⁰

II. A BASIC CONCEPTUAL DIFFICULTY IN DEVELOPER-INITIATED EXCLUSIONARY ZONING LITIGATION

Conceptual confusion in developer-initiated exclusionary zoning litigation arises from the fact that a developer-challenger seeks relief which, though consistent with his economic interest, is inconsistent with the legal theory which underlies his substantive challenge. A developer who brings an exclusionary zoning challenge in Pennsylvania contends that a municipality's zoning ordinance is invalid *on its face*; he does not contend that the zoning is invalid *as applied to his land*.³¹ Nevertheless, because of the chal-

27. See notes 31-41 and accompanying text *infra*.

28. See notes 42-142 and accompanying text *infra*.

29. See notes 143-284 and accompanying text *infra*.

30. See notes 285-351 and accompanying text *infra*.

31. Although a comprehensive treatment of Pennsylvania substantive exclusionary zoning law is beyond the scope of this article, a brief review of the major Pennsylvania exclusionary zoning decisions is necessary in order to explain the relationship between the two types of challenges.

In its first exclusionary zoning decision, *National Land and Inv. Co. v. Easttown Twp. Bd. of Adj.*, 419 Pa. 504, 215 A.2d 597 (1965), the Supreme Court of Pennsylvania held that a municipality's zoning ordinance was invalid because it imposed large minimum lot-size requirements upon a substantial amount of acreage in the municipality. *Id.* at 533, 215 A.2d at 613. The plurality opinion by Justice Roberts set forth various grounds for holding the zoning ordinance invalid, including the effect of the large minimum lot-size restrictions upon the value and marketability of the challenger's land. *Id.* at 523-25, 215 A.2d at 608. Thus, this first exclusionary zoning decision appeared to suggest that a landowner-challenger must demonstrate, at least to some extent, that the challenged ordinance is invalid in its application to him.

This suggestion, if ever intended, has been laid to rest by the subsequent exclusionary zoning decisions of the Pennsylvania Supreme Court. In *Concord Twp. Appeal*, 439 Pa. 466, 268 A.2d 765 (1970), the supreme court again invalidated a zoning ordinance because it imposed large minimum lot-size requirements upon a substantial amount of acreage in the municipality. *Id.* at 478, 268 A.2d at 770. However, the plurality opinion by Justice Roberts did not even mention the impact of the zoning ordinance upon the challenger's

lenger's economic interest in a particular parcel of land, he is not content with a simple judicial declaration that the challenged ordinance is invalid — the traditional and clearly authorized form of judicial relief when legislation is held to be facially invalid. Such relief is unlikely to result in any benefit to the challenger.³² Instead, the developer-challenger seeks a judicial order directed to his land — site-specific relief³³ — a form of relief which would seem to be more appropriate to a challenge grounded upon a contention that the municipality's zoning is invalid only as applied to the challenger's land.³⁴

land. Similarly, in *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970), the supreme court invalidated a municipal zoning ordinance which made no provision for apartments. *Id.* at 240-42, 263 A.2d at 396-97. As in *Concord Township Appeal*, the supreme court, in yet another plurality opinion by Justice Roberts, did not consider the impact of the challenged ordinance as applied to the challenger's land. Finally, in two of its recent "fair share" decisions, the Pennsylvania Supreme Court invalidated zoning ordinances which did not provide a "fair share" of the municipality's acreage for apartments. See *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 382 A.2d 105 (1977); *Township of Willistown v. Chesterdale Farms, Inc.*, 462 Pa. 445, 341 A.2d 466 (1975). In neither case did the supreme court consider the impact of the challenged ordinance as applied to the challenger's land.

The *Casey* decision provides explicit support for the proposition that an exclusionary zoning challenge is a challenge to the facial validity of a zoning ordinance. In *Casey*, the challenger contended that a municipality's zoning ordinance was invalid because, contrary to *Girsh Appeal*, the ordinance made no provision for apartments. 459 Pa. at 223, 328 A.2d at 466. Commenting on the nature of this challenge, the court in *Casey* stated:

Once a zoning ordinance is found to be constitutionally defective, the judgment invalidates the entire ordinance, not merely the zoning on a particular tract of land.

This case must be distinguished from the case in which a challenger is merely contesting the zoning of his own tract of land and only seeking to have the court declare the zoning of his tract invalid.

Id. at 229 & n.11, 328 A.2d at 468 & n.11.

32. See D. Moskowitz, *supra* note 3, at 275-88. If the court simply declares the challenged ordinance to be invalid, the end result may be subsequent municipal adoption of an amended zoning ordinance which cures the original invalidity, but which does not rezone the challenger's land. This is what happened in the *Girsh* controversy. See *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970). After the Pennsylvania Supreme Court had declared in *Girsh* that the zoning ordinance of Nether Providence Township was invalid because it made no provision for apartments, the township amended its ordinance to provide for apartments but did not rezone the *challenger's land* to permit apartment development. D. Moskowitz, *supra*, at 363. Dissatisfied with this outcome, the challenger sought an order requiring the township to permit apartment development on *his property*. *Id.* at 363-64. Although the court issued the requested order, it did not advance any legal rationale to support the proposition that a court had the power to order such site-specific relief. *Id.* It was not until its decision in *Casey* that the Pennsylvania Supreme Court articulated such a rationale. See notes 10-12 and accompanying text *supra*.

33. See note 10 and accompanying text *supra*.

34. I am simply suggesting that if a court may ever grant site-specific relief, it would seem that such relief would be more appropriate where there has been

This inconsistency between a developer's economic interest in particular land and the legal theory underlying his exclusionary challenge brought about the development of the "pending ordinance doctrine" of *Casey*.³⁵ When a person challenges legislation on the ground of alleged facial invalidity, he will, in the usual case, be pleased with a post-challenge amendment to the legislation which cures the alleged invalidity. The post-challenge cure will usually result in the voluntary dismissal of the challenge because, in the usual case, the challenger's objective is simply to eliminate the alleged invalidity in the challenged legislation. If the alleged invalidity is eliminated by a post-challenge amendment, the challenger is spared the time and expense of pursuing the challenge to a final judicial resolution. Indeed, again in the usual case, the post-challenge amendment moots the original challenge. A challenger faced with a post-challenge amendment must, if he wishes to continue to litigate, redirect his challenge to the legislation as amended.³⁶

The developer-initiated exclusionary zoning challenge, however, does not possess the theoretical consistency of the normal case.³⁷ Although a post-challenge amendment may cure the in-

a site-specific challenge — that is, a challenge to zoning as applied to a particular parcel of land. But even when there is a site-specific challenge, it is not clear that a court has the power to go beyond a declaration of invalidity and order site-specific relief. See Krasnowiecki, *supra* note 7, at 1060-65; Note, *supra* note 23.

35. See note 9 *supra*.

36. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 62-68 (1978). The mootness doctrine, which precludes courts from considering matters no longer in dispute, is based ultimately upon the perceived scope of judicial power. Once there has been an amendment to challenged legislation, the challenger must, in order to maintain a justiciable controversy, shift his attack to the amended legislation because a court lacks power to consider the validity of legislation which is no longer in effect. *Id.*

37. See notes 35-36 and accompanying text *supra*. Such consistency is present in nonresident-initiated exclusionary zoning litigation. In such cases, the nonresident plaintiff who challenges a zoning ordinance is content with relief which simply eliminates the alleged invalidity — *i.e.*, a judicial declaration of invalidity followed by municipal adoption of an amended zoning ordinance which does not have the same defect. Because the nonresident, by definition, does not have an interest in particular land in the defendant municipality, the nonresident is not interested in a form of relief which benefits particular land. For the same reason, a nonresident plaintiff is content with a post-challenge amendment which cures the alleged invalidity irrespective of the particular land which benefits from the amendment.

Although nonresident-initiated exclusionary zoning litigation does not suffer from the conceptual difficulty described in the text, it presents significant problems in fashioning an effective judicial remedy. If a court, in non-resident-initiated litigation, merely declares that a challenged ordinance is invalid, the municipality will have an opportunity to amend its ordinance in order to bring the ordinance into conformity with the substantive criteria of constitutionality articulated by the court. But what if the amended ordinance is challenged on exclusionary grounds and held to be unconstitutional? After the municipality

validity alleged by the developer, it will not necessarily satisfy his interest in developing his parcel of land.³⁸ For this reason, the developer-challenger in *Casey* asked the Pennsylvania Supreme Court to disregard the post-challenge amendment to the municipality's zoning ordinance.³⁹ The supreme court granted the developer's request by extending the pending ordinance doctrine to exclusionary zoning litigation.⁴⁰ In doing so, the supreme court took upon itself the unusual, if not unique, task of determining the validity of legislation which was no longer in effect.⁴¹

III. JUDICIAL DEVELOPMENT OF THE PENDING ORDINANCE DOCTRINE IN PENNSYLVANIA EXCLUSIONARY ZONING LITIGATION

A. *The Problem*

Although the legal basis for the *Casey* pending ordinance doctrine is uncertain,⁴² the policy basis for its adoption is clear. The Pennsylvania Supreme Court adopted the pending ordinance doctrine in exclusionary zoning litigation because it did not wish, on the one hand, to discourage developer-initiated exclusionary zoning challenges and, on the other, to encourage municipalities to continue exclusionary zoning practices. Because of the inconsistency between the legal basis for a developer's challenge and his interest

has been given an opportunity to cure the invalidity, should the court go beyond a simple declaration that the amended ordinance is invalid and impose a court-devised scheme of zoning upon the municipality? The Supreme Court of New Jersey, which upheld nonresident-initiated exclusionary zoning challenges in *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 159 n.3, 336 A.2d 713, 717 n.3, *cert. denied*, 423 U.S. 808 (1975), has begun to cope with this problem. See *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 552-54, 371 A.2d 1192, 1227-28 (1977). Pennsylvania courts, however, will not have to deal with these issues as long as they continue to hold that nonresidents may not initiate exclusionary zoning challenges. See note 7 *supra*. Thus, though developer-initiated challenges present conceptual difficulties, there is a tradeoff — developer-initiated challenges do not present the awesome remedial problems of nonresident-initiated challenges. See Hyson, *supra* note 7, at 22-27; *Developments in the Law — Zoning*, *supra* note 2, at 1700-07.

38. See notes 31-34 and accompanying text *supra*. Indeed, a municipality which wishes to discourage developer-initiated exclusionary challenges would *never* adopt a post-challenge amendment which benefited the challenger. See text accompanying notes 46-47 *infra*.

39. See 459 Pa. at 225-29, 328 A.2d at 466-69. For a discussion of the facts in *Casey*, see notes 48-64 and accompanying text *infra*.

40. See note 9 and accompanying text *supra*.

41. See note 36 and accompanying text *supra*.

42. For a discussion of the legal basis for the *Casey* pending ordinance doctrine, see notes 48-124 and accompanying text *infra*.

in a particular parcel of land,⁴³ a developer is usually not satisfied with a post-challenge amendment which cures the facial invalidity of the challenged ordinance. Indeed, the developer-challenger will be satisfied with a post-challenge amendment only if, in addition to curing the facial invalidity, it also benefits the parcel in which the developer has an interest.

In *Casey*, the supreme court was faced with a post-challenge amendment which did not benefit the challenger.⁴⁴ If the court had held that such a post-challenge amendment may not be disregarded in ruling upon the merits of a developer's challenge, a developer would be required either to accept the dismissal of his original challenge on grounds of mootness,⁴⁵ or shift his challenge from the ordinance in existence at the time of the challenge to the ordinance as amended. Such a shift in the focus of the challenge could be quite burdensome to a challenger because, though the burden in establishing the invalidity of the unamended ordinance may be slight, the burden in establishing the invalidity of an amended ordinance may be great.⁴⁶ Thus, if a developer-challenger can be required, by virtue of a post-challenge amendment, to assume a heavy burden in establishing invalidity, such challenges will clearly be discouraged.⁴⁷

43. For a discussion of the inconsistency between the legal basis for a developer's challenge and his interest in particular land, see notes 31-41 and accompanying text *supra*.

44. 459 Pa. at 224, 328 A.2d at 466.

45. See *Hall v. Bealls*, 396 U.S. 45 (1969) (amendment of voter residency statute mooted appellants' case); note 36 and accompanying text *supra*.

46. For example, the original unamended ordinance may have been patently invalid under *Girsh* Appeal, 437 Pa. 237, 263 A.2d 395 (1970), because it made no provision for apartments. See note 31 *supra*. A post-challenge amendment might cure this patent de jure invalidity by amending the zoning ordinance and zoning map to permit apartment development on particular land, other than that of the challenger, within the municipality. But where it is arguable that apartments could not, as a practical matter, be developed on the parcels which have been rezoned for apartment development by the post-challenge amendment, the challenger might assert that the ordinance as amended continued to be invalid because there was still a de facto prohibition of apartments. Alternatively, the challenger might argue that the amended ordinance continued to be invalid because, though the amendment had cured the total prohibition of apartments (which is invalid under *Girsh*), the amended ordinance still failed to provide a "fair share" of acreage for apartment development as required by *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 382 A.2d 105 (1977), and *Township of Willistown v. Chesterdale Farms, Inc.*, 462 Pa. 445, 341 A.2d 466 (1975). See note 31 *supra*. Both the de facto prohibition and lack of fair share contention are much more difficult to prove than the de jure prohibition argument which could have been directed against the unamended ordinance. See *Benham v. Board of Supervisors*, 22 Pa. Commw. Ct. 245, 349 A.2d 484 (1975).

47. Since, in Pennsylvania, only developers may challenge zoning ordinances on exclusionary grounds, see notes 7 & 14 *supra*, to discourage developer-challengers is to discourage all potential challengers.

Judicial consideration of post-challenge amendments would also encourage municipalities to maintain even patently invalid zoning ordinances. Municipalities could wait to cure invalid ordinances until such time as they might be challenged by a developer. At that time, after the filing of a challenge, the municipality could amend its ordinance so as to eliminate any patent invalidity. Further, if municipalities regularly adopted post-challenge amendments which did not benefit the challenger, there would soon be few, if any, developer challenges and thus no incentive for a municipality to cure patently invalid ordinances by amendment. This, then, was the problem faced by the Pennsylvania Supreme Court in *Casey*.

B. *The Legal Basis for the Pending Ordinance Doctrine in Exclusionary Zoning Litigation*

1. *The Casey Decision*

Though I have referred generally to the problem which the supreme court faced in *Casey*,⁴⁸ any analysis of the *Casey* pending ordinance doctrine must begin with a description of the particular facts underlying the decision.

In 1967, the Board of Supervisors of Warwick Township (Board)⁴⁹ entered into an agreement with a firm of planning and development consultants under which the consulting firm was to prepare a comprehensive land use plan for the township.⁵⁰ In September of 1969, the Board adopted the comprehensive plan after deleting from it a section which provided for the development of multi-family housing in the township.⁵¹ On February 13, 1970, the Supreme Court of Pennsylvania handed down its opinion in *Girsh Appeal*⁵² in which the court held that a zoning ordinance which made no provision for apartments was unconstitutional.⁵³ On April 11, 1970, *Casey's* predecessor in interest to the relevant

48. See text accompanying notes 42-47 *supra*.

49. The Board is the governing body of Warwick Township. The MPC defines a governing body as "the board of supervisors in townships of the second class. . . ." PA. STAT. ANN. tit. 53, § 10107(10) (Purdon 1972). The governing body "may enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of [the MPC]." *Id.* § 10601.

50. 459 Pa. at 223-25, 328 A.2d at 465-66.

51. *Id.* at 223, 328 A.2d at 465.

52. 437 Pa. 237, 263 A.2d 395 (1970).

53. *Id.* at 243, 263 A.2d at 398.

property applied to the Board for authorization to introduce multi-family housing into the township⁵⁴ and, relying on *Girsh*, contended that the township's zoning ordinance was invalid because it did not provide for multi-family dwellings.⁵⁵

On the same date that the challenge to the township's ordinance was commenced, the Board referred to the Township Planning Commission, for its recommendation, a proposed amendment to the zoning ordinance which provided for multi-family housing.⁵⁶ The amendment, however, did not rezone Casey's land to permit apartment development.⁵⁷ Two days after the township's referral, the Planning Commission submitted to the Board a positive recommendation on the proposed amendment.⁵⁸ Public notice of this proposed amendment was made on May 1 and May 8, 1970, and the amendment was adopted on May 25, 1970.⁵⁹

The initial issue before the supreme court in *Casey* was whether, in ruling upon the merits of the challenge, it should consider the post-challenge amendment adopted on May 25, 1970.⁶⁰ With respect to this issue, the supreme court held that Pennsylvania courts, in deciding the merits of a developer-initiated exclusionary zoning challenge, must disregard a post-challenge amendment unless the amendment had been publicly advertised prior to the commencement of the challenge.⁶¹ The entirety of the court's

54. 459 Pa. at 223, 328 A.2d at 465. Since Casey's predecessor in interest filed its challenge in 1970, the challenge was subject to the procedures set forth in the original version of the MPC. *Id.* at 230 n.12, 328 A.2d at 469 n.12. For a discussion of these procedures, see Krasnowiecki, *supra* note 7, at 1084-93. In 1972, the MPC was amended to provide the alternative methods for instituting a challenge, now set forth in §1004(1). See PA. STAT. ANN. tit. 53, §11004(1) (Purdon 1972).

55. 459 Pa. at 223, 328 A.2d at 465-66. Casey's predecessor in interest also challenged the township's ordinance on the ground that it required a two-acre minimum lot size for residential housing. *Id.*, 328 A.2d at 466. However, because of its disposition of the *Girsh*-based contention, the supreme court did not reach the minimum lot size contention. *Id.* at 231 n.17, 328 A.2d at 470 n.17.

56. *Id.* at 233, 328 A.2d at 466. The proposed amendment was based upon the provisions in the consultant's comprehensive plan which the governing body had previously rejected. *Id.*

57. *Id.* at 223-24, 328 A.2d at 466.

58. *Id.*

59. *Id.* at 224, 328 A.2d at 466.

60. *Id.* at 225, 328 A.2d at 466. The other two issues in *Casey* related to the power of a court to grant site-specific relief and, assuming such power, the circumstances in which site-specific relief was appropriate. *Id.* at 227, 230, 328 A.2d at 467, 469. For a brief discussion of these issues, see notes 23-26 and accompanying text *supra*.

61. 459 Pa. at 226, 328 A.2d at 467. Although the reference in the text focuses on whether "courts" must disregard post-challenge amendments, exclusionary challenges in Pennsylvania are initially commenced either before the

rationale in support of this holding is set forth in the following language:

The "pending ordinance doctrine" has been most carefully defined in cases involving zoning modifications vis-a-vis applications for building permits. It is well settled in this Commonwealth that a building permit may be refused if at the time of application for such permit there is pending an amendment to a previously permissive zoning ordinance which would prohibit the use of the land for which such permit is sought. . . . When there has been a "sufficient public declaration" of an intent to amend the existing zoning ordinance, it is the pending amendment which governs the issuance of such permits. . . . While the facts presented herein distinguish the instant case from the typical "pending ordinance" case, in that there existed no permissive zoning ordinance subsequently amended to effectively deny the application for the building permit, the same approach will be followed.⁶²

The *Casey* court then found that the amendment adopted on May 25 was not pending at the time of the developer's challenge since the township had not "publicly advertised its intentions [to rezone] prior to the filing of the [challenge]." ⁶³ Therefore, the court concluded that the amendment should be ignored.⁶⁴

zoning municipality's governing body or its zoning hearing board. See note 15 *supra*. Thus, the *Casey* pending ordinance doctrine mandates that not only courts but also governing bodies and zoning hearing boards are to disregard post-challenge amendments which have not been previously advertised. For the sake of brevity, however, I will refer to the *Casey* pending ordinance doctrine as imposing a mandate upon Pennsylvania's "courts."

62. 459 Pa. at 225-26, 328 A.2d at 466-67 (citations omitted). This language is the only affirmative support which the *Casey* court advances in support of its adoption of the pending ordinance doctrine. Later in its opinion, the *Casey* court rejected the argument that § 1009(2)(ii) of the MPC, since repealed, "would allow the [post-challenge] amendment to cure the constitutional defect [in the unamended ordinance]." *Id.* at 227, 328 A.2d at 467. See Act of July 31, 1968, Pub. L. No. 805, 1968 Pa. Laws 805 (repealed 1972). For a discussion of the supreme court's analysis of § 1009(2)(ii), see notes 75 & 77-79 and accompanying text *infra*. In looking to see whether § 1009(2)(ii) provided for consideration of a curative post-challenge amendment, the *Casey* court seemed to assume that it had already set forth sufficient affirmative support for the proposition that a post-challenge amendment must be disregarded and that, in analyzing the applicability of § 1009(2)(ii), it was simply considering whether the affirmative support was rebutted by a provision in the MPC which allowed for judicial consideration of a post-challenge amendment. See 459 Pa. at 227, 229, 328 A.2d at 467-69.

63. 459 Pa. at 227, 328 A.2d at 467. This conclusion rested pivotally upon the court's finding that the Board had not publicly advertised its intention to adopt the amendment until three weeks after the initiation of the challenge by *Casey's* predecessor in interest. *Id.*

64. *Id.*

2. *The Inadequacy of the Casey Rationale*⁶⁵

a. Reliance Upon the Pending Ordinance Doctrine

The holding in *Casey* that a court must disregard a previously unadvertised post-challenge amendment is grounded entirely upon the court's decision to apply the "approach" of the "pending ordinance doctrine" to the situation before it. The *Casey* court recognized that the pending ordinance doctrine was developed to deal with circumstances totally dissimilar to those before it — *i.e.*, "cases involving zoning modifications vis-a-vis applications for building permits."⁶⁶ In other words, the pending ordinance doctrine developed in the context of a situation in which 1) a landowner had applied for a building permit; 2) his application was consistent with existing zoning; but 3) his application was inconsistent with a proposed amendment to the zoning ordinance. In this context, Pennsylvania courts have articulated the "pending ordinance doctrine" which provides, as the supreme court stated in *Casey*, "that a building permit may be refused if at the time of application for such permit there is pending an amendment to a previously permissive zoning ordinance which would prohibit the use of the land for which such permit is sought."⁶⁷ In *Casey*, however, the landowner had not applied for a permit which was consistent with the zoning applicable to his land at the time of the application.⁶⁸ On the contrary, the landowner sought to avoid compliance with the zoning applicable to his land by obtaining judicial invalidation of the municipality's zoning ordinance.⁶⁹ In spite of the fundamental difference between the situation in which the pending ordinance doctrine developed and the situation before the court in *Casey*, the supreme court, though specifically recognizing this difference,⁷⁰ applied the doctrine without reviewing the considerations which gave rise to the development of the pending ordinance doctrine or

65. This analysis is an amplification of the views set forth in Hyson, *supra* note 7, at 30-31.

66. 459 Pa. at 225, 328 A.2d at 466.

67. *Id.*, 328 A.2d at 467, citing *Boron Oil Co. v. Kimple*, 445 Pa. 328, 284 A.2d 744 (1971); *Hertrick Appeal*, 391 Pa. 148, 137 A.2d 310 (1958).

68. 459 Pa. at 230, 328 A.2d at 469.

69. *Id.* at 225-27, 328 A.2d at 465-66.

70. *Id.* at 226, 328 A.2d at 467. The *Casey* court stated explicitly that "the facts presented herein distinguish the instant case from the typical 'pending ordinance' case" *Id.*

determining whether the application of the doctrine to a different situation would be consistent with those considerations.⁷¹

If the court in *Casey* had examined closely the difference between the typical situation in which the pending ordinance doctrine was developed and the situation before it, it is unlikely that the supreme court would have reached the same result.⁷² In the typical case, the pending ordinance doctrine prevents the establishment of vested rights even before a zoning ordinance is amended.⁷³ Rather than serving to protect developers, the pending ordinance doctrine, in the typical situation, is *protective* of a municipality's power to amend its zoning ordinance by preventing development of land which is inconsistent with a proposed amendment.⁷⁴ In

71. Although recognizing the difference between the "typical" pending ordinance case and the situation before it, *see note 9 supra*, the court in *Casey* stated simply that "the same approach will be followed." 459 Pa. at 226, 328 A.2d at 467.

72. *See Hyson, supra note 7*, at 30-31.

73. *See id.*

74. *See id.* The accuracy of this statement might be questioned on the ground that the typical situation in which the pending ordinance doctrine developed actually consisted of two distinct situations, only one of which corresponds to the statement in the text. Specifically, the "typical" pending ordinance situation is one in which a landowner's application for a building permit has been denied because, even though the application was consistent with the existing zoning at the time of the application, it was inconsistent with a proposed amendment. If the landowner seeks judicial review of the denial of the permit, the crucial issue will be whether the proposed amendment was pending at the time of the landowner's application for a permit. Obviously there are two possible outcomes in such an action: 1) the court may hold that the proposed amendment *was* pending at the time of the permit application and rely on the pending ordinance doctrine to uphold the denial of the permit (assuming that the proposed amendment was subsequently enacted); or 2) the court may hold that the proposed amendment *was not* pending at the time of the permit application and, thus, overturn the denial of the permit and direct that the permit be issued. Both of these situations are represented in the decisions referred to by the *Casey* court. *See* 459 Pa. at 225-26, 328 A.2d at 467, *citing* *Boron Oil Co. v. Kimple*, 445 Pa. 327, 284 A.2d 744 (1971) (denial of permit upheld); *Lhormer v. Bowen*, 410 Pa. 508, 188 A.2d 747 (1963) (issuance of permit ordered); *Hertrick Appeal*, 391 Pa. 148, 137 A.2d 310 (1958) (issuance of permit ordered).

In the former situation, the application of the pending ordinance doctrine protects the effectiveness of a municipality's power to amend. In the latter situation, the court, in ordering the issuance of the permit, might be viewed as relying upon the pending ordinance doctrine to undercut the effectiveness of the subsequently enacted amendment. The usual rule, however, is that an application for a permit is to be evaluated in light of the law in existence at the time of the application. *See Lhormer v. Bowen*, 410 Pa. 508, 188 A.2d 747 (1963); *Shapiro v. Zoning Bd. of Adj.*, 377 Pa. 621, 105 A.2d 299 (1954). The pending ordinance doctrine is a unique exception to that usual rule. Thus, when a court orders that a permit issue in the second situation, the court is not *relying* on the pending ordinance doctrine to justify such an order; rather, the court is relying upon the usual rule and is implicitly holding that the circumstances do not fall within the pending ordinance exception to that rule. It is only in the first situation that the court, in upholding the denial

the *Casey* situation, however, application of the pending ordinance doctrine is *destructive* of the municipality's power to amend its ordinance since, under the doctrine, courts must disregard a properly enacted zoning amendment. In short, the decisions which mandate application of the pending ordinance doctrine in the typical situation provide no support for the *Casey* court's holding.

b. Failure to Explain Judicial Power to Disregard a Post-Challenge Amendment

The major flaw in the *Casey* opinion is that the court fails to explain how a Pennsylvania court has the power to disregard a properly enacted zoning amendment.⁷⁵ Under section 601 of the Municipalities Planning Code (MPC), the township in *Casey* had the power to "enact, amend, and repeal" zoning ordinances.⁷⁶ In spite of this explicit grant of power, the court in *Casey* held that a Pennsylvania court not only may, but *must*, disregard a post-challenge amendment unless previously advertised.

of a permit because of its inconsistency with a pending amendment, relies upon the pending ordinance doctrine. The court in *Casey* recognizes this point when, in its articulation of the pending ordinance doctrine, it states that it is "well settled" that "a building permit may be *refused* if the application is inconsistent with a pending amendment." 459 Pa. at 225, 382 A.2d at 467 (emphasis added).

75. The *Casey* pending ordinance doctrine provides that a Pennsylvania court has the *obligation* to disregard a previously advertised post-challenge amendment. See note 9 and accompanying text *supra*. To say that a court has such an obligation, however, presupposes that it has the *power* to carry out the obligation. The *Casey* court made an oblique reference to the power issue after discussing the stay provision of former § 1009 of the MPC. See PA. STAT. ANN. tit. 53, § 11009 (Purdon 1968) (repealed). The court stated:

Future applicants must contend with the amended ordinance as it is now written. However, we cannot allow a municipality to thwart a valid challenge to its zoning ordinance by adopting a curative provision, which was not considered or advertised prior to the time of the challenger's application. Therefore, we will not permit this provision for multi-family housing, . . . , to deny appellee's rights.

459 Pa. at 229, 328 A.2d at 469. The *Casey* court, in stating that future applicants "must contend" with the ordinance as amended, seemed to recognize that it must generally accept the validity of the amendment, so long as the amendment did not "thwart a valid challenge" or "deny appellee's rights." *Id.* But the court failed to explain what "rights" of the challenger would be thwarted by consideration of the post-challenge amendment. The *Casey* court, in other words, did not explain from whence it derived the power to disregard the post-challenge amendment.

76. PA. STAT. ANN. tit. 53, § 10601 (Purdon 1972) (emphasis added). Section 601 was not modified by amendments to the MPC in 1972 and 1978. It provides that "[t]he governing body of each municipality, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of this act." *Id.*

Strange as it may seem, the *Casey* opinion does not refer to section 601. This oversight occurred presumably because counsel and the trial court had diverted the supreme court's attention away from section 601 and directed it instead toward the then applicable section 1009(2)(ii),⁷⁷ arguing that the latter section gave a municipality the power to adopt a post-challenge amendment which a court must consider.⁷⁸ The *Casey* court's rejection of this argument is persuasive⁷⁹ — but not dispositive. Even though section

77. Brief for Appellant at 19-25, *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (1974). See PA. STAT. ANN. tit. 53, § 11009(2) (Purdon 1968) (repealed 1972). Section 1109(2), which related to zoning appeals to a court from a decision by a zoning hearing board, provided:

(2) Where the appeal involves a challenge to the validity of any ordinance or map the court shall have power to declare the ordinance, map or any provisions thereof invalid and, in addition thereto, shall have power to:

(i) enter judgment in favor of the landowner as provided in section 802, or (ii) stay the effect of its judgment for a limited time to give the local governing body an opportunity to modify or amend the ordinance or map in accordance with the opinion of the court.

Id. At no point in its brief, however, did the township rely upon the general power to amend contained in § 601. See PA. STAT. ANN. tit. 53, § 10601 (Purdon 1972). A significant portion of the township's brief in *Casey* was devoted to the argument that the post-challenge amendment was pending at the time of the challenge. Brief for Appellant at 8-15, *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (1974). This argument assumes, of course, the applicability of the pending ordinance doctrine to the *Casey* situation.

78. 459 Pa. at 227, 328 A.2d at 467-68. More specifically, the township contended that the trial court was correct in holding that § 1009(2)(ii) permitted the township to adopt an effective post-challenge amendment. Brief for Appellant at 19-25, *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (1974). See PA. STAT. ANN. tit. 53, § 11009(2) (Purdon 1968) (repealed 1972). The trial court had reasoned that since § 1009(2)(ii) granted the municipality an "opportunity to cure the ordinance deficiency after judgment, *a fortiori* it may be given the opportunity to cure the deficiency before judgment." 459 Pa. at 227, 328 A.2d at 468 (emphasis supplied by court). In other words, the trial court had looked to § 1009(2)(ii) as support for the proposition that a municipality could adopt a post-challenge amendment which must be given consideration by a court. The township in *Casey* relied on this argument in seeking to reinstate the trial court decision which had been overturned by the commonwealth court. See *Casey v. Zoning Hearing Bd.*, 8 Pa. Commw. Ct. 473, 303 A.2d 535 (1973), *aff'd*, 459 Pa. 219, 328 A.2d 464 (1974).

79. 459 Pa. at 228-29, 328 A.2d at 468-69. The supreme court held that § 1009(2)(ii) was intended to deal with the situation where there had been a judicial declaration that a municipality's zoning ordinance was invalid. *Id.* In the court's view, § 1009(2)(ii), in authorizing a court to "stay the effect" of the declaration of invalidity (during which stay the municipality could amend its zoning ordinance so as to cure the declared defect), was intended to "avoid the chaotic situation which would arise if the municipality remained temporarily unzoned." 459 Pa. at 229, 328 A.2d at 468. A "chaotic situation" would arise because, in the absence of a § 1009(2)(ii) stay, landowners in the municipality would not be subject to any zoning restrictions until such time as it adopted a new zoning ordinance to replace the ordinance declared to be invalid. See *Davis v. Board of Supervisors*, 32 Pa. Commw. Ct. 343, 379 A.2d 645 (1977). The court in *Casey* stated that the "stay" provisions of § 1009(2)(ii) were intended to effectuate "a moratorium . . . upon the challenging of the zoning

1009(2)(ii) might not have given a municipality the power to adopt a post-challenge amendment, section 601 conferred upon municipalities the power to amend zoning ordinances⁸⁰ — a power that

ordinance and the application for building permits until an amended, constitutionally permissible ordinance would be enacted." 459 Pa. at 229, 328 A.2d at 468-69.

Having thus identified the legislative intent with respect to § 1009(2)(ii), the *Casey* court concluded that it was inapplicable in the situation in which the municipality had already adopted a post-challenge amendment to its challenged zoning ordinance. *Id.* If the challenged ordinance were declared to be invalid, as in *Casey*, the ordinance as modified by the post-challenge amendment would still be in existence and effective against landowners in the municipality. Thus, the "chaotic situation" which § 1009(2)(ii) was designed to eliminate would not arise. *Id.* However, in the majority's view, § 1009(2)(ii) was not intended to require that a post-challenge amendment be considered either in resolving the merits of a developer's challenge or in awarding relief to the challenger. *See id.* Indeed, the court might have said, more simply, that § 1009(2)(ii) afforded an opportunity to a municipality to adopt a new zoning ordinance, effective against all landowners except the challenger, *after a declaration that a challenged ordinance was invalid*, and furthermore, that § 1009(2)(ii) did not deal with the effectiveness of a zoning amendment which was adopted subsequent to a challenge but *prior to a declaration of invalidity*.

80. *See* PA. STAT. ANN. tit. 53, § 10601 (Purdon 1972). It might be argued that § 601 could be interpreted as not authorizing a previously unadvertised post-challenge amendment. The argument would be that § 601 authorizes only amendments "to implement comprehensive plans and to accomplish any of the purposes of this act;" *see id.*, that previously unadvertised post-challenge amendments are adopted for the purpose of frustrating the challenger; and that previously unadvertised post-challenge amendments are thus not authorized by § 601.

Assuming that this argument has merit, the fact remains that the supreme court in *Casey* did not consider the impact of § 601 and that it is at least arguable that § 601 empowers a municipality to adopt a previously unadvertised post-challenge amendment. *See* note 77 *supra*; note 81 and accompanying text *infra*. The argument that § 601 does not authorize such amendments is based upon a less than obvious and fairly restrictive interpretation of that section. If the court in *Casey* based its holding upon such an interpretation of § 601, one would have expected the court to say so.

In any event, the argument that § 601 does not authorize the adoption of previously unadvertised post-challenge amendments is faulty because there is no basis for the assertion that such amendments are adopted in order to frustrate the challenger and not to implement a comprehensive plan and accomplish any of the purposes of the MPC. The purpose which lies behind a particular post-challenge amendment would seem to be a question of fact. *See* Comment, *The Doctrine of Special Legislation in Pennsylvania Zoning Law*, 22 VILL. L. REV. 106, 119-20 (1977). While some post-challenge amendments may be adopted for the purpose of frustrating the challenger, it is not difficult to conceive of a situation in which a municipality might adopt a post-challenge amendment which did not benefit the challenger, because it believed in good faith that the amendment best furthered the welfare of the municipality. For example, if a landowner challenged the validity of a municipal ordinance under *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970), *see* note 53 and accompanying text *supra*, the municipality might, by way of post-challenge amendment, zone land other than the challenger's for apartment development because of its belief that such land was the best place for apartment development. In this situation, can it be said that the purpose of such an amendment is to frustrate the challenger and not to "implement [a] comprehensive plan and . . . accomplish any of the purposes of [the] act"?

at least on its face includes the authority to adopt post-challenge amendments.⁸¹

3. *The Implicit Constitutional Basis for the Casey Pending Ordinance Doctrine*

a. The Necessity of a Constitutional Basis

Although the articulated basis for the *Casey* pending ordinance doctrine is inadequate because of the supreme court's failure to state a rationale in support of its conclusion that Pennsylvania courts may disregard a properly enacted post-challenge amendment,⁸² the decision could not have been reached without an implicit determination that the courts have such power. It is useful, therefore, to examine the possible unarticulated grounds for asserting the existence of judicial power to disregard a post-challenge amendment in developer-initiated exclusionary zoning litigation.

81. See note 80 *supra*. The rule applicable in most jurisdictions is that "[t]he power of a municipal legislative body to amend the zoning regulations is not suspended by the filing of legal proceedings to determine the validity of a related ordinance." 1 R. ANDERSON, *supra* note 2, § 4.29, at 243. Thus, in those jurisdictions, the municipality may adopt a post-challenge amendment which effectively moots a challenge to the unamended ordinance. See note 45 and accompanying text *supra*. This rule does not exist in Pennsylvania because of the unique *Casey* pending ordinance doctrine. See 4 R. ANDERSON, *supra*, § 25.31, at 280-82.

The strength and general acceptance of this rule is reflected in the history of the lengthy litigation in *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977). The named plaintiff in *Oakwood at Madison* was a developer who had an interest in particular land in Madison Township. *Id.* at 492, 371 A.2d at 1196-97. Six low-income persons who resided outside of Madison Township were joined as co-plaintiffs. *Id.*, 371 A.2d at 1197. In November of 1970, the plaintiffs filed a judicial challenge to the township's zoning ordinance, which had been adopted two months previously. *Id.* at 491, 371 A.2d at 1196. This challenge was litigated all the way to the Supreme Court of New Jersey. *Id.* In October of 1973, after oral argument before the Supreme Court of New Jersey, the township adopted an amendment to its zoning ordinance. *Id.* As a result, the supreme court "remanded the action to the trial court for a trial and ruling on the ordinance as amended. . . ." *Id.* at 492, 371 A.2d at 1196. The amendment in *Oakwood at Madison* was adopted after almost three years of litigation directed to the unamended ordinance. *Id.* at 491, 371 A.2d at 1196. Yet, in spite of the challenger's substantial investments in the challenge to the unamended ordinance, the New Jersey Supreme Court apparently assumed that the amendment mooted the challenge to the unamended ordinance. Since the amendment apparently did not benefit the challengers, they continued to challenge the township's amended ordinance. *Id.* at 492, 371 A.2d at 1196. However there is no suggestion either that the challengers had a right to continue with their challenge to the original ordinance or that the challengers contended that they had such a right. In short, in *Oakwood at Madison*, the *Casey* pending ordinance doctrine was not even mentioned.

82. See notes 75-81 and accompanying text *supra*.

The court in *Casey* did not suggest that there was statutory support for its application of the pending ordinance doctrine to developer-initiated exclusionary zoning challenges.⁸³ The Pennsylvania Legislature could, of course, authorize judicial disregard of post-challenge amendments by adopting legislation which limits the power of a municipality to amend its zoning ordinance.⁸⁴ Specifically, the legislature could deny to a municipality the power to adopt, after institution of a developer's challenge, a previously unadvertised zoning amendment which would be effective against the challenge.⁸⁵ But no such statutory provision was applicable in *Casey*.

Similarly, the *Casey* court did not draw on precedent to support its holding. Instead, the supreme court relied implicitly upon its notions of wisdom and fairness so as not to "thwart a valid challenge" or "deny appellee's rights."⁸⁶ However, a court may not override the legislative decision to grant to municipalities the power to amend its zoning ordinances⁸⁷ simply because the court believes that the recognition of such power, in the context of a developer-initiated exclusionary zoning challenge, is unwise or unfair. To put it simply, the *Casey* pending ordinance doctrine is not rendered valid merely because, in the opinion of the justices, it is a good idea.⁸⁸

But to say that there is no valid statutory or common law basis for the *Casey* pending ordinance doctrine is not to suggest that there could not be some other valid legal justification for judicial

83. The *Casey* court did not mention § 601 of the MPC, see note 77 *supra*, which does not, in any event, provide support for the *Casey* pending ordinance doctrine. See notes 80-81 *supra*. The *Casey* court did analyze § 1009(2)(ii) of the MPC. See notes 75 & 77-79 *supra*. However, the court did not suggest that § 1009(2)(ii) supported the proposition that a court may disregard a post-challenge amendment; instead the court held that § 1009(2)(ii) was not inconsistent with judicial power to disregard a post-challenge amendment. 459 Pa. at 229, 328 A.2d at 468-69.

84. Specifically, such a provision, if included in the MPC, would limit the general power to amend conferred by § 601. See PA. STAT. ANN. tit. 53, § 10601 (Purdon 1972); notes 75-81 and accompanying text *supra*.

85. Under the *Casey* doctrine, a post-challenge amendment is effective against everyone except the challengers. See 459 Pa. at 229, 328 A.2d at 469. As the supreme court noted, "[f]uture applicants must contend with the amended ordinance as it is now written." *Id.*

86. 459 Pa. at 229, 328 A.2d at 469. See note 75 *supra*.

87. The power to adopt and amend a zoning ordinance is part of a state's inherent police power. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). In the absence of a state constitutional provision to the contrary, the state may, by zoning enabling legislation, delegate the zoning power to local governments. 1 R. ANDERSON, *supra* note 2, § 2.19, at 58-59.

88. Indeed, my position is that the *Casey* pending ordinance doctrine is ill-conceived. See notes 279-310 and accompanying text *infra*.

disregard of a post-challenge amendment in exclusionary zoning litigation. Though it might seem improper for a court to ignore an amendment and focus on an ordinance which is no longer in effect, the court might properly do so (and would be obligated to do so) if it concluded that the post-challenge amendment to the ordinance was itself unconstitutional and, therefore, ineffective. The *Casey* situation is one in which a developer contends that the ordinance in effect at the time of his challenge is unconstitutional. Subsequent to the challenge, the municipality amends its ordinance and thereby creates a new zoning ordinance for the municipality. This subsequently enacted ordinance may, and should, be disregarded in resolving the initial constitutional challenge if the subsequently enacted ordinance is itself unconstitutional. Thus, if one can devise a colorable ground for concluding that a previously unadvertised post-challenge amendment is unconstitutional, then one can provide a legal basis for the *Casey* pending ordinance doctrine.

The conclusion that the only valid legal basis for the *Casey* pending ordinance doctrine is a constitutional basis has important implications. If the *Casey* pending ordinance doctrine has been erected upon an implicit judicial holding that a previously unadvertised post-challenge amendment is unconstitutional, the doctrine cannot be overturned by the Pennsylvania Legislature. It is, of course, axiomatic that a legislature cannot overturn a constitutional decision by a court.⁸⁹

b. Possible Constitutional Bases for the *Casey* Doctrine

I believe that one can begin to formulate some constitutional theories which might support the *Casey* doctrine by examining the concerns which led to the development of the doctrine.⁹⁰ First, there is a concern about the impact of a post-challenge amendment upon the developer-challenger. If the post-challenge amendment is considered in resolving the challenge, the challenger must shift the challenge to the ordinance as amended, thereby losing whatever time and effort has been expended in challenging the unamended ordinance.⁹¹ Second, there is a concern about the municipality's motivation in adopting a post-challenge amendment. Has the municipality adopted the particular amendment following an objective and dispassionate assessment of the public interest or is the amend-

89. *E.g.*, *Hetherington v. McHale*, 10 Pa. Commw. Ct. 501, 510, 311 A.2d 162, 167 (1973), *rev'd on other grounds*, 458 Pa. 479, 329 A.2d 250 (1974).

90. *See* notes 42-47 and accompanying text *supra*.

91. *See* notes 44-47 and accompanying text *supra*.

ment simply an attempt by the governing body to frustrate the challenger?⁹²

Although these two concerns do not, in themselves, provide a basis for adopting the *Casey* doctrine,⁹³ each suggests a constitutional analysis which might provide a proper legal foundation for the doctrine. For example, the former concern invites an inquiry into whether "vested rights" theory, though developed in a different context, might be used to justify the *Casey* doctrine.⁹⁴ The latter concern suggests that "special legislation" theory, also developed in another context, might be used to justify the *Casey* doctrine.⁹⁵

i. A "Vested Rights" Basis for the *Casey* Doctrine

The vested rights doctrine has developed to protect good faith expenditures in accordance with applicable zoning laws.⁹⁶ In the typical vested rights case, a landowner procures a permit and expends certain sums for the purpose of developing his land in accordance with existing zoning restrictions.⁹⁷ Subsequent to these expenditures, the municipality passes an amendment which rezones the developer's land in such a way that his proposed development is no longer an authorized use. If the developer has incurred good faith expenditures in reliance upon the preamendment zoning,⁹⁸

92. See text following note 47 *supra*. See also notes 115-17 and accompanying text *infra*.

93. See note 88 and accompanying text *supra*.

94. For a description of the "vested rights" theory and the context in which it developed, see notes 96-110 and accompanying text *infra*.

95. For a description of the "special legislation" theory and the context in which it developed, see notes 111-20 and accompanying text *infra*.

96. For a thorough treatment of the vested rights doctrine, see Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625 (1978). For a critical treatment of the development of the vested rights doctrine in Pennsylvania, see Comment, *Emerging from the Confusion: Zoning and Vested Rights in Pennsylvania*, 83 DICK. L. REV. 515 (1979).

97. See, e.g., *Herskovits v. Irwin*, 299 Pa. 155, 149 A. 195 (1930) (landowner engaged contractor and built foundation after obtaining building permit).

98. There appears to be some disagreement among commentators over the requirement of expenditures in vested rights cases in Pennsylvania. Compare Comment, *supra* note 80, at 108 n.16 (finding that the requirement of good faith expenditures exists) with R. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE § 8.2.3, at 5-7 (1970) (finding that it does not). The problem springs from the case of *Gallagher v. Building Inspector*, 432 Pa. 301, 247 A.2d 572 (1968). In *Gallagher*, the Pennsylvania Supreme Court held, in a context in which there was no zoning amendment under consideration when a permit was issued, that a validly issued building permit cannot be revoked whether or not expenditures have been made in reliance upon it. *Id.* at 304-07, 247 A.2d at 573-74. However, the *Gallagher* court was faced with a situation in which a zoning amendment was aimed directly at the landowner — a common special

then constitutionally protected "property" rights, called "vested rights," which cannot be destroyed by a subsequently adopted zoning amendment, accrue to him.⁹⁹

The typical vested rights situation differs markedly from the *Casey* situation. Use of a vested rights analysis in the *Casey* situation is awkward because the developer-challenger must argue for a vested right to proceed with his challenge to the unamended ordinance.¹⁰⁰ The expenditures by the landowner in the *Casey* situa-

legislation case. See Comment, *supra*, at 112-18. For a discussion of special legislation, see notes 111-20 and accompanying text *infra*. Additionally, the court in *Gallagher* relied heavily upon the decision in *Shapiro v. Zoning Bd. of Adj.*, 377 Pa. 621, 105 A.2d 299 (1954), the leading special legislation case in Pennsylvania. 432 Pa. at 304-05, 247 A.2d at 573-74. See Comment, *supra*, at 112. Subsequent cases have maintained the expenditure requirement. See, e.g., *Petrosky v. Zoning Hearing Bd.*, 485 Pa. 501, 402 A.2d 1385 (1979); Commonwealth Dept. of Environment Resources v. Flynn, 21 Pa. Commw. Ct. 264, 344 A.2d 720 (1975). It is unlikely, therefore, that the *Gallagher* case is controlling in the typical vested rights situation. See Comment, *supra* note 96, at 517-19.

99. See *Herskovits v. Irwin*, 299 Pa. 155, 160-61, 149 A. 195, 197 (1930). It has been noted that "[j]udicial reliance upon the vested rights doctrine . . . is unfortunately characterized by inconsistent application and confused rationales. . . . [T]he rationale applied by a particular court in [the typical vested rights situation] might be based on rigid concepts of private property rights, theories of equitable estoppel, generalized prohibitions against retroactive application of new laws, or vague concepts of fairness." Cunningham & Kremer, *supra* note 96, at 626.

I equate "vested rights" with "constitutionally protected 'property' rights" because it is my view that the only valid conceptual basis for a vested right is constitutional. See *Herskovits v. Irwin*, 299 Pa. at 160-61, 149 A. at 197. In the typical vested rights situation, a court may hold that the landowner has acquired a vested right to develop in accordance with prior zoning only if it concludes that the application of the existing zoning would violate "property" rights of the landowner protected by either the federal or state constitutions. Non-constitutional conceptions of "fairness" are not, I believe, a sufficient conceptual basis upon which a court may grant an exemption from a zoning restriction. See *id.*; note 88 and accompanying text *supra*. But see *Gallagher v. Building Inspector*, 432 Pa. 301, 304, 247 A.2d 572, 573 (1968) (permit issued on basis of fairness).

100. See *Colonial Park for Mobile Homes, Inc. v. Zoning Hearing Bd.*, 5 Pa. Commw. Ct. 594, 601, 290 A.2d 719, 723 (1972). In *Colonial Park*, a landowner contended that a municipality's zoning ordinance was unconstitutional because it prohibited mobile home parks anywhere in the municipality. *Id.* at 599, 290 A.2d at 719. After the filing of the landowner's challenge, New Britain Borough adopted a new zoning ordinance which removed the prohibition against mobile home parks. *Id.* at 597, 290 A.2d at 721. The challenger in *Colonial Park* contended that its challenge had to be resolved in light of the ordinance in existence at the time it filed its challenge. *Id.* at 601-02, 290 A.2d at 723. The commonwealth court characterized the challenger's argument as follows: "Its contention, . . . is that it acquired a vested right in an unconstitutional ordinance [in effect at the time it filed its challenge], of which it might not be dispossessed by curative action of the Borough taken subsequent to the filing of its action." *Id.* at 601, 290 A.2d at 723. Noting that the challenger's substantive claim of invalidity was based upon very recent judicial decisions, the court stated that "the challenger would have to make out a case of extraordinary appeal to induce us to hold that a municipality

tion are not made *in accordance with* the unamended zoning ordinance; on the contrary, they are expenditures incurred in challenging the unamended ordinance. If a court were to conclude that such expenditures established a constitutionally based "property" right to proceed with the challenge to the unamended ordinance, then there is, arguably, a constitutional basis for disregarding a post-challenge amendment.¹⁰¹

However, if vested rights theory is to be carried over and applied to developer-initiated zoning challenges, the components of vested rights theory must also be recognized. In the typical situation, only *good faith* expenditures in accordance with existing zoning will give rise to a vested right.¹⁰² Expenditures incurred with an awareness of an impending amendment would not be made

may keep pace of shifting and changing zoning principles only at the pain of suffering unwanted uses sought by those seeking advantage of the latest judicially discovered imperfection." *Id.* at 602, 290 A.2d at 723. In short, the court held that it would not disregard the post-challenge amendment in ruling upon the merits of the challenge. *Id.*

Writing prior to the supreme court's decision in *Casey*, Robert S. Ryan commented favorably upon the *Colonial Park* decision: "[I]t is difficult to argue that an owner has a 'right' to rely on the fact that a zoning ordinance contains an invalid provision, and ask that the Courts maintain that invalidity [by disregarding a post-challenge amendment] so that he can take advantage of it." R. RYAN, *supra* note 98, § 8.2.7 (Supp. 1972), *quoted* in Brief for Appellant at 18, *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (1974).

Both the *Colonial Park* decision and the commentary by Mr. Ryan express great difficulty in applying "vested right" concepts to the *Casey* situation. In its brief to the Pennsylvania Supreme Court in *Casey*, the municipality relied upon both *Colonial Park* and the Ryan commentary. Brief for Appellant at 15-19, *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (1974). However, neither was mentioned in the majority opinion. Chief Justice Jones, in his dissenting opinion, referred to *Colonial Park*. 459 Pa. at 232, 328 A.2d at 470 (Jones, C.J., dissenting).

101. In recent decisions, the United States Supreme Court has suggested that federal constitutional provisions which protect "property" are aimed at providing a measure of security to "reasonable investment backed expectations." *PruneYard Shopping Center v. Robins*, 100 S. Ct. 2035, 2041-42 (1980). *See also* *Agins v. City of Tiburon*, 100 S. Ct. 2138, 2142 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978). If "property" is construed to include "reasonable investment backed expectations," then it might be argued that judicial consideration of a post-challenge amendment would interfere with the developer's "property" interest in his challenge. The Supreme Court has indicated, however, that the extent of the interference is crucial in determining whether such expectations are unconstitutional deprivations of property. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. at 130. It might be argued that, at some point, the amount of investment in a challenge becomes so great that the challenger has acquired a "property" right to proceed with the challenge — a right which may not constitutionally be eliminated by judicial consideration of a post-challenge amendment. *See* notes 105-08 and accompanying text *infra*.

102. *Penn Twp. v. Yecko Bros.*, 402 Pa. 386, 217 A.2d 171 (1966). *See generally* Comment, *supra* note 96, at 525-26.

in good faith.¹⁰³ By analogy, then, expenditures made in commencing and prosecuting a challenge after the challenger becomes aware of an impending amendment should not be deemed to be good faith expenditures.¹⁰⁴

In addition, in the typical situation, the determination of whether the landowner has secured a vested right will depend, at least in part, upon the *extent* of the expenditures in accordance with the preamendment zoning.¹⁰⁵ The greater the landowner's expenditures, the more likely it is that a court will conclude that the landowner has a vested right.¹⁰⁶ Again, by analogy, the determination of whether a developer-challenger has acquired a vested right to proceed with his challenge to the preamendment ordinance would turn upon the extent of his investment in commencing and prosecuting the challenge. Thus, a court should consider a post-challenge amendment if it is adopted within a short period of time

103. *Penn Twp. v. Yecko Bros.*, 402 Pa. 386, 217 A.2d 171 (1966). If a landowner seeks a building permit and his application is inconsistent with a pending amendment which has been publicly advertised, then his application may be denied under the pending ordinance doctrine. *Lhormer v. Brown*, 410 Pa. 508, 511, 188 A.2d 747, 487 (1963) (dictum). A denial precludes his development of a vested right because, in Pennsylvania, a vested right cannot be asserted unless there is a validly issued permit. *Dunlap Appeal*, 370 Pa. 31, 87 A.2d 299 (1952).

Suppose, however, that a landowner seeks a building permit and his application is inconsistent with a pending amendment which has *not* been publicly advertised. For example, the landowner may be aware of contemplated amendments to the zoning of his land which are being discussed by the municipality's planning commission but which have not yet been proposed to the township's governing body. In this situation, the landowner may wish to acquire, before the adoption of the contemplated amendment, a vested right to develop his land in accordance with the existing zoning. If, as I have hypothesized, the contemplated amendment has *not* been publicly advertised when the landowner files his application for a building permit, the landowner's application may not be denied under the pending ordinance doctrine. But, if the landowner proceeds to make expenditures in accordance with the permit, he will not acquire a vested right because his knowledge of the contemplated amendment precludes a determination that such expenditures were made in "good faith." See *A.J. Aberman, Inc. v. New Kensington*, 377 Pa. 520, 105 A.2d 586 (1954). This analysis assumes, of course, that the contemplated amendment is ultimately adopted.

104. Although it is not clear from the supreme court's statement of the facts in *Casey*, it would appear that the challenger was aware, prior to the filing of his challenge, that the municipality was contemplating an amendment to its ordinance in order to comply with the then recently decided *Girsh* case. Brief for Appellant at 8-19, *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (1974). For a discussion of the *Girsh* case and its effect on the *Casey* decision, see notes 52-53 & 55 and accompanying text *supra*. It is difficult, therefore, to view the challenger's expenditures as costs which he incurred in "good faith." See note 103 *supra*.

105. See *Petrosky v. Zoning Hearing Bd.*, 485 Pa. 501, 510, 402 A.2d 1385, 1390 (1979). See also Comment, *supra* note 96, at 522-25.

106. Comment, *supra* note 96, at 522-25.

after a developer has filed his challenge, but before the developer has invested heavily in the challenge itself.¹⁰⁷ Conversely, a court should disregard a post-challenge amendment if it is adopted late in the challenge process — for example, after the challenger has litigated the challenge before a municipality's governing body or zoning hearing board.¹⁰⁸

This analysis suggests that the traditional vested rights doctrine might be used by analogy to provide a constitutional basis for disregarding a post-challenge amendment in a situation where the challenger has, before the adoption of the amendment, made a substantial good faith investment in his challenge to the preamendment zoning ordinance. The *Casey* doctrine, however, goes beyond this fact sensitive analogy to traditional vested rights doctrine by requiring that *all* previously unadvertised post-challenge amendments are to be disregarded irrespective of whether the challenger has made a substantial good faith investment in his challenge to the preamendment ordinance.¹⁰⁹ Thus, though traditional vested rights theory might be used by analogy to support judicial disregard of post-challenge amendments in *some* circumstances,¹¹⁰ it cannot be used to justify judicial disregard of post-challenge amendments in *all* circumstances.

107. For example, if a landowner files a challenge and the municipality adopts a proposed curative amendment within a few weeks of the filing of the challenge, the landowner's investment in the challenge will most likely be minimal. Application of vested rights principles by analogy would therefore preclude the landowner from acquiring a vested right to proceed with his challenge to the unamended ordinance.

108. In *Casey*, the post-challenge amendment was not adopted until three days after the township's zoning hearing board began hearings on the landowner's challenge to the unamended ordinance. 459 Pa. at 224, 328 A.2d at 466. The opinion in *Casey*, however, does not reveal whether the challenger had incurred substantial expenditures in preparing for, and in participating in, the board's hearings in the three days prior to the adoption of the amendment. If such expenditures had been incurred, then, based upon the application by analogy of vested rights principles, it might be argued that the challenger had acquired a vested right to proceed with his challenge to the unamended ordinance. However, since traditional vested rights doctrine requires that expenditures be made in good faith, it is doubtful that any expenditures by the challenger in *Casey* would have satisfied the good faith requirement.

By comparison, in *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1193 (1977), it would seem that the developer-challenger had acquired a vested right to proceed with its challenge, since it had litigated the challenge all the way to the Supreme Court of New Jersey. However, the challenger in *Oakwood at Madison* apparently did not contend that its investment in the challenge warranted the acquisition of a vested right to proceed with the challenge. See note 81 *supra*.

109. See note 9 and accompanying text *supra*.

110. For a discussion of the application of a vested rights theory to the facts in *Casey*, see note 104 *supra*.

ii. A "Special Legislation" Basis for the *Casey* Doctrine

The Supreme Court of Pennsylvania has developed the "special legislation" doctrine¹¹¹ to protect a landowner, who seeks to develop in accordance with applicable zoning, from a subsequently enacted amendment adopted solely to frustrate the landowner's proposed development.¹¹² In the most common special legislation situation, a landowner purchases land which is zoned to permit high-density development.¹¹³ When it becomes known that the landowner intends to develop his land in accordance with the high-density zoning, there is public opposition to the proposed development and the municipality's governing body hastily enacts an amendment which rezones the landowner's land to prohibit the contemplated high-density development.¹¹⁴ Pennsylvania courts have invalidated such amendments as "special legislation" if the amendment is "aimed directly" at preventing development on a particular parcel of land.¹¹⁵ The ground for invalidation in the special legislation decisions is *not* the substantiality of a landowner's good faith investment in reliance upon particular zoning,¹¹⁶ but the lack of a public welfare justification for the amendment.¹¹⁷

The typical special legislation situation differs significantly from the *Casey* situation. In a special legislation case, a landowner desires to develop in a manner *consistent* with the zoning which was applicable to his land prior to the "special legislation" amend-

111. See *Shapiro v. Zoning Bd. of Adj.*, 377 Pa. 621, 105 A.2d 299 (1954). The *Shapiro* case is considered to be the seminal decision on the special legislation doctrine. See Comment, *supra* note 80, at 112. However, commentators are not in agreement with respect to the classification of cases arising under *Shapiro*. Compare Comment, *supra* (special legislation) with R. RYAN, *supra* note 98, § 8.2.9, at 17-19 (abuse of legislative power) and Comment, *supra* note 96, at 526-27 (requirement of good faith on part of municipality). For a thorough and thoughtful analysis of the relationship of the special legislation doctrine to the vested rights and pending ordinance doctrines, see Comment, *supra* note 80, at 112.

112. See, e.g., *Commercial Properties, Inc. v. Peternel*, 418 Pa. 304, 311, 211 A.2d 514, 518 (1965). See generally Comment, *supra* note 80, at 112.

113. See, e.g., *Gallagher v. Building Inspector*, 432 Pa. 301, 247 A.2d 572 (1968) (townhouses).

114. See *id.* (after neighbors complained, land was rezoned to exclude townhouses).

115. *Shapiro v. Zoning Bd. of Adj.*, 377 Pa. 621, 628, 105 A.2d 299, 302-03 (1954). See generally Comment, *supra* note 80.

116. On the other hand, this is the basis for invalidation and disregard of the amendment under the vested rights doctrine. See notes 98-99 & 102-05 and accompanying text *supra*.

117. See *Commercial Properties, Inc. v. Peternel*, 418 Pa. 304, 312, 211 A.2d 514, 519 (1965) (amendment not enacted for health, safety, and general or moral welfare of the community).

ment. In the *Casey* situation, the landowner-challenger wishes to develop in a way that is *inconsistent* with the zoning which is applicable to his land under either the preamendment ordinance or the ordinance as amended by the post-challenge amendment. Nevertheless, the special legislation doctrine might be useful by analogy in the *Casey* situation if it could be contended successfully that post-challenge amendments are "aimed directly" at the challenger and thus have no public welfare justification.

There is, however, a difficulty in applying special legislation theory to the *Casey* situation. An amendment is invalid as "special legislation" only if, *on the particular facts*, it can be said that the amendment was "aimed directly" at a particular landowner.¹¹⁸ It cannot be said, in the *Casey* situation, that *all* post-challenge amendments are "aimed directly" at the challenger in order to frustrate his attack on the ordinance.

For example, one can easily imagine a situation in which, in response to a developer's challenge, a governing body might conclude: 1) that a zoning ordinance violated *Girsh* because it did not provide for apartments; 2) that the municipality should therefore amend its zoning ordinance in order to provide for apartments; but 3) that it should not rezone so as to permit apartment development on the challenger's land because, in the governing body's view, the challenger's land was not the most appropriate place for apartment development. It may be apparent to any observer that the governing body did not wish to benefit the challenger. And it may even be arguable that an objective assessment of the circumstances would support the conclusion that the challenger's land was an appropriate place for apartment development. But these facts will not support the finding which is necessary to invalidate the amendment under special legislation theory — that the *only* purpose of the amendment was to frustrate the challenger. In order to establish that the sole purpose of the post-challenge amendment was to frustrate him, a challenger would have to prove that not only was his land an appropriate place for apartment development, but that it was either the *only* appropriate place for such development or at

118. See note 115 and accompanying text *supra*. One commentator has suggested that the 1972 amendments to Article X of the MPC made it more difficult for a developer to prevail in a special legislation challenge to a zoning amendment. Comment, *supra* note 80, at 123-29. A special legislation challenge to a zoning amendment must, in accordance with §§ 1001 & 1004(a) of the MPC, be submitted either to the governing body or zoning hearing board. *Id.* at 123. Neither body is likely to find that the amendment was "aimed directly" at the challenger and, therefore, invalid as special legislation. *Id.* at 124-26. For a discussion of the 1972 amendments to the MPC, see notes 125-42 and accompanying text *infra*.

least clearly more appropriate for apartment development than the land rezoned by the post-challenge amendment. Only when armed with such a demonstration could the challenger successfully contend that there was no public welfare justification for the post-challenge amendment.¹¹⁹

In short, special legislation theory, like vested rights theory, provides support for disregarding zoning amendments *in particular circumstances*. The special legislation decisions might be used by analogy to justify judicial disregard of a post-challenge amendment when, from an evaluation of the particular circumstances, a court finds that the amendment was enacted for the sole purpose of frustrating the challenger. But the *Casey* doctrine mandates that all post-challenge amendments are to be disregarded — without judicial inquiry into whether, in light of all the circumstances, the purpose of the amendment was to frustrate the challenger. Therefore, while special legislation theory might support judicial disregard of post-challenge amendments in *some* circumstances, it cannot be used to justify judicial disregard of post-challenge amendments in *all* circumstances.¹²⁰

c. Conclusion

Although I believe that the only possible basis for the *Casey* doctrine is a *constitutional* basis,¹²¹ I am unable to imagine a constitutional theory which would support the doctrine as stated in the *Casey* decision. I have, however, attempted to demonstrate that traditional Pennsylvania “vested rights” and “special legislation” doctrines might be judicially broadened to justify judicial disregard of post-challenge amendments in some circumstances.¹²²

119. See Comment, *supra* note 80, at 112-18. This analysis is similar to that applied to the question of whether a previously unadvertised post-challenge amendment is authorized under § 601 of the MPC. See note 81 *supra*.

120. Special legislation theory would not support judicial disregard of the post-challenge amendment in *Casey* itself. The *Casey* opinion reveals that the post-challenge amendment was based upon a “Comprehensive Zoning Plan” which had been prepared by a “firm of planning and development consultants.” 459 Pa. at 223, 328 A.2d 465. The firm had formulated this plan and submitted it to the municipality’s governing body months before the challenge was initiated. *Id.* at 223-24, 328 A.2d at 465-66. The firm’s plan called for rezoning for apartment use land other than that owned by the challenger. *Id.* Since the post-challenge amendment in *Casey* was consistent with a professionally developed plan that had been prepared prior to the filing of the challenge, it is difficult to conclude that the amendment was adopted solely to frustrate the challenger.

121. See notes 82-120 and accompanying text *supra*.

122. I am not advocating judicial development of “vested rights” or “special legislation” doctrine in order to provide legal support (at least in part)

Nevertheless, while the broad statement of the pending ordinance doctrine in *Casey* cannot be supported, the fact remains that *Casey* does set forth a general requirement that, in developer-initiated exclusionary zoning litigation, all previously unadvertised post-challenge amendments are to be disregarded. Furthermore, because this requirement can only be explained as an implicit determination that all post-challenge amendments are unconstitutional,¹²³ the *Casey* doctrine cannot be set aside, or modified, by the Pennsylvania Legislature.¹²⁴

C. *The Casey Doctrine and the 1972 Amendments to the MPC*

In 1972, the Pennsylvania Legislature enacted extensive amendments to the MPC, replacing the entire article relating to appeal procedures.¹²⁵ In section 1004 of the new article (Article X), the legislature established alternate procedures for landowner challenges to municipal zoning ordinances.¹²⁶

The commonwealth court, in *Ellick v. Board of Supervisors*,¹²⁷ attempted to provide a comprehensive explanation of the operation of the landowner challenge procedures established by the 1972 amendments.¹²⁸ The *Ellick* case, however, did not present the

for disregarding post-challenge amendments in developer-initiated exclusionary zoning challenges. A legislative solution is preferable. For a discussion of possible legislative solutions to this problem, see notes 311-45 and accompanying text *infra*.

123. See notes 82-89 and accompanying text *supra*.

124. See note 89 and accompanying text *supra*.

125. Act of June 1, 1972, Pub. L. No. 1972-93, 1972 Pa. Laws 333 (amending various sections of the MPC).

126. PA. STAT. ANN. tit. 53, § 11004 (1) (Purdon 1972). For an extensive discussion of the appeals procedures contained in Article X of the 1972 amendments, see Krasnowiecki, *supra* note 7, at 1093-111. See also note 128 *infra*. The 1972 amendments were not applicable to the *Casey* litigation because they were adopted after the commencement of the *Casey* challenge. 459 Pa. at 227 n.6, 328 A.2d at 467 n.6. The challenge in *Casey* was initiated on April 11, 1970. *Id.* at 223, 328 A.2d at 465. The amendments were adopted on June 1, 1972. See note 125 *supra*.

127. 17 Pa. Commw. Ct. 404, 333 A.2d 239 (1975).

128. See *id.* The 1972 amendments to the MPC made major changes in Article X by consolidating, in that article, 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 pursuant to this act." PA. STAT. ANN. tit. 53, § 11001 (Purdon 1972). Article X sets up separate procedures for "landowner" challenges, in which a person contests the validity of restrictions applicable to his own land, and challenges by "persons aggrieved" by a use permitted on the land of another. See *id.* §§ 11004-11005. For a comprehensive description and analysis of the Article X procedures, see Krasnowiecki, *supra* note 7, at 1093-111. *Ellick* involved a

court with an opportunity to consider the *Casey* issue. The challenger in *Ellick* had filed his challenge under the curative amendment procedure authorized by the 1972 amendments,¹²⁹ contending that the township unlawfully excluded townhouses.¹³⁰ Rather than amend its ordinance in response to the challenge, the township denied relief on the ground that townhouses were allowed under the ordinance.¹³¹ While the commonwealth court did find that town-

"landowner" challenge under § 1004 to the validity of a municipal ordinance. See text accompanying note 129 *infra*. Section 1004(1) provides:

(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.

PA. STAT. ANN. tit. 53 § 11004(1) (Purdon 1972).

Choosing the second of the two methods of challenge, the landowner in *Ellick* submitted his challenge to the governing body together with a request for a curative amendment. 17 Pa. Commw. Ct. at 406, 333 A.2d at 242. After the request was denied, the challenger sought review in the appropriate court of common pleas and ultimately in the commonwealth court. *Id.* at 407, 333 A.2d at 242.

The commonwealth court prefaced its discussion by noting that "[t]he instant case is the first time this Court has dealt with a challenge to the validity of a zoning ordinance pursuant to section 1004(1)(b) of the MPC, as amended in 1972" *Id.* at 408, 333 A.2d at 242 (emphasis added) (footnote omitted). The court remarked further that "[b]ecause the 1972 amendments are somewhat complex, and we notice an increasing number of appeals related thereto, we believe it will be helpful to all concerned to set forth some guidelines to aid in the disposition of the type of case now facing us." *Id.* at 409, 333 A.2d at 243.

For a discussion of the § 1004(1) landowner challenge procedures, see Henszey & Novak, *supra* note 15, at 189.

129. 17 Pa. Commw. Ct. at 411, 333 A.2d at 244. Specifically, the challenger in *Ellick* elected to proceed under § 1004(1)(b) by submitting his challenge to the governing body together with a request for a curative amendment under § 609.1. See note 128 *supra*. Section 609.1 provides a procedure to be followed when there is a request for a curative amendment under § 1004(1)(b). See PA. STAT. ANN. tit. 53, § 10609.1 (Purdon 1972). Among other things, § 609.1 provides that a challenger proceeding under § 1004(1)(b) "may submit a curative amendment to the governing body." *Id.* In short, the landowner who chooses the § 1004(1)(b) curative amendment procedure not only challenges the validity of a municipal ordinance but may, and usually will, submit a proposed amendment which cures the defect that underlies his challenge. For a discussion of the use of the curative amendment procedure, see generally Rosenzweig, *supra* note 15; note 128 *supra*.

130. 17 Pa. Commw. Ct. at 406, 333 A.2d at 242. The challenger argued that the Worcester Township zoning ordinance violated the mandate of *Girsh*. *Id.* at 407, 333 A.2d at 242, citing *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970). For a discussion of *Girsh*, see notes 52-53 and accompanying text *supra*.

131. 17 Pa. Commw. Ct. at 407, 333 A.2d at 242. The challenger's proposal was "deemed to have been denied" due to the township's failure to act upon it within the statutorily prescribed 30 days. *Id.* See note 133 *infra*.

houses were excluded,¹³² it was not faced with the necessity of disregarding a post-challenge amendment in order to decide the constitutionality of the original ordinance.¹³³ Nonetheless, the *Ellick* court recognized the possibility of a governing body adopting a curative amendment different from the one proposed by the challenger.¹³⁴ Though it disclaimed making a decision on the issue,¹³⁵ the commonwealth court commented that the 1972 amendments "do not . . . interfere with the governing body's power to amend its zoning ordinance in a manner which the governing body believes will best further legally the public interest."¹³⁶ The court further noted that governing bodies "may choose to cure the defect by an amendment other than that proposed by the challenging landowner," but cautioned that they "cannot adopt . . . a curative amendment [to] frustrate the challenging landowner. . . ." ¹³⁷

Although *Ellick* was ambiguous with respect to the effect of the 1972 amendments upon the *Casey* doctrine,¹³⁸ the issue was later settled by the commonwealth court in *Appeal of Carr*.¹³⁹ In *Carr*, the intermediate court was faced with a previously unadvertised post-challenge amendment and thus had to resolve the issue which it had been able to avoid in *Ellick*. The court ruled that in considering a landowner's challenge under section 1004, a court must disregard a previously unadvertised post-challenge amendment.¹⁴⁰

132. 17 Pa. Commw. Ct. at 418-21, 333 A.2d at 247-49.

133. The *Ellick* court's comments about the effect of a post-challenge amendment which does not benefit the challenger are dicta because there was no post-challenge amendment. The governing body had failed to act on the challenge and request for a curative amendment within the 30-day period prescribed by § 1004(4)(iii) and, therefore, the challenger's request "was deemed to have been denied." *Id.* at 407, 333 A.2d at 242. See note 131 *supra*; PA. STAT. ANN. tit 53, § 11004(4)(iii) (Purdon 1972).

134. 17 Pa. Commw. Ct. at 411, 333 A.2d at 244.

135. *Id.*

136. *Id.*

137. *Id.*

138. If, as I have argued, the *Casey* doctrine is constitutionally based, see notes 82-124 and accompanying text *supra*, the 1972 amendments to the MPC could not overturn the doctrine. See note 89 and accompanying text *supra*.

139. 30 Pa. Commw. Ct. 342, 374 A.2d 735 (1977). Although *Carr* involved a landowner validity challenge under § 1004 of the MPC, see note 128 *supra*, the challenge was not grounded upon alleged exclusionary zoning. Instead, the landowner in *Carr*, by way of a request for a curative amendment under § 1004(1)(b), see *id.*, challenged a municipal ordinance which limited the expansion of a nonconforming use. 30 Pa. Commw. Ct. at 345, 374 A.2d at 736. Nevertheless, the substantive basis of a challenge is irrelevant to the question of what effect must be given to a previously unadvertised post-challenge amendment.

140. 30 Pa. Commw. Ct. at 350, 374 A.2d at 739. The *Carr* court stated that its holding was "required by the weight of existing authority, by fairness to the landowner and by the practical consideration that the required appli-

The *Carr* court grounded its conclusion on the *Casey* decision and rejected the municipality's suggestion that the 1972 amendments had overturned or modified the *Casey* doctrine.¹⁴¹

Thus, until the adoption of Act 249 of 1978,¹⁴² the *Casey* doctrine was a firmly entrenched part of the Pennsylvania procedure for challenging exclusionary zoning ordinances.

IV. ACT 249 AND THE CASEY DOCTRINE

The overwhelming success of landowners' challenges to exclusionary zoning ordinances under the *Casey* pending ordinance doctrine¹⁴³ prompted Pennsylvania municipalities to seek legislative modification of the *Casey* decision.¹⁴⁴ The Pennsylvania Legislature responded by adopting Act 249.¹⁴⁵ I will now focus on the extent to which the Act purports to overturn or modify the *Casey* doctrine.¹⁴⁶ Underpinning this discussion is the basic contention of this article, that the *Casey* doctrine is constitutionally derived

cation of the governing body's amendment to the condemnor's proposal would tend to introduce into the proceedings an ancillary suit over the validity of the municipality's amendment." *Id.* The last basis for the court's holding is particularly curious. The *Carr* court seems to be saying that, in order to avoid "an ancillary suit over the validity of the municipality's [post-challenge] amendment," it will simply treat the amendment as invalid — *i.e.*, it will disregard it.

141. *Id.* at 350-52, 374 A.2d at 739. In both *Ellick* and *Carr*, the commonwealth court was faced with landowner challenges submitted to a governing body in accordance with § 1004(1)(b). *See* notes 128 & 139 *supra*. In this context, the *Carr* court held that a post-challenge amendment was to be disregarded. *See* note 140 and accompanying text *supra*. Although neither *Ellick* nor *Carr* involved a post-challenge amendment in the context of a challenge submitted to the zoning hearing board under § 1004(1)(a), the *Casey* doctrine, adopted in *Carr*, would require that a post-challenge amendment in this context should likewise be disregarded.

142. For a discussion of Act 249, *see* notes 6 & 23-24 and accompanying text *supra*; notes 143-284 and accompanying text *infra*.

143. *See* notes 19-22 and accompanying text *supra*. The ease with which developers can submit challenges under § 1004 of the MPC was viewed by one commentator as contributing significantly to the success rate of developers in exclusionary zoning cases. *See* Rosenzweig, *supra* note 15, at 44. He suggests that the 1972 amendments to the MPC were intended to simplify the procedure for, and reduce the expense of, challenging municipal zoning ordinances. *Id.*

144. *See* R. RYAN, *supra* note 98, § 3.1.10, at 83-88 (Supp. 1979).

145. *Id.* *See* Act of Oct. 5, 1978, Pub. L. No. 249, 1978 Pa. Laws 1067 (codified at PA. STAT. ANN. tit. 53, §§ 10101-11012 (Purdon Supp. 1980-81) (amending various sections of the Pennsylvania Municipalities Code, PA. STAT. ANN. tit. 53, §§ 10101-11012 (Purdon 1972 & Supp. 1980-81))).

146. The extent to which Act 249 overturns or modifies other aspects of the *Casey* decision will not be considered. For a brief discussion of these issues, *see* note 23 *supra*.

and, thus, may not be overturned by legislative action.¹⁴⁷ Therefore, to the extent that Act 249 attempts to overturn the *Casey* doctrine, it is an unconstitutional attempt by the legislature to negate a constitutional decision.¹⁴⁸

A. The Section 609.2 "Self-Cure" Procedure and the Casey Doctrine

The provision of Act 249 which appears most clearly to affect the *Casey* doctrine is section 609.2, which creates a multi-step procedure by which a municipality may cure an invalid ordinance.¹⁴⁹ The first step in the procedure enables "[a] municipality, by formal action"¹⁵⁰ to "declare its zoning ordinance or portions thereof substantially invalid and propose to prepare a curative amendment to overcome such invalidity."¹⁵¹ The second step of the procedure, to take place within thirty days of the first, provides that a municipality shall "make specific findings setting forth the declared invalidity of the zoning ordinance"¹⁵² and shall "[b]egin to prepare and consider a curative amendment to the zoning ordinance to correct the declared invalidity."¹⁵³ The final step of the procedure, to be completed within 180 days from the date of the declaration and proposal, provides that the municipality shall "enact a curative amendment to . . . its zoning ordinance pursuant to the provisions required by section 609, to cure the declared invalidity of the zoning ordinance."¹⁵⁴

The primary question, then, is the effect of this procedure and any resulting curative amendment upon an exclusionary zoning

147. See notes 82-124 and accompanying text *supra*.

148. *Id.*

149. PA. STAT. ANN. tit. 53, § 10609.2 (Purdon Supp. 1980-81).

150. *Id.* § 10609.2(1). The Act does not define what constitutes "formal action." Presumably, the phrase refers to action which is the product of a vote by the members of the governing body at a public meeting. Curiously, the Act refers to formal action by a "municipality" rather than by a municipality's "governing body." *Id.* Although the terms "governing body" and "municipality" are separately defined in the MPC, see *id.* §§ 10107(10) & 10107(13), it would seem that the "formal action" contemplated by § 609.2(1) would have to be action by a municipal governing body, since it is the governing body which is empowered to "enact, amend and repeal zoning ordinances . . . to accomplish any of the purposes of [the] act." *Id.* § 10601 (Purdon 1972).

151. *Id.* § 10609.2(1) (Purdon Supp. 1980-81).

152. *Id.* § 10609.2(1)(a).

153. *Id.* § 10609.2(1)(b).

154. *Id.* § 10609.2(2) (footnote omitted). Section 609, referred to in § 609.2 (2), describes the procedure for the enactment of a zoning ordinance amendment. See *id.* § 10609 (Purdon 1972).

challenge which is filed prior to the initiation of the self-cure procedure.¹⁵⁵ The answer to this question lies in an examination of subparagraph (3) of section 609.2.¹⁵⁶

1. Section 609.2(3) and the Casey Doctrine

There are two sentences in subparagraph (3) of section 609.2.¹⁵⁷ The first sentence defines the effect of the initiation of the self-cure procedures upon the obligation of a governing body or zoning hearing board¹⁵⁸ to consider challenges which are based upon grounds similar to those specified by the municipality when it initiated the self-cure procedures.¹⁵⁹ The second sentence de-

155. For a discussion of this issue, see notes 157-214 and accompanying text *infra*. For a discussion of the effect of the self-cure procedure on an exclusionary zoning challenge which is filed *after* the initiation of § 609.2 self-cure procedure, see notes 215-22 and accompanying text *infra*.

156. PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81) (footnotes omitted). Section 609.2(3) provides:

Upon the initiation of the procedures set forth in subsection (1), the governing body shall not be required to entertain or consider any landowner's curative amendment filed under section 609.1 nor shall the Zoning Hearing Board be required to give a report requested under section 910 or 913.1 subsequent to the declaration and proposal based upon the grounds identical to or substantially similar to those specified in the resolution required by subsection (1)(a). Upon completion of the procedures as set forth in subsection (1) and (2) no rights to a cure pursuant to the provisions of sections 609.1 and 1004 shall, from the date of the declaration and proposal, accrue to any landowner on the basis of the substantive invalidity of the unamended zoning ordinance for which there has been a curative amendment pursuant to this section.

Id.

157. *Id.*

158. *Id.* In referring to the obligations of the governing body or zoning hearing board that arise upon the initiation of a self-cure procedure, § 609.2(3) implicitly recognizes, and is consistent with, the alternate procedures for landowner validity challenges delineated in § 1004(1). *Id.* For a discussion of the § 1004(1) procedures, see note 128 *supra*.

159. PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81). The "stay" authorized by the first sentence of § 609.2(3) is applicable only to challenges which are "based upon the grounds identical to or substantially similar to those specified in the resolution required by subsection (1)(a)." *Id.* Thus, for example, a municipal governing body, acting pursuant to § 609.2(1)(a), might, by resolution, make a "specific finding" that its zoning ordinance is invalid because it makes no provision for townhouses. See *Camp Hill Dev. Co. v. Zoning Bd. of Adj.*, 13 Pa. Commw. Ct. 519, 319 A.2d 197 (1974). Clearly, this resolution authorizes the governing body or zoning board to stay or defer consideration of a challenge which is based upon the ground, identical to that specified in the resolution, that the municipality's ordinance is invalid because it makes no provision for townhouses. However, the hypothesized resolution does *not* authorize the governing body or zoning hearing board to stay, or defer, consideration of any challenge based upon a ground totally different from that specified in the resolution, such as a claim that the municipality's zoning ordinance is invalid because of its minimum lot-size requirements. See

finer the effect of completed self-cure procedures upon landowner challenges.¹⁶⁰

a. The First Sentence of Section 609.2(3)

The interpretation of section 609.2 (3) turns primarily on the effect to be given to the last phrase in the sentence — the phrase beginning with the word “subsequent.”¹⁶¹ Either of two interpretations is possible and, as a matter of grammar, proper.¹⁶² If the “subsequent” phrase is viewed as modifying the infinitives “entertain or consider” and “give,” then the initiation of the self-cure procedures would relieve the governing body of the obligation to “entertain or consider,” *subsequent* to the initiation of the self-cure procedures, *any* application for a curative amendment, regardless of whether the challenge was commenced before or after the initiation of self-cure proceedings.¹⁶³ Similarly, the initiation of the self-cure procedures would relieve the zoning hearing board

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

But what is the effect of the hypothesized resolution upon a challenge which concedes that the municipality's ordinance does not exclude townhouses *de jure*, but contends that it excludes them *de facto*? See *Benham v. Board of Supervisors*, 22 Pa. Commw. Ct. 245, 349 A.2d 484 (1975). Does a *de facto* exclusion of use challenge rest upon grounds “substantially similar to” a *de jure* resolution? See PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81).

160. PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81).

161. *Id.*

162. See *Galbreath v. Northampton Twp. Bd. of Supervisors*, 33 Bucks County L. Rep. 363 (C.P. 1979), *aff'd*, — Pa. Commw. Ct. —, 423 A.2d 45 (1980). The analysis that follows in the text is similar to that employed by Judge Bortner of the Court of Common Pleas of Bucks County in *Galbreath*. 33 Bucks County L. Rep. at 366-67 & n.6. In *Galbreath*, Judge Bortner was faced with an appeal which required him to interpret § 609.2(3). *Id.* at 365-69. After noting that “[t]he framers of new Section 609.2 have . . . erected a monument to Ambiguity,” *id.* at 366, Judge Bortner stated that either of two interpretations was possible and he doubted that “the solution to the problem may be found in a book on grammar [*sic*].” *Id.* at 367 (footnote omitted). Instead, Judge Bortner, in a footnote, looked to the provisions of § 1104A of the MPC for guidance in interpreting the first sentence of § 609.2(3) and construed that provision to mean that “[t]he governing body shall not be required to entertain or consider any landowner's curative amendment *filed* . . . *subsequent* to the advertisement.” *Id.* at 367 n.6 (emphasis by the court). The commonwealth court, in affirming the lower court's decision, adopted Judge Bortner's reasoning. See — Pa. Commw. Ct. at —, 423 A.2d at 46-48.

163. See *Galbreath v. Northampton Twp. Bd. of Supervisors*, 33 Bucks County L. Rep. 363, 366-67 & n.6 (C.P. 1979), *aff'd*, — Pa. Commw. Ct. —, 423 A.2d 45 (1980). See also PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81). The obligations of a municipal governing body with respect to an application for a curative amendment are set forth in various provisions of § 1004. *Id.* § 11004 (Purdon 1972 & Supp. 1980-81). Under § 1004(2) (f), the governing body must “hold a hearing upon the landowner's request [for a cura-

of the obligation "to give a report" subsequent to the initiation of the self-cure procedures with respect to *any* request for a report.¹⁶⁴

A different interpretation of section 609.2(3) arises, however, if the "subsequent" phrase is deemed to modify the participles "filed" and "requested."¹⁶⁵ Under this interpretation, the initiation of the self-cure procedures would relieve the governing body of any obligation to "entertain or consider any landowner's curative amendment" *filed subsequent* to the initiation of the self-cure procedures.¹⁶⁶ Likewise, the initiation of the self-cure procedures would relieve the zoning hearing board of any obligation "to give a report" *requested subsequent* to the initiation of the self-cure procedures.¹⁶⁷

Although either of these interpretations is grammatically sound,¹⁶⁸ neither affects the *Casey* doctrine issue. Under the first interpretation, the initiation of the self-cure procedures has the

tive amendment] . . . not later than sixty days after the request is filed unless the landowner requests or consents to an extension of time." *Id.* § 11004(2)(f) (Purdon 1972). The same requirement exists under § 609.1. *See id.* § 609.1. Section 1004(4) provides further that if a governing body fails to act on a request for a curative amendment, the request is deemed to be denied as of the thirtieth day after the close of the last hearing on the request. *Id.* § 11004(4). Such a deemed denial triggers the right to appeal to a court of common pleas. Pennsylvania Municipalities Planning Code, Pub. L. No. 53-202, § 2(a) [1421] (Purdon Supp. 1980-81) (amending PA. STAT. ANN. tit. 53, § 11004 (Purdon 1972 & Supp. 1980-81)).

The effect of the first sentence of § 609.2(3), therefore, is to stay the operation and effect of these time limitations. *See* PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81).

164. *See Galbreath v. Northampton Twp. Bd. of Supervisors*, 33 Bucks County L. Rep. 363, 366-67 & n.6 (1979), *aff'd*, — Pa. Commw. Ct. —, 423 A.2d 45 (1980). *See also* PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81). The obligations of a zoning hearing board with respect to a § 910 request for a report are set forth in various provisions of the MPC. Under § 1004(2)(f), the board must hold a hearing on a § 910 request not later than 60 days after the request is filed. *Id.* § 11004(2)(f) (Purdon 1972). Under § 908(9), if the board does not render a decision on a § 910 request within 45 days after the last hearing, the decision is deemed to have been rendered in favor of the applicant. *Id.* § 10908(9) (Purdon Supp. 1980-81). The timely denial of a § 910 request triggers the right to appeal to a court of common pleas. Pennsylvania Municipalities Planning Code, Pub. L. No. 53-202, § 2(a) [1421] (Purdon Supp. 1980-81) (amending PA. STAT. ANN. tit. 53, § 11004 (Purdon 1972 & Supp. 1980-81)).

The effect of the first sentence of § 609.2(3), then, is to stay the operation and effect of these time limitations. *See* PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81).

165. *See Galbreath v. Northampton Twp. Bd. of Supervisors*, 33 Bucks County L. Rep. 363, 367 & n.6 (1979), *aff'd*, — Pa. Commw. Ct. —, 423 A.2d 45 (1980).

166. *See id.*

167. *See id.*

168. *See* note 162 and accompanying text *supra*.

effect of authorizing the governing body and the zoning hearing board to *delay consideration* of any pre-existing challenges, but does not, however, address the question of the effect of a self-cure curative amendment upon the *resolution* of a challenge which predates the initiation of the self-cure procedures. Even if section 609.2 (3) is interpreted as authorizing a delay in the consideration of challenges which predate the self-cure procedures, it could still be argued that when such challenges are finally resolved, following the completion of the self-cure procedures, they are to be resolved with reference to the original ordinance.¹⁶⁹

The first sentence of section 609.2 (3), then, does not address itself to the *Casey* doctrine issue. The issue is addressed, however, by the second sentence.

b. The Second Sentence of Section 609.2(3)

The second sentence of section 609.2 (3), less complex than the first, limits the accrual of "rights to a cure" by providing that no such rights are to accrue "*from the date of the declaration and proposal.*"¹⁷⁰ This language leaves open the possibility that rights to

169. I do not mean to suggest that this approach is logical. Specifically, it is difficult to imagine why the Pennsylvania Legislature would provide in the first sentence of § 609.2(3) that the initiation of the self-cure procedures stays the obligation to consider a pre-declaration challenge until such time as the municipality adopts a self-cure amendment; and then provide in the second sentence that the self-cure amendment was to be disregarded in resolving the merits of the pre-declaration challenge. See PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81). The first and second sentences of § 609.2(3) should be interpreted in such a way that the two sentences, considered together, set forth an approach which makes sense. My point is simply that the first sentence, considered *by itself*, does not address the *Casey* doctrine issue. I will suggest an interpretation of the two sentences of § 609.2(3) after I have examined the language of the second sentence. See notes 170-241 and accompanying text *infra*.

170. PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81). Section 609.2(3) provides in relevant part that upon completion of the self-cure procedures, "no rights to a cure pursuant to the provisions of §§ 609.1 and 1004 shall, from the date of the declaration and proposal, accrue to any landowner on the basis of the substantive invalidity of the unamended zoning ordinance for which there has been a curative amendment pursuant to this section." *Id.* (emphasis added) (footnotes omitted). Due to the specific reference to § 609.1, it might be argued that, irrespective of whether the second sentence of § 609.2(3) affects challenges filed prior to the initiation of the § 609.2 self-cure procedure, § 609.2(3) has no impact on "rights to a cure" sought by a request for a report from a zoning hearing board. This argument is grounded upon a close interpretation of the second sentence of § 609.2(3) which reads that sentence as limiting "rights to a cure" *only* insofar as such rights are sought, pursuant to §§ 609.1 and 1004, by a request to a governing body for a curative amendment. See *id.* Under this reading, rights to a cure sought pursuant to §§ 910 and 1004 are not limited by the second sentence of § 609.2(3).

This argument finds support in the language of the second sentence of § 609.2(3), since the legislature did choose to refer to § 609.1, and not § 910.

a cure *can* accrue *prior* to the date of the declaration and proposal. The only apparent circumstance in which a pre-declaration right might accrue is when there has been a pre-declaration challenge. In that situation, the rights that would accrue would be those based upon the invalidity of the pre-declaration zoning ordinance. Thus, there is nothing in the second sentence of section 609.2 (3) which purports to contradict or overturn the *Casey* doctrine by denying to a pre-declaration challenger the right to have his challenge assessed against the ordinance which was in existence at the time he filed his challenge.

In his treatise on the law of zoning in Pennsylvania,¹⁷¹ Robert S. Ryan takes a contrary position with respect to the interpretation of section 609.2 (3).¹⁷² Mr. Ryan addresses the issue of whether a landowner, who has filed a challenge prior to the initiation of section 609.2 self-cure procedures has a right to have the challenge determined with respect to the ordinance in existence when the challenge was filed. In resolving this issue, Mr. Ryan sets forth¹⁷³

However, it is difficult to conceive of why the legislature might decide to limit rights to a cure sought by one method of challenge under § 1004 (a request to a governing body for a curative amendment), and, at the same time, decide not to limit those rights when sought by the second method of challenge under § 1004 (a request to a zoning hearing board for a report). For a general description of the two § 1004 methods of challenge, *see* note 128 *supra*. I would conclude, therefore, that the reference to § 609.1 in the second sentence of § 609.2(3) was inadvertent and that the legislature intended in that sentence to limit rights to a cure pursuant to either method of challenge under § 1004.

171. R. RYAN, *supra* note 98.

172. *Id.* § 3.1.10, at 83-88 (Supp. 1979).

173. *Id.* at 85. Mr. Ryan outlines the "landowner's argument" as follows:

The last sentence of § 609.2(3) provides that "no rights to a cure pursuant to the provisions of sections 609.1 and 1004 shall, from the date of the declaration and proposal, accrue to any landowner on the basis of the substantive invalidity of the unamended zoning ordinance." Does this indicate an intent to preserve any rights which had accrued prior to September 1, the "date of the declaration and proposal" in the hypothetical? The landowner would urge: "(1) I filed my challenge on August 1, when no curative amendment was pending; (2) as of that date, I had a right to have my challenge decided under the unamended ordinance and to have my project approved if the challenge was upheld; (3) the municipality's declaration on September 1, came too late because my right had 'accrued' prior to September 1; (4) under the *Casey* decision and its progeny, the rezoning of someone else's land cannot be used to defeat my application.

Id. Mr. Ryan's "landowner's argument" relies explicitly upon the authority of *Casey*. *Id.* The "landowner's argument" advanced in this discussion, however, relies upon the precise language of the second sentence of § 609.2(3). For a discussion of the latter "landowner's argument," *see* note 170 and accompanying text *supra*.

and rejects¹⁷⁴ the “landowner’s argument” advanced earlier in this discussion.¹⁷⁵

Mr. Ryan’s rejection of the landowner’s argument is grounded in large measure upon a perceived inconsistency between the landowner’s argument and the “stay” provisions in the first sentence of section 609.2 (3).¹⁷⁶ In his view, the “stay” provisions “are not limited to challenges filed after the date the municipality declares its ordinance invalid,” but are also applicable to challenges filed before the initiation of the self-cure procedures.¹⁷⁷ If this were the only possible interpretation of the “stay” provisions set forth in the first sentence of section 609.2 (3), then Mr. Ryan’s assertion that the landowner’s argument “would make no sense” is justifiable for the reason he states.¹⁷⁸ But Mr. Ryan’s interpretation of the

174. R. RYAN, *supra* note 98, § 3.1.10, at 85 (Supp. 1979). Mr. Ryan asserts that

[t]he landowner’s argument ought to fail, because it frustrates the essential purpose of Code § 609.2. It seems clear from the first portions of § 609.2(3) that the governing body is not obligated to hear a challenge while it is reviewing a curative amendment under the procedures established in that section and that a zoning board need not make its report within the same period. These “stays” are not limited to challenges filed after the date the municipality declares its ordinance invalid. It would make no sense for the Legislature to have said “you need not hear the landowner’s challenge while you are reviewing your ordinance, but after you have cured your ordinance you must decide the challenge as though the ordinance had not been cured.” The problem can be eliminated by reading the word “accrue” in § 609.2(3) as meaning “shall be available,” expressing the idea that “from and after the date of declaration and proposal” no definitive relief can be granted to a landowner on the basis of the invalidity of the unamended ordinance, so long as the municipality cures its ordinance in a timely fashion under § 609.2. If this is done, then § 602.(3) can be read, consistently, as applying to all challenges which have not reached the stage where they had been decided by the governing body or the zoning hearing board, as staying all such proceedings during the 180-day “turn-around” period, and as denying to the landowner challenging the ordinance the right to obtain definitive relief under his challenge unless the municipality fails to amend its ordinance to cure its prior error. If § 609.2 is not read in this fashion, then the section will have practical application only in the relatively rare instance where a municipality anticipates a challenge and manages to get its declaration of invalidity issued before the challenge is filed.

Id.

175. For a discussion of the landowner’s argument, see note 170 and accompanying text *supra*.

176. See PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81).

177. R. RYAN, *supra* note 98, § 3.1.10, at 85 (Supp. 1979).

178. *Id.* See note 174 *supra*. It would be illogical to interpret the first sentence of § 609.2(3) as authorizing a stay in the consideration of a pre-declaration challenge until such time as the municipality adopts a self-cure amendment and, at the same time, to interpret the second sentence of § 609.2(3)

“stay” provisions of section 609.2(3) is not the only reasonable interpretation which those provisions will bear.¹⁷⁹ The “stay” provisions *can* be interpreted as being applicable only to challenges filed after the date the municipality declares its ordinance invalid.¹⁸⁰ If the “stay” provisions are interpreted in this way, the perceived incongruity between the landowner’s argument and the “stay” provisions disappears.¹⁸¹

If, contrary to Mr. Ryan’s analysis, the “stay” provisions of section 609.2(3) are interpreted as restricted to challenges filed *after* the initiation of the self-cure procedures, then the second sentence of section 609.2(3) can be interpreted in a way that does not do violence to its plain language. In order to eliminate the incongruity between the landowner’s argument and his interpretation of the “stay” provisions,¹⁸² it is necessary for Mr. Ryan to read the word “accrue” as meaning “shall be available.”¹⁸³ Quite simply, the word “accrue” does *not* mean “shall be available,” but rather, “to come into existence as an enforceable claim: vest as a right.”¹⁸⁴ If the word “accrue” is given its normal meaning, then the second sentence of section 609.2(3), reads constructively that *from the date of declaration and proposal* no rights to a cure shall “come into existence” or “vest” in any landowner on the basis of the substantive invalidity of the unamended ordinance.¹⁸⁵ But, under this construction, section 609.2(3) implicitly recognizes that rights may come into existence or vest *before* the declaration and proposal. In short, by according the word “accrue” its normal meaning, the second sentence of section 609.2(3) does not deny to a pre-declaration challenger the right to have his challenge considered in light

as allowing such a self-cure amendment to be regarded in resolving the merits of the pre-declaration challenge. *See id.*

179. *See* notes 149-70 and accompanying text *supra*.

180. *See* notes 163-64 and accompanying text *supra*.

181. In order to eliminate any inconsistency between the first and second sentences of § 609.2(3), I believe that the first sentence should be interpreted as authorizing a governing body or board to defer consideration of only those challenges which are filed subsequent to the initiation of a declaration invoking the § 609.2 self-cure procedures. *Id.* Under this interpretation, the first sentence of § 609.2(3) cannot be relied upon to defer consideration of pre-declaration challenges. *Id.* Such challenges must be heard and resolved in accordance with the time requirements previously described. *See* notes 163-64 *supra*.

182. *See* notes 176-78 and accompanying text *supra*.

183. *See* R. RYAN, *supra* note 98, § 3.1.10, at 85 (Supp. 1979).

184. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 13 (1976).

185. *See* PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81).

of the ordinance in effect at the time he filed his challenge and, therefore, remains consonant with the *Casey* doctrine.¹⁸⁶

Mr. Ryan also bases his construction of section 609.2 (3) upon his fear that the section, if interpreted differently, would then apply as a practical matter only "in the relatively rare instance where a municipality anticipates a challenge and manages to get its declaration of invalidity issued before the challenge is filed."¹⁸⁷ Implicit in this assertion is a policy judgment that section 609.2(3), construed in accordance with the landowner's argument, is not sound legislation because it does not protect municipalities against a challenger who races to file his challenge before the municipality initiates the section 609.2 self-cure process. Whatever the merits of such a policy judgment,¹⁸⁸ it is simply inconsistent with the plain language of section 609.2 (3), which supports the landowner's argument.¹⁸⁹

Furthermore, I question the accuracy of Mr. Ryan's assertion that, if section 609.2 (3) is not interpreted as he suggests, it has an insignificant practical effect.¹⁹⁰ If section 609.2 (3) is construed as consistent with the landowner's argument, it still affords municipalities an advantage which they did not enjoy under pre-existing law. Under section 609.2 (3), a simple declaration and proposal in accordance with 609.2 (1) will operate to foreclose any further accrual of rights with respect to challenges directed to the unamended ordinance,¹⁹¹ whereas under *Casey*, a municipality had to advertise

186. Since the Pennsylvania Legislature may not overturn the constitutionally-based *Casey* doctrine, see notes 82-124 and accompanying text *supra*, it follows that, if there are two interpretations of § 609.2(3) — one of which is inconsistent with *Casey* and, therefore, unconstitutional; and the other is consistent with *Casey* and, thus, constitutional — a court should construe § 609.2(3) in a way that preserves its constitutionality.

187. R. RYAN, *supra* note 98, § 3.1.10, at 86 (Supp. 1979).

188. Mr. Ryan is apparently concerned about the operation of § 609.2(3) in the situation where a decision by the supreme court or commonwealth court establishes a new basis for holding that a municipal ordinance is unconstitutionally exclusionary. Immediately after this decision, a developer might challenge a municipal zoning ordinance before the municipality has had an opportunity under § 609.2(1) to declare its own ordinance unconstitutional on the ground that it is not in compliance with the requirements of the recent decision. I agree that a municipality in this circumstance should have a reasonable time to amend its ordinance to comply with the requirements of the recent decision and that a developer-challenger should not be able to acquire a "right" to challenge the existing, admittedly invalid, ordinance during this period of time. See note 205 *infra*. This is, however, not the law as stated in the second sentence of § 609.2(3). See PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81).

189. See text following note 170 *supra*.

190. See note 174 *supra*.

191. See note 170 and accompanying text *supra*. This proposition assumes the constitutionality of § 609.2(3) insofar as it shuts off any post-declaration

publicly a specific proposed amendment in order to terminate the accrual of rights as against the unamended ordinance.¹⁹² Admittedly, as Mr. Ryan argues, a municipality must issue its section 609.2 (1) declaration of invalidity before a challenge is filed if it wishes to cut off the accrual of rights as against the unamended ordinance.¹⁹³ It is easier and faster, however, to issue a section 609.2 (1) declaration of invalidity than to advertise publicly a proposed amendment.¹⁹⁴ Thus, while section 609.2 (3) does not afford

accrual of rights with respect to challenges directed to the existing unamended ordinance. *But see* notes 215-22 and accompanying text *infra*.

192. *See* note 61 and accompanying text *supra*.

193. R. RYAN, *supra* note 98, § 3.1.10, at 85 (Supp. 1979).

194. *See* note 61 and accompanying text *supra*. The process which culminates in the public announcement of a proposed amendment under *Casey* is time-consuming. In order to come within the protection of the *Casey* pending ordinance doctrine, a municipality's governing body must have "resolved to consider a particular scheme of rezoning and . . . advertised to the public its intention to hold public hearings on the rezoning." 459 Pa. at 226, 328 A.2d at 467, quoting *Boron Oil Co. v. Kimple*, 445 Pa. 327, 331, 284 A.2d 744, 747 (1971). Such a resolution presumably must occur at a meeting of the governing body and, in order for the resolution to relate to a "particular scheme of rezoning," the meeting cannot take place until a proposed amendment has been drafted. The task of preparing a proposed amendment may take some time. If, for example, a municipality's existing ordinance is invalid because it fails to provide for apartment development as required by *Girsh*, *see* notes 52-53 and accompanying text *supra*, any amendment remedying this defect would have to include textual provisions which describe in some detail the circumstances in which apartment development would be permitted. In addition, an amendment to the zoning map would be required in order to indicate where the newly authorized apartment development would be permitted. The preparation of such provisions would require additional time. Only when decisions had been made and the required documents had been drafted could there be a "particular scheme of rezoning" which the governing body could "resolve to adopt." *Id.*

However, before this "particular scheme of rezoning" can become "pending," the governing body must "advertise to the public its intention to hold public hearings on the rezoning." *Id.* This advertisement requirement is consistent with the procedure for the enactment of ordinance amendments set forth in §§ 609, 610 & 107(18) of the MPC. *See* PA. STAT. ANN. tit. 53, §§ 10609, 10610 & 10107(18) (Purdon 1972). Section 609 requires "public notice" of a public hearing on a proposed amendment. *Id.* § 10609. Section 610 provides that "public notices of proposed zoning . . . amendments shall include either the full text thereof, or a brief summary setting forth the principal provisions in reasonable detail." *Id.* § 10610. Section 107(18) defines "public notice" as requiring, among other things, publication in a "newspaper of general circulation in the municipality." *Id.* § 10107(18). In short, the actions which trigger the *Casey* pending ordinance doctrine require considerable time as well as concerted effort.

In contrast, under § 609.2 a municipality is protected against challenges to its defective ordinance as soon as it issues a declaration of invalidity under § 609.2(1). *See* notes 150-51 and accompanying text *supra*. It is not necessary, in order to issue a § 609.2(1) declaration, that the municipality have a particular self-cure amendment in mind. Indeed, the various provisions of §§ 609.2(1) and (2), which expressly impose no obligation upon the municipality to enact a curative amendment until 180 days after the § 609.2(1) declaration of invalidity, allow the municipality a better opportunity to forestall chal-

municipalities as much protection as Mr. Ryan deems advisable, it does provide them with a benefit that they did not previously have.

Mr. Ryan's interpretation of section 609.2 (3) also does not seem to comport with the certification requirement of section 1004 (2) (a)¹⁹⁵ and the related limitation upon judicial relief embodied in section 1011 (4).¹⁹⁶ Under section 1004 (2) (a), a landowner who submits a challenge to either the governing body or the zoning hearing board must include in his submission a certification that he is unaware of the municipality's resolution to consider a proposed scheme of zoning or of any inconsistency between that scheme and his proposed use.¹⁹⁷ Under section 1011 (4), judicial relief in an exclusionary zoning challenge is precluded unless the court finds as a matter of fact that the landowner's certification is "true and correct."¹⁹⁸

The provisions of sections 1004(2)(a) and 1011(4) are not without ambiguity.¹⁹⁹ Their basic purpose, however, seems clear: to deny site-specific relief to a landowner who, knowing that a municipality is contemplating amendments to its zoning ordinances, races to submit a challenge before the amendments are adopted or advertised. There would be no purpose to these provisions if Mr. Ryan's interpretation of section 609.2 (3) was accepted. Under his interpretation, a municipality could effectively thwart the landowner's challenge by initiating the self-cure procedures after the "racer" has filed his challenge and then adopting a self-cure amendment which did not benefit the challenger.²⁰⁰ If the challenger was dissatisfied with this result, he would have no right, under Mr. Ryan's view of section 609.2 (3), to a determination of his challenge to the unamended ordinance.²⁰¹

lenges to its existing ordinance than it has under the *Casey* doctrine. See PA. STAT. ANN. tit. 53, §§ 609.2(1)-(2) (Purdon Supp. 1980-81). For a discussion of the § 609.2 self-cure procedure, see notes 149-54 and accompanying text *supra*.

195. PA. STAT. ANN. tit. 53, § 11004(2)(a) (Purdon Supp. 1980-81).

196. *Id.* § 11011(4).

197. *Id.* § 11004(2)(a).

198. *Id.* § 11011(4).

199. For a discussion of the ambiguity inherent in the interrelationship between §§ 1004(2)(a) and 11011(4), see notes 242-84 and accompanying text *infra*.

200. See R. RYAN, *supra* note 98, § 3.1.10, at 85 (Supp. 1979).

201. See *Galbreath v. Northampton Twp. Bd. of Supervisors*, 33 Bucks County L. Rep. 363, 370 (C.P. 1979), *aff'd*, — Pa. Commw. Ct. —, 423 A.2d 45 (1980).

Significantly, Mr. Ryan recognizes that “[i]t may be argued that the new § 609.2 [as he interprets it] is itself unconstitutional.”²⁰² His response to this argument is succinct:

[T]he decision of the Legislature to give the municipal governing body a short time within which to correct its ordinance is not such a clog on the ability of a landowner to challenge zoning ordinances as to itself transcend the boundaries of constitutional law. This is particularly so when one considers that under the terms of Code § 1004, . . . a landowner may initiate a challenge without incurring the cost of developing the full plans necessary for preliminary, tentative or final approval of his project, and that the § 609.2 procedures must be invoked by the municipality early in a proceeding, before larger legal costs have been incurred.²⁰³

It is difficult to comment upon Mr. Ryan's response to the argument that section 609.2 is unconstitutional because the precise constitutional basis for the argument is not set forth. Presumably, the argument is that: 1) the *Casey* doctrine is a constitutionally based doctrine; 2) the legislature may not, consistent with the doctrine of separation of powers, overturn a judicially created doctrine which is constitutionally based; 3) section 609.2 (3) is legislation which purports to overturn the *Casey* doctrine; and 4) section 609.2 (3) is therefore unconstitutional.²⁰⁴

Assuming that this is the argument against the constitutionality of section 609.2 (3) which Mr. Ryan addresses,²⁰⁵ he maintains that even though a self-cure amendment enacted pursuant to section 609.2 may, in his view, moot a pre-declaration challenge to the unamended ordinance, the impact upon the challenger is mini-

202. R. RYAN, *supra* note 98, § 3.1.10, at 86 (Supp. 1979).

203. *Id.*

204. For an expanded articulation of this argument, see notes 82-148 and accompanying text *supra*, notes 220-22 and accompanying and following text *infra*.

205. It may be, however, that the constitutional argument which Mr. Ryan rejects is one of procedural due process. Basic to this argument would be the assertion that the “short time” provided by § 609.2 within which a municipality may correct its ordinance authorizes such a delay in the determination of a developer's challenge that the delay itself constitutes a violation of due process. See R. RYAN, *supra* note 98, § 3.1.10, at 86 (Supp. 1979). However, the major impact of the § 609.2(3) procedure, as interpreted by Mr. Ryan, is substantive, not procedural, because that section can be used, not merely to delay the resolution of a pre-declaration challenge, but to quash a developer's right under the *Casey* doctrine to have his pre-declaration challenge determined on the basis of the ordinance in existence at the time he filed his challenge. See *id.* at 85.

mal because a section 1004 challenge can be initiated without significant cost and the section 609.2 self-cure procedures cannot negate a challenge after substantial legal costs have been incurred.²⁰⁶ These observations reflect a belief that the *Casey* doctrine is grounded upon a judicial concern for protecting substantial good faith expenditures in commencing and prosecuting a challenge — what I have identified previously as “vested rights” concerns²⁰⁷ — and that the section 609.2 self-cure procedures do not violate the *Casey* doctrine because they do not interfere with these concerns.²⁰⁸

The *Casey* doctrine, however, is not based upon vested rights considerations.²⁰⁹ It requires, instead, that courts disregard a post-challenge amendment irrespective of the extent of the challenger’s investment in his challenge to the unamended ordinance.²¹⁰ Even accepting the correctness of Mr. Ryan’s contention that the section 609.2 procedures cannot negate a pre-declaration challenge for which substantial legal costs have been incurred,²¹¹ his assertion implicitly concedes that the section 609.2 procedures *can* negate a pre-declaration challenge for which substantial legal costs have *not* been incurred. Such a result, however, is inconsistent with *Casey*.

In summary, then, the plain language of the second sentence of section 609.2 (3) is consistent with the *Casey* doctrine because it

206. *Id.* at 86. Although Mr. Ryan is clearly correct in asserting that a § 1004 challenge can be initiated inexpensively, *see id.* at 85, his assertion that “the 609.2 procedures [as he views them] must be invoked by the municipality early in a proceeding, before larger legal costs have been incurred,” *id.* at 86, is open to question. Mr. Ryan interprets the first sentence of § 609.2(3) to authorize a delay in the consideration of a pre-declaration challenge and the second sentence of § 609.2(3) to negate the right of a pre-declaration challenger to have his challenge resolved on the basis of the ordinance in existence at the time he initiated his challenge. *Id.* See notes 172-94 and accompanying text *supra*. Assuming the validity of this interpretation, there is nevertheless no provision in § 609.2 which suggests that, if the § 609.2 procedures are to have any effect upon a pre-declaration challenge, they “must be invoked by the municipality early in a proceeding, before larger legal costs have been incurred.” *See* R. RYAN, *supra* note 98, § 3.1.10, at 86. On the contrary, under Mr. Ryan’s view, a § 609.2 self-cure amendment could conceivably extinguish a pre-declaration challenge even if, prior to the initiation of the § 609.2 self-cure procedures, there had been extensive hearings on the challenge before the governing body or zoning hearing board. For an opposing view of the impact of § 609.2 self-cure procedures upon pre-declaration challenges, *see* text following note 170 *supra*.

207. *See* notes 97-99 and accompanying text *supra*.

208. This argument assumes that the § 609.2 procedures, as interpreted by Mr. Ryan, cannot be used to negate a pre-declaration challenge for which the challenger has incurred substantial good faith expenditures. *But see* note 206 *supra*.

209. For a discussion of the applicability of the vested rights theory to *Casey*, *see* notes 96-110 and accompanying text *supra*.

210. *See* note 61 and accompanying text *supra*.

211. For a critical analysis of this position, *see* note 206 *supra*.

does not negate the right of a pre-declaration challenger to have the challenge determined on the basis of the ordinance which was in existence at the time the challenge was filed.²¹² Although the first sentence of section 609.2 (3), considered by itself, could be interpreted in two ways,²¹³ once it is determined that the second sentence of section 609.2 (3) contemplates that a pre-declaration challenge will be decided on the basis of the ordinance in existence at the time the challenge was filed, the only construction of the first sentence which is consistent with that of the second is one that authorizes a delay in the consideration of only those challenges initiated subsequent to a section 609.2 (1) declaration.²¹⁴

2. Section 609.2 and the Post-Declaration Challenge

Up to this point, discussion has focused upon the effect of the section 609.2 self-cure procedures upon a challenge that is filed *before* the initiation of the first step in that process — the declaration of invalidity by the municipality's governing body.²¹⁵ The question of the impact of the section 609.2 self-cure procedures upon a challenge filed *after* a declaration of validity remains to be considered.

Section 609.2 (3) provides that, upon the completion of the three-step self-cure process,²¹⁶ "no rights to a cure . . . shall, *from the date of the declaration and proposal*, accrue to any landowner on the basis of the substantive invalidity of the unamended zoning ordinance for which there has been a curative amendment pursuant to this section."²¹⁷ This language indicates quite clearly that, once there has been a declaration and proposal, any "rights to a cure" under the original unamended zoning ordinance are terminated, assuming of course that the self-cure process produces a curative amendment to the original ordinance.²¹⁸ In other words, a challenge filed after a section 609.2 (1) self-cure declaration is to be adjudicated in light of the municipality's zoning ordinance as amended by any curative amendment produced by the self-cure process.

212. See note 186 and accompanying text *supra*.

213. See notes 161-69 and accompanying text *supra*.

214. See notes 179-94 and accompanying text *supra*.

215. See notes 155-214 and accompanying text *supra*.

216. For a description of the § 609.2 self-cure process, see notes 149-54 and accompanying text *supra*.

217. See PA. STAT. ANN. tit. 53, § 10609.2(3) (Purdon Supp. 1980-81) (emphasis added); note 156 *supra*.

218. *Id.*

This reading of section 609.2 (3) contradicts the *Casey* doctrine. Under *Casey*, a post-challenge amendment affects a challenge only if there has been "sufficient public declaration" of the amendment prior to the initiation of the challenge.²¹⁹ Section 609.2, on the other hand, dispenses with the public advertisement requirement of *Casey* and provides that a self-cure amendment affects a challenge if the section 609.2(1) declaration has been made prior to the initiation of the challenge.²²⁰ Since the *Casey* doctrine embodies an implicit determination that a previously unadvertised post-challenge amendment is unconstitutional,²²¹ the doctrine cannot be overturned by the legislature.²²² Thus, to the extent that section 609.2 purports to authorize consideration of post-challenge amendments which were not advertised prior to the challenge, section 609.2 is itself unconstitutional.

3. Section 609.2 as a Limitation Upon Municipal Authority Under the *Casey* Doctrine

Thus far, the *Casey* doctrine and Act 249 have been discussed from the perspective of a landowner-challenger. Using that perspective, I have argued that the *Casey* doctrine implicitly states that a landowner-challenger has a constitutionally based right to have his challenge decided without regard to any previously unadvertised post-challenge amendment.²²³ I have further contended that this constitutionally based right of a developer-challenger cannot be overturned by the Pennsylvania Legislature.²²⁴ If, however, the *Casey* doctrine is viewed from the perspective of a municipality, it becomes evident that the doctrine upholds a municipality's authority to adopt an effective post-challenge amendment so long as the post-challenge amendment is publicly advertised prior to the initiation of a developer's challenge.²²⁵ This authority is, like any authority of a municipality, subject to modification or outright

219. See note 61 and accompanying text *supra*.

220. See notes 149-56 and accompanying text *supra*.

221. See note 123 and accompanying text *supra*.

222. See notes 89 & 124 and accompanying text *supra*.

223. See notes 82-122 and accompanying text *supra*.

224. See notes 89 & 124 and accompanying text *supra*.

225. This limited municipal authority to adopt an effective post-challenge amendment is *upheld* and not *conferred* by *Casey*. The source of a Pennsylvania municipality's authority to adopt zoning amendments is § 601 of the MPC. See notes 49, 76 & 80 *supra*. *Casey* overrides this authority with respect to post-challenge amendments except when such amendments have been advertised prior to the initiation of the challenge. Thus, in recognizing the effect of such previously advertised post-challenge amendments, *Casey* simply upholds (to a limited extent) the amendment power conferred by § 601.

elimination by the state legislature.²²⁶ I believe that section 609.2 modifies a Pennsylvania municipality's authority under the *Casey* doctrine.

Under the *Casey* doctrine, if a municipality concluded that its existing ordinance was exclusionary and contemplated a challenge to that ordinance in the near future by a particular developer, it had only to advertise publicly an amendment prior to the developer's challenge to insure that the challenge would be measured against the ordinance as amended, and not against the constitutionally vulnerable existing ordinance.²²⁷ Moreover, Pennsylvania courts did not limit the number of times that a municipality could publicly advertise a proposed amendment in order to invoke the benefits of the *Casey* doctrine against possible challengers.

In contrast, section 609.2 (4)²²⁸ limits the frequency with which a municipality may use the section 609.2 self-cure procedures by providing that, once a municipality has used the section 609.2 process, it may not, except in limited circumstances, use the process again within a thirty-six month period following the date on which it enacts a curative amendment.²²⁹ This frequency limitation raises a question with respect to the interrelationship of the section 609.2 self-cure process and a municipality's power under the *Casey* doctrine: may a municipality, after adopting a self-cure amendment in accordance with section 609.2 procedures, thereafter take advantage of the *Casey* doctrine by publicly advertising a new amendment within the section 609.2 (4) waiting period?

Suppose, for example, that a municipality has an ordinance which makes no provision for apartments and, therefore, is invalid under *Girsh*.²³⁰ The municipality invokes the procedures of section 609.2 and ultimately adopts an amendment which authorizes apartment uses and designates particular locations for such uses on the municipality's zoning map. Shortly after the enactment of this self-cure amendment and within the thirty-six month waiting period of section 609.2 (4), the municipality learns that a particular

226. A state legislature may not, of course, modify or eliminate municipal power which is constitutionally based — for example, municipal power under a "home rule" provision in the state constitution.

227. See note 61 and accompanying text *supra*.

228. PA. STAT. ANN. tit. 53, § 10609.2(4) (Purdon Supp. 1980-81).

229. *Id.* Section 609.2(4) provides that the § 609.2 self-cure procedure may be used again within the 36-month waiting period if "a substantially new duty or obligation [is] imposed upon the municipality by virtue of a change in statute or by virtue of a Pennsylvania Appellate Court decision." *Id.*

230. See 437 Pa. 237, 263 A.2d 395 (1970). For a discussion of *Girsh*, see notes 52-53 and accompanying text *supra*.

landowner believes that the amended ordinance is still exclusionary because, though there is no longer a *de jure* exclusion of apartments, the amended ordinance and zoning may still embody a *de facto* exclusion of apartments.²³¹ The municipality then attempts to invoke the benefits of the *Casey* doctrine by advertising a proposed amendment to remedy the defect before it can become the basis for the anticipated challenge.

The basic question raised by this hypothetical is whether section 609.2 should be interpreted as setting forth the *only* circumstances in which a post-challenge amendment is to be considered in ruling upon the merits of an exclusionary challenge. There are a number of reasons for suggesting an affirmative answer to this question. First, the continued recognition of municipal power under the *Casey* doctrine after use of section 609.2 self-cure procedures would undercut the thirty-six month waiting period established by section 609.2 (4).²³² If a municipality could invoke the *Casey* self-cure process as often as it wished, the waiting period provision of section 609.2 (4) would be rendered useless.

Second, the section 609.2 process reflects a legislative awareness and treatment of problems which the *Casey* doctrine creates.²³³ Under the *Casey* doctrine, it is not clear how long an advertised amendment may be "pending" — that is, it is not clear how long a municipality may "study" an advertised proposed amendment and thereby preclude a challenger from acquiring "rights" under the existing ordinance.²³⁴ Similarly, it is unclear under the *Casey* doctrine how frequently a municipality may advertise proposed amendments and thereby preclude a challenger from acquiring "rights" under the existing ordinance.²³⁵ Section 609.2 treats both these

231. For an explanation of the distinction between *de jure* and *de facto* exclusions, see note 46 *supra*.

232. For a discussion of the waiting period provision of § 609.2(4), see notes 228-29 and accompanying text *supra*.

233. See notes 42-47 and accompanying text *supra*.

234. Suppose, for example, that a municipality has a zoning ordinance which is clearly invalid under *Girsh* because it makes no provision for apartments. See notes 52-53 and accompanying text *supra*. May a municipality protect itself against exclusionary zoning challenges by advertising a proposed amendment which would cure this defect and then "studying" the proposed amendment for months on end? *Casey* provides no answer to this question.

235. For example, fearing that it cannot "study" this proposed amendment forever, see note 234 *supra*, the municipality decides not to adopt it but simultaneously advertises a new proposed amendment which, if adopted, would cure the *Girsh* defect. This process of advertisement followed by rejection and simultaneous advertisement of a new proposed amendment might be carried on indefinitely. *Casey* provides no guidance as to whether such dilatory tactics are permissible.

problems by requiring that any curative amendment under section 609.2 be enacted within 180 days of the section 609.2(1) declaration of invalidity²³⁶ and by imposing a three year moratorium on reuse of the section 609.2 process.²³⁷ The purpose of these solutions would be negated if section 609.2 were not the *exclusive* procedure for subjecting exclusionary challenges to post-challenge amendments.

Third, the self-cure process of section 609.2 is buttressed by the certification requirements of section 1004(2).²³⁸ Even in the absence of municipal invocation of the section 609.2 process, landowners challenging a municipal ordinance can obtain relief only if they comply with the certification provisions of section 1004(2).²³⁹ These requirements are designed to remedy the evil which gave rise to the *Casey* doctrine — the race by a challenger to file his challenge while the municipality is considering an amendment which would not benefit him. Under *Casey*, such a challenger would, of course, have his challenge evaluated against any subsequently adopted amendment only if the amendment had been publicly advertised at the time of the challenge. The certification requirement of section 1004(2) goes further in protecting a municipality against the “racing” challenger.²⁴⁰ Legislative enactment of the certification requirement suggests that the legislature intended that this requirement, together with the section 609.2 self-cure procedure, would serve to protect a municipality against a racing

236. PA. STAT. ANN. tit. 53, § 10609.2(2) (Purdon Supp. 1980-81). For a discussion of this provision, see note 154 and accompanying text *supra*.

237. PA. STAT. ANN. tit. 53, § 10609.2(4) (Purdon Supp. 1980-81). For a discussion of this provision, see notes 228-29 & 232 and accompanying text *supra*.

238. See PA. STAT. ANN. tit. 53, § 11004(2)(a) (Purdon Supp. 1980-81). For an in-depth discussion of the certification requirements, see notes 242-57 and accompanying text *infra*.

239. See PA. STAT. ANN. tit. 53, § 11011(4) (Purdon Supp. 1980-81). Section 1011(4) of the MPC provides that “[n]o court shall grant or enforce relief with respect to a substantive challenge without first making an affirmative finding of fact that the landowner’s certification required by section 1004(2)(a) has in fact been made and is true and correct.” *Id.* For a detailed discussion of § 1011(4), see notes 258-67 and accompanying text *infra*.

240. PA. STAT. ANN. tit. 53, § 11004(2)(a) (Purdon Supp. 1980-81). The certification requirement of § 1004(2)(a) provides greater protection to a municipality than the *Casey* doctrine because, under this requirement, a developer-challenger must certify that he does not know about “a particular scheme of rezoning” including, but not limited to, an advertised proposal amendment. For a discussion of the § 1004(2)(a) certification requirement, see notes 242-57 and accompanying text *infra*. If the challenger fails to make the § 1004(2)(a) certification or if the certification is not “true and correct,” a court must deny relief to the challenger. See notes 252-58 and accompanying text *infra*. For a discussion of § 1011(4), see notes 258-67 and accompanying text *infra*.

developer-challenger and that this protection would supersede the municipal authority recognized under the *Casey* doctrine.

In short, while the state legislature may not override a developer-challenger's constitutionally based rights under *Casey*, the legislature may limit the municipal authority recognized in *Casey*. I believe that the Pennsylvania Legislature intended to limit this authority when it enacted sections 602.2 and 1004 (2) (a). These sections reflect the legislative solution to the problem of the racing developer-challenger and this solution supersedes the judicial solution fashioned in *Casey*.²⁴¹

B. Certification Under Section 1004(2)(a) and the Casey Doctrine

1. The Certification Requirement of Section 1004(2)(a) and Its Relationship to the Availability of Judicial Relief

Act 249 added a certification requirement to section 1004, the MPC provision which sets forth the procedural requirements for landowner challenges to the substantive validity of municipal zoning ordinances.²⁴² Section 1011 (4),²⁴³ another addition to the MPC under the Act, links the availability of judicial relief to the certification requirement of section 1004 (2) (a).²⁴⁴ In order to un-

241. See notes 233-40 and accompanying text *supra*. Section 609.2 may be viewed as a limitation upon a municipality's power to amend under § 601. See note 225 *supra*. Section 609.2 states, in effect, that a municipality may not adopt an effective post-challenge amendment (at least insofar as the challenger is concerned) unless the post-challenge amendment is a product of the § 609.2 self-cure procedures. See PA. STAT. ANN. tit. 53, § 10609.2 (Purdon Supp. 1980-81).

242. See PA. STAT. ANN. tit. 53, § 11004 (Purdon Supp. 1980-81). Section 1004(1) provides that a landowner challenge may be submitted to either the zoning hearing board or to the governing body. *Id.* § 11004(1). A submission to either body is governed by the requirements of § 1004(2). Subsection (a) of § 1004(2) requires that any submission under § 1004(1) shall include a written request for a hearing containing "a short statement" of the grounds for the challenge. *Id.* § 11004(2)(a). In turn this statement must

contain a certification that the landowner did not know at the time of the application (i) that the municipality had resolved to consider a particular scheme of rezoning by publication of notice of hearings on a proposed comprehensive plan or proposed zoning ordinance or otherwise, or (ii) that the scheme of rezoning would be inconsistent with this landowner's proposed use; provided that the rezoning scheme had reached sufficient particularity to disclose that, if adopted, it would cure the defect in the zoning ordinance attacked by the substantive challenge.

Id. For a discussion of the § 1004 challenge procedures, see note 128 *supra*.

243. See PA. STAT. ANN. tit. 53, § 11011(4) (Purdon Supp. 1980-81).

244. *Id.* Section 1011(4) provides that "[n]o court shall grant or enforce relief with respect to a substantive challenge without first making an affirma-

derstand the certification requirement and its relationship to the provision of judicial relief, several ambiguities must be identified and clarified.

a. The Nature of the Certification Requirement

A basic difficulty in interpreting section 1004 (2) (a) derives from the legislature's choice to employ the disjunctive "or." Under this section, a challenger must certify that he was not aware of the municipality's resolution "to consider a particular scheme of rezoning" *or* of the inconsistency of that scheme with his proposed use.²⁴⁵ Presumably, the use of the disjunctive "or" means that a certification would be inadequate if it failed to satisfy *either* of these requirements.²⁴⁶

The reason for the twofold certification requirement is unclear. One might have expected a unitary certification requirement more finely tuned to realize the apparent purpose of section 1004 (2) (a) — to discourage racing challenges.²⁴⁷ But perhaps the twofold certification requirement reflects a legislative desire to guard against the situation in which a landowner-challenger knows of the municipality's decision to consider a particular scheme of rezoning, but attempts to maintain a state of blissful ignorance with respect to the precise nature of that scheme. In such a case, the challenger would be able to satisfy a unitary certification requirement²⁴⁸ because he could certify honestly that he was unaware that the particular rezoning scheme *would be inconsistent with his proposed use*.²⁴⁹ The challenger could not, however, satisfy the twofold certification requirement of section 1004 (2) (a).

tive finding of fact that the landowner's certification required by section 1004(2)(a) has in fact been made and is true and correct." *Id.*

245. *Id.* § 11004(2)(a).

246. For example, at the time of his challenge a landowner might know that the municipality had resolved to consider a "particular scheme of rezoning" but might not know that "the scheme of rezoning would be inconsistent with [his] use." A certification consistent with this state of knowledge would satisfy the second part of the § 1004(2)(a) certification requirement but not the first. *See id.*

247. Section 1004(2)(a) might, for example, have set forth the following unitary certification requirement:

[s]uch statement shall contain a certification that the landowner did not know at the time of the application that the municipality had resolved to consider a particular scheme of rezoning, by publication of notice of hearings on a proposed comprehensive plan or proposed zoning ordinance or otherwise, which would be inconsistent with the landowner's use.

248. For an example of a unitary requirement, *see* note 247 *supra*.

249. As a practical matter, however, it is difficult to envision a challenger being aware of a "*particular* scheme of rezoning" without knowing whether

There is additional ambiguity in the language of section 1004 (2) (a) which requires the challenger to affirm his ignorance of a municipality's resolution to consider a specific rezoning scheme "by publication of notice of hearings . . . or otherwise."²⁵⁰ Although the meaning of the first part of the italicized phrase is clear, the meaning of the words "or otherwise" is not. For example, if the challenger knew at the time of filing his challenge that the members of the governing body had stated at a public hearing that they would soon be proposing amendments to the municipality's zoning ordinance which would cure a constitutional defect in the existing ordinance, would such statements sufficiently indicate that "the municipality had resolved to consider a particular scheme of rezoning" by a means that fits within the "or otherwise" language?²⁵¹

b. The Effect of a Challenger's Failure to Meet the Certification Requirement

Section 1004 (2) (a) provides that a request (*i.e.*, a challenge) to the zoning hearing board or governing body *shall* contain a statement of the basis for the challenge and that such statement *shall* contain the certification previously discussed.²⁵² What is the consequence if a challenge fails to contain the certification required by section 1004 (2) (a)?

It could be argued that, if a challenge fails to contain a section 1004 (2) (a) certification, the challenge is defective and therefore may not be considered by the body to which it was submitted. This argument is supported by a number of commonwealth court decisions which have held that a section 1004 challenge is defective, and therefore may not be considered by the body to which it was submitted, if the challenge does not include the plans required by section 1004 (2) (c).²⁵³

"that scheme of rezoning was inconsistent with the landowner's proposed use." See PA. STAT. ANN. tit. 53, § 11004(2)(a) (Purdon Supp. 1980-81).

250. *Id.* (emphasis added).

251. For further discussion of the nature of the § 1004(2)(a) certification requirement and its relation to the *Casey* doctrine, see notes 258-67 and accompanying text *infra*.

252. PA. STAT. ANN. tit. 53, § 11004(2)(a) (Purdon Supp. 1980-81).

253. Cf. *Ralph W. Connelly, Inc. v. Board of Supervisors*, 19 Pa. Commw. Ct. 110, 115-16, 340 A.2d 597, 600 (1975) (failure to include plans and materials with challenge procedurally defective). But see *Appeal of H & K Materials, Inc.*, 43 Pa. Commw. Ct. 320, 322-25, 403 A.2d 134, 135-36 (1975) (failure to submit plans and materials to zoning board with challenge to ordinance in violation of § 1004 of MPC should not preclude challenger from submitting them to court on appeal where board made no objection to the omission during hearing and landowner testified in detail about proposed use).

In the alternative, it could be argued that section 1011(4) describes the only consequence of a failure to include in a challenge the certification required by section 1004(2)(a) — no grant of judicial relief.²⁵⁴ By prohibiting judicial relief where there is no section 1004(2)(a) certification, section 1011(4) seems to presuppose that a challenge might properly reach the level of judicial consideration even though the challenge did not include a section 1004(2)(a) certification. To put it another way, section 1011(4) seems to state that the consequence of a failure to make a section 1004(2)(a) certification is *not* rejection of the challenge at the outset on the ground of procedural defectiveness, but rather the denial of judicial relief if and when the challenge receives judicial review.

While the particular language of section 1011(4) suggests the second of the preceding arguments should prevail, such a result is, of course, illogical. Why should a zoning hearing board or governing body be required to hear a challenge which does not contain a section 1004(2)(a) certification when it is clear that the challenger may not ultimately obtain judicial relief?²⁵⁵ The legislature could not have intended such an absurd result. The more sensible approach would have been to provide: (1) that a challenge which failed to include a section 1004(2)(a) certification was procedurally defective and, therefore, was not to be considered by the zoning hearing board or governing body; (2) that if a challenge did include a section 1004(2)(a) certification, it would be considered by the municipal body to which it was submitted; but (3) that if there was judicial review, judicial relief would be provided only if the court could make an "affirmative finding" that the certification was "true and correct."²⁵⁶ While this approach may appear to

254. See PA. STAT. ANN. tit. 53, § 11011(4) (Purdon Supp. 1980-81).

255. On its face, § 1011(4) has no effect upon the initial consideration of a § 1004 challenge by either a zoning hearing board or a governing board or a governing body. See *id.* Since it simply precludes a court from granting or enforcing "relief" without first making a finding that the challenger's § 1004(2)(a) certification is "true and correct," § 1011(4) is not activated until there is judicial review of the § 1004 challenge. See *id.*

It is at least questionable whether the statutory interplay of §§ 1004(2)(a) and 1011(4) is logical in a situation in which a § 1004(2)(a) certification is not "true and correct." See *id.* In this circumstance, it would seem that the zoning board or governing body could not decline to consider the challenge if all the procedural requirements of § 1004 had been satisfied, even though upon judicial review, a court could not under § 1011(4) grant or enforce relief with respect to the challenge. See *id.* Does it make sense to have a zoning hearing board or governing body consider the merits of a challenge in such a situation?

256. See *id.* This approach could be implemented by deleting from § 1011(4) the phrase "has in fact been made." See *id.*; note 244 *supra*.

be the more logical one, it nevertheless is not consistent with the language of section 1011(4) because that language, by also prohibiting judicial relief in the absence of an affirmative finding that the section 1004(2)(a) certification "has in fact been made," implicitly authorizes initial consideration of a challenge which fails to contain the certification.²⁵⁷

c. The Nature of the Affirmative Finding Required by Section 1011(4)

Section 1011(4) permits the granting of judicial relief only upon an affirmative finding that a certification "has in fact been made" and "is true and correct."²⁵⁸ There is no difficulty in understanding the nature of the factual inquiry on the issue of whether a section 1004(2)(a) certification "has in fact been made." The court simply examines the documents filed with the challenge to determine whether they include the appropriate certification. It is less clear, however, how a court would determine whether a certification is "true and correct."

In order for a court to determine whether a section 1004(2)(a) certification "is true and correct," it must understand the nature of the required certification. Since section 1004(2)(a) requires the challenger to certify that he "did not know" certain matters at the time the application was filed,²⁵⁹ the logical inquiry to be made under section 1011(4) would be whether the challenger's assertion that he "did not know" certain matters "is true and correct." It follows, therefore, that the court must investigate what the challenger *knew* at the time of the application, and not what the facts *actually were*.

Cutting against the preceding analysis is the fact that section 1011(4) mandates that, prior to judicial relief, there be a determination that the section 1004(2)(a) certification was *both* "true" and "correct."²⁶⁰ An inquiry with respect to the "truth" of an asserted state of knowledge makes sense; an inquiry with respect to the "correctness" of an asserted state of knowledge does not. In other words, a court may logically consider whether an asserted state of knowledge was "true" — that is, whether the asserted state of knowledge in a certification truthfully sets forth what a challenger knew at the time of the certification. But, how may a court

257. See PA. STAT. ANN. tit. 53, § 11011(4) (Purdon Supp. 1980-81).

258. *Id.*

259. See PA. STAT. ANN. tit. 53, § 11004(2)(a) (Purdon Supp. 1980-81).

260. *Id.* § 11011(4).

determine whether an asserted state of knowledge is correct? It is possible to talk about the "correctness" of the underlying facts with respect to which a challenger asserts a particular state of knowledge.²⁶¹ For example, a court could logically ascertain whether there was, in fact, a publication of notice of hearings on a proposed comprehensive plan at the time of the certification. But is it possible to talk about the "correctness" of the asserted state of knowledge itself?

There are two possible solutions to this problem of statutory construction. First, it could be argued that the proper inquiry under section 1011(4) is the state of knowledge of the challenger at the time of the section 1004(2)(a) certification. Under this argument, the word "correct" would be assigned the same meaning as the word "true." The problem with this interpretation is that it imbues the word "correct" with a meaning that is inconsistent with its ordinary meaning²⁶² and ascribes to the legislative draftsmen the fault of redundancy.

An alternative view suggests that the word "correct" be given its ordinary meaning.²⁶³ In that case, the appropriate inquiry under section 1011(4) would *not* be directed to the challenger's state of knowledge, but instead to the existence of the real facts underlying the challenger's asserted knowledge at the time of the challenge. This interpretation, however, is inconsistent with the language of section 1004(2)(a), which requires a certification that the challenger "did not know" certain matters, rather than a certification that certain matters did not in fact exist.²⁶⁴ Although use of the word "correct" seems out of place in referring to an inquiry into the state of a challenger's knowledge,²⁶⁵ I believe, nevertheless, that such is the appropriate inquiry under section 1011(4) because section 1004(2) expressly requires a certification as to what the challenger knew at the time of the certification.²⁶⁶ Thus, I conclude that the term "correct" is used both inappropriately and redundantly.

If the inquiry under section 1011(4) is to be directed to the state of the challenger's knowledge at the time of the certification,

261. The word "correct" means "conforming to or agreeing with fact: accurate." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 511 (1976).

262. *See id.*

263. *See id.*

264. *See* PA. STAT. ANN. tit. 53, § 11004(2)(a) (Purdon Supp. 1980-81).

265. *See* note 262 and accompanying and following text *supra*.

266. *See* PA. STAT. ANN. tit. 53, § 11004(2)(a) (Purdon Supp. 1980-81); text accompanying note 264 *supra*.

Pennsylvania courts will encounter several difficulties in undertaking such an investigation. For example, the courts must determine who has the burden of proof with respect to whether the certification was "true." Moreover, it is not clear whether a municipality may introduce proof of what the underlying facts actually were at the time of the certification for the purpose of demonstrating what the challenger knew at that time.²⁶⁷

2. *The Impact of Sections 1004(2)(a) and 1011(4) Upon the Casey Doctrine*

The preceding examination of the nature, operation, and effect of sections 1004(2)(a) and 1011(4) indicates that, technically speaking, neither section impacts the *Casey* doctrine because neither purports to dictate when a post-challenge amendment is relevant to the determination upon the merits of an exclusionary challenge. However, this technical point ignores the practical impact of 1004(2)(a) and 1011(4) upon the *Casey* doctrine.

a. The Impact of Section 1004(2)(a) Upon the *Casey* Doctrine

Although the language of section 1004(2)(a) does not focus on the relevance of a post-challenge amendment to an exclusionary challenge, it may be viewed as precluding initial consideration of an exclusionary challenge by either the zoning hearing board or the governing body where the challenger has failed to make a section 1004(2)(a) certification.²⁶⁸ Thus, if the certification requirements of section 1004(2)(a) prohibit *any* consideration of a challenge

267. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). In *Arlington Heights*, the United States Supreme Court held that municipal zoning action does not violate the Equal Protection Clause of the fourteenth amendment "solely because it results in a racially disproportionate impact." 429 U.S. at 265. Instead, "[p]roof of racially discriminatory intent or purpose is required." *Id.* The Supreme Court commented further that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and that "[t]he impact of the official [zoning] action . . . may provide an important starting point." *Id.* at 266. Thus, the Supreme Court held that discriminatory purpose or intent was the test of invalidity under the Equal Protection Clause and that discriminatory impact was evidence, though not determinative, of discriminatory purpose or intent. By analogy, although § 1004(2)(a) makes the applicant's knowledge (and not the underlying facts) the subject of certification, it might be appropriate in determining the truth of the certified state of knowledge pursuant to § 1011(4) to consider the underlying facts. See PA. STAT. ANN. tit. 53, §§ 11004(2)(a) and 11011(4) (Purdon Supp. 1980-81).

268. For a discussion of the effect of a challenger's failure to make the certification required under § 1004(2)(a), see notes 252-57 and accompanying text *supra*.

which would have been successful under the *Casey* doctrine, then section 1004(2)(a) effectively limits the *Casey* doctrine. The impact of section 1004(2)(a) upon the *Casey* doctrine is perhaps best understood by examining separately the operation of each in a hypothetical situation.

For example, suppose that a landowner challenged a zoning ordinance on the ground that it made no provision for apartments and thus was invalid under *Girsh*.²⁶⁹ At the time of the challenge, the existing ordinance was clearly invalid under *Girsh* and the municipality had not advertised a proposed amendment which would cure this defect. However, when the challenge was commenced, the municipality's governing body had published a notice of hearings on a proposed comprehensive plan which called for apartment zoning in the municipality and the landowner knew of this publication. After the challenge was filed, the municipality amended its zoning ordinance and map to provide for apartment development on land other than that owned by the challenger.

If the certification requirement of section 1004(2)(a) is applied to this hypothetical situation, the landowner will not be able to certify truthfully that he was unaware, at the time of the application, that the municipality had advertised a notice of hearing on a proposed comprehensive plan.²⁷⁰ Because of his inability to file this certification, the landowner's challenge may be viewed as procedurally defective and, therefore, not deserving of consideration.²⁷¹

If, however, the *Casey* doctrine is applied to the hypothetical situation, the landowner would not have to contend with the certification requirement and would be entitled to have his challenge considered on the merits.²⁷² Since there had been no advertisement of a proposed amendment prior to the challenge, the landowner would have the right to have his challenge evaluated as against the ordinance in existence on the date of his challenge.²⁷³ Moreover, since that ordinance is admittedly unconstitutional under *Girsh*,²⁷⁴ the challenger would prevail on the merits.

269. See 437 Pa. 237, 263 A.2d 395 (1970). For a discussion of *Girsh*, see notes 52-53 and accompanying text *supra*.

270. See PA. STAT. ANN. tit. 53, § 11004(2)(a) (Purdon Supp. 1980-81).

271. See text accompanying note 253 *supra*. But see text accompanying note 254 *supra*.

272. For a discussion of the *Casey* doctrine, see notes 48-64 and accompanying text *supra*.

273. See note 62 and accompanying text *supra*.

274. See 437 Pa. 237, 263 A.2d 395 (1970). For a discussion of *Girsh*, see notes 52-53 and accompanying text *supra*.

Even though a favorable decision on the merits of the challenge does not insure that a challenger will obtain site-specific relief,²⁷⁵ there is a significant difference in the results obtained when the certification requirement of section 1004(2)(a) and the *Casey* doctrine are applied to the hypothetical situation. Under the certification requirement of section 1004(2)(a), the landowner's challenge is not even considered.²⁷⁶ However, if *Casey* holds that a landowner-challenger has a *constitutional* right in the hypothetical situation to have his challenge evaluated on the basis of the ordinance in existence at the time of the challenge,²⁷⁷ then the certification requirement of section 1004(2)(a), in purporting to negate that right, is unconstitutional.²⁷⁸

b. The Impact of Section 1011(4) Upon the *Casey* Doctrine

The impact of section 1011(4) upon the *Casey* doctrine is likewise best illustrated by using the hypothetical situation described above²⁷⁹ with one modification — the landowner did not know at the time of his challenge that a proposed notice of hearings had been published.

Under these circumstances, the challenger will be able to file a valid section 1004(2)(a) certification.²⁸⁰ Furthermore, if he files the section 1004(2)(a) certification and satisfies the other procedural requirements of section 1004, his challenge must be considered.²⁸¹ But the question remains whether, under the *Casey* doctrine, the challenge must be determined in light of the original ordinance or the ordinance as later amended. Under the *Casey* doctrine, the challenge must be determined as against the original ordinance because the amendment was not advertised at the time of the challenge.²⁸² There is nothing in section 1011(4) which contradicts this conclusion because the language of that section is silent on the issue of whether a post-challenge amendment should be considered

275. The question of whether a successful developer-challenger should obtain site-specific relief is distinct from the *Casey* doctrine issue. See notes 9-12 and accompanying text *supra*.

276. See text accompanying note 271 *supra*.

277. For a discussion of vested rights and special legislation considerations as possible bases for this constitutional right, see notes 94-124 and accompanying text *supra*.

278. See notes 123-24 and accompanying text *supra*.

279. See text accompanying and following note 269 *supra*.

280. See PA. STAT. ANN. tit. 53, § 11004(2)(a) (Purdon Supp. 1980-81); note 242 *supra*.

281. See note 242 and accompanying text *supra*.

282. See note 62 and accompanying text *supra*.

in ruling upon the merits of a challenge.²⁸³ Therefore, the *Casey* doctrine stands unaffected by the provisions of section 1011(4).²⁸⁴

V. SOME THOUGHTS ABOUT POLICY: POSSIBLE SOLUTIONS TO THE PROBLEM OF POST-CHALLENGE AMENDMENTS IN DEVELOPER-INITIATED EXCLUSIONARY ZONING CHALLENGES

The analysis to this point has been primarily legal in character. I have sought to determine the legal basis for the *Casey* pending ordinance doctrine²⁸⁵ and have interpreted Act 249 in order to demonstrate the extent of its consistency with the *Casey* doctrine.²⁸⁶

I wish now to focus upon policy. I will consider first whether the *Casey* doctrine is good policy.²⁸⁷ Second, I will suggest possible legislative solutions to the problem of post-challenge amendments in developer-initiated exclusionary zoning challenges.²⁸⁸ Finally, I will set forth some institutional and practical considerations which, in my opinion, make it unlikely that there will be an ideal solution to the problem.²⁸⁹

A. A Policy Analysis of the Casey Pending Ordinance Doctrine

Casey is a poor decision because it is grounded, in primary part, upon policy considerations rather than law. Throughout the decision, the Pennsylvania Supreme Court focused upon the policy implications of considering or disregarding post-challenge amendments and was particularly concerned about the extent to which consideration of post-challenge amendments would deter the initiation of developer challenges.²⁹⁰ Though this deterrence factor is a legitimate policy consideration for a legislature to take into ac-

283. See PA. STAT. ANN. tit. 53, § 11011(4) (Purdon Supp. 1980-81).

284. See *id.* Although § 1011(4) has no impact on the *Casey* pending ordinance doctrine, it is nevertheless questionable whether the Pennsylvania legislature may constitutionally limit the circumstances in which a Pennsylvania court may award site-specific relief once it has determined that a challenged ordinance is unconstitutionally exclusionary. See note 23 *supra*.

285. See notes 48-124 and accompanying text *supra*.

286. See notes 143-284 and accompanying text *supra*.

287. See notes 290-310 and accompanying text *infra*.

288. See notes 311-45 and accompanying text *infra*.

289. See notes 346-51 and accompanying text *infra*.

290. 459 Pa. at 228, 328 A.2d at 468. This concern is expressed most clearly in the following language: "The municipality could penalize the successful challenger by enacting an amendatory ordinance designed to cure the constitutional infirmity, but also designed to zone around the challenger. Faced with an obstacle to relief, few would undertake the time and expense necessary to have a zoning ordinance declared unconstitutional." *Id.*

count in fashioning a solution to the problem of post-challenge amendments in developer-initiated challenges, it is not a sufficient foundation for a *judicial* decision which effectively negates a municipality's statutory power to amend its zoning ordinance.²⁹¹ But though the adoption of the pending ordinance doctrine was bad law, can it be said that it was good policy? To put it another way, is the *Casey* pending ordinance doctrine the best legislative solution to the problem of post-challenge amendments in developer-initiated exclusionary zoning challenges?

The *Casey* doctrine is not a poor policy solution to the problem of post-challenge amendments in developer-initiated challenges²⁹² if one approaches the problem with two assumptions: 1) that developer-initiated challenges are the *only* possible exclusionary zoning challenges and 2) that previously unadvertised post-challenge amendments are either always to be considered or always to be disregarded. These seem to be the assumptions which the *Casey* court entertained, and for good reason.

The language of the *Casey* opinion reflects an assumption by the court that only developers could initiate exclusionary zoning challenges. In rejecting the trial court's interpretation of the old stay provision of the MPC,²⁹³ the supreme court noted that an interpretation which gave municipalities time to amend their exclusionary zoning ordinances after a declaration of invalidity would penalize successful challenges and, thus, discourage challenges altogether.²⁹⁴ While this is true in the case of developer-challengers who are interested in building on a particular parcel of property, it is not true with respect to challenges by persons who do not have an interest in a particular parcel in the exclusionary municipality.²⁹⁵ The supreme court, therefore, must have assumed that non-landowners could not bring challenges. Given the state of the law at the time of *Casey*, this assumption was justified. When *Casey* was decided it had already been determined by the commonwealth court that nonresidents could not bring exclusionary zoning challenges.²⁹⁶ In addition, the entire body of Pennsylvania substantive exclu-

291. See notes 75-81 and accompanying text *supra*.

292. See notes 42-47 and accompanying text *supra*.

293. PA. STAT. ANN. tit. 53, § 11009(2) (Purdon 1968) (repealed 1972). See note 78 *supra*.

294. 459 Pa. at 228, 328 A.2d at 468. See note 79 *supra*.

295. For a discussion of the ramifications of legislative authorization of non-developer changes, see notes 313-33 and accompanying text *infra*.

296. *Lightcap v. Wrightstown Twp. Bd. of Supervisors*, 25 Bucks County L. Rep. 145 (C.P. 1974), *aff'd per curiam*, No. 1625, C.D. 1973, Oct. 18, 1974 (Pa. Commw. Ct.). See note 7 *supra*.

sionary zoning law had evolved solely in the context of developer-initiated challenges.²⁹⁷

The language of the *Casey* opinion also suggests that the supreme court assumed that it had to adopt an all-or-nothing approach to post-challenge amendments in developer-initiated challenges. Such an approach was implicit in the threshold question addressed by the court — whether it should apply the pending ordinance doctrine to developer-initiated challenges.²⁹⁸ The *Casey* court perceived that if it applied the doctrine, all post-challenge amendments which were not “pending” at the time of the challenge would be disregarded; if it declined to apply the doctrine, all post-challenge amendments (whether or not they were pending at the time of the challenge) would be considered.

If one accepts, then, the assumptions entertained by the *Casey* court, the *Casey* pending ordinance doctrine is not, as I have previously stated, bad policy. The only perceived alternative — rejection of the pending ordinance doctrine — would have totally discouraged developer-initiated challenges, the only perceived type of exclusionary zoning challenge.²⁹⁹ This result would have nullified the significance of the extensive body of Pennsylvania substantive exclusionary zoning law.³⁰⁰

There are problems, however, with the *Casey* doctrine, particularly when it is considered in conjunction with the award of site-specific relief, to which it is closely bound. The court in *Casey* recognized that, in order to provide developers with an incentive to bring exclusionary zoning challenges, they must not only be protected against the effect of post-challenge amendments, but must also have some significant hope of obtaining site-specific relief.³⁰¹ The two issues are closely intertwined because a court is more likely to reach the issue of site-specific relief if post-challenge curative amendments are disregarded.³⁰² Thus, the adoption of

297. See cases cited at note 31 *supra*.

298. For a discussion of the treatment given to this issue in the briefs submitted by the parties, see Briefs for Appellant and Appellee; Reply Briefs for Appellant and Appellee; *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (1974); note 77 *supra*.

299. See text following note 295 *supra*.

300. See cases cited at note 31 *supra*.

301. 459 Pa. at 229-30, 328 A.2d at 469.

302. See notes 25-26 and accompanying text *supra*. If a post-challenge amendment is considered, the amendment may eliminate the defect which is the basis for the developer's challenge and thus cause the developer to lose his challenge on the merits. Obviously, if a court decides against a developer's challenge on the merits, it will not reach the issue of whether to award site-specific relief. See *id.*

the *Casey* pending ordinance doctrine, with its directive that previously unadvertised post-challenge amendments are to be disregarded, made it much more likely that courts would be called upon to decide whether to award site-specific relief to a developer-challenger.

The issue of whether to award site-specific relief is difficult for courts to resolve; indeed, the issue is on the fringes of justiciability.³⁰³ Though Act 249's amendments to section 1011 of the MPC clarified the factors which a court must consider in addressing the question of site-specific relief,³⁰⁴ the nature of the factors specified

303. See, e.g., *Ellick v. Board of Supervisors*, 17 Pa. Commw. Ct. 404, 333 A.2d 239 (1975). In *Ellick*, the commonwealth court sought to explain how a Pennsylvania court was to exercise the power, conferred by the 1972 amendments to the MPC, to award site-specific relief to a successful challenger. The court stated:

[S]ection 1011 of the MPC permits one to conclude that the Legislature, through the 1972 amendments, has imposed upon the courts of common pleas broad and burdensome duties and authority. In effect, the Legislature has directed those courts to act as administrative bodies (as super zoning boards of adjustment) which the appellate courts in this Commonwealth have stated many times is not a proper judicial function. . . . [S]ocial and economic problems of society presented in zoning cases should properly be resolved by the legislative and executive branches of government rather than by the courts. Courts are intended to decide cases on the facts and the law presented, and were never intended to dictate legislative matters . . . as may be involved in challenging landowners' plans. Nonetheless, we may not disregard the intent of the Legislature which is expressed in the MPC.

Id. at 414-15, 333 A.2d at 246 (emphasis added) (footnote omitted). If the court in *Ellick* truly believed that § 1011 directed courts "to act as administrative bodies," to perform what "is not a proper judicial function," and "to dictate legislative matters," then the court could "disregard the intent of the Legislature." See *id.* The legislature does not have the authority to require that courts perform a non-judicial task. The legislature could not, for example, require the Pennsylvania courts to prepare comprehensive plans or adopt zoning ordinances. Thus, if the court in *Ellick* believed that § 1011 sought to impose a nonjudicial task upon the courts, the court could have refused to accept the task.

Although the *Ellick* court was unwilling to "disregard the intent of the Legislature" by refusing to carry out the responsibilities assigned to the courts by § 1011, the court's language nevertheless supports the proposition that the issue of whether to award site-specific relief in a particular case is one of questionable justiciability.

304. See PA. STAT. ANN. tit. 53, § 11011(2) (Purdon Supp. 1980-81). Prior to the adoption of Act 249, § 1011(2) provided:

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 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

and the authorization for a court to retain an expert reflect legislative recognition that judicial resolution of the issue requires consideration of matters beyond the competence of the judiciary.³⁰⁵

A further difficulty with the *Casey* pending ordinance doctrine, and its concomitant facilitation of site-specific relief, is that the award of site-specific relief may have a considerable negative impact upon the zoning municipality. A basic premise of zoning is that a zoning ordinance will reflect a plan for development which, in the eyes of the municipality's governing body, best serves the public welfare.³⁰⁶ The awarding of site-specific relief by a court, however, introduces an arbitrary element, not the result of deliberate, comprehensive planning. Admittedly, a developer who prevails on the merits of his challenge is not automatically entitled to site-specific relief,³⁰⁷ but the courts must, and undoubtedly do, recognize that if such relief is consistently denied to successful challengers, they will discourage challenges by developers. Rather than discourage such challenges, and thereby encourage municipalities to maintain exclusionary ordinances, courts understandably may be inclined to entertain a presumption in favor of awarding

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.

Id. § 11011(2) (Purdon 1972) (amended 1978).

Although this provision authorized courts to "order the described development or use approved as to all elements" or to "order it approved as to some elements," it did not provide any guidance to the courts as to when they should order approval of *all* or only *some* elements of a challenger's described development. *See id.* However, Act 249's amendment to § 1011 (2) does supply this guidance in the form of five factors which courts "shall consider" in issuing an order under § 1011(2). *See* PA. STAT. ANN. tit. 53, § 11011(2) (Purdon Supp. 1980-81).

305. *See* PA. STAT. ANN. tit. 53, § 11011(2) (Purdon Supp. 1980-81). A cursory review of the enumerated factors reveals that courts are required to consider matters that are beyond the traditional areas of judicial competence. *See id.* For example, the first factor which a court must pass upon is "the locational suitability of the [challenger's] site for the uses proposed including the general location of the site with regard to major roads, sewer facilities, water supplies, schools and other public services facilities or the comprehensive plan and zoning ordinance of the municipality and the county if they exist." *Id.* Moreover, in authorizing courts to "employ experts to aid the court to frame an appropriate order," § 1011 (2) indicates that the legislature was aware that the evaluation of the factors specified in that section required courts to perform administrative and legislative tasks which were beyond their competence. *See id.*

306. *See* PA. STAT. ANN. tit. 53, § 10105 (Purdon 1980-81).

307. *See, e.g., id.* § 11011(2). At no time has § 11011(2) *required* that a court award site-specific relief to a developer who prevails on the merits of his challenge. *See id.*; notes 304-05 *supra*.

site-specific relief even when such relief is inconsistent with any rational scheme of development.³⁰⁸

A final problem with the *Casey* doctrine is that it requires a post-challenge amendment to be disregarded even when a challenge has been filed before the municipality has had adequate time to

308. See, e.g., *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (1974). In *Casey*, the supreme court came close to suggesting that a developer who prevails on the merits of his challenge is *entitled* to site-specific relief. Admittedly, the *Casey* court began its discussion with language that seems to limit the availability of site-specific relief. The supreme court stated: "To forsake a challenger's *reasonable* development plans after all the time, effort and capital invested in such a challenge is grossly inequitable." *Id.* at 230, 328 A.2d at 469 (emphasis added). This language would lead one to believe that a developer-challenger should receive site-specific relief only when his development plans are "reasonable" and that a determination of "reasonableness" would involve an inquiry into the many different factors, such as locational suitability and possible adverse environmental consequences, which are presently codified in § 1011(2) of the MPC. See PA. STAT. ANN. tit. 53, § 11011(2) (Purdon Supp. 1980-81); notes 304-05 *supra*. However, the court culminated its discussion of site-specific relief by simply directing "that the building permits applied for [by the developer-challenger] be issued upon compliance by appellee with all administrative requirements of the zoning ordinance in effect on the date of the original application which are not inconsistent with this opinion." 459 Pa. at 231, 328 A.2d at 469-80. This language conveys the impression that the only limitation upon the availability of site-specific relief to a developer-challenger is the requirement that his plans be in conformity with the unchallenged zoning requirements which were in existence at the time of the challenge.

Of course, the 1972 amendments to the MPC were not applicable to the challenge in *Casey*. See note 11 *supra*. These amendments revised Article X of the MPC and, among other things, added § 1011(2), which specifically authorized courts to award site-specific relief. The 1972 amendments to Article X underwent comprehensive analysis in *Ellick v. Board of Supervisors*, 17 Pa. Commw. Ct. 404, 333 A.2d 239 (1975). In *Ellick*, the commonwealth court stated that "the function of the court [under § 1011(2)] is to pass upon the *reasonableness* of the restrictions present in the record, including both the restrictions contained in the landowner's [§ 1004(2)(c)] plans and the restrictions present in the ordinance which are applicable to the same class of usage or construction." *Id.* at 416, 333 A.2d at 247. Although this language connotes that, under the 1972 version of § 1011(2), a court was to undertake a wide-ranging "reasonableness" evaluation in determining whether to award site-specific relief, the history of judicial application of the 1972 version of § 1011(2) bespeaks an assumption by the courts that a developer-challenger who prevailed on the merits, was *entitled* to site-specific relief if, in accordance with *Casey*, his plans conformed to the unchallenged land use restrictions in existence at the time he filed his challenge. See, e.g., *Board of Supervisors v. Barness*, 33 Pa. Commw. Ct. 364, 382 A.2d 140 (1978); notes 20-21 *supra*.

As a result of the 1978 amendments to § 1011(2), a court must consider various specified factors in fashioning an order of relief for a successful developer-challenger. See notes 304-05 *supra*. The directive that a court "consider" the specified factors suggests that a court is to deny site-specific relief if its consideration of the challenger's proposed development in light of the specified factors compels such a result. Thus, the 1978 amendments to § 1011(2) mandate that courts should not automatically award site-specific relief to developer-challengers who prevail on the merits. See note 307 and accompanying text *supra*. To what extent the Pennsylvania Legislature may limit the availability of site-specific relief remains an open question. See note 23 *supra*.

respond to a new substantive zoning requirement.³⁰⁹ For example, a developer might file a challenge on the day after an appellate decision which sets forth a new substantive requirement for municipal zoning ordinances. Although the municipality would clearly not have had an adequate opportunity to bring its zoning ordinance into conformity with this new requirement (or, as required under *Casey*, to advertise a proposed amendment), the *Casey* doctrine would, nevertheless, mandate that the developer's challenge be decided in light of the ordinance in existence at the time of the challenge.³¹⁰ Any post-challenge amendment, adopted in response to the new substantive requirement, would have to be disregarded.

Given its assumptions, then, the *Casey* court's adoption of the pending ordinance doctrine is understandable. There are, however, difficulties with the *Casey* doctrine, particularly to the extent that it increases the likelihood that courts will have to consider the award of site-specific relief. The existence of these problems encourages an inquiry into whether there are solutions, better than the *Casey* doctrine, to the problem of post-challenge amendments in developer-initiated exclusionary zoning challenges.

B. *Proposed Legislative Solutions to the Problem of Post-Challenge Amendments in Developer-Initiated Challenges*

I wish to consider at this point several possible legislative solutions to the problem of post-challenge amendments in developer-initiated challenges.³¹¹ I will proceed upon the assumption that there are no constraints upon the legislature's power to adopt what it considers to be the best solution.³¹² Under such circumstances,

309. See 459 Pa. at 227-29, 328 A.2d at 467-69. In *Casey*, the developer's challenge was filed only two months after the *Girsh* decision upon which the challenge was based. *Id.* at 223, 328 A.2d at 465. For a discussion of *Girsh*, see notes 52-53 and accompanying text *supra*. It is at least arguable that two months was not a sufficient period of time for Warwick Township to consider the many factors necessary to bring its zoning ordinance into conformity with *Girsh*. Had the township been given sufficient time to determine, for instance, the amount, location, and density of land it wished to zone for apartments?

310. See 459 Pa. at 227-29, 328 A.2d at 467-69.

311. Since the legislature has more flexibility and freedom than a court in fashioning remedies for problems brought to its attention, the suggestions offered here are for legislative rather than judicial solutions to the problem of post-challenge amendments in developer-initiated challenges.

312. This, however, does not alter the view expressed above that *Casey* is constitutionally based. See notes 82-124 and accompanying text *supra*. The constraints imposed by *Casey* hinder the formulation of an "ideal" legislative solution to the problem. See notes 346-51 and accompanying text *infra*.

the Pennsylvania Legislature might consider the following solutions to the problem.

1. *Legislative Authorization of Non-Developer Challenges*

At the time *Casey* was decided, Pennsylvania law was clear in providing that only developers could bring exclusionary zoning challenges.³¹³ This also appears to be the present law.³¹⁴ Under this law, there is a strong policy argument in support of the *Casey* doctrine: post-challenge amendments must be disregarded because, otherwise, the only permissible type of exclusionary zoning challenges will be discouraged.³¹⁵

Suppose, however, that the legislature were to authorize exclusionary challenges by non-developers — that is, persons who do not have an interest in particular land in the zoning municipality.³¹⁶ This group would include nonresidents of the zoning municipality, fair housing organizations, and other organizations which represent the varied interests of the housing construction industry.³¹⁷ Given such legislative authorization, the major policy argument in support of the *Casey* doctrine is considerably weakened. Consideration of post-challenge amendments in developer-initiated challenges would discourage *developer* challenges, but a municipality with an exclusionary zoning ordinance would still be subject to *non-developer* challenges. Thus, the consideration of post-challenge amendments in developer-initiated litigation would not discourage *all* exclusionary challenges.

Post-challenge amendments do not present a problem in the context of non-developer challenges. In such challenges, there is

313. See notes 7 & 14 and accompanying text *supra*.

314. See cases cited at note 7 *supra*. The Supreme Court of Pennsylvania has never held that only developers may bring exclusionary zoning challenges. Such holdings are embodied in lower court decisions. *Id.* Furthermore, it has been persuasively argued that non-developer challengers are preferable to developer-challengers for remedying the problem of exclusionary zoning and that nothing in Article X of the MPC precludes non-developer challenges. Krasnowiecki, *supra* note 7, at 1101-02.

315. See notes 290-310 and accompanying text *supra*.

316. Such authorization could be effectuated by amendment of §§ 1004 or 1005 of the MPC, or by addition of a new section which explicitly permits non-developer challenges.

317. Such challengers are common in New Jersey exclusionary zoning litigation. See, e.g., *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975). In *Mount Laurel*, the New Jersey Supreme Court held that nonresidents of the zoning municipality had standing, under New Jersey law, to bring their exclusionary zoning challenge. 67 N.J. at 159 n.3, 336 A.2d at 717 n.3.

not, as there is in developer challenges, an inconsistency between the theory underlying the challenge and the relief sought by the challenger.³¹⁸ In developer challenges, the challenger attacks the validity of an ordinance on its face, but seeks relief with respect to the particular property in which he has an interest.³¹⁹ The developer-challenger is thus not content with a post-challenge amendment which cures the defect asserted in the challenge, but which does not benefit the property in which he has an interest.³²⁰ In non-developer challenges, however, the challenger is satisfied with any action, whether by a court or by the zoning municipality, which cures the defect asserted in the challenge. The non-developer is not interested in particular property in the municipality and, therefore, does not seek relief directed to particular property. A non-developer challenger will thus not be aggrieved by a post-challenge amendment which cures the defect asserted in his challenge, and judicial consideration of post-challenge amendments will not discourage such challenges. There is, to repeat, no post-challenge amendment problem in non-developer challenges.

There are difficulties, however, with legislative authorization of non-developer challenges. The first and most basic problem is the fact that the Pennsylvania substantive law of exclusionary zoning has developed in the context of developer challenges³²¹ and, on its face at least, is grounded upon federal and state constitutional protection of "property."³²² Non-developers would not be able to assert that a zoning ordinance affected their "property" in-

318. For a discussion of the inconsistency between the theory underlying a developer's challenge and the nature of the relief sought by a developer-challenger, see notes 31-41 and accompanying text *supra*.

319. *Id.*

320. *Id.*

321. See notes 7, 14 & 31 and accompanying text *supra*.

322. See, e.g., *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 382 A.2d 105 (1977). Justice Nix's plurality opinion in *Surrick* embodies the most explicit statement of the constitutional basis for exclusionary zoning decisions in Pennsylvania. Justice Nix declared:

Article I Section 1 of the Pennsylvania Constitution protects the citizen's right to the enjoyment of private property, and governmental interference with this right is circumscribed by the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution. In reviewing zoning ordinances, this Court has stated that an ordinance must bear a substantial relationship to the health, safety, morals, or general welfare of the community. Thus, without expressly labelling it as such, this Court has employed a substantive due process analysis in reviewing zoning schemes and has concluded implicitly that exclusionary or unduly restrictive zoning techniques do not have the requisite substantial relationship to the public welfare.

Id. at 188, 382 A.2d at 107-08 (citations omitted).

terests.³²³ Thus, if the legislature simply authorized non-developer exclusionary zoning challenges, it is possible that, though such authorization would allow non-developers to hurdle the statutory "standing" threshold,³²⁴ they would lack a substantive basis for challenging a zoning ordinance. Perhaps this problem might be avoided if the legislature specifically authorized non-developers to bring challenges based not only upon violations of their own constitutional rights, but also upon the violation of the "property" rights of developers. In doing so, the legislature would effectively confer upon non-developers "standing" to assert the rights of third parties — *i.e.*, developers.³²⁵

A second problem with legislative authorization of non-developer challenges is that it is unclear whether, even if granted the right, there would be many non-developer initiated exclusionary zoning challenges. This is a significant question once it is assumed that the *Casey* doctrine has not been judicially imposed.

323. Although non-developers could not contend that the zoning municipality's ordinance affects their use and enjoyment of property within the municipality because, by definition, non-developers have no interest in property located in the municipality, they might be able to assert that the zoning municipality's ordinance impinges upon their right under the Pennsylvania Constitution to "acquire" or "possess" property in the zoning municipality. See PA. CONST. art. I, § 1. Such a theory appears to be the constitutional basis for the New Jersey law of exclusionary zoning. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 175 n.11, 336 A. 2d 713, 725 n.11, *cert. denied*, 423 U.S. 808 (1975).

324. The statutory "standing" problem with respect to non-developer challengers is presented by the interpretation given to Article X of the MPC in *Lightcap v. Wrightstown Twp. Bd. of Supervisors*, 25 Bucks County L. Rep. 145 (C.P. 1974), *aff'd per curiam*, No. 1625, C.D. 1973, Oct. 18, 1974 (Pa. Commw. Ct.). This statutory limitation could be eliminated by an amendment to Article X which explicitly authorized non-developer challenges. See note 316 *supra*.

While an amendment to Article X would eliminate any statutory "standing" problem with respect to non-developer challenges, it is possible that there would still be constitutional problems with such challenges. For example, non-developer challenges might be held to be nonjusticiable. See note 7 *supra*. In addition, the Supreme Court of the United States has held that, in most instances, non-developers do not have standing to bring exclusionary zoning challenges in federal courts. *Warth v. Seldin*, 422 U.S. 490, 508 & n.18 (1975). Although the constitutional basis for the *Warth* decision, the "case or controversy" requirement of art. III, § 2 of the United States Constitution, is not applicable to state courts, the Pennsylvania Supreme Court could, nevertheless, adopt *Warth*-type standing requirements on state constitutional, or prudential, grounds.

325. If the Pennsylvania Legislature were to authorize non-developers to assert the constitutional rights of developers, the third-party standing issue would be the converse of that discussed by the United States Supreme Court in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). In *Arlington Heights*, the Supreme Court considered whether, and to what extent, developers could assert the constitutional rights of non-residents. *Id.* at 260-64.

In the absence of the *Casey* doctrine, post-challenge amendments in developer-initiated challenges would be considered and, thus, developer challengers discouraged, thereby placing the brunt of exclusionary zoning litigation on non-developers. The question remains whether there would be many non-developer challengers. The answer, uncertain at best, would depend upon a number of factors.

First, there would have to be legal services programs employing litigators with the willingness and expertise necessary to initiate exclusionary zoning challenges on behalf of non-developers. Second, construction industry associations would have to be inclined to bring non-developer challenges. If it appeared that there would be few non-developer challenges and, in the absence of the *Casey* doctrine, few, if any, developer challenges, municipalities would have little inducement to amend existing exclusionary ordinances. If the legislature wished to provide an incentive for non-developer challenges, it might, in addition to authorizing such challenges, authorize courts to award litigation expenses to successful challengers.³²⁶

A third problem presented by legislative authorization of non-developer challenges is uncertainty about whether, and to what extent, exclusive reliance upon such challenges would eliminate a municipality's incentive to cure exclusionary zoning ordinances in advance of a challenge. *Casey* and its treatment of the rights of developer-challengers provided a strong incentive for municipalities to remedy exclusionary ordinances in advance of a challenge. Under *Casey*, a municipality with an exclusionary zoning ordinance learned to expect that a failure to effect a speedy cure of the exclusionary deficiency could produce a double disaster: 1) the initiation of a developer challenge against which a post-challenge amendment would be ineffective and 2) the likelihood that a successful developer-challenger would win, by way of site-specific relief, the right to develop a high-density use in an area where the municipality did not wish to have it.³²⁷ On the other hand, if a non-developer challenge were the sole form of exclusionary zoning attack, a

326. The term "litigation expenses" in the present discussion refers to *all* expenses related to the prosecution of exclusionary zoning challenges, not just attorneys' fees. For a discussion of legislative authorization of the award of litigation expenses to *developer-challengers*, see notes 334-38 and accompanying text *infra*.

327. If a municipality were willing to accept a developer-challenger's proposed use, it could simply amend its zoning ordinance to accommodate the use. If it did so, there would be no reason for the developer to bring his statutory challenge. Thus, in any developer-challenge, the challenger seeks development which the zoning municipality opposes.

municipality would be inclined to maintain a patently unconstitutional ordinance on the theory that it could always adopt an effective post-challenge amendment if and when the ordinance were challenged. Legislative authorization of the award of litigation expenses³²⁸ to the non-developer challenger in this situation might induce municipalities to adopt pre-challenge amendments. Thus, the legislature might provide that any time that a non-developer challenge produces a curative post-challenge amendment, the non-developer would be entitled to recover all his litigation expenses from the municipality. But it is questionable whether the threat of liability for litigation expenses is as strong an incentive for municipalities to adopt pre-challenge curative amendments as the threat of undesired site-specific relief.

A fourth and final problem with non-developer challenges is the difficulty of fashioning a remedy should the challenge succeed.³²⁹ In developer-initiated litigation the court is asked only to award site-specific relief to the challenger. The developer-challenger does not seek, and probably does not want,³³⁰ any further relief. In non-developer challenges, however, the challenger does not seek site-specific relief because he does not yet hold an interest in particular property. But though a non-developer challenge does not present a court with the difficulties that are involved in determining whether to grant site-specific relief to a developer,³³¹ these difficulties pale in comparison to those which a court might face in a non-developer challenge. Initially the non-developer challenger wishes only a judicial declaration that the challenged ordinance is invalid. However, the non-developer may ultimately seek judicial supervision of any subsequent amendment or, even more troublesome, judicial imposition of a court-devised zoning ordinance upon the municipality.³³² These remedial issues present fundamental

328. See note 326 *supra*.

329. See Hyson, *supra* note 7, at 22-27; *Developments in the Law—Zoning*, *supra*, note 2, at 1700-07.

330. A developer-challenger, who is granted site-specific relief in his bid for a right to build apartments on his property, has no reason to wish that the municipality allow apartments on other property. Indeed, he may wish, as a matter of economics, that his will be the only property in the municipality on which there will be apartments.

331. For a discussion of the difficulties in fashioning site-specific relief, see notes 303-08 and accompanying text *supra*.

332. See, e.g., *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977). In *Oakwood at Madison*, the New Jersey Supreme Court recognized that judicial imposition of a court-devised zoning ordinance lay at the end of the remedial road in a non-developer challenge. At the conclusion of the majority opinion, the supreme court provided the following guidance to the trial court on remand:

questions concerning the limitations of judicial power and competence in reviewing the validity of municipal zoning ordinances.³³³

In short, legislative authorization of non-developer challenges would avoid the problems inherent in the *Casey* pending ordinance doctrine and in the award of site-specific relief. Non-developer challenges, however, present problems of their own and, thus, are not clearly preferable to the present exclusive reliance upon developers to challenge exclusionary zoning ordinances.

2. *Legislative Authorization of the Award of Litigation Expenses to a Successful Developer-Challenger*

The Pennsylvania Legislature might seek to resolve the problem of post-challenge amendments in developer-initiated challenges by authorizing courts to award litigation expenses, payable by the defendant municipality, to a successful developer-challenger.

A major policy argument in support of the *Casey* doctrine is that, together with the availability of site-specific relief, it induces municipalities to cure unconstitutional ordinances prior to the institution of any challenge.³³⁴ If post-challenge amendments in developer-challenges were considered, then the effect of the *Casey* doctrine in inducing "voluntary" pre-challenge cures would be lost.

The award of generous litigation expenses to a successful developer-challenger might be an adequate substitute for the incentives offered by the *Casey* doctrine and the availability of site-specific relief. For example, the legislature could permit courts to award to a successful developer-challenger *all* costs involved in pursuing the challenge.³³⁵ In addition, the term "successful" challenger

The trial court shall have discretion, in the event of undue delay [by the municipality] in compliance with this opinion or of a finding by the court that any zoning revision submitted by the defendant [municipality] fails to comply with this opinion, to appoint an impartial zoning and planning expert or experts. Such expert may be directed to file a report or to testify, as the court may deem appropriate, as to a recommendation for the achievement by defendant of compliance with this opinion or with any further directions by the court pursuant thereto.

Id. at 553-54, 371 A.2d at 1228. Presumably, such "recommendation," if it were to have any practical effect, would be imposed upon the municipality by court order.

333. For a thoughtful discussion of these fundamental questions, see the separate opinions of Justices Mountain and Clifford in *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 623-38, 371 A.2d 1192, 1263-71 (1977). See also authorities cited at note 329 *supra*.

334. See notes 290-310 and accompanying text *supra*.

335. "All costs" would constitute every expense incurred by a developer-challenger in the course of bringing his challenge. A successful developer-

could be defined legislatively to include not only the developer-challenger who obtained a judicial declaration of invalidity, but also the developer whose challenge prompted the municipality to adopt a post-challenge amendment which cured the defect asserted in the challenge. Under these circumstances, municipalities would be motivated to cure a defective ordinance in advance of a challenge in order to avoid the litigation expenses that might be incurred by a successful developer-challenger. The award of litigation expenses would similarly provide an incentive for developer challenges or, at the very least, tend to eliminate litigation expenses as a disincentive to developer challenges.³³⁶

It is questionable, however, whether legislative authorization of the award of litigation expenses to a successful developer-challenger would operate as effectively as the *Casey* doctrine and the threat of site-specific relief in stimulating pre-challenge municipal cures of defective zoning ordinances. Perhaps, in order to provide the necessary incentive, a "penalty" could be imposed upon a losing municipality in addition to the obligation to compensate the successful challenger for his litigation expenses.

The award of litigation costs has one significant advantage over the *Casey* doctrine and site-specific relief: the end product of a successful challenge will never be the construction of the wrong development in the wrong place.³³⁷ There will be no enduring monument to the municipality's ignorance, or malevolence, in maintaining an invalid ordinance. The only cost to the municipality will be the temporary, albeit possibly substantial, loss of municipal funds.³³⁸

challenger must receive compensation for all costs because, to the extent that he is not fully compensated, there is a disincentive for a developer to bring a challenge.

336. I do not intend to suggest, however, that a successful developer-challenger should receive compensation for all litigation expenses in every case. A court should not award such relief when a developer-challenger has raced to file a challenge before a municipality has had an adequate time to respond to a new judicial decision which is the basis of the challenge. See notes 309-10 and accompanying text *supra*.

337. Furthermore, the award of litigation expenses presents neither the difficulties involved in fashioning site-specific relief nor a justiciability problem. See notes 303-08 and accompanying text *supra*.

338. The existing availability of site-specific relief to a successful developer-challenger has encouraged a "bounty hunting" mentality on the part of developers. The "outlaw" is the municipality with an exclusionary ordinance; the "bounty" is site-specific relief. Legislative authorization of litigation expenses to a successful developer-challenger would simply transform the winning challenger's "bounty" into a more traditional monetary form. Of course, a municipality faced with the possibility of a large monetary judgment might settle a developer's challenge by offering some form of site-specific relief.

3. *Legislative Adoption of a Modified Casey Doctrine*

Thus far, the suggested resolutions of the post-challenge amendment dilemma have ignored and implicitly rejected the solution fashioned in *Casey* itself. But while the *Casey* solution is subject to criticism on policy grounds,³³⁹ I believe that legislative adoption of a modified *Casey* doctrine would prove useful.

The chief problem with the *Casey* doctrine is that it requires previously unadvertised post-challenge amendments to be disregarded *in all circumstances*.³⁴⁰ In particular, the *Casey* doctrine requires judicial disregard of a post-challenge amendment even when a municipality has had no reasonable opportunity to respond to a judicial decision creating new obligations for zoning municipalities. I believe that in such circumstances it is not sound policy to disregard a post-challenge amendment. A municipality should be afforded a reasonable period of time in which to amend its zoning ordinance in response to a judicial decision imposing a new obligation upon it. Any amendment adopted during this interval should be effective against all challengers, regardless of whether the amendment is adopted before or after a developer has filed a challenge. It would not be poor policy, however, to disregard a post-challenge amendment when the amendment seeks to cure a defect which the municipality has had ample time to correct prior to the filing of the developer's challenge.

To implement these suggestions, the Pennsylvania Legislature might limit the amendment power of municipalities conferred by section 601 of the MPC³⁴¹ by providing that a curative post-challenge amendment is not to be considered in resolving a developer's challenge unless the challenge was filed before the municipality had had a reasonable time to respond to the judicial decision forming the basis for the challenge.³⁴² Alternatively, the legisla-

339. See notes 290-310 and accompanying text *supra*.

340. See text following notes 298 *supra*.

341. See PA. STAT. ANN. tit. 53, § 10601 (Purdon Supp. 1980-81). For the text of § 601 of the MPC, see note 76 *supra*.

342. Alternatively, § 601 might be modified to provide that a post-challenge amendment which seeks to cure the defect asserted by a developer-challenger is to be considered in resolving the developer's challenge unless the challenge was filed *after* the municipality had had a reasonable time to respond to the judicial decision which is the basis for the developer's challenge. I prefer the language in the text because I believe it is appropriate to provide that, as a general matter, post-challenge amendments are to be disregarded unless the municipality satisfies the burden of proving that it had not had sufficient time to respond to the judicial decision forming the basis for the developer's challenge. The language at the beginning of this note suggests, conversely, that, as a general matter, post-challenge amendments should be considered unless the

ture, after conducting hearings, might specify an appropriate specific period of time in which a municipality would be free to fashion an amendment in order to conform its zoning ordinance to a new substantive obligation. The municipality would then be assured that a developer challenge, filed within the specified period of time, would still be subject to any amendment adopted within the time period. Moreover, a specified time period would supply more certainty than a general "reasonable time" provision.³⁴³

There are at least two defects with the foregoing proposal for a legislatively modified *Casey* doctrine. First, this modification, like the *Casey* doctrine itself, contemplates that courts will be called upon at times to struggle with the difficulties involved in determining whether to award site-specific relief to a developer-challenger who prevails on the merits of his challenge.³⁴⁴ Second, it may prove troublesome in a particular case to determine whether a developer's challenge is actually based upon a recent judicial decision announcing a *new* substantive requirement which the municipality has not had a reasonable opportunity to study and implement.³⁴⁵

C. Institutional and Practical Obstacles to Resolving the *Casey* Problem

Although the *Casey* doctrine does not provide the optimum solution to the problem of post-challenge amendments in developer-initiated exclusionary zoning challenges, there are major institutional and practical obstacles that must be overcome before a better solution is possible. The greatest obstacle is the apparent constitutional basis for the *Casey* doctrine.³⁴⁶ The Pennsylvania Supreme

challenger satisfies the burden of proving that the defendant municipality, at the time of the challenge, had already had a reasonable time to comply with the requirements of the judicial decision upon which the challenge is founded. Since a municipality has better access to proof on the issue of whether, prior to the challenge, it has had reasonable time, the burden of proof with respect to this issue should be placed on the municipality.

343. Moreover, the requirement of a specified period of time would eliminate the "burden of proof" problem. See note 342 *supra*.

344. See notes 303-08 and accompanying text *supra*.

345. In any judicial opinion setting forth "new law," a court typically seeks to demonstrate that its decision is not "novel" in the sense that there is no precedent to support it. Thus, for example, though the decision in *Girsh Appeal* may seem to be the paradigm of a decision setting forth "new law," the plurality opinion seeks to persuade the reader that its conclusion follows inescapably from previous decisions in which the supreme court had invalidated zoning ordinances that prohibited a particular use anywhere within the zoning municipality. See 437 Pa. at 242-44, 263 A.2d at 397-98.

346. For a discussion of the possible constitutional bases for the *Casey* doctrine, see notes 90-124 and accompanying text *supra*.

Court's "constitutionalization" of the post-challenge amendment problem has precluded the legislature from devising a different solution to the problem.³⁴⁷

The obstacle presented by the *Casey* decision would obviously be removed if the supreme court chose to overrule the *Casey* doctrine. It would be relatively easy for the supreme court to conclude that there was an inadequate legal basis for the *Casey* pending ordinance doctrine.³⁴⁸ Based on this conclusion, the court could then rule that, subject only to a legislative decision to limit a municipality's amendment power under section 601, a post-challenge amendment moots a developer's challenge to the original unamended ordinance. Adoption of this position by the Pennsylvania Supreme Court would give the legislature freedom to develop an appropriate solution to the *Casey* dilemma.

However, if the legislature had a free hand, how would it act? Would it be likely to adopt a resolution of the post-challenge amendment problem which appropriately balanced the interests of developers, nonresidents, and zoning municipalities? Or would the legislature, when freed from the constitutional constraints of the *Casey* doctrine, resolve the post-challenge amendment dilemma in a way which furthered only the interests of zoning municipalities? In light of past events, it would not be unduly cynical to suggest an affirmative answer to the last question — the Pennsylvania Legislature has not gone out of its way to remedy the evils of exclusionary zoning. The legislative action that has taken place has occurred only after the supreme court has led the way.³⁴⁹ If the Pennsylvania Supreme Court simply overruled the *Casey* doctrine, it is plausible to suggest that the legislature would be content with the resulting status quo, in which post-challenge amendments always mooted developer challenges.³⁵⁰ Legislative inaction in this case

347. See notes 121-24 and accompanying text *supra*.

348. See notes 65-81 and accompanying text *supra*.

349. Act 249 itself is an example of how legislative action has followed the lead of the supreme court. As interpreted herein, § 609.2 (3) does not deprive a developer-challenger, who files a challenge prior to the initiation of § 609.2 self-cure procedures, of the *Casey* right to have his challenge determined in light of the zoning ordinance in effect at the time he filed his challenge. See text accompanying notes 212-14 *supra*. However, I believe that, if the legislature had a free hand, it would erase any developer-challenger's rights conferred by *Casey*. Indeed, according to Mr. Ryan's construction of § 609.2, this is precisely what the Pennsylvania Legislature did. See notes 172-211 and accompanying text *supra*.

350. If the *Casey* doctrine were overruled by the Pennsylvania Supreme Court, it is not totally clear what the "resulting status quo" would be. On the one hand, it could be argued that § 609.2 (3) does not confer upon a developer-challenger, who files a challenge prior to the initiation of § 609.2 self-cure pro-

would merely condone a "solution" which 1) eliminated the *Casey* doctrine and the possibility of site-specific relief as an incentive for developer-initiated exclusionary zoning challenges; and 2) provided no substitute incentive for exclusionary zoning challenges either through legislative authorization of non-developer challenges or the award of litigation expenses to successful challengers.

These institutional and practical considerations suggest that the Pennsylvania Supreme Court will not overrule the *Casey* doctrine in spite of its inadequate legal foundation. While the continued vitality of the *Casey* doctrine precludes legislative adoption of a better solution to the problem of post-challenge amendments in developer challenges, it also prevents legislative backsliding in the area of exclusionary zoning.³⁵¹

VI. CONCLUSION

The *Casey* pending ordinance doctrine is not only bad law, but also bad policy. The problem which the doctrine addresses — the problem of post-challenge amendments in developer-initiated exclusionary zoning challenges — is admittedly not an easy one to resolve. The resolution set forth in Act 249 of 1978 is muddled, far from ideal, and, to the extent that it deviates from the *Casey* doctrine, ineffective. Indeed, there can be no effective legislative solution to the *Casey* problem until the Supreme Court of Pennsylvania "deconstitutionalizes" it by overruling the doctrine. It is unlikely that such action is in the offing because, if the legislature were free to solve the post-challenge amendment problem, it might fail to perceive a problem and, thus, decline to fashion a solution. Finally, though the *Casey* doctrine is indefensible on legal grounds, the supreme court is unlikely to abandon a doctrine which is so essential to the effectiveness of the Pennsylvania substantive law of exclusionary zoning.

cedures, a statutory right to have his challenge determined on the basis of the ordinance in existence at the time of his challenge. See notes 172-211 and accompanying text *supra*. Instead, § 609.2 (3), as interpreted herein, does not seek to *take away* this right conferred by *Casey*. See notes 212-14 and accompanying text *supra*. On the other hand, it might be argued that § 609.2 (3) implicitly confers this right. Even under the latter interpretation, if the *Casey* doctrine were overruled, the legislature could simply amend the MPC to provide explicitly that post-challenge amendments were always effective in developer challenges.

351. I do not mean to suggest, however, that a desire to prevent legislative backsliding in the area of exclusionary zoning is a justification for the continued vitality of a doctrine which lacks an adequate legal basis. See notes 65-81 and accompanying text *supra*.