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THE PROBLEM OF RELIEF IN DEVELOPER-INITIATED EXCLUSIONARY ZONING LITIGATION

JOHN M. HYSON*

The Pennsylvania and New Jersey courts are now entering the second phase of exclusionary zoning litigation. Having set forth (however imprecisely) the substantive law of exclusionary zoning,¹ the courts are now beginning to face the more practical and important issue—the relief to be granted once an ordinance has been determined to be exclusionary.

The problem of appropriate judicial relief can arise in two different contexts because two fundamentally different kinds of relief may be sought by the challengers of exclusionary zoning ordinances: (1) reformation of a municipality's zoning ordinance to eliminate its exclusionary aspects, and (2) the authorization to carry out a particular development on a particular parcel of land. The former type of relief is sought primarily in litigation initiated by nonresidents of the exclusionary

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1. See *Township of Willistown v. Chesterdale Farms, Inc.*, — Pa. —, 341 A.2d 466 (1975); *Concord Twp. Appeal*, 439 Pa. 466, 268 A.2d 765 (1970); *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970); *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustments*, 419 Pa. 504, 215 A.2d 597 (1965). The landmark New Jersey decision is *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975). *Accord*, *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

municipality.² The latter (which shall be referred to as “site-specific relief”) is sought in developer-initiated cases.

The courts have neither confronted nor always recognized the difficult conceptual and practical problems which hinder a court’s ability to grant appropriate relief in a developer-initiated case. Any judicial attempt to formulate site-specific relief must first confront the question whether the courts have the power to grant such relief. If it is determined that the courts do have such power, it is still necessary for the courts to recognize that, in formulating site-specific relief, they must balance two competing social interests: the economic interests of the developer, who often is the only one who can effectively attack exclusionary zoning in a municipality, and the interests of the municipality in rational and planned community growth. The problem of relief in nonresident litigation will be examined briefly in order to provide a background for the discussion of the problem of relief in developer-initiated cases.

I. NONRESIDENT-INITIATED LITIGATION

As already indicated, the relief sought in a nonresident suit can be expected to differ considerably from the relief sought in a developer suit. The developer who initiates an exclusionary zoning challenge is interested only in receiving permission to proceed with his development on his parcel of land—site-specific relief. Though the developer’s exclusionary challenge may be directed at the entire zoning ordinance of the municipality, once he receives site-specific relief he is not concerned with whether the municipality’s zoning ordinance continues to be exclusionary. On the other hand, the nonresident is usually not interested in a particular parcel of land. He seeks broader relief, the amendment of the entire zoning ordinance, so that land will become available for low and moderate income housing. The specific location of that land is of no particular interest to the nonresident; he wishes only an opportunity to live somewhere in the exclusionary municipality.

The nonspecific nature of the relief sought by the nonresident may make judicial resolution of his challenge difficult. The threshold problem is one of access to the courts. In *Warth v. Seldin*,³ the United States

2. Such relief can be sought by any person who has an interest in eliminating a municipality’s exclusionary zoning practices but who has no interest in the development of a particular parcel of land within the municipality. In *Warth v. Seldin*, 422 U.S. 490 (1975), plaintiff challengers included nonresident persons of low and moderate income, an adjoining municipality’s taxpayers, an association of homebuilders, and a corporation interested in the development of low and moderate income housing.

3. 422 U.S. 490 (1975).

Supreme Court dismissed a federal court challenge to an exclusionary zoning scheme because the nonresident plaintiffs lacked standing.⁴ One of the bases for the *Warth* decision was the Court's concern about the efficacy of relief which does not involve construction of housing on a specific site.⁵ While *Warth* did not completely close the federal courts to nonresident-initiated exclusionary zoning litigation,⁶ the Court did make clear that such litigation would usually not be entertained unless it focused upon a particular project so that a court might grant effective relief—*i.e.*, order the approval of that project.⁷

Though *Warth v. Seldin*, on its facts, is limited to nonresident exclusionary litigation in *federal* courts, its impact on nonresident *state* court litigation could be substantial. The Court stated that its discussion of standing involved "both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise."⁸ The constitutional limitations (the "case or controversy" requirement of article III of the United States Constitution) are clearly inapplicable to state court litigation. The prudential limitations, however, are relevant to state court litigation and can be expected to influence nonresident litigation in state courts.

Even before the decision in *Warth*, Pennsylvania courts refused to entertain nonresident exclusionary zoning litigation. In *Commonwealth v. County of Bucks*,⁹ the Commonwealth Court¹⁰ dismissed an action in which nonresidents challenged the validity of the zoning ordinances of all fifty-four townships in Bucks County. The court rejected plaintiffs' far-reaching request for relief "of an ongoing and continuing nature"¹¹

4. *Id.*

5. *Id.* at 516-17.

6. See Note, *Alternatives to Warth v. Seldin: The Potential Resident Challenger of an Exclusionary Zoning Scheme*, 11 URBAN L. ANN. 223 (1976).

7. 422 U.S. at 516-17.

8. *Id.* at 498.

9. 8 Pa. Cmwlth. 295, 302 A.2d 897 (1973), *cert. denied*, 414 U.S. 1130 (1974).

10. The Commonwealth Court is an intermediate appellate court with jurisdiction over zoning appeals.

11. 22 Bucks Co. L. Rep. 179, 180 (C.P. 1972), *also reported in* 302 A.2d 897, 309 (1973).

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 super-planning agency, with no expertise in the field; and as such the Court would be required to make immediate and basic initial policy considerations of a kind clearly

against the respective municipalities, the county planning commission, the county housing authority, and the county.¹² *County of Bucks* accurately reflects the real basis for the result in *Warth*—the reluctance of the judiciary to fashion and implement the necessary relief should the court decide in favor of the nonresident challenger on the merits. The fashioning of effective relief in nonresident litigation not only burdens the courts, requiring retention of jurisdiction in order to supervise the municipality's correction of the invalid ordinance, but also requires judicial "intrusion" into areas which have traditionally been viewed as the domain of local legislative bodies. *Warth* thus can be viewed as an attempt by the Court to avoid "government by injunction."¹³

In New Jersey, a nonresident may challenge an exclusionary zoning ordinance,¹⁴ but the state supreme court has thus far skirted the problem of relief. In *Southern Burlington County NAACP v. Township of Mount Laurel*¹⁵ the majority cautiously declined to say how far it might go in fashioning a remedy, declaring only that certain aspects of the township's ordinance were invalid¹⁶ and hinting at further relief should it be necessary.¹⁷ If Mount Laurel adopts amendments which do not cure the

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.

Id. at 188, also reported in 302 A.2d at 904-05, quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962).

12. 22 Bucks Co. L. Rep. at 180-81, also reported in 302 A.2d at 899-900.

13. *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 222 (1974).

14. N.J. STAT. ANN. § 40: 55-47.1 (Supp. 1973) (confers standing upon "other interested persons"). Cf. *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). In most other jurisdictions, standing is accorded only to an "aggrieved person" and that phrase is interpreted to apply only to those with property interests which are adversely affected by the allegedly exclusionary ordinance. See Note, *Beyond Invalidation: The Judicial Power to Zone*, 9 URBAN L. ANN. 159, 160 (1975). After the commencement of the nonresident challenge in *County of Bucks*, the Pennsylvania Municipalities Planning Code (the state zoning enabling legislation) was amended to specifically provide that standing to challenge the validity of an ordinance is limited to landowners and "persons aggrieved by a use or development permitted on the land of another." Act of June 1, 1972, §§ 1001, 1004, 1005, [1972] Pa. Laws 333, PA. STAT. ANN. tit. 53, §§ 11001, 11004, 11005 (1972). A trial court has ruled that a nonresident is not a person aggrieved. *Lightcap v. Wrightstown Twp. Bd. of Supervisors*, 25 Bucks Co. L. Rep. 145 (C.P. 1974), *aff'd per curiam* by the Commonwealth Court in an unreported opinion.

15. 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975).

16. See *id.* at 209-17, 336 A.2d at 743-47 (Pashman, J., concurring).

17. It is not appropriate *at this time* . . . to deal with the matter of the further extent of judicial power in the field or to exercise any such power. . . . The municipality should *first* have full opportunity to itself act without judicial supervision. We trust

invalidity of its zoning ordinance, will the court grant further relief or will the court give the township another opportunity to amend its ordinance? Will the availability of such an opportunity depend upon whether the township is perceived to be acting in "good faith"?

Just how far a court will intrude into the legislative domain when it entertains a nonresident challenge is suggested by *Pascack Association v. Mayor & Council of Township of Washington*,¹⁸ a developer-initiated challenge. On December 20, 1972, the court held that the township's zoning ordinance was invalid because, among other things, it failed to make any provision for multi-family housing, the type of development proposed by the challenger.¹⁹ In entering judgment on January 12, 1973, the court emphasized that it was not going to order the adoption of specific zoning provisions.²⁰ On January 29, 1973, the township amended its ordinance establishing a multi-family district consisting of approximately 34 acres. The challenger contended that this action did not constitute compliance with the court's judgment.²¹ After some procedural maneuvering, the court held a hearing on October 4, 1973. At the conclusion of the hearing the court held that "the township had been afforded sufficient opportunity to comply with the judgment of January 12, 1973;"²² in other words, the court was not going to give the township another opportunity to amend its ordinance so as to comply with the January 12th judgment. In addition, the court appointed planning consultants who were to report to the court on whether the township's action constituted compliance with the January 12th judgment. If the consultants concluded that there had not been compliance, they were to recommend a zoning plan and zoning controls for the township which

that it will do so in the spirit we have suggested, both by appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of its fair share of the regional need for low and moderate income housing may be indicated as necessary and advisable.

67 N.J. at 192, 336 A.2d at 734 (emphasis added).

18. 131 N.J. Super. 195, 329 A.2d 89 (L. Div. 1974), *rev'd*, No. A-3790-72, A-1841-73 (App. Div. 1975).

19. *Id.* at 197, 329 A.2d at 91.

20. [I]t is not the province of the court to specify zoning densities or to exercise any other control *at this juncture* over the manner in which the township must meet its obligation to provide for multi-family or rental-type housing within its borders. Obviously, in view of the township's state of development, the range of choices available to it is limited, but these choices are properly a function of the legislative power which it must exercise with reasonable promptness and in accordance with the requirements of the statute.

Id. at 198, 329 A.2d at 91 (emphasis added).

21. *Id.*

22. *Id.* at 200, 329 A.2d at 92.

would carry out the terms of the judgment. On January 19, 1974, the consultants reported that the township's actions did not constitute compliance with the court's judgment; in addition, they submitted the requested zoning plan and controls.²³ Since the consultants had concluded that the challenger's land was appropriate for multi-family development, the court ordered the township to permit such development on the challenger's land.²⁴

In retrospect, *Pascack* is an easy case. Since it was initiated by a developer, the ultimate relief granted by the court need only address itself to the developer's land.²⁵ But what if *Pascack* had been non-resident-initiated? Would the court have ordered the township to adopt the zoning controls which had been recommended by the court-appointed consultants?²⁶ This seems to be suggested by the reference to *Pascack* in *Mount Laurel*.²⁷ If a township is ordered to adopt an ordinance recommended by court-appointed experts and declines to do so, what are the options available to the court? Is it realistic to suppose that the court would hold the township governing body in contempt? Is it feasible to suggest that the court might by-pass the township governing body and take over zoning administration in the township? Finally, would it be conscionable for the court to attempt to enforce compliance by enjoining the enforcement of *all* township zoning restrictions until the township adopts a valid zoning ordinance?²⁸

23. *Id.* at 201, 329 A.2d at 93. See Levin & Rose, *Suburban Land Use War: Skirmish in Washington Township*, I MANAGEMENT AND CONTROL OF GROWTH 507 (R. Scott ed. 1975) (description of process used by the consultants in making their decisions).

24. 131 N.J. Super. at 208, 329 A.2d at 97.

25. The developer who challenges an exclusionary zoning ordinance is interested only in site-specific relief and may, in fact, favor the continuation of an exclusionary zoning ordinance in order to exclude potential competing developers.

26. In *Urban League of Greater New Brunswick v. Mayor and Council of the Borough of Carteret*, 142 N.J. Super. 11, 359 A.2d 526 (Ch. 1976), the court invalidated the zoning ordinances of 23 of the 25 municipalities of Middlesex County and ordered each of these municipalities to undertake various activities which, in the court's view, would insure that each municipality would accommodate its "fair share" of low and moderate income housing. The court (apparently without the assistance of a planning consultant) computed the number of units of low and moderate income housing which each municipality must accommodate in order to meet its "fair share" obligation. The court held that it was not enough for the municipalities to simply rezone so as not to exclude the possibility of low and moderate income housing in the allocated amounts. The court also ordered each municipality to undertake affirmative action, including an order to "pursue and cooperate in federal and state subsidy programs for new housing and rehabilitation of substandard housing." *Id.* at —, 359 A.2d at 542. The court did not indicate what it would do if the municipalities did not comply with its order.

27. 67 N.J. at 192, 336 A.2d at 734.

28. See Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760 (1976).

These difficult questions will eventually have to be faced by the New Jersey Supreme Court.²⁹ It would be surprising if the court were not somewhat chastened by its experience in *Robinson v. Cahill*³⁰ where, after holding the state system of financing education to be unconstitutional,³¹ it was forced to close the state's public schools in order to enforce its judgment.³² Though the state legislature finally capitulated by adopting an income tax,³³ the strain created by this confrontation between the judicial and legislative branches suggests that the court may move slowly in attempting to implement the substantive holding of *Mount Laurel*.

II. DEVELOPER-INITIATED LITIGATION

In developer-initiated cases the challenger seeks relief only as to his specific site. Though not as far-ranging as the relief sought in nonresident litigation, site-specific relief does present several problems. First, it is not entirely clear that courts have the power to grant even this

29. These questions may be faced when the court renders its decision in the longstanding *Madison Township* litigation. This litigation is a developer-initiated challenge to the township's zoning ordinance. In October 1971, Judge Furman of the Superior Court declared that the township's ordinance was invalid. *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971). The state supreme court granted review. 62 N.J. 185, 299 A.2d 720 (1972). The township then amended its ordinance and the supreme court remanded the matter to Judge Furman for consideration of the amended ordinance. In early 1974, Judge Furman decided that the amended ordinance was still invalid. *Oakwood at Madison, Inc. v. Township of Madison*, 128 N.J. Super. 438, 320 A.2d 223 (L. Div. 1974). In January 1976, the supreme court heard oral argument for the fourth time and took the matter under advisement. Prior to the most recent argument, the supreme court submitted 18 questions to be briefed by the parties. Among them were the following:

11. If the Court affirms the determination of the trial court that the ordinance, as amended, still does not affirmatively provide adequately for low or moderate income housing, how specific should the court be as to the terms of an ordinance which will satisfy *Mt. Laurel*? Do the interests of bringing this litigation to a final determination dictate some degree of specificity in the determination of the Court?

12. In connection with the latter question, would it be serviceable for the Court to appoint a Special Master to consult with the municipality and frame specific zoning guidelines to assist the municipality in meeting the Court's judgment?

Letter to Parties, Sept. 25, 1975. If the court addresses these questions in its decision, it will certainly clarify the New Jersey law with respect to relief in exclusionary zoning litigation.

30. The opinions and orders of the New Jersey Supreme Court in the *Robinson* litigation are reported at 62 N.J. 473, 303 A.2d 273 (1973); 63 N.J. 196, 306 A.2d 65 (1973); 67 N.J. 35, 335 A.2d 6 (1975); 69 N.J. 133, 351 A.2d 713 (1975); 69 N.J. 449, 355 A.2d 129 (1976); 70 N.J. 155, 358 A.2d 457 (1976).

31. 62 N.J. 473, 303 A.2d 273 (1973).

32. 70 N.J. 155, 358 A.2d 457 (1976).

33. New Jersey Gross Income Tax Act, Laws 1976, c. 47, N.J. STAT. ANN. §§ 54A:1-1 to :9-27 (West Sess. Law Serv. 1976, No. 2).

limited form of relief. Assuming that courts do have such power, the practical problem remains of determining what circumstances warrant site-specific relief. Limited use of site-specific relief may discourage developer-initiated litigation, particularly if the court permits the municipality to cure its defective ordinance through an amendment that does not benefit the developer. On the other hand, if courts are generous in granting site-specific relief to a successful developer-challenger—by ordering that he be permitted to proceed with his proposed development—they may impose upon the municipality a highly irrational and even harmful pattern of development.³⁴

The Pennsylvania courts have considered the problem of whether a court should grant site-specific relief to a developer who has successfully challenged a municipality's zoning ordinance.³⁵ The Pennsylvania decisions will be considered in examining the following questions: (1) If a municipality amends its zoning ordinance after the developer has initiated his challenge, must the court consider such amendment in ruling upon the validity of the municipality's zoning ordinance? (2) If a court determines that a municipality's zoning ordinance is invalid, does the court have the power to order site-specific relief to the developer? (3) If a court determines that a municipality's zoning ordinance is invalid and if the court has the power to order site-specific relief, under what circumstances should such relief be ordered?

A. *The Relevance of the Post-Challenge Amendment*

The problem of the post-challenge amendment was presented to the Pennsylvania Supreme Court in *Casey v. Zoning Hearing Board*.³⁶ Less than two months after the court had held another municipality's zoning ordinance invalid because it made no provision for apartments,³⁷ a developer challenged the zoning ordinance of Warwick Township on the same ground.³⁸ Shortly after the commencement of the developer's challenge, the municipality amended its ordinance to create an apartment district and rezoned certain property to this new classification.³⁹

34. See Williams, Doughty, & Potter, *Exclusionary Zoning Strategies: Effective Lawsuit Goals and Criteria*, I MANAGEMENT AND CONTROL OF GROWTH 477, 485-87 (R. Scott ed. 1975).

35. The principal decisions are *Casey v. Zoning Hearing Bd.*, ___ Pa. ___, 328 A.2d 464 (1974), and *Ellick v. Board of Supervisors*, 17 Pa. Cmwlth. 404, 333 A.2d 239 (1975).

36. ___ Pa. ___, 328 A.2d 464 (1974).

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

38. ___ Pa. at ___, 328 A.2d at 465.

39. *Id.* at ___, 328 A.2d at 466.

The rezoning, however, did not include the property of the developer-challenger.⁴⁰

If a post-challenge amendment must be considered by a court when it rules upon the merits of the challenge, the developer's task becomes difficult. He must shift his attack from the original ordinance to the amended ordinance. The developer has only two alternatives, both equally unattractive. First, he can continue to contend that the ordinance is exclusionary by asserting, for example, that the amended ordinance does not provide for the municipality's "fair share" of apartment development.⁴¹ Such a contention will presumably require that the developer produce extensive and sophisticated evidence of housing demand in the municipality. The cost of prosecuting such a challenge will be great, with little assurance of success, since the applicable substantive law is unclear. Alternatively, the developer can drop his exclusionary challenge and contend that the municipality's ordinance is invalid as applied to his property on one of the traditional grounds—arbitrariness or confiscation. Such grounds are difficult to establish because the amended ordinance enjoys a presumption of validity.

Judicial consideration of a post-challenge amendment in ruling upon the merits will discourage developer challenges. No developer will initiate a challenge if its only effect will be to make someone else's land available for high-density development. If a jurisdiction refuses to consider nonresident challenges, discouraging developer challenges effectively discourages all challenges and leaves little incentive for a municipality to amend its exclusionary zoning ordinance.

These considerations apparently influenced the Pennsylvania Supreme Court in *Casey* when it decided whether the post-challenge amendment must be considered in ruling upon the merits of the developer's challenge. In reaching its decision, the court took the Pennsylvania "pending ordinance" doctrine,⁴² applied it to a totally different situation, and held that, in considering the developer's challenge, it would look at the municipality's ordinance as it existed at the time of the challenge and would not consider the subsequent amendment since it

40. *Id.*

41. Such a contention would be grounded upon *Township of Willistown v. Chesterdale Farms, Inc.*, ___ Pa. ___, 341 A.2d 466 (1975).

42. ___ Pa. at ___, 328 A.2d at 467. The Pennsylvania "pending ordinance" doctrine provides that a permit may be denied if, on the date when an application for a building permit is filed, there has been public declaration of a pending ordinance which would, if adopted, require the denial of the permit. *Id.* Many of the decisions applying this doctrine are collected in *Boron Oil Co. v. Kimple*, 1 Pa. Cmwlt. 55, 275 A.2d 406 (1970), *aff'd*, 445 Pa. 327, 284 A.2d 744 (1971).

was not “pending” at the time of the challenge.⁴³ The court’s “reasoning” is set forth as follows:

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 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.⁴⁴

The court goes on to conclude that, since there had not been “sufficient public declaration” by the municipality of an intent to amend its ordinance at the time of the developer’s challenge, the amendment need not be considered.⁴⁵

1. Judicial Power to Disregard a Post-Challenge Amendment

Had the court in *Casey* examined the differences between the “typical” pending ordinance situation and the situation which it had before it, it is unlikely that the court would have reached the result which it did. In the “typical” situation, application of the pending ordinance doctrine does not infringe in any way upon the municipality’s zoning power; on the contrary, the doctrine was formulated in order to insure that such power could not be frustrated. In the typical situation a developer has submitted an application for a building permit which is consistent with the existing zoning but which is inconsistent with a proposed amendment to the municipality’s zoning ordinance. Since the pending ordinance doctrine provides that a municipality may not deny a permit under such circumstances unless there has been “sufficient public declaration” of the proposed amendment, the doctrine might be viewed as a device designed to protect a developer’s right to a building permit. But the right to receive a building permit is not equivalent to the right to develop in accordance with the permit. Since Pennsylvania law provides that there can be no vested right to develop in accordance with existing zoning unless there have been *both* good faith expenditures *and* the issuance of a valid permit,⁴⁶ the pending ordinance doctrine is a

43. — Pa. at —, 328 A.2d at 466-67.

44. *Id.*

45. *Id.* at —, 328 A.2d at 467.

46. *Gulf Oil v. Township Bd. of Supervisors*, 438 Pa. 457, 266 A.2d 84 (1970). An earlier decision, *Gallagher v. Building Inspector*, 432 Pa. 301, 247 A.2d 572 (1968), appears

doctrine designed to protect a municipality against the establishment of vested rights which would be inconsistent with publicly declared pending amendments to the municipality's zoning ordinance.

The court's application of the pending ordinance doctrine to the *Casey* situation does, however, constitute an infringement upon the municipality's zoning power. The court's application of the doctrine to the *Casey* situation purports to authorize a court to disregard a post-challenge amendment to the municipality's zoning ordinance. The court refers to no authority in support of the proposition that a court may, in ruling upon the validity of a challenged ordinance and in granting relief,⁴⁷ disregard the fact that the challenged ordinance has been amended.⁴⁸

to suggest that the acquisition of a permit, in and of itself, confers a vested right to develop in accordance with the terms of the permit. See 73 DICK. L. REV. 578 (1969). However, *Gallagher* may be viewed as a case of "special legislation"—that is, the court refused to deny the landowner's right to develop in accordance with his permit because the municipality's post-permit zoning amendment was intended to frustrate the landowner's plans for development. Cf. *Boron Oil Co. v. Kimple*, reported in 275 A.2d 406, 410 (C.P. Beaver County), *aff'd*, 1 Pa. Cmwlth. 55, 275 A.2d 406 (1970), *aff'd*, 445 Pa. 327, 284 A.2d 744 (1971). See generally Annot., 49 A.L.R.3d 13 (1973).

47. Strictly speaking, the court's application of the pending ordinance doctrine to the *Casey* situation dealt only with the propriety of considering the post-challenge amendment in ruling upon the merits of the developer's challenge; it did not deal with the propriety of considering the post-challenge amendment in determining whether, after the merits have been decided in favor of the challenger, the challenger should receive site-specific relief. Common sense, however, dictates that if the post-challenge amendment is ignored when the court rules upon the merits of the challenge, it must also be ignored when the court considers whether to grant site-specific relief. The result in *Casey* indicates that the court, in applying the pending ordinance doctrine, intended that the post-challenge amendment was to be ignored not only when the court ruled upon the merits of the challenge but also when the court determined whether to grant site-specific relief.

48. In the *Madison Township* litigation (see note 29 *supra*), the Supreme Court of New Jersey apparently assumed that it had no power to disregard a post-challenge amendment. After a lower court had ordered that the township's ordinance was invalid and the supreme court had granted review, the township amended its ordinance. The supreme court then remanded the matter to the lower court for consideration of the validity of the amended ordinance.

There is a rather cryptic suggestion in *Ellick v. Board of Supervisors*, 17 Pa. Cmwlth. 404, 333 A.2d 239 (1975), that the *Casey* holding was modified by the 1972 amendments to the Pennsylvania Municipalities Planning Code, PA. STAT. ANN. tit. 53, §§ 11001-11011 (1972) (state zoning enabling legislation). The 1972 amendments established new procedures for litigating challenges to zoning ordinances. A challenger is given the option of submitting his challenge either to the zoning hearing board or to the governing body. If the challenger chooses to submit his challenge to the governing body, he is required to submit a request for a "curative amendment." See Rosenzweig, *The Curative Amendment Procedure in Pennsylvania: The Landowner's Challenge to the Substantive Validity of Zoning Restrictions*, 80 DICK. L. REV. 43 (1975). Naturally, a challenger will request a curative amendment which, if adopted, would rezone his property. See Henszey & Novak, *Substantive Validity Challenges Under the Pennsylvania Municipalities Planning Code: The*

2. Policy Considerations Relating to the Effect Which Should Be Given to a Post-Challenge Amendment

In the previous section, consideration was given to the question whether a court has the power to disregard a post-challenge amendment in ruling upon the merits of the challenge. Though it has been argued that the *Casey* decision was incorrect in assuming the existence of such power, it is clear that such power could be conferred upon the courts by the state legislature. Since a municipality is not a sovereign but only a created subdivision of the sovereign state, its legislative power is not plenary. It has only such legislative power as has been delegated to it by the state. Therefore, the state legislature could provide that a court, in ruling upon the merits of a challenge, could disregard any post-challenge amendment. The present section will consider whether such a provision would be desirable—whether, in other words, the result in *Casey* makes sense.

The policy considerations which influenced the *Casey* decision can be found in the court's response to the municipality's contention that the state zoning enabling legislation compelled the court to give consideration to the post-challenge amendment. The legislation provided that, where there has been a challenge to the validity of an ordinance, a court has the power to declare the ordinance invalid and also has the power to "[s]tay the effect of its judgment for a limited time to give the local

Practitioner and the New Procedures, 21 VILL. L. REV. 187 (1976); Wolffe, *Procedures Under the Municipalities Planning Code*, 14 DUQUESNE L. REV. 1 (1975). In *Ellick*, the court (while not faced with the issue) recognized that problems might arise if the governing body adopted a curative amendment other than that suggested by the challenger.

If the governing body determines that its ordinance is defective, it may amend the ordinance by accepting the proposed curative amendment, or a variation thereof. While recognizing the potential problems which may thus arise, we do not decide in this case what happens if the governing body adopts a curative amendment different from the one which was proposed by the landowner. We are quite certain, however, that the 1972 amendments to the MPC do not in any way 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. To reiterate, if it finds that its ordinance is defective, the governing body may choose to cure the defect by an amendment other than that proposed by the challenging landowner. However, we must caution governing bodies that they cannot adopt or pass a curative amendment which would frustrate the challenging landowner, as was attempted in the *Girsh* case, *supra*. See the recent opinion of our Supreme Court in *Casey v. Zoning Hearing Board of Warwick Township*, — Pa. —, 328 A.2d 464 (1974).

17 Pa. Cmwlth. at 411, 333 A.2d at 244.

The reference to *Casey* seems to limit (if not negate) the court's earlier statement that a municipality may adopt a post-challenge curative amendment which differs from that sought by the challenger.

Since the procedures established by the 1972 amendments do not clearly overturn the holding in *Casey*, it must be assumed that a Pennsylvania court in ruling upon a developer's challenge need not consider a post-challenge curative amendment which differs from that sought by the challenger.

governing body an opportunity to modify or amend the ordinance or map in accordance with the opinion of the court.”⁴⁹ The township contended that since this provision granted the municipality the opportunity to cure an ordinance deficiency after judgment, a fortiori it may be given the opportunity to cure the deficiency before judgment.⁵⁰

The court rejected the township’s argument by rejecting its premise—that the state legislation required that a township be given an opportunity to cure a defective ordinance after judgment.⁵¹ In refusing to so interpret the legislation, the court argued:

To so read the legislative intent would effectively grant the municipality a power to prevent any challenger from obtaining meaningful relief after a successful attack on a zoning ordinance. 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 such an obstacle to relief, few would undertake the time and expense necessary to have a zoning ordinance declared unconstitutional.⁵²

The court also stated that to allow a municipality to correct a defective ordinance after judgment by zoning around a successful challenger would be inconsistent with its ultimate disposition of *Girsh Appeal*.⁵³ In *Girsh*, after the municipal zoning ordinance was successfully challenged by a developer, the municipality amended its ordinance without including the developer’s land.⁵⁴ The developer returned to the supreme court with a “petition for enforcement” of its previous decision. In a cryptic order which contained no explanatory rationale, the court granted the petition.⁵⁵ The missing explanation came in *Casey* when the court stated that its final disposition of *Girsh* indicated a recognition “that an applicant, successful in having a zoning ordinance declared unconstitutional, should not be frustrated in his quest for relief by a retributory township.”⁵⁶

The court’s references in *Casey* to the state legislation and its ultimate disposition of *Girsh* are interesting but inapposite. The court failed to

49. Act of July 31, 1968, § 1009 [1968] Pa. Laws 845. This provision was deleted from the Municipalities Planning Code by the 1972 amendments. PA. STAT. ANN. tit. 53, §§ 11001-11011 (1972).

50. — Pa. at —, 328 A.2d at 468.

51. *Id.*

52. *Id.*

53. *Id.* at —, 328 A.2d at 469.

54. *Id.* at —, 328 A.2d at 468.

55. Order No. MP-12, 271 (Aug. 29, 1972) (unpublished).

56. — Pa. at —, 328 A.2d at 468.

perceive the distinction between pre- and post-judgment amendments. Both the state legislation and *Girsh* involved post-judgment amendments. *Casey* involved *pre-judgment* amendments, amendments enacted after the challenge but *before* the case goes to judgment. Even if it is sound policy to deny to a municipality the right to zone around a challenger *after judgment* in favor of the challenger, as in *Girsh*, it does not follow that it is sound policy to deny to a municipality the right to zone around the challenger *before judgment*, as in *Casey*.

Arguably, these two situations should be treated differently. Once there has been a judgment that an ordinance is invalid, the municipality should not be able to zone around the challenger because of the substantial time and expense incurred by the challenger in bringing his challenge to development. The *Casey* court was correct in asserting that if the municipality were given a free hand to zone around the challenger after judgment, "few would undertake the time and expense necessary to have a zoning ordinance declared unconstitutional."⁵⁷ On the other hand, when the municipality amends its ordinance in response to the challenge but before the case goes to court, the challenger has not yet been subjected to the expense of litigation. The developer may have to abandon his challenge (if he feels that the amendment cures the exclusionary defect)⁵⁸ or change the theory underlying his challenge (if he feels that the amended ordinance is still invalid on exclusionary grounds). But if the cost of commencing a challenge is not prohibitive⁵⁹ and if the municipality's amendment is enacted within a short period of time after the challenge is commenced, the developer who abandons his challenge as a result of the amendment will not have incurred substantial expense and the developer who changes the theory of his challenge will not have invested a substantial amount of effort in the discarded theory.

In addition, there are substantial arguments in support of giving consideration to a post-challenge amendment. The substantive law of exclusionary zoning is in a state of development. The Pennsylvania courts, in particular, are constantly establishing new standards for declaring municipal ordinances to be exclusionary.⁶⁰ A municipality

57. *Id.* at —, 328 A.2d at 468.

58. Of course, even if the developer believes that the amendment has cured the exclusionary defect, he can still challenge the amended ordinance on the more traditional grounds of arbitrariness or confiscation.

59. One of the purposes of the 1972 amendments to the Municipalities Planning Code was to simplify the procedures and reduce the expense of prosecuting challenges to municipal zoning ordinances. See Rosenzweig, *The Curative Amendment Procedure in Pennsylvania*, *supra* note 48, at 44.

60. See note 1 *supra*. The Commonwealth Court has also held that a zoning ordinance is invalid if it makes no provision for townhouses. *Camp Hill Dev. Co. v. Zoning Bd. of*

which is attempting in good faith to meet its obligations under the substantive law of exclusionary zoning must regularly amend its ordinance in response to judicial decisions. For such amendments to be sound as a matter of policy, they will often have to be preceded by weeks (or months) of planning. If post-challenge amendments are not to be considered by the courts, the opportunistic developer will race to challenge a municipality's ordinance immediately after a change in the substantive law of exclusionary zoning. Disregarding post-challenge amendments and granting site-specific relief may upset rational planning.⁶¹ The municipality will be denied the opportunity to choose where and how it wishes to meet its obligations under the substantive law of exclusionary zoning.⁶²

Adjustment, 13 Pa. Cmwlth. 519, 319 A.2d 197 (1974). The same court has suggested that a zoning ordinance is invalid if it makes no provision for "fourplex units." *Kaufman & Broad, Inc. v. Board of Supervisors*, 20 Pa. Cmwlth. 116, 340 A.2d 909 (1975). These decisions indicate that the Commonwealth Court interprets *Girsh* to require that a zoning ordinance contain some provision for every "valid" use. One group of commentators has contrasted this "Pennsylvania rationale" with the "sensible rationale" of the New Jersey courts. *Williams, Doughty & Potter, supra* note 32, at 485-87.

61. *See Williams, Doughty & Potter, supra* note 32, at 485-87.

62. One municipality in Bucks County, Buckingham Township, reacted to developmental pressures and the *Girsh* decision by undertaking a lengthy course of planning which was designed to produce land use controls which would satisfy the township's obligations under the Pennsylvania exclusionary zoning decisions but which would also preserve the township's rural amenities. The township contemplated, among other things, a limited "development district," extensive open space zoning, and the use of transferable development rights. While this planning process was going on, the township's effective zoning ordinance was clearly invalid under *Girsh* since it made no provision for apartments. When the apparent boundaries of the development district became known—but before there was "public declaration" of an amendment to the zoning ordinance—eight challenges to the existing zoning ordinance were instituted by persons who owned land outside of the area which was being considered for the development district. The township governing body denied the requests of these landowners for curative amendments and the landowners sought judicial review.

On October 23, 1976, the Court of Common Pleas of Bucks County handed down its decision. *Schlanger v. Board v. Supervisors of Buckingham Twp.* No. 75-2561-08-5 (C.P. 1976). Relying on the *Casey* decision (among others), the court held that an amendment enacted after the commencement of the eight challenges was not "pending" at the time of commencement and therefore could not be considered in ruling upon the merits of the eight challenges. Since the township acknowledged that the zoning ordinance in effect at the time of commencement was exclusionary, the court decided the merits in favor of the challengers. In accordance with § 1011 of the 1972 amendments to the Pennsylvania Municipalities Planning Code, PA. STAT. ANN. tit. 53, § 11011 (1972) (*see* note 81 *infra*), the court referred all elements of the challengers' plans for development to the township's governing body "in order that this body may restudy them in the existing record and formulate reasonable restrictions which will be subject to review in this court." *Schlanger v. Board of Supervisors of Buckingham Twp.*, No. 75-2561-08-5, slip op. at 7 (C.P. 1976). The court gave no guidance to the governing body on the question as to what restrictions would be considered to be "reasonable." *See* notes 82-98 and accompanying text *infra*.

Casey thus goes too far in favoring the challenger over the municipality. A municipality should be given a reasonable period of time within which to respond to decisions which change the law of exclusionary zoning. Post-challenge amendments should be considered if they have been enacted in "good faith," that is, if the amendments have been enacted within a reasonable period of time after the articulation of the substantive law which is the basis for the developer's challenge.⁶³

This proposed solution⁶⁴ obviously lacks the clarity and simplicity of the *Casey* "pending ordinance" approach. But the adverse consequences of the *Casey* approach far outweigh any advantages in simplicity of application. Under the proposed solution, a developer would be required to give a municipality a reasonable period of time within which to react to a new declaration of substantive law. If, in the opinion of the developer, that period of time passes and the municipality has not amended its ordinance, the developer can then initiate his challenge. If the municipality thereafter amends its ordinance, the municipality should bear the burden of proving that the amendment was in "good faith." Should the municipality meet this burden of proof, the developer

A newspaper account of this decision states that the plans of the successful challengers call for 9,000 housing units and that, if these units were developed and occupied, the township's population would quadruple (from 7,500 to 30,000). *Philadelphia Inquirer*, Nov. 1, 1976, § B, at 1, col. 2. Needless to say, the township plans to appeal. But, absurd as it may seem, the decision of the Court of Common Pleas seems to follow logically from *Casey*.

63. This view was espoused by Chief Justice Jones in his dissent in *Casey*:

[U]ntil today, I believe a lower court could consider the prompt, good faith efforts of a township to bring its zoning ordinance into compliance with the unconstitutionality [sic] cited in *Girsh* and, where such a good faith amendment was adopted prior to court proceedings, the trial court would be permitted to dismiss the challenging landowner's complaint. Although the majority refers to the affirmative relief granted in *Girsh* as mandating similar relief here, it must be noted that in *Girsh* the 'curative' amendment was adopted over three and a half months after this court's decision and more than a year after the landowner's initial challenge. Furthermore, when this court decided to grant specific relief to the landowner in *Girsh* (order dated August 29, 1972), the issue was whether a township could in 'bad faith' zone around the challenging landowner. The issue of bad faith was not presented here.

— Pa. at —, 328 A.2d at 470-71 (Jones, C.J., dissenting).

What constitutes a "reasonable period of time" will vary depending upon the nature and complexity of the planning response which is necessitated by a particular declaration of substantive law. Where the substantive law requires that a municipality provide for a "fair share" of apartment development, it may be reasonable for a municipality to take a substantial period of time in calculating the prospective demand for apartments within the municipality and in determining the appropriate location for such apartment development.

64. Since under present zoning enabling legislation a court has no power to disregard a post-challenge amendment (*see* notes 46-48 and accompanying text *supra*) the effectuation of this solution would require that state zoning enabling legislation be amended to provide that in ruling upon developer-initiated challenges, a court need consider only the original ordinance and "good faith" amendments.

would have to shift his attack to the amended ordinance or abandon his challenge.⁶⁵

B. *Judicial Power to Grant Site-Specific Relief*

The second major concern relating to relief in developer-initiated exclusionary zoning litigation is the question of the court's power to grant site-specific relief in the absence of legislation specifically conferring such power upon the courts. Conceptually, the issue is whether the granting of site-specific relief by a court infringes upon the legislative rights and prerogatives of the municipality.⁶⁶

The issue can arise in several factual contexts. In *Casey*, for example, the municipality responded to the developer's challenge by amending its ordinance to provide for apartment development on land other than that owned by the challenger. In adopting such an amendment, it must be presumed that the municipality made an objective policy or legislative judgment that it would be in the best interest of the municipality to have apartment development in a particular geographic area.⁶⁷ Even if this amended ordinance may be disregarded by the court when it rules upon the merits of the developer's challenge, the question remains whether the court has the power to disregard the amendment in granting relief.⁶⁸

65. This approach assumes a situation where there has been an authoritative appellate court decision which constitutes a new declaration of substantive law. It attempts to deal with developer challenges which are commenced shortly after such a decision. Thus, this approach is not designed to deal with the situation where a developer challenges a municipality's ordinance on novel grounds. Since the challenger's grounds for attacking the municipality's ordinance are novel, it is unlikely that the municipality will adopt a post-challenge "curative" amendment for it will not be clear that there is any defect which must be cured.

66. This issue can be looked at in two ways: (1) whether a court has the power to grant site-specific relief after a declaration of invalidity, or (2) whether a municipality has the right to amend its ordinance after a judicial declaration of invalidity.

67. It could be argued that when a municipality, shortly after the commencement of a developer's challenge, amends its ordinance in a way that does not benefit the challenger, it should be presumed from these facts alone that the amendment was not the product of an objective determination of the public welfare by the municipality but rather was an act of retribution against the challenger. If such a view were adopted, the burden would be on the municipality to rebut this presumption. Even though such a reversal of the usual presumption of validity has been adopted under some circumstances in exclusionary zoning decisions (*see, e.g., Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 180-81, 336 A.2d 713, 728, *cert. denied*, 423 U.S. 808 (1975)), it would not be a proper way to deal with the post-challenge amendment. In view of the large number of exclusionary zoning decisions, a municipality acting in good faith needs time to plan before amending its ordinance in response to such decisions and thus might not adopt an amendment until after a challenge has been commenced. In addition, there may be many valid planning reasons supporting a municipality's decision to deny high-density zoning to a challenger.

68. These two questions are quite similar and it would obviously make no sense for a

The issue of a court's power to grant site-specific relief can also arise when there has been no amendment to the challenged ordinance. In *Girsh*, for example, the court declared the municipality's ordinance to be invalid because it made no provision for apartments.⁶⁹ May the court go on to grant site-specific relief to the challenger—by requiring that he be permitted to pursue his proposed apartment development—without giving the municipality an opportunity to amend its ordinance and thereby indicate where it wishes to have apartment development? Even if it could be argued that a court may order that a successful challenger be allowed to proceed with apartment development, may the court deny to the municipality an opportunity to impose non-locational (*e.g.*, density, set-back) restrictions on apartment development?

The courts seem to recognize the problem of judicial encroachment upon municipal legislative power when a developer-challenger seeks, in addition to a declaration of invalidity, an order compelling the defending municipality to rezone the developer's land so as to permit his proposed development. Most courts still view zoning as a legislative act and a judicial order compelling rezoning is thus viewed as a blatant infringement of the municipality's legislative power.⁷⁰ A developer-challenger

court to disregard a post-challenge amendment in ruling upon the merits of a developer's challenge and then, having declared the original ordinance invalid, to hold that the amendment limits the availability of site-specific relief. *See* note 47 *supra*. Nonetheless, the question of a court's power to disregard a post-challenge amendment in ruling upon the merits of a developer's challenge and the question of a court's power to disregard a post-challenge amendment in granting site-specific relief are conceptually distinct questions. Indeed, it appears that § 1011 of the Pennsylvania Municipalities Planning Code, PA. STAT. ANN. tit. 53, § 11011 (1972), confers the latter power upon Pennsylvania courts but not the former.

69. 437 Pa. at 240, 263 A.2d at 396.

70. There are an increasing number of exceptions to this general rule as courts in many jurisdictions come to distinguish between legislative and administrative (or quasi-judicial) rezonings. The initial decisions set aside rezonings which failed to satisfy quasi-judicial standards. *See, e.g.*, *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973). *See generally* Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972). More recent decisions have taken the next logical step—judicial orders requiring specific rezonings. This position has been adopted in a trilogy of plurality opinions by three members of the Michigan Supreme Court. *Nickola v. Township of Grand Blanc*, 394 Mich. 589, 232 N.W.2d 604 (1975); *Sabo v. Township of Monroe*, 394 Mich. 531, 232 N.W.2d 584 (1975); *Smookler v. Township of Wheatfield*, 394 Mich. 574, 232 N.W.2d 616 (1975). *See* Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning*, 73 MICH. L. REV. 1341 (1975). The courts of Illinois have long been willing to enter orders requiring municipalities to rezone specific land. *See generally* Note, *Beyond Invalidation: Judicial Power to Zone*, *supra* note 14, at 162-64.

Pennsylvania adheres to the traditional view of zoning as a legislative act. Indeed, though § 1011 of the Pennsylvania Municipalities Planning Code, PA. STAT. ANN. tit. 53, §

may subtly avoid the problem by requesting an injunction against the enforcement of any ordinance which is inconsistent with his proposed development rather than a rezoning. For example, in *City of Richmond v. Randall*,⁷¹ the Supreme Court of Virginia rejected the Illinois approach of compulsory rezoning.⁷² "We believe these holdings [of the Illinois court], which compel affirmative action by legislative bodies, go too far. The injunction is a more traditional remedy and one less offensive to the concept of separation of powers."⁷³

It is difficult to see how the approach of the Virginia court is "less offensive to the concept of separation of powers" than the Illinois approach. The difference between the two approaches is more semantic than real. A court order requiring apartment zoning of a particular parcel of land (the Illinois approach) denies the municipality the power to determine whether apartment development should take place on that parcel of land. An order prohibiting the municipality from enforcing any ordinance which would prevent apartment development on a particular parcel of land (the Virginia approach) also denies the municipality the power to determine whether apartment development should take place on that parcel of land. Assuming that the power to determine the location of particular uses is a legislative power of the municipality, both the Illinois and Virginia approaches constitute equal encroachments upon that power.

Although the Pennsylvania Supreme Court has authorized site-specific relief, it has never set forth the authority for granting such relief. In *Girsh* the court apparently suggested to the municipality that it could amend its ordinance by providing for apartment development on land other than that owned by the successful challenger,⁷⁴ but when the municipality took such action, the developer was able to obtain site-specific relief.⁷⁵

11011 (1972), clearly authorizes a court to grant site-specific relief, the Commonwealth Court has stressed that a court has no authority to order a rezoning. *Ellick v. Board of Supervisors*, 17 Pa. Cmwlth. 404, 415, 333 A.2d 239, 246 (1975).

71. 215 Va. 506, 211 S.E.2d 56 (1975).

72. The leading Illinois decision is *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406 (1960).

73. 215 Va. at 513 n.3, 211 S.E.2d at 61 n.3. The kind of injunction contemplated by the court is a "decree enjoining the legislative body from taking any action which would disallow the one use shown to be reasonable . . . [the challenger's proposed use]." *Id.*

74. 437 Pa. at 246 n.6, 263 A.2d at 399 n.6:

[A]ppellee [the municipality] could show that apartments are not appropriate on the site where appellant wished to build, but that question is not before us so long as the zoning ordinance is fatally defective on its face. Appellee could properly decide that apartments are more appropriate in one part of the Township than in another but it cannot decide that apartments can fit in *no* part of the Township.

(emphasis in original).

75. Order No. MP-12, 271 (Aug. 29, 1972) (unpublished).

In *Casey*, after invalidating the municipality's ordinance, the court turned to the question "whether a court has the power to grant an applicant-challenger definitive relief upon rendering a zoning ordinance constitutionally infirm."⁷⁶ The court's treatment of the issue was less than incisive. In effect, the court said that definitive relief may be granted (1) because *Girsh* permits such relief (without explaining why), and (2) because it would be unwise not to allow definitive relief.⁷⁷ Neither ground confronts the issue of judicial infringement upon the legislative power of the municipality.

The problem of whether site-specific relief interferes with the municipality's legislative prerogative could be easily resolved if statutory support could be found for the proposition that such a prerogative does not include the right to rezone a challenger's land after there has been a successful challenge.⁷⁸ Since a municipality is merely a created subdivision of the sovereign state, its legislative power is limited and defined by state legislation. Therefore, state zoning enabling legislation could validly deny to a municipality the right to rezone a successful challenger's land.⁷⁹ Section 10111 of the 1972 amendments to the Pennsylvania

76. — Pa. at —, 328 A.2d at 469.

77. The appellee seeks a building permit for the erection of multi-family dwellings on his tract of land located in Warwick Township. This Court, pursuant to its disposition of the petition for enforcement of our order in *Girsh Appeal* has implicitly held that courts in this Commonwealth do have such power. "Obviously, if judicial review of local zoning action is to result in anything more than a farce, the courts must be prepared to go beyond mere invalidation and grant definitive relief." [Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedure*, 120 U. PA. L. REV. 1029, 1082 (1972)] To forsake a challenger's reasonable development plans after all the time, effort and capital invested in such a challenge is grossly inequitable.

Id.

78. Professor Jan Z. Krasnowiecki has argued persuasively that, as a matter of policy, a municipality should not be able to rezone a successful challenger's land. Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedure*, 120 U. PA. L. REV. 1029, 1060-65 (1972). He points out that a municipality which loses an exclusionary challenge "has had one bite at the apple"—that is, it has had a chance to enact a valid zoning ordinance. And, writing before the decision in *Casey*, Professor Krasnowiecki goes on to say: "if it [the municipality] felt so strongly about the other possible uses [for which it might wish to zone the challenger's land], it could have amended its ordinance during the course of the legal proceedings, thus forcing the landowner to contend with its preferred alternative." *Id.* at 1064. Though these arguments are persuasive on policy grounds, Professor Krasnowiecki does not cite statutory support for the proposition that a municipality does not have the right to rezone a successful challenger's land.

79. This assertion may be subject to qualification in states which have conferred home rule powers upon their municipalities. See generally 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 3.04-3.08 (1968). In Pennsylvania, it is clear that the Home Rule Act does not confer upon municipalities any zoning power in excess of that conferred by the Municipalities Planning Code, the specific zoning enabling legislation. PA. STAT. ANN. tit. 53, § 1-302(a)(10) (1972).

Municipalities Planning Code⁸⁰ is an example of such legislation, in that it clearly confers upon the Pennsylvania courts the power to grant site-specific relief to a successful challenger.⁸¹

C. The Circumstances Under Which Site-Specific Relief Should Be Granted

Once it has been determined that a court may grant site-specific relief in developer-initiated exclusionary zoning litigation, it is still necessary to consider the circumstances under which such relief *should* be granted. It is again appropriate to focus upon policy considerations even though such considerations are in conflict. Any relief granted must provide an incentive for a developer-challenger by holding out hope that a successful challenge will entitle him to site-specific relief. At the same time such relief must protect the defendant municipality against the challenger's development if such development is inconsistent with rational planning or harmful to the environment.

Though section 11011 of the Pennsylvania Municipalities Planning Code clearly confers upon the Pennsylvania courts the power to grant site-specific relief, it gives the courts little guidance as to when, and to

80. PA. STAT. ANN. tit. 53, §§ 10101-11011 (1972).

81. *Id.* § 11011:

(1) In a zoning appeal the court shall have power to declare any ordinance or map invalid and to set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal.

(2) If the court finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or failure to act is in question on the appeal, it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order. The court shall retain jurisdiction of the appeal during the pendency of any such further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order.

In order to understand the effect of § 11011(2), one must be familiar with one additional aspect of the new procedure for zoning challenges which was established by the 1972 amendments. A challenge must be accompanied by a description of the development which the challenger proposes to undertake if he is successful in his challenge. *Id.* § 11004(2)(c). This description is set forth in "plans and other materials," which, under § 11011(2), become a focal point when the court decides upon the nature of the relief which it will grant to the successful challenger.

Thus, § 11011(2) clearly denies to a municipality the right to zone around a successful challenger. Viewed another way, § 11011(2) clearly confers upon the Pennsylvania courts the power to grant site-specific relief to a successful challenger.

what extent, such relief should be granted.⁸² Section 11011 describes a number of options which are available to a court once it has ruled in favor of a developer's challenge but it does not describe the circumstances under which a court should use a particular option.

In *Ellick v. Board of Supervisors*⁸³ the Commonwealth Court interpreted section 11011 for the first time.⁸⁴ The court established a reasonableness standard: "It would be grossly inequitable to reject a successful challenger's reasonable development, considering the time and effort which must be invested in such a challenge."⁸⁵ But the reasonableness standard, in and of itself, provides little guidance.⁸⁶ The following discussion will attempt to set forth a more precise standard.

1. Compliance with Existing Unchallenged Restrictions

When a court has determined that a particular aspect of a zoning ordinance is invalid, it would be inappropriate for the court to order that the challenger be allowed to proceed with his development without giving the municipality an opportunity to determine whether the proposed development complies with unchallenged (and presumptively

82. *Id.* § 11011(2):

[The court] may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order. The court shall retain jurisdiction of the appeal during the pendency of any such further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order.

83. 17 Pa. Cmwlth. 404, 333 A.2d 239 (1975).

84. More recent decisions of the Commonwealth Court add little, by way of explanation, to the discussion in *Ellick*. See, e.g., *Gorski v. Township of Skippack*, 19 Pa. Cmwlth. 346, 339 A.2d 624 (1975); *Appeal of Olson*, 19 Pa. Cmwlth. 514, 338 A.2d 748 (1975). The Pennsylvania Supreme Court has not yet been called upon to interpret § 11011.

85. 17 Pa. Cmwlth. at 415, 333 A.2d at 246.

86. In *Ellick*, the court went beyond a simple statement of the "reasonableness" test and attempted to give more specific guidance to courts when they must consider whether, and to what extent, to grant site-specific relief. *Id.* at 416-17, 333 A.2d at 247.

[W]e believe the 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. If the court finds that none of the restrictions present in the record are reasonable, then we believe the proper course would be to remand to the governing body for the formulation of reasonable restrictions, which would then be subject to review. In carrying out its responsibilities, the courts of common pleas may order the landowner's plans, or portions of them, to be approved subject to the otherwise legal zoning regulations in the ordinance (which has been found to be defective), which may be applicable to the same class of usage or construction.

Id.

valid) non-zoning restrictions which were in existence at the time the challenge was commenced.⁸⁷

There may also be unchallenged zoning restrictions which a successful challenger should be required to meet. For example, a developer might challenge a municipality's zoning ordinance on the ground that the amount of land zoned for apartment use is insufficient to satisfy the municipality's "fair share" obligation. If the challenger is successful, the municipality should nevertheless be given the opportunity to determine whether the challenger's proposed development meets the applicable unchallenged aspects of the municipality's zoning ordinance which were in existence at the time of the challenge.⁸⁸ The court may disregard the municipality's land use restrictions only if, and to the extent that, the court has determined them to be invalid.⁸⁹

For a successful challenger to be entitled to site-specific relief, it is necessary that his development comply with unchallenged restrictions,

87. See *Casey v. Zoning Hearing Bd.*, ___ Pa. ___, ___, 328 A.2d 464, 469 (1974):

[W]e are not justified in ordering the immediate issuance of this building permit when the right thereto is conditioned on other prior approvals which have not been given. We cannot say that the appellee is entitled to the building permit, as a matter of right, upon successful challenge to the zoning ordinance. Rather, he must satisfy the requirements of the other sources of control (i.e., subdivision controls, building codes, etc.) before such permit may issue.

88. This general situation is presented under the facts of *Township of Willistown v. Chesterdale Farms, Inc.*, ___ Pa. ___, 341 A.2d 466 (1975). The Pennsylvania court ruled that the township's zoning ordinance was invalid "in that it does not provide for a fair share of the township acreage for apartment construction." ___ Pa. at ___, 341 A.2d at 468. The court went on to grant the following relief:

We direct that zoning approval for appellee's tract of land be granted and that a building permit be issued given appellee's compliance with the administrative requirements of the zoning ordinance and other reasonable controls, including building, subdivision, and sewerage regulations, which are consistent with this opinion.

___ Pa. at ___, 341 A.2d at 468-69.

The court's language (especially its reference to "zoning approval") is less than precise and left both the developer and the township uncertain as to the relief to which the developer was entitled. The developer has taken the position that, if it complies with all applicable non-zoning restrictions, it is entitled to a building permit which would allow apartment construction at the density set forth in its plans. The township, on the other hand, contends that the developer is subject to the more restrictive density limitations for apartment construction which are contained in the township's ordinance. Interview with Lawrence E. Wood, attorney for Chesterdale Farms, Inc., and Robert J. Shenkin, attorney for the Township of Willistown.

89. Section 11011 and the *Ellick* decision are ambiguous on this point. Section 11011 empowers a court to order the challenger's development "approved as to all elements." PA. STAT. ANN. tit. 53, § 11011 (1972). The language should not be construed as authority to order approval of those elements which are not in compliance with unchallenged existing restrictions. So also, the court in *Ellick* stated that it is "the function of the court to pass upon the reasonableness of the restrictions present in the record." 17 Pa. Cmwlth. at 416, 333 A.2d at 247. This language should not be viewed as authorization for a court to pass upon the "reasonableness" of existing restrictions which have not been challenged.

but compliance with such restrictions may not be sufficient to entitle the challenger to site-specific relief. Several Pennsylvania decisions suggest that compliance with zoning and non-zoning restrictions in effect at the time of the developer's challenge is sufficient to entitle the challenger to site-specific relief,⁹⁰ but such a *per se* rule, although simple to apply,⁹¹ will not produce desirable results in all cases.

First, such a rule does not require compliance with restrictions which were not in existence at the time of the challenge but which were part of a "good faith" post-challenge amendment. If such an amendment has been adopted by the municipality, a successful challenger should not receive site-specific relief which is inconsistent with the unchallenged aspects of that amendment.

Second, such a rule fails to deal sensibly with the situation in which the successful challenger seeks to undertake high-density development on land that is unsuitable for such development. Suppose, for example, that the land in *Casey* had been zoned for low-density agricultural uses and constituted a major aquifer recharge area. The *per se* rule cannot be interpreted as requiring compliance with the *use* restriction which was in effect at the time of the challenge because, if it did, there would never be any developer challenges.⁹² A developer would never challenge a zoning ordinance if he could not expect to use his land in a way which differed from the use permitted at the time of his challenge. On the other hand, the successful challenger should not always be permitted to proceed

90. In *Casey* itself, the court directed that "the building permits applied for 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." — Pa. at ___, 328 A.2d at 469-70 (emphasis added). In the *Chesterdale Farms* decision the majority did not direct themselves to this specific issue but Justice Roberts, in a concurring opinion, stated that: "[A]ppellee is entitled to a building permit upon compliance with 'all administrative requirements [e.g. subdivision controls, building codes, etc.] of the zoning ordinance in effect on the date of the original application' which are not unconstitutional. *Casey v. Zoning Hearing Board*, ___ Pa. ___, 328 A.2d 464, 469-70 (1974)." — Pa. at ___, 341 A.2d at 471.

91. All that would be necessary would be for the court to remand in order to give the appropriate agency an opportunity to determine whether the challenger's development complied with the existing restriction. If the agency determined that there had not been compliance, the court (having retained jurisdiction) could review the determination. Disputes as to the issue of compliance would probably be infrequent and would not present complex issues for judicial review.

92. In Pennsylvania, at least, it is clear that a developer who initiates exclusionary zoning litigation need not challenge the zoning ordinance as it applies to his property. His challenge is to the entire zoning ordinance. *See, e.g., Casey v. Zoning Hearing Bd.*, ___ Pa. ___, ___ n.11, 328 A.2d 464, 468 n.11 (1974). Therefore, it could be argued that the use restriction applicable to a challenger's property is an unchallenged existing restriction which should limit any site-specific relief granted to the challenger.

with his proposed use when such use might cause environmental harm.

Third, the existing restrictions rule fails to deal with the situation in which high-density use of the developer's land might be suitable but certain aspects of the developer's plans are unreasonable. Suppose, for example, that the developer in *Casey* had plans for apartment development which called for a density of 40 units per acre. It might be reasonable for the developer's land to be developed at a density of 20 units per acre but must the developer be allowed to develop at the higher density specified in his plans simply because there were no existing density restrictions for apartment uses at the time he commenced his challenge?

These not uncommon situations demonstrate that a challenger's proposed development should not always be considered to be "reasonable" simply because it complies with existing restrictions.⁹³ A more sophisticated standard of reasonableness is necessary.

2. Defining the Standard of Reasonableness

If the existing restrictions rule is inadequate, there are a number of alternative ways to determine whether a successful challenger's development is "reasonable."

First, the municipality could be given the opportunity, after its ordinance has been determined to be invalid, to adopt new restrictions which would be applicable to the challenger's proposed development and which would enjoy the usual presumption of validity. The challenger would have the opportunity to prove that such new restrictions are not "reasonable" because they are exclusionary, arbitrary or confiscatory.

Second, the municipality could be given the opportunity to adopt new restrictions which would be applicable to the challenger's development but such new restrictions would not enjoy the above presumption. Rather, the court would be required to make a *de novo* determination that such restrictions were "reasonable." In making this determination, the court would take into account the various considerations which underlie the adoption of land use restrictions—the topography of the developer's land, the availability of public water and sewerage, the nature of abutting roads, to name a few.

Third, the court itself could determine whether the challenger's plans

93. PA. STAT. ANN. tit. 53, § 11011 (1972) contemplates that there may be circumstances in which a court, in fashioning site-specific relief, should go beyond existing restrictions and refer the matter to the appropriate municipal agency for the "adoption of alternative restrictions."

for development are “reasonable.” This approach would actually require two reasonableness determinations: whether high-density development on the challenger’s land is reasonable and, if so, whether the sites selected by the challenger are reasonable. The former determination would require the court to consider the proximity of the challenger’s land to schools and other public facilities, the availability of public water and sewers, the adequacy of abutting roads to handle additional traffic, and various other matters.

Fourth, the court itself could focus upon the challenger’s plans for development, as above, and determine whether the plans are “reasonable” solely in terms of their potential environmental impact. The developer’s plans would be “reasonable” if they would not cause substantial environmental damage.

The first and second approaches give the municipality an opportunity to adopt new restrictions which would then be subject to judicial review. Certainly, providing the municipality with an opportunity to adopt new restrictions makes sense when the municipality has no restrictions which are applicable to the kind of development proposed by the challenger. Such is the situation when a municipality’s ordinance is declared to be invalid because of its failure to make any provision for a particular use.⁹⁴

On the other hand, once the municipality is given an opportunity to adopt new restrictions, the likelihood is great that such restrictions will either prohibit altogether the use contemplated by the challenger (by zoning land other than the challenger’s for such use) or limit certain aspects of the challenger’s proposed development (density, for example) more severely than was contemplated by the challenger. In either situation the challenger will be forced to accept the new restrictions or seek judicial review. Under the first approach, if the challenger seeks judicial review he will carry a heavy burden of proof—in effect, he must institute a new challenge. Under the second approach, there is no presumption that the new restrictions are valid, but the court is required to consider factors outside its usual area of competence. Arguably, the

94. In *Ellick v. Board of Supervisors*, 17 Pa. Cmwlth. 404, 333 A.2d 239 (1975), the court held that the municipality’s ordinance was invalid because it failed to make any provision for townhouses. However, rather than referring the matter back to the municipality for the adoption of restrictions relating to townhouses (*e.g.*, set-back requirements, density), the court said that it would be appropriate to subject the challenger’s plans to “all of the other zoning regulations and provisions of the ordinance applicable to residential usage insofar as they are reasonably adaptable to townhouses.” *Id.* at 417, 333 A.2d at 247. See note 81 *supra*. It is difficult to conceive how regulations adopted for other forms of residential usage (*e.g.*, single family) could be “reasonably adaptable to townhouses.”

state legislature could not require the courts to make a *de novo* determination of the reasonableness of particular zoning restrictions because such a determination is not justiciable in character.⁹⁵

Both the third and fourth approaches deny a municipality the opportunity to adopt new restrictions and instead require the court to focus upon the reasonableness of the challenger's plans for development.⁹⁶ The third approach shares, to some extent, the weakness of the second in requiring the court to consider matters outside its usual area of competence. Since the court would be focusing upon the reasonableness of specific plans rather than the reasonableness of new municipal restrictions, the court's inquiry is more particularized under the third approach. Nevertheless, the court would still be required to conduct an extensive and complex inquiry.

The fourth approach—defining reasonableness in terms of the proposed development's environmental impact—would require a court to determine whether development in accordance with the challenger's plans would cause substantial environmental damage. This is not an easy determination but one which courts have long made.⁹⁷ Because this approach increases the likelihood that a successful challenger will receive site-specific relief, it does not act as a disincentive to developer-

95 There is at least a question as to whether state legislation could validly impose upon state courts the obligation to make a *de novo* determination of the "reasonableness" of provisions in a municipal zoning ordinance. Just as Congress cannot constitutionally impose upon federal courts the obligation to perform tasks that are outside of the judicial power, many state constitutions can be interpreted to impose similar restrictions upon state legislatures. For example, in *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699 (1959), the court held that a provision of a Texas urban renewal law which required a *de novo* judicial determination on the question of whether an area was in fact a slum violated the separation of powers provided for in the Texas Constitution by imposing a nonjusticiable task upon the Texas state courts. See *Town of Beloit v. City of Beloit*, 37 Wis. 2d 637, 155 N.W.2d 633 (1968).

96. For a court to apply this approach it would be necessary to require a developer-challenger to submit his plans for development to the court. There is such a requirement in Pennsylvania. PA. STAT. ANN. tit. 53, § 11004(2)(c) (1972). For a court to make the kind of determination which is required under either the third or fourth approach, the submitted plans would probably have to be more detailed and specific than that which is required under § 1004(2)(c) of the Pennsylvania Municipalities Planning Code, *id.* For either of these approaches to work, a court would have to give a successful challenger an opportunity to draw up detailed plans which would allow the court to make a determination of their "reasonableness." This is somewhat cumbersome but it probably could be expected that, in a significant number of cases, the successful challenger and the municipality would be able to reach an agreement as to the kind of development which the challenger could undertake and therefore would not impose upon the court the burden of determining whether the developer's plans are "reasonable."

97. Courts have long been required to make such determinations in private and public nuisance litigation. See generally D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT LAW 289-92 (1971).

challengers. It grants the developer-challenger the maximum relief which he could reasonably hope to obtain.

If a jurisdiction is going to limit exclusionary challenges to those which are initiated by developers, it must adopt a policy of site-specific relief which does not deter such challenges. In addition, such a policy should not impose upon the courts an obligation to make unduly complex and burdensome determinations. The fourth approach is thus preferable. Arguably this approach is too limited in defining the circumstances under which site-specific relief should be denied; it prevents development which is "harmful" but not that which is "irrational." But now that the substantive law of exclusionary zoning has been outlined by the courts, the municipalities are under an obligation to plan and zone in accordance with that substantive law. If they do so, they should have no reason to fear developer challenges and "irrational" site-specific relief.⁹⁸

CONCLUSION

It has been suggested that those courts which have refused to entertain nonresident-initiated exclusionary zoning litigation have done so because they are reluctant to grant the kind of sophisticated, far-ranging relief which is sought in such litigation. Fashioning relief may not be as troublesome in developer-initiated site-specific litigation, but it is not without difficult conceptual and practical problems.

The Pennsylvania courts—having barred nonresident challenges of exclusionary zoning ordinances—are now facing and resolving the problem of relief in developer-initiated litigation. The Pennsylvania Supreme Court, however, has imprecisely dealt with the problem of whether a municipality may "zone around" a developer-challenger—either before or after a declaration that the municipal ordinance is invalid. Judicial interpretation of the 1972 amendments to the Pennsylvania Municipalities Planning Code, which clearly empower the courts to grant site-specific relief to the successful developer-challenger, has given no clear indication of when and to what extent such relief is appropriate. Site-specific relief granted on the basis of the environmental impact of the proposed development would neither burden the courts with decisionmaking outside judicial competence nor discourage developer challenges to exclusionary zoning practices.

98. There is no reason to fear if courts give effect to "good faith" amendments by a municipality in response to new declarations of substantive exclusionary zoning law. If, however, the *Casey* approach of disregarding such amendments is followed there is a real danger that the granting of site-specific relief under this fourth approach would bring about "irrational" development.