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Procedure Under the Pennsylvania Municipalities Planning Code

*Lenard L. Wolffe**

A series of recent decisions by appellate courts in Pennsylvania has arisen involving the procedures available in zoning cases under the Pennsylvania Municipalities Planning Code (MPC).[1] This article will detail those procedures, in light of the historical development in the field of zoning, and offer practical suggestions for the benefit of the practitioners, solicitors, local governing bodies, zoning boards and planning boards which must function under these procedures.

There are essentially eight ways to raise a zoning case in Pennsylvania. Directly or indirectly, each is based upon statutory authority. Consequently, every procedural problem in a zoning case is a matter of statutory construction in the first instance. Six of the eight procedural means of raising a zoning case involve the exhaustion of an administrative remedy;[2] two do not.[3]

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1. Pa. Stat. Ann. tit. 53, §§ 10101-11202 (1972).

2. Prior to the MPC, the doctrine of exhaustion of administrative remedy as the exclusive means of determining zoning questions had become firmly ensconced in Pennsylvania law and was virtually uniformly adhered to. *See* Jacobs v. Fetzer, 381 Pa. 262, 112 A.2d 356 (1955).

3. These two means of raising a zoning case, namely the right to a writ of mandamus under certain limited circumstances and the right to bring suit to test the *procedural* regularity of a zoning ordinance, avoid the administrative process.

The right to mandamus is a direct carryover from pre-MPC law. *See* Gallagher v. Building

The eight ways to raise a zoning case are:

(1) By appeal, by any party aggrieved, from an administrative decision to the zoning hearing board under the authority contained in Sections 10909,[4] 10912,[5] and 10913[6] of the MPC;[7]

Inspector, 432 Pa. 301, 247 A.2d 572 (1968).

Under pre-MPC law, by reason of the authority contained in the codes of both second class counties and first class townships, the right existed to test a zoning ordinance for its procedural regularity by bringing a complaint in quarter sessions court within thirty days from the passage of the ordinance. The matter now goes to the court of common pleas and the time has been changed to thirty days from the effective date of the ordinance.

4. PA. STAT. ANN. tit. 53, § 10909 (1972) provides:

> The board shall hear and decide appeals where it is alleged by the appellant that the zoning officer has failed to follow prescribed procedures or has misinterpreted or misapplied any provision of a valid ordinance or map or any valid rule or regulation governing the action of the zoning officer. Nothing contained herein shall be construed to deny to the appellant the right to proceed directly in court, where appropriate, pursuant to Pa.R.C.P., sections 1091 to 1098 relating to mandamus.

Id. (footnote omitted).

5. PA. STAT. ANN. tit. 53, § 10912 (1972) provides:

> The board shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. Subject to the provisions of section 801, the board may by rule prescribe the form of application and may require preliminary application to the zoning officer. The board may grant a variance provided the following findings are made where relevant in a given case:
>
> (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;
>
> (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;
>
> (3) That such unnecessary hardship has not been created by the appellant;
>
> (4) That the variance, if authorized, will not alter the essential character of the neighborhood, or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and
>
> (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.
>
> In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance.

Id. (footnote omitted).

6. PA. STAT. ANN. tit. 53, § 10913 (1972) provides:

> Where the governing body in the zoning ordinance, has stated special exceptions to be granted or denied by the board pursuant to express standards and criteria, the board

(2) By a landowner's "challenge" to the substantive validity of a zoning ordinance or map, either with or without an adverse administrative decision, brought before the zoning hearing board under Section 10910;[8]

(3) By a non-landowner's "challenge" to the substantive validity of a zoning ordinance or map by reason of the authority contained in Section 11005;[9]

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shall hear and decide requests for such special exceptions in accordance with such standards and criteria. In granting a special exception, the board may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

7. Hereinafter, all references to section numbers are to those contained in the MPC.

8. PA. STAT. ANN. tit. 53, § 10910 (1972) provides:

The board shall hear challenges to the validity of a zoning ordinance or map except as indicated in section 1003 and subsection (1) (b) of section 1004. In all such challenges, the board shall take evidence and make a record thereon as provided in section 908. At the conclusion of the hearing, the board shall decide all contested questions and shall make findings on all relevant issues of fact which shall become part of the record on appeal to the court.

Id. (footnotes omitted).

9. PA. STAT. ANN. tit. 53, § 11005 (1972) provides:

Persons aggrieved by a use or development permitted on the land of another by an ordinance or map or any provision thereof who desire to challenge its validity on substantive grounds shall first submit their challenge to the zoning hearing board for a report thereon under section 910.

The submission to the board shall be governed by the following:

(a) The aggrieved person shall submit a written request to the board that it hold a hearing on the challenge. The request shall contain a short statement reasonably informing the board of the matters that are in issue and the grounds for the challenge.

(b) The request shall be submitted within the time limitations prescribed by section 915. In order not to unreasonably delay the time when a landowner may secure assurance that the ordinance or map under which he proposes to build is free from challenge, and recognizing that the procedure for preliminary approval of his development may be too cumbersome or may be unavailable, the landowner may advance the date from which time for any challenge to the ordinance or map will run under section 915 by the following procedure: (i) The landowner may submit plans and other materials describing his proposed use or development to the zoning officer for a preliminary opinion as to their compliance with the applicable ordinances and maps. Such plans and other materials shall not be required to meet the standards prescribed for preliminary, tentative or final approval or for the issuance of a building permit so long as they provide reasonable notice of the proposed use or development and a sufficient basis for a preliminary opinion as to its compliance. (ii) If the zoning officer's preliminary opinion is that the use or development complies with the ordinance or map, notice thereof shall be published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall include a general description of the proposed use or development and its location, by some readily identifiable directive, and the place and times where the plans and other materials may be examined by the public. The favorable preliminary opinion of the zoning officer shall be

(4) By a landowner filing a "curative amendment" before the local governing body[10] together with the appropriate documents alleging the substantive invalidity of a zoning ordinance or map and requesting a hearing under Sections 10609.1[11] and 11004(1)(b);[12]
(5) By an appeal to the zoning hearing board from the grant or denial of a planned unit development tentative or final approval;
(6) By an appeal from conventional subdivision actions (non-planned residential development) under Sections 10507[13] and

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deemed to be a preliminary approval under section 915 and the time therein specified for commencing a proceeding with the board shall run from the time when the second notice thereof has been published.

(c) The board shall hold a hearing upon the aggrieved person's request pursuant to section 910, commencing not later than sixty days after the request is filed. If a hearing has been held by the governing body covering the same matters, at which a stenographic record has been taken, the board shall upon motion of any party accept said record as the record in the case before the board but the board shall not be precluded from taking additional evidence, unless such evidence ought to be excluded under section 908(6).

After submitting his challenge to the board, as provided in clauses (a) and (b), any party aggrieved may take the same to court by appeal filed not later than thirty days after notice of the report of the board is issued.

Id. (footnotes omitted).

10. *E.g.*, borough councils, boards of supervisors, boards of commissioners.

11. PA. STAT. ANN. tit. 53, § 10609.1 (1972) provides:

A landowner who desires to challenge on substantive grounds the validity of an ordinance or map or any provision thereof, which prohibits or restricts the use or development of land in which he has an interest may submit a curative amendment to the governing body with a written request that his challenge and proposed amendment be heard and decided as provided in section 1004. The governing body shall commence a hearing thereon within sixty days of the request as provided in section 1004. The curative amendment shall be referred to the planning agency or agencies as provided in section 609 and notice of the hearing thereon shall be given as provided in section 610 and in section 1004. The hearing shall be conducted in accordance with subsections (4) to (8) of section 908 and all references therein to the zoning hearing board shall, for purposes of this section be references to the governing body.

Id. (footnotes omitted).

12. PA. STAT. ANN. tit. 53, § 11004(1)(b) (1972) 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:

. . . .

(b) To the governing body together with a request for a curative amendment under section 609.1.

Id. (footnote omitted).

13. PA. STAT. ANN. tit. 53, § 10507 (1972).

10508[14] either directly to the court of common pleas (at the landowner's option) or to the zoning hearing board (non-landowners may appeal in such situations only to the zoning hearing board);

(7) By a writ of mandamus directed to the proper person or body presumably after an adverse decision;

(8) By appeal directly to the court of common pleas within 30 days of the effective date of an ordinance alleging procedural irregularity under Section 11003.[15]

I. THE PRE-MPC BACKGROUND AND EXPERIENCE

The MPC was designed to cure many of the problems that had crept into land-use law not the least of which were those created by procedural difficulties. The most seriously disadvantaged person under the pre-MPC law was the landowner. For example, there was no way to attack the substantive validity of either a zoning ordinance or the mapping process which so restrictively zoned land as to make it virtually unsalable. The common circumstance was to zone in the most restrictive possible category so as to "freeze" the land and thus allow the local governing body to pass on each proposal on an ad hoc basis. In that situation, the landowner who wanted to make a different use of his land required a special act of rezoning. This was, of course, completely contrary to the concept of rational planning. In addition, it gave rise to opportunities for favoritism and irrational decision making. Like it or not, most local governing bodies responded largely to the "head count" principle in making their determinations. That is, they counted up the number of people who were in favor of the rezoning application and the number of people who were against it and decided the matter on that basis. Other highly restrictive zones were created, such as massive industrial zones, for which there was no reasonable likelihood of use in the foreseeable future.

In order to test the substantive validity of such zoning practices, the landowner was required to present very finite plans (including

14. PA. STAT. ANN. tit. 53, § 10508 (1972).

15. PA. STAT. ANN. tit. 53, § 11003 (1972) provides:

> Questions of an alleged defect in the process of enactment or adoption of any ordinance or map shall be raised by an appeal taken directly from the action of the governing body to the court filed not later than thirty days from the effective date of the ordinance or map.

final engineering and architectural plans), make an application, be refused by the zoning administrative officer or building inspector, take his appeal to the zoning board of adjustment and thence to court. The cost of this was considerable, the likelihood of success small, and definitive relief could only be achieved one parcel at a time. Frequently, the municipality did not rezone the balance of the tract, thus forcing the landowner to utilize the same procedure for each parcel. The legal costs and the extensive amount of time involved made such actions highly unprofitable and consequently impractical. If the landowner elected to assault the entire scheme of zoning and if he was successful, the likely result was that the matter would be remanded until a new scheme of zoning was enacted. Usually the landowner who initiated the litigation was the one least likely to be treated deferentially by the local authorities. Thus, he was placed in a position of simply going through an academic exercise without definitive relief.

The MPC was designed to prevent such evils and to make it possible for the landowner to successfully challenge zoning ordinances and mapping so as to bring some rationality into the decision-making process. The MPC is totally geared to giving definitive relief so that the landowner has a substantial opportunity to recoup the cost and time involved in litigation by winning his case and making his land that much more valuable. It also serves to give the landowner some bargaining chips so that in the process of honest negotiation, the local governing authorities cannot simply sit back and ignore him. This is done by allowing the landowner to obtain legal sanction for his plans in the event that his allegations of invalidity are sound.

The contrast between Pennsylvania, which employs this concept, and those states which do not have provisions for definitive relief is profound. For example, in most states exclusionary zoning is prohibited. Yet, very few landowners bring suit to have such ordinances declared invalid. The reason is that a landowner may go through the entire process and the courts may declare the ordinances and the mapping unconstitutional. They will then order the local governing authority to draft a new map and ordinance conforming to the court's opinion. This leaves the landowner to the tender mercies of the people he has just defeated in court. Obviously, they are not of a mind, in most instances, to reward him or to accept his point of view. Most frequently they will engage in what is known as "retributory zoning" and place the suing landowner in the same or even

worse position than that in which he was before. In those states, and in the exclusion suits in particular, the members of the local governing body will actually benefit by a court test since the matter will drag on for several years, wasting valuable time. As a result of this process, there is little if any effective control over local authorities by the courts and little if any reason for local authorities to obey court mandates.

One economic consequence of irrational and uneconomic zoning practices is that of pushing the cost of land (and consequently housing) inexorably upward so that only the very wealthy can afford it. The tendency toward large-lot zoning and the virtual dearth of land zoned for middle and high densities have created a situation whereby many suburban communities have no room for middle or lower income groups. This is particularly true in the bedroom communities which ring the large cities and has resulted in the term "white noose." It is not, however, a racial matter at all, but one of the economics of land-use. These economics are profoundly affected by zoning practices, and these practices have been manipulated in the past by the municipalities surrounding the cities to foster results which conformed with the desires of the constituents of those communities.

The MPC procedures and the Pennsylvania court cases construing such practices are designed to make it easier and considerably less expensive to strike down such unconstitutional, invalid and irrational zoning acts and ordinances. At the same time, the traditional zoning approach concerning the sanctity of use and bulk restrictions has been reinforced by the codification of the requirements for a variance. These requirements have been made somewhat more rigid so that the integrity of a rational, reasonably economical, and realistic zoning plan has been strengthened considerably under the MPC. Greater reliance can be placed upon existing zoning restrictions by consumers and others if the entire scheme of zoning meets the court tests. This is a significant advance.

II. The Traditional Cases and the New Procedure

In terms of the number of cases, the most common is the traditional zoning appeal from the refusal of a zoning administrative officer or building inspector to issue a permit, involving an appeal to the zoning hearing board and thence to the court of common pleas. This procedure has remained intact under the MPC. The

traditional duty of the board to hear disputed questions involving the construction or application of dimensional requirements is now contained in Section 10909.[16] That too remains substantially as prior to the MPC.

The term "unnecessary hardship" which gave the old zoning boards of adjustment so much difficulty has been codified in the MPC in Section 10912.[17]

The special exception cases which formerly vexed those who deal with zoning questions are now codified in Section 10913.[18] Clarity has emerged in the special exception situation in that special exceptions are now what they were originally intended to be. Originally, a special exception was a use or dimensional requirement which could be had if certain very specific requirements were met. For example, in an area zoned for single family dwellings on one acre minimum tracts, a special exception could be had to reduce the one acre to one-half acre if public water and sewage were available. Under the MPC, the special exception now requires that fairly specific standards be met, which, if met, should result in the granting of the special exception.

Cases presently brought under Sections 10909, 10912, and 10913 very closely follow the law prior to the MPC. Under the pre-MPC law, it was clear that the old zoning boards had no original jurisdiction and could only act on appeal from the act of a ministerial officer. It is important to note that now, as then, the zoning board has no original jurisdiction under these sections; the board can only act on appeal after some definitive action by the zoning officer.[19] The MPC, however, in part, did away with this requirement in the curative and challenge provisions. The zoning hearing board now has original jurisdiction in the challenge type of case.

This procedural change has produced some confusion in that the ordinary variance type of case has been improperly intermingled with a "challenge."[20] The statutory requirements for a "challenge" are expressly laid down in Sections 10910[21] and 11005[22] and it would be difficult to follow the mandates of those provisions and confuse

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16. PA. STAT. ANN. tit. 53, § 10909 (1972).
17. PA. STAT. ANN. tit. 53, § 10912 (1972).
18. PA. STAT. ANN. tit. 53, § 10913 (1972).
19. Pittsburgh Outdoor Advertising Co. v. Clairton, 390 Pa. 1, 133 A.2d 542 (1957).
20. Phelan v. Zoning Hearing Bd., 339 A.2d 612 (Pa. Commw. 1975).
21. PA. STAT. ANN. tit. 53, § 10910 (1972).
22. PA. STAT. ANN. tit. 53, § 11005 (1972).

the two types of cases. The ordinary variance situation is one in which relief is sought from some requirement because the individual property is unique in a particular respect. It subsumes that the ordinance and the mapping process are quite valid. It is the unique feature of the property itself which, for one reason or another, makes it virtually impossible to use the property in the manner in which the bulk or use requirements state it must be used. In a challenge case, however, the broad aspects of the ordinance or mapping are under attack as they apply to all of the properties subject to that particular type of zoning.[23]

III. The New Procedures: Challenge and Curative

A. *Challenge*

As seen, Section 10910 provides that the board has original jurisdiction and that a landowner may challenge the validity of the ordinance or map; a non-landowner may similarly challenge by reason of the provision set forth in Section 11005. The statutory requirements are explicit and should be rigidly adhered to.[24]

Procedurally, the landowner must direct a letter to the zoning hearing board which contains the following:

1. A request for a hearing. In this instance, it might be well to frame the letter as a request for a hearing and mention the statutory authority under which it is sought (Section 11004).[25]

2. The request for a hearing must contain a short statement "reasonably" informing the board of the grounds for the challenge and the matters in issue. Here it might be well to specify the sections of the ordinance or the map which impinge upon what the landowner wishes to do, and why.

3. The challenge must be accompanied by plans "and other material" describing the use or development which the landowner proposes instead of that which is permitted by the ordinance or map which he is challenging. Under the challenge section of the MPC, the plans need not be highly detailed; in fact, something in the nature of a sketch plan is usually sufficient. The plans need only

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23. *See* Shuttle Dev. Corp. v. Township of Upper Dublin, 338 A.2d 777 (Pa. Commw. 1975), and cases cited therein.

24. Ralph W. Connelly, Inc. v. Board of Supervisors, 340 A.2d 597 (Pa. Commw. 1975).

25. Pa. Stat. Ann. tit. 53, § 11004 (1972).

reasonably inform the board of the use and bulk which the challenging party wishes to make of the land or building, and provide the board with some basis for evaluating the challenge. The last sentence in Section 11004(2)(c)[26] makes it clear that a landowner could, should he so elect, draw quite a finite plan to an explicit level of detail, obtain refusal from the zoning officer for that plan and proceed on challenge to use that particular plan as his basis for compliance with these requirements.

Because the orderly flow of legal business seldom follows the manner in which statutes are drafted, the challenges (and curatives for that matter) frequently provide the same information as indicated above but not necessarily in the order outlined above.

The following is an outline for the aforementioned "challenge" letter which, it is suggested, would meet all of the statutory requirements and nevertheless fit within the normative behavior of most lawyers practicing in this field. The letter should be directed to the zoning hearing board chairman, secretary and members, sent by certified mail, return receipt requested, setting forth the following facts:

(a) "Please be advised that this office represents Mr. *X* (or the *XYZ* Corporation) who is (or which is) landowner as defined by Section 10107(12) of the Pennsylvania Municipalities Planning Code of certain lands situate or encompassed in the following application.

(b) "Pursuant to the provisions of Section 11004 and Section 10910 of the Municipalities Planning Code, the landowner challenges the validity of Sections ____ and ____ of the zoning ordinance of the township/borough on grounds that the same (here specify the grounds for the challenge as to the ordinance or map)."

(c) The statement which is to inform the board of the grounds for the challenge could well contain specifics such as:

"The present zoning ordinance makes no provision for multifamily dwellings anywhere in the township, which is improper as being exclusionary," or "the section of the zoning ordinance which permits only condominiums in certain districts is void since it is beyond the power of the local authorities to regulate the manner of ownership.

26. The last sentence of PA. STAT. ANN. tit. 53, § 11004(2)(c) (1972) reads: "Nothing contained herein shall preclude the landowner from first seeking a final permit or approval before submitting his challenge to the board or governing body."

(d) "We enclose herewith plans and other materials which describe the use to which the landowner wishes to put the land in lieu of the use or development presently permitted by the ordinance (here some description of the plan and other material forwarded should be set forth which facilitates identification of the enclosures)."

(e) This should be followed by a request for the hearing which might take the following form:

"On behalf of the above-mentioned landowner, request is hereby made for a hearing and a report thereon pursuant to the provisions of the Pennsylvania Municipalities Planning Code."

The purpose of these requirements becomes quite clear in light of the express purpose of the MPC. The statement of the grounds for challenge and the requirement for setting forth the matters in issue allow the board and any other party in interest to determine the nature of the case being brought and serve as a pleading. The plans and other materials, of which more will be said later in the text dealing with curatives, set the controversy in the context of a realistic issue where alternatives can readily be ascertained. The plans and other materials also set the stage for definitive relief in the event that the landowner is successful. The plan itself and the details spelled out in the other materials can form the basis of a very definitive order.

B. *Curative*

The curative amendment proceeding in Pennsylvania is one of the two procedures that are available to a landowner to test the validity of a general ordinance, any particular section thereof, or the mapping process.[27] As in the challenge procedure, the requirements set forth in the MPC[28] must be followed meticulously. The failure to comply with any one of them may result in dismissal.[29] The reasoning here seems to be consonant with the overall purpose which is to allow a landowner to make a complaint to the local governing body that something in the ordinance is substantively invalid and to give

27. Penn Township Bd. of Supervisors v. DeRose, 339 A.2d 859 (Pa. Commw. 1975); Robin Corp. v. Board of Supervisors, 17 Pa. Commw. 386, 332 A.2d 841 (1975); Township of Neville v. Exxon Corp., 14 Pa. Commw. 225, 322 A.2d 144 (1974).

28. The procedural requirements are established in PA. STAT. ANN. tit. 53, § 10609.1 (1972).

29. Ralph W. Connelly, Inc. v. Board of Supervisors, 340 A.2d 597 (Pa. Commw. 1975); Phelan v. Zoning Hearing Bd., 339 A.2d 612 (Pa. Commw. 1975).

the governing body an opportunity to correct that substantive deficiency. In order to set this in motion, the landowner must follow all of the steps outlined above for a "challenge" *and*, additionally, must submit a proposed form of amendment which would cure the alleged defect. It is important to note, of course, that under Section 11004 the curative proceeding is addressed to the local governing body, not to the zoning hearing board. Substantially the same format as that outlined above in terms of a request should be made except that the curative should be forwarded along with the other documentation. Obviously, it should be sent to the local board of commissioners, board of supervisors, or borough council. Once this is done, the landowner has effectively served notice on the local governing body that he believes its ordinance is defective and wants a hearing, a determination, and definitive relief.

The filing of a curative amendment triggers an interesting shift in the function of the local governing body under the MPC, converting the local governing body into a quasi-judicial forum from which an appeal will lie.[30]

The purpose of compelling this material and strict adherence to the statutory requirements is, in reality, to allow the landowner to put the local governing body on notice that he feels something is grossly wrong and to give that body an opportunity to correct it. The local governing body has the option of enacting the curative as proposed, but it need not do so. That is, if the local authorities find that there is merit to the allegation, they have the right not to enact the suggested (curative) ordinance, but to cure using another ordinance—provided it in fact cures.[31] However, the local governing body may not engage in retributory zoning and deprive the landowner of definitive relief and the fruits of victory.[32] The local governing body, having been converted into a quasi-judicial tribunal, should hold a full administrative hearing closely following the requirements set forth in Section 11004(2)(e) and (f).[33] The hearings

30. Board of Commissioners v. Beho Dev. Co., 332 A.2d 848 (Pa. Commw. 1975).

31. Ellick v. Board of Supervisors, 17 Pa. Commw. 404, 333 A.2d 239 (1975); *accord*, Appeal of Olson, 338 A.2d 748 (Pa. Commw. 1975).

32. Casey v. Zoning Hearing Bd., 328 A.2d 464 (Pa. 1974).

33. PA. STAT. ANN. tit. 53, § 11004 (2)(e), (f) (1972) provide:

(e) Notice of the hearing required by sections 609.1, 910, or 913.1, whichever is applicable, shall include notice that the validity of the ordinance or map is in question and shall give the place where and the times when a copy of the landowner's request, including the plans submitted pursuant to subsection (2) (c) and the proposed amend-

must be held within the time frame set out by the MPC and a decision rendered within the time permitted by the MPC.

As a practical matter, the failure or unwillingness of the local governing body to recognize that the ordinance or mapping is fatally defective puts them at some risk. If they recognize the danger under *Ellick v. Board of Superisors,*[34] they may choose to cure the defect by enacting either the curative amendment or an amendment other than that which was proposed. In taking the latter course, they maintain some degree of control provided that they do not pass one which would be retributory under *Casey v. Zoning Hearing Board.*[35] They may not pass an ordinance which fails to give reasonable relief nor may they enact an ordinance which imposes burdensome and unreasonable conditions on the successful landowner. It behooves municipalities to examine their ordinances carefully and to see that they are in conformity with existing statutes and case law. If the ordinance or mapping is in fact defective, the governing body acts in its own best interest in granting the landowner some relief. If the

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ments, if any, submitted under subsection (2) (d) may be examined by the public.

(f) The board or the governing body, as the case may be, shall hold a hearing upon the landowner's request pursuant to sections 609.1, 910, or 913.1, whichever is applicable, commencing not later than sixty days after the request is filed unless the landowner requests or consents to an extension of time.

34. 17 Pa. Commw. 404, 333 A.2d 239 (1975). If the ordinance is defective, the municipality is exposed to being compelled to permit the challenging landowner to proceed in accordance with his "plans and other materials." If the ordinance is shown to be improper "because it totally prohibits the use proposed by the challenging landowner, then the governing body *must* permit the challenging landowner to develop his land as proposed . . . ." 17 Pa. Commw. at 411, 333 A.2d at 244 (emphasis added).

Note, however, that the local governing body does not lose its general "police power" regulatory means, *i.e.*, safety measures, sewage regulation, and reasonable building requirements, but insofar as overruling planning design, the governing body can lose its ability to control use, bulk and location.

35. 328 A.2d 464 (Pa. 1974). The municipality may not cure the defect by passing an ordinance which technically cures, but which leaves the challenger "out in the cold," *i.e.*, by rezoning others but not the challenger. The motive here might be to punish the challenger for his effrontery and to discourage others from doing the same thing. Speaking of the term "retributory zoning," the Supreme Court of Pennsylvania noted:

> [T]he 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.*

328 A.2d at 468 (emphasis added).

The court went on to state that "an applicant, successful in having an ordinance declared unconstitutional, should not be frustrated in his quest for relief by a *retributory* township." *Id.* (emphasis added).

municipality fails to do that and on appeal the court finds that the landowner is correct, the court is obligated to determine then whether the plan that he submitted is unreasonable and, if not, to order its approval.[36] In short, if the municipality for political or other reasons refuses to recognize an essentially meritorious claim, it runs the risk of having the landowner's plan forced upon it, whereas, if it acts itself, it can still exercise a measure of control. It loses that limited potential for control, however, once the proceedings on curative are closed, for a municipality cannot attempt to amend a generally defective ordinance after that time.[37]

The curative amendment procedure is a landowner-limited route which is specifically procedurally circumscribed for the purpose of allowing a landowner to give a municipality notice of a complaint and of his intention to seek a hearing to correct a substantively defective matter in the ordinance or the map. It should only be used when the ordinance or map is virtually defective on its face.[38]

On appeal from an action involving a curative amendment to the court of common pleas, the court is no longer concerned with the curative amendment itself, for that is no longer a viable issue.[39] If the court finds that the ordinance is, in fact, defective, its function is then to determine whether or not the landowner's plan is "reasonable" and which elements of the plan for the proposed development should be approved so as to permit the landowner to proceed.[40] It is not the duty of the court to redesign or modify the plan, but merely to pass upon the reasonableness of the proposal presented to it upon that record.[41] The court can refer (remand) elements of the plan to the local governing body,[42] but cannot refer the question of any curative itself or the degree of relief to be granted. When such a plan is referred or remanded, however, it should be accompanied by a very specific court order delineating exactly what the local governing body is to find or do.[43]

36. Kaufman & Broad, Inc. v. Board of Supervisors, 340 A.2d 909 (Pa. Commw. 1975); Ellick v. Board of Supervisors, 17 Pa. Commw. 404, 333 A.2d 239 (1975).

37. Kratz v. Skippack Township, 339 A.2d 595 (Pa. Commw. 1975).

38. *See* Robin Corp. v. Board of Supervisors, 17 Pa. Commw. 386, 397-99, 332 A.2d 841, 848 (1975) (Crumlish, J., concurring).

39. Appeal of Olson, 338 A.2d 748 (Pa. Commw. 1975).

40. *Id.*

41. Ellick v. Board of Supervisors, 17 Pa. Commw. 404, 333 A.2d 239 (1975).

42. PA. STAT. ANN. tit. 53, § 11011(2) (1972).

43. As to referral, *see* Gorski v. Township of Skippack, 339 A.2d 624 (Pa. Commw. 1975). As to remand, *see* Kaufman & Broad, Inc. v. Board of Supervisors, 340 A.2d 909 (Pa. Commw. 1975).

It is highly unlikely that any significant litigation will develop after the court has referred plans back to the local governing body; the parties will have a tendency to work out an acceptable resolution based upon the specifics of the court order. As a consequence, the question of what is encompassed by a referral back to the local agency may be subject to a good deal of confusion. It is generally felt that the purpose of referring elements of the plan back to the local governing body is to ensure that *non-zoning* conditions are met in the plans. Since the MPC does not require detailed plans for either a challenge or a curative, it could well be that such elements as building code and fire code requirements, and water and sewage connections, which are normally part of the process of obtaining building permits, would not as yet have been complied with. It is suggested that these are the items to which the MPC addresses itself when it speaks of referring elements of the plan back to the local governing body. Most of these are ministerial acts. Others are engineering/architectural acts so nearly ministerial as to warrant classification as "quasi-ministerial."

Consequently, those items which deal with other than the broad zoning aspects of the case should be referred to the local governing body to see to it that compliance is achieved. The rationale for this is perfectly obvious—the local governing bodies are accustomed to processing such applications and the courts are not; the local governing bodies have the expertise to handle the matter, whereas the courts do not.

Some confusion has arisen because of the tendency to use the curative amendment procedure in lieu of the variance procedure. The two are distinct and in fact, mutually exclusive. In establishing these procedures as independent, the MPC merely acknowledged the generally accepted notions of the separation of powers. The distinction between the two is evidenced by the following:

(1) A variance case is heard by the zoning hearing board, which has exclusive jurisdiction to hear requests for variances and authority to grant relief under appropriate circumstances. In a curative amendment, the hearing is held by the local governing body, sitting specially as a quasi-judicial tribunal, which has no such authority.

(2) If the local governing body were to pass a curative amendnent or grant definitive relief on a small parcel which does not affect the overall scheme of zoning, it would approach "spe-

cial" or "conditional" legislation which is constitutionally impermissible.

(3) The allegations in a variance case are totally different from those in a curative case. In a variance case the validity and constitutionality of the ordinance and map are assumed, and it is asserted that there is some unique or peculiar hardship to the property itself which makes it impossible to comply with the regulations which are otherwise valid. In a curative proceeding the restrictions imposed by either the ordinance or the mapping, either particularly or as a general scheme, are themselves attacked as being substantively invalid.

(4) In a curative case, unless the ordinance or mapping is substantively defective, the local governing body has no power to grant definitive relief, and it is the failure to grant definitive relief that creates the cause or controversy which is appealed and upon which the court acts. This cause or controversy is the underlying bedrock of the court's jurisdiction.

Thus, as in many other fields of law, the questions of procedure subtly blend into questions of substance. In this instance, this blending is caused by the inextricable interlinkage which permeates all of the procedural provisions of the MPC in its thrust for definitive relief.

As a practical matter, this distinction seems to work out well. Generally, a curative proceeding is short (or should be) because the ordinance or mapping itself *upon its face* is under attack. This usually takes but a short time to put on the record. Extensive rulings with respect to the ordinance itself or the map are rarely required. After all, the ordinance *is* the ordinance and the official map *is* the official map and the simple offer of both of them as physical exhibits should suffice to make them a matter of record. Frequently the local governing body takes much more time with the plans and other materials than is necessary, although the issues are quite sharply drawn. If the local governing body attempts to hold down the propensity for speech making which frequently afflicts such hearings, usually these cases can be completed in one evening. It is rare that the local governing body needs to resort to the notes of testimony to come to its decision, although it may wish to have these for the filing of its formal findings of fact and conclusions of law.

Challenges, on the other hand, may take much more time and tend to create a much longer record with many potential issues and

so, perhaps, it is wiser to leave them to the zoning hearing boards. The boards are, theoretically at least, more familiar with the hearing, record-making and decision-making process than are governing bodies. The challenge proceedings are more likely to be used where there is a question of the net effect of the ordinance or mapping. This would virtually mandate that there be much more of a record and many more significant facts in contention.

Nevertheless, there is an area in which the procedures may well overlap. One of the problems that can easily be foreseen is that there will be many cases in which a portion of the facts, or all of the facts, fit under one or more of the categories involved. In that instance, the drawing of sharp lines between the various procedural routes presents a counter-productive trend. It is easy to envision a series of facts in which all three procedural avenues could be used for varying aspects of the case. At some point, counsel will be compelled to choose one of them. Confronted with the choice of whether to go variance, challenge, or curative, it may be difficult to predict how the courts will respond. One way to avoid this would be to apply the normal rules with respect to such situations as obtain in equity. Once one has obtained equity jurisdiction by reason of an acknowledged equity head, the court in equity will take jurisdiction of the entire matter and hear and decide all phases of the case to prevent a circuity of actions. This would seem to be equally applicable in cases arising under the MPC. Parties should not be forced to varying procedures and different tribunals hearing different aspects of the same case if for no other reason than that they might come to inconsistent results which would be legally supportable otherwise. The only exception to this would be the confusion which might occur in the variance versus curative procedures for the reasons previously discussed.

IV. Planned Residential Development and Conventional Subdivision Cases

Appeals by the *landowner*, from the grant or denial of conditions imposed upon planned residential development[44] applications and conventional subdivision controls, can go either to the zoning hear-

44. Hereinafter referenced as PRD. Planned residential development is governed by PA. STAT. ANN. tit. 53, §§ 10701-10712 (1972).

ing board or to the courts of common pleas at the option of the landowner under Section 11006.[45] The exception to this rule, as stated in the MPC, only involves questions of interpretation of the regulations, variances or special exceptions in which case the exclusive remedy is to the zoning hearing board.[46] The possibility of this arising in a PRD application or a conventional subdivision action is quite remote. In the ordinary course of events, PRD applications and their approvals, disapprovals or conditions are not likely to involve variance, special exception or interpretation questions. The same is true of conventional subdivision actions. Any other action taken by either the governing body or the planning agency (or their failure to act within the statutory period) could go on appeal directly to the court of common pleas for resolution or, at the option of the landowner, to the zoning hearing board.

On the other hand, the non-landowner is treated quite differently. Under Section 11007,[47] any complaint by a person aggrieved, other than a landowner, must first go to the zoning hearing board for determination.[48] It might seem at first blush that it is markedly unfair to treat the non-landowner and the landowner differently. As

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45. PA. STAT. ANN. tit. 53, § 11006 (1972) provides in part:

> (1) A landowner who desires to file a zoning application or to secure review or correction of a decision or order of the governing body or of any officer or agency of the municipality which prohibits or restricts the use or development of land in which he has an interest on the grounds that such decision or order is not authorized by or is contrary to the provisions of an ordinance or map shall proceed as follows:
>
> (a) From a decision of the governing body or planning agency under a subdivision or land development ordinance the landowner may appeal directly to court or to the zoning hearing board under section 913.1 in cases where that section is applicable. If the municipality provides a procedure, formal or informal, for the submission of preliminary or tentative plans an adverse decision thereon shall, at the landowner's election, be treated as final and appealable.
>
> (b) From the decision of the governing body or planning agency denying tentative approval of a development plan under section 709(3) or, if tentative approval has been granted, from any adverse decision on an application for final approval, the landowner may appeal directly to court or to the zoning hearing board under section 913.1 in cases where that section is applicable.

Id. (footnotes omitted).

46. PA. STAT. ANN. tit. 53, § 11006(1)(c), (d) (1972).

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

48. *See* Raum v. Board of Supervisors, 342 A.2d 450 (Pa. Commw. 1975); Northampton Residents Ass'n v. Northampton Township Bd. of Supervisors, 14 Pa. Commw. 515, 322 A.2d 787 (1974); Cablevision-Division of Sammons Communications, Inc. v. Zoning Hearing Bd., 13 Pa. Commw. 232, 320 A.2d 388 (1974).

Who has standing in such cases and who is a "person aggrieved" within the meaning of the MPC could well warrant a separate article.

a matter of fact, this is not so. In general, the landowner has more resources at his disposal and is seeking a conclusion of the controversy along defined legal lines. A non-landowner, on the other hand, generally has less enonomic resources and wants to obtain the advantage of some delay, if only to give himself an opportunity to study the problem with which he is confronted. The procedures were obviously designed to reduce the tendency toward litigation on the part of both types of parties commonly involved in zoning cases. The landowner-developer is not likely to go to court unless he is reasonably sure of his position, but will gladly go if he has a legitimate complaint. Comparatively, the non-landowner who is reluctant to spend time and money defending a difficult or untenable position will be able to obtain a sympathetic hearing before the zoning hearing board without expending as much time or money. Given the relative positions of the parties because of these procedures, there is a built-in incentive to compromise along rational lines.

One of the inequities of the pre-MPC law was that the non-landowner, usually protesting some kind of use or development, could profit enormously by delay and defeat legitimate proposals by engaging in protracted appeals or by threatening to do so. This practice was colloquially known as "sandbagging" and more legalistically described as keeping an applicant "in terrorem." Frequently the local municipal officials covertly aided and abetted this process, as by holding protracted zoning board hearings randomly scheduled over several months and by delaying the decision for as long as was humanly possible. After an appeal was filed, the local authorities would seek continuances and would fail to have their records in condition to be reviewed by the courts. This became such a common practice that in many communities, it took upwards of eighteen months to get a simple zoning decision to the argument list in the court of common pleas. During this time the landowner usually suffered substantial economic losses due to the necessity of carrying the land and paying taxes and insurance while the land lay unproductive. Thus, the protestant, or non-landowner, clearly profited by delay. The MPC seeks to discourage the "in terrorem" or "sandbagging" tactics by including a special provision with respect to appeals to the courts by a non-landowner who seeks to prevent

development on the land of another. Sections 10916[49] and 11008(4)[50] provide that a non-landowner who seeks to prevent such use or development, whether he seeks a stay of proceedings by appealing to court or not, may be required to post a bond as a condition to proceeding with his appeal. This provision has been interpreted to be a precondition to the right to continue an appeal and if it is not met, the appeal can be dismissed,[51] tending to reduce the number of spurious appeals taken by non-landowners.

It is important to note that the bonding provision only comes into effect after a non-landowner, or protestant, has taken an appeal from the zoning hearing board. Certainly, at that stage of the proceeding he should have an excellent idea of whether or not he has a clearly meritorious case. Should he have such a case, the bond will not be as deterring at the time. Further, the landowner's rights to demand such a bond of the non-landowner and the amount of the bond are within the sound discretion of the court. In making such determinations, the court will be influenced by the overview of the case and will make an impartial appraisal of whether the non-landowner has any reasonably legitimate cause for complaint. If his complaint is well grounded the court could deny the right to a bond altogether or set it at a minimal amount. On the other hand, if the

49. PA. STAT. ANN. tit. 53, § 10916 (1972) provides in part:

> When an application for development, preliminary or final, has been duly approved and proceedings designed to reverse or limit the approval are filed with the board by persons other than the applicant, the applicant may petition the court having jurisdiction of zoning appeals to order such persons to post bond as a condition to continuing the proceedings before the board. The question whether or not such petition should be granted and the amount of the bond shall be within the sound discretion of the court

Id. (footnote omitted).

50. PA. STAT. ANN. tit. 53, § 11008(4) (1972) provides:

> The filing of an appeal in court under this section, shall not stay the action appealed from but the appellants may petition the court having jurisdiction of zoning appeals for a stay. If the appellants are persons who are seeking to prevent a use or development of the land of another, whether or not a stay is sought by them, the landowner whose use or development is in question may petition the court to order the appellants to post bond as a condition to proceeding with the appeal. The question whether or not such petition should be granted and the amount of the bond shall be within the sound discretion of the court.

51. There are two separate provisions for bonds by non-landowners who appeal under Sections 10916 and 11008(4). The first, Section 10916, deals with a bond when the appeal is taken to the zoning hearing board, and the second, Section 11008(4), when the appeal is in court. *See, e.g.*, Hercek v. Whitehall Township Zoning Hearing Bd., 342 A.2d 127 (Pa. Commw. 1975); Driscoll v. Plymouth Township, 13 Pa. Commw. 404, 320 A.2d 444 (1974); Linda Dev. Corp. v. Plymouth Township, 3 Pa. Commw. 334, 281 A.2d 784 (1971).

complaint is as one judge put it "picayune and insubstantial in nature," and if the landowner's potential damages by delay may run into large figures, the amount of the bond can be made quite high.

All in all, there is a rough-and-ready kind of justice about this. These provisions are consistent with the entire tenor of the MPC which is to define controversies, provide definitive relief, and create situations whereby parties have equal bargaining power. All of this tends to lead to very serious settlement negotiations, particularly where building ordinances and mapping procedures have been used for purposes not originally envisioned by the law.

V. Non-Administrative Procedures: Mandamus and Procedural Appeals

The traditional right to mandamus has remained unchanged. Obviously, a writ of mandamus will only be sought by someone who has been denied the right to do something; this would make it almost inevitably a landowner type of proceeding. The time-honored qualifications upon that writ have not been significantly altered by the MPC nor were they intended to be. A writ of mandamus will usually lie only where there is a clear right which has been denied by a ministerial official.[52] Section 10909[53] of the Code expressly states that nothing contained in that section shall be construed to deny the right to proceed to the court of common pleas for relief in mandamus.

To the same extent, the pre-existing right to test the *procedural* regularity of passage of an ordinance by going directly to court[54] is preserved to both landowners and non-landowners, as provided for in Section 11003.[55] The change from the pre-MPC law lies in the fact that the action is now brought in the court of common pleas rather than in quarter sessions and is raised by a zoning appeal rather than a complaint. Inclusion of this provision in the MPC was also a creature of experience. It was found that it was better to have the questions of procedural regularity hammered out early if they were

52. Gallagher v. Building Inspector, 432 Pa. 301, 247 A.2d 572 (1968); Lhormer v. Bowen, 410 Pa. 508, 188 A.2d 747 (1963); Cohen v. Ford, 339 A.2d 175 (Pa. Commw. 1975).

53. Pa. Stat. Ann. tit. 53, § 10909 (1972).

54. Under pre-MPC law, by reason of the authority contained in the second class county and first class township codes, there was a right to test the *procedural* regularity of a zoning ordinance.

55. Pa. Stat. Ann. tit. 53, § 11003 (1972).

to be assaulted and to go to court quickly for a determination. This provision had worked well in pre-MPC days and was consequently carried over.

The only substantial modification in this area has been by reason of *Northampton Residents Association v. Northampton Township Board of Supervisors*,[56] which basically turned on the question of the word "appeal" in Section 11003. In that case, the parties filing the appeal to court were not those who had appeared at the township hearings, and consequently were held not to be proper parties.[57]

VI. Conclusion

The MPC consistently places an economic incentive in front of those who would bring the zoning laws back to their original purpose (to protect the public health, safety and welfare) and simultaneously discourages those who would use it for purposes of economic, social or parochial discrimination. There is also a built-in incentive for local governing bodies to zone and plan rationally; the risk of having such actions overthrown at the landowner's initiative is always present. In contrast to the pre-MPC procedures which placed a premium upon irrationality and resulted in a great deal of ad hoc rezoning with the inevitable concomitant of both bad planning and an incentive to delay final adjudication, many of the provisions of the MPC have come as welcome relief. This is not to say that all is completely well since the tendency toward strong home rule has been effectively weakened by the MPC's enactment. A major tool for home rule was the ability of the community to zone out that which it did not want. If one takes the view that home rule is necessarily always good, then of course, the MPC and its procedures are very unwelcome. The consensus among most scholars and practitioners in the field is that the pre-MPC law and procedures resulted in excessive parochialism and that the MPC has redressed the balance significantly.

The procedural aspects of the Pennsylvania Municipalities Planning Code came about as a result of experiences within the Commonwealth of Pennsylvania over the last half century. The procedures differ for landowners and non-landowners in most instances.

56. 14 Pa. Commw. 515, 322 A.2d 787 (1974).
57. *Id.* at 520, 322 A.2d at 791.

Landowners generally are given quicker access to the courts. Nonlandowners are largely relegated to their administrative remedy via the zoning hearing boards if they are the parties initiating the action. The thrust behind all of the procedures is to compel a rational approach to zoning and mapping. The procedures give a clear incentive to landowners to attack patently invalid ordinances and a concomitant disincentive to local government to enact such ordinances. The procedures are designed not only to give ready access to the courts and to set the framework of the controversy against a very realistic and practical backdrop, but also to discourage litigation for the sake of delay. The procedural aspects are very much in keeping with the rest of the MPC in that the various contending forces usually involved in the zoning drama are given roughly equal bargaining chips and are thus encouraged to obey the law without going to court. The penalty for taking a bad position and adhering to it through a court proceeding may be substantial for any one of the contending forces. This in itself encourages moderation, reasonableness and obedience to the law. Despite the recent spate of litigation, this will probably result in much better zoning and planning and considerably less litigation in the long run.