ANTI-EXCLUSIONARY ZONING IN PENNSYLVANIA: A WEAPON FOR DEVELOPERS, A LOSS FOR LOW-INCOME PENNSYLVANIANS

I. INTRODUCTION

In 1974, seven landowners proposed to develop several thousand units of apartments, townhouses, and mobile homes in Buckingham Township, an outer suburb of Philadelphia.[1] The 1970 census indicated that Buckingham was home to only 5150 residents and 1609 housing units.[2] The proposed housing would have increased the number of Buckingham's housing units by over 500%.[3] Wealthy and bucolic, Buckingham was just beginning to feel the pressure of increased development and trying to preserve its agricultural heritage. At the time, Buckingham's zoning allowed for only single-family homes on minimum lot sizes of one acre, which would clearly prohibit the proposed development.[4]

The landowners challenged the zoning under Pennsylvania's developing exclusionary zoning case law, arguing that the zoning unconstitutionally excluded multifamily housing and mobile homes.[5] Buckingham agreed that its zoning ordinance was unconstitutional under the new law and was in the process of developing a new, comprehensive zoning plan for the township.[6] Buckingham enacted new, non-exclusionary zoning in 1975 and rejected the landowners' applications for a curative amendment, filed to "cure" the former defective zoning.[7] The landowners sued the township and won; the court held that the new zoning was not applicable to the case because the curative amendment was filed before the zoning changes were advertised.[8] The court urged the landowners and the township to negotiate.[9]

Today, on these parcels of land sit over one thousand single-family homes with values between $400,000 to $750,000, almost three hundred luxury townhouses worth over $400,000 each, and a desirable mobile-home park with

1. Schlanger v. Buckingham Twp. Bd. of Supervisors, 29 Bucks Co. L. Rep. 280, 281 (Pa. Ct. Com. Pl. 1976).

2. Bucks County Planning Commission, 1970 Census Information (on file with author).

3. *See Schlanger*, 29 Bucks Co. L. Rep. at 285 (approving developers' curative amendment); Bucks County Planning Commission, *supra* note 2 (providing housing unit numbers as of 1970).

4. *Schlanger*, 29 Bucks Co. L. Rep. at 281.

5. *See* Appeal of Girsh, 263 A.2d 395, 397 (Pa. 1970) (holding that township's zoning, which did not provide for multifamily housing, was unconstitutional). For an explanation of the development of exclusionary zoning case law in Pennsylvania, see *infra* Part II.C.

6. *Schlanger*, 29 Bucks Co. L. Rep. at 281-82.

7. *Id.* at 282.

8. *Id.* at 283-84. The commonwealth court affirmed. Bd. of Supervisors of Buckingham Twp. v. Barness, 382 A.2d 140, 142 (Pa. Commw. Ct. 1978).

9. *Schlanger*, 29 Bucks Co. L. Rep. at 285.

monthly land rental costs of $400 and home values of approximately $200,000.[10] Buckingham Township indeed heeded the suggestion of the court to negotiate and in doing so avoided most of the 8155 new households that would have resided in the proposed multifamily housing and mobile-home park.[11] In Pennsylvania, a developer who successfully challenges exclusionary zoning is not required to build the housing type for which he sued, and the developer and municipality may negotiate for a more mutually desirable development.[12] In Buckingham, the lawsuit, ostensibly to build housing for low- to moderate-income residents, resulted in expensive single-family homes, luxury townhouses, and an exclusive mobile-home community. This result hardly seems like a victory for affordable housing advocates.

This Comment argues that the great need for affordable housing is not being met under Pennsylvania's unique anti-exclusionary zoning case law because the law focuses on property rights and land uses rather than classes of people and because developers manipulate the curative amendment process. Part II provides an overview of the intertwined affordable housing and exclusionary zoning problems, an explanation of various state approaches to exclusionary zoning, a description of the Pennsylvania case law, and a discussion of the "sue and switch" tactic used by developers in the Buckingham example above. Part III.A discusses the financial and planning burdens placed on municipalities by the misuse of curative amendments. Part III.B criticizes the fact that affordable housing has not effectively resulted from this process. Part III.C suggests that anti-exclusionary zoning efforts would be more successful in Pennsylvania if they focused on creating housing for a variety of classes of people rather than ensuring a variety of land uses. Finally, Part III.D provides several suggestions for change, including an end to the doctrine of definitive relief, promotion of inclusionary zoning practices, and the pursuit of smart growth policies to rein in sprawl and make both the cities and the suburbs more desirable and affordable places to live.

II. OVERVIEW

Exclusionary zoning is widely considered to be a significant impediment to the development of affordable housing.[13] States have taken a variety of approaches to combat exclusionary zoning, both in the courts and the legislatures.[14] The most well-known example of judicial action against exclusionary zoning is found in New Jersey, where the *Mt. Laurel* doctrine[15]

10. Buckingham Township, Table on Barness Cures (Nov. 2006) (on file with author).

11. *Id.*

12. *See, e.g.*, *Schlanger*, 29 Bucks Co. L. Rep. at 285 (encouraging township and landowners to negotiate to "resolv[e] their differences").

13. See *infra* Part II.A for a definition of exclusionary zoning and its relationship to affordable housing as well as a general discussion of zoning authority in Pennsylvania.

14. See *infra* Part II.B for a discussion of state efforts against exclusionary zoning.

15. *See generally* S. Burlington County NAACP v. Twp. of Mount Laurel (*Mt. Laurel I*), 336 A.2d 713 (N.J. 1975) (establishing *Mt. Laurel* doctrine). See *infra* Part II.B.1 for an explanation of the

requires all municipalities to affirmatively provide for affordable housing.[16] In Pennsylvania, the state supreme court has developed the "fair share" doctrine under the state constitution, requiring municipalities to allow a fair share of housing types.[17] Nevertheless, the Pennsylvania Supreme Court has clarified that municipalities must provide for a variety of uses, not a variety of classes of people, because the fair-share doctrine is based on constitutional property rights rather than a large-scale social justice program such as New Jersey's.[18]

To challenge zoning as exclusionary, a landowner may file a curative amendment application, requesting that the municipality "cure" the zoning's alleged constitutional infirmity and allow a certain use of the land.[19] If the municipality denies the application and the landowner wins a lawsuit in state court, the doctrine of definitive relief allows the court to order the requested zoning change, and the landowner may build on the property subject only to applicable building codes and other administrative requirements.[20] Upon a successful challenge, a developer is not required to build the housing type for which he sued and may instead negotiate with the municipality to build a use that was prohibited under the zoning but not otherwise excluded from the township (for example, large single-family homes on small lots).[21] This approach has been labeled "sue and switch."[22]

A. Exclusionary Zoning

The need for affordable housing in America has been well documented.[23] Over twelve million households use more than fifty percent of their income to pay for housing, while the U.S. Department of Housing and Urban Development ("HUD") definition of affordability is for a household to pay only thirty percent or less of its income on housing.[24] Thirty percent of Americans have difficulty affording their housing.[25] Rental costs have risen faster than the consumer price

Mt. Laurel doctrine.

16. *Id.* at 724.

17. Surrick v. Zoning Hearing Bd., 382 A.2d 105, 108-09 (Pa. 1977). See *infra* Part II.C for a discussion of exclusionary zoning case law in Pennsylvania and a description of the fair-share doctrine.

18. BAC, Inc. v. Bd. of Supervisors, 633 A.2d 144, 147 (Pa. 1993).

19. See *infra* Part II.D for a description of the curative amendment process.

20. See *infra* Part II.E for an explanation of the doctrine of definitive relief.

21. See *infra* Part II.F for a discussion of how the curative amendment process can be used by developers to build luxury rather than affordable housing.

22. See *infra* Part II.F.1 for a discussion of the "sue and switch" tactic employed by developers.

23. *See, e.g.*, Douglas R. Porter, *The Promise and Practice of Inclusionary Zoning*, *in* GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 212, 213 (Anthony Downs ed., 2004) (discussing fact that "the supply of housing affordable to many Americans has not kept up with needs" and advocating inclusionary zoning as solution to affordable housing problem).

24. U.S. Department of Housing and Urban Development, Affordable Housing, http://www.hud.gov/offices/cpd/affordablehousing/index.cfm (last visited Sept. 1, 2008). HUD has established that "[f]amilies who pay more than 30 percent of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care." *Id*.

25. Mandara Meyers, Comment, *(Un)equal Protection for the Poor: Exclusionary Zoning and the*

index since 1997.[26] It is difficult to overstate the importance of stable and adequate housing in an individual's life.[27] Housing closely correlates to employment prospects, educational opportunities, and access to health care.[28] Cities and their suburbs are inherently interconnected, and a lack of affordable housing in one leads to extensive problems in the other.[29] In Pennsylvania, population increases in the outer suburbs led to the creation of approximately 269,000 new homes in the 1990s, while population decreases in the cities led to the loss of over 22,000 housing units during the same period.[30] Because poor Pennsylvanians are significantly more likely to live in the cities and older suburbs, this population shift and the resulting housing changes disproportionately affect the poor.[31]

Exclusionary zoning can be a barrier to the creation of affordable housing.[32] Zoning labeled as exclusionary often prescribes limits on types of housing, minimum lot sizes, restrictions on the number of occupants, and required setbacks.[33] Such restrictions generally increase housing costs, which then make the housing unaffordable to low- and moderate-income individuals.[34]

Need for Stricter Scrutiny, 6 U. PA. J. CONST. L. 349, 355 (2003) (citing JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 25 (2003)); *see also* NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2006, at 2-3 (2006), *available at* http://www.nlihc.org/oor/oor2006/introduction.pdf (comparing wages and rents in communities nationally to derive a "Housing Wage," finding that average worker must earn $16.31 an hour to afford two-bedroom rental, and noting that federal minimum wage was $5.15 in 2006).

26. Porter, *supra* note 23, at 213.

27. *See* Justin D. Cummins, Comment, *Recasting Fair Share: Toward Effective Housing Law and Principled Social Policy*, 14 LAW & INEQ. 339, 342-51 (1996) (discussing "geography of opportunity," meaning centrality of housing to important social opportunities, such as employment, education, and health care).

28. *Id.*

29. *Id.* at 359-60 (arguing that health of city will always be critical to health of its suburbs because of tourism, sustainable economic growth, spillover of poor conditions, and regional financial burden); *see also* Edward G. Goetz et al., *The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia*, 22 LAW & INEQ. 31, 33 (2004) (stating that suburban barriers to affordable housing generate urban sprawl and trap poorer individuals in cities, away from suburban resources including superior jobs and schools).

30. THE BROOKINGS INST., BACK TO PROSPERITY: A COMPETITIVE AGENDA FOR RENEWING PENNSYLVANIA 34 (2003), *available at* http://www.brook.edu/metro/publications/pa.htm. Population shifts, development trends, and zoning impediments are only some of the factors contributing to the shortage of affordable housing. For further information on the affordable housing crisis in Philadelphia, see generally AMY E. HILLIER & DENNIS P. CULHANE, UNIV. OF PA., CLOSING THE GAP: HOUSING (UN)AFFORDABILITY IN PHILADELPHIA (2003), *available at* http://repository.upenn.edu/cgi/viewcontent.cgi?article=1000&context=cplan_papers; Housing Alliance of Pennsylvania, http://www.housingalliancepa.org (last visited Sept. 1, 2008).

31. THE BROOKINGS INST., *supra* note 30, at 9-11.

32. *See, e.g.*, Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 888 (2006) (arguing that exclusionary zoning is most common legal impediment to creation of affordable housing).

33. Meyers, *supra* note 25, at 354 (citing Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 309 (2002)).

34. *Id.*

Exclusionary zoning has historically been linked to racial and class segregation and discriminatory motives by zoning authorities.[35]

Municipalities are entitled to enact zoning ordinances under their police powers,[36] though to be constitutional, the zoning must not be arbitrary or unreasonable and must bear a "substantial relation to the public health, safety, morals, or general welfare."[37] Ordinances are presumed to be valid unless shown to be unreasonable, arbitrary, or not substantially related to the municipality's police powers.[38] The challenging party bears the burden of proving the ordinance's unconstitutionality.[39] Nevertheless, where a legitimate use is completely prohibited, the burden shifts to the municipality to justify the ordinance on grounds of public health, safety, morals, or general welfare.[40] On appeal, the reviewing court has statutory authority to invalidate any ordinance.[41]

Municipalities have primary land-use authority in Pennsylvania, as delegated to them by the state legislature in the Municipalities Planning Code ("MPC").[42] The MPC was enacted in 1968 and is a consolidation of all planning and zoning requirements for local governments with which municipalities must comply.[43] The MPC specifies for which purposes municipalities may zone, including to protect the public welfare, preserve natural and historic values, prevent overcrowding and blight, preserve agricultural lands, provide for all

35. Lisa C. Young, Comment, *Breaking the Color Line: Zoning and Opportunity in America's Metropolitan Areas*, 8 J. GENDER RACE & JUST. 667, 668-72 (2005) (describing zoning that was historically enacted with discriminatory purpose and arguing that, because minorities are disproportionately poor, exclusionary zoning can cause racial segregation today).

36. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926). In *Euclid*, the Court upheld a zoning restriction banning apartment buildings from areas of single-family homes, finding that apartment buildings are often a "mere parasite" of the pleasant community and expressing concern for the safety and welfare of children living in single-family homes. *Id.* at 394. For a discussion of the exclusionary tone of *Euclid*, see Young, *supra* note 35, at 673-74.

37. *Euclid*, 272 U.S. at 395 (recognizing constitutional source of zoning powers); C&M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd., 820 A.2d 143, 154 (Pa. 2002); Nat'l Land & Inv. Co. v. Kohn, 215 A.2d 597, 607 (Pa. 1965).

38. *C&M Developers, Inc.*, 820 A.2d at 154.

39. BAC, Inc. v. Bd. of Supervisors, 633 A.2d 144, 147 (Pa. 1993) (citing *Nat'l Land*, 215 A.2d at 607).

40. Fernley v. Bd. of Supervisors, 502 A.2d 585, 587 (Pa. 1985). This burden does not shift to the municipality if the zoning is allegedly exclusionary due to minimum lot-size requirements rather than total prohibition of a certain use (e.g., prohibition of apartment buildings). *See C&M Developers, Inc.*, 820 A.2d at 154 (finding that protection of property rights does not require that this burden shift, and holding that municipalities need not establish "extraordinary justification" for minimum lot-size requirements).

41. 53 PA. STAT. ANN. § 11006-A(a) (West 1997 & Supp. 2007).

42. *See* 53 PA. STAT. ANN. § 10601 (West 1997) ("The governing body of each municipality, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of this act.").

43. Joel P. Dennison, Comment, *New Tricks for an Old Dog: The Changing Role of the Comprehensive Plan Under Pennsylvania's "Growing Smarter" Land Use Reforms*, 105 DICK. L. REV. 385, 399 (2001) (citing Robert S. Ryan, PENNSYLVANIA ZONING LAW AND PRACTICE § 2.1.1 (1992)).

basic forms of housing, and accommodate reasonable community growth.[44]

Today, however, zoning that some may label as "exclusionary" may be designed to have beneficial effects on the community, such as protecting public safety, preventing overcrowding, and ensuring adequate public services and facilities.[45] For example, municipalities may enact zoning to control sprawl.[46] The Pennsylvania Supreme Court has defined sprawl as "development that is inefficient in its use of land (i.e. low density); constructed in a 'leap frog' manner in areas without existing infrastructure, often on prime farmland; automobile dependent, and consisting of isolated single use neighborhoods requiring excessive transportation."[47] Sprawl is a national phenomenon; in the year 2000 alone, three million acres of land were developed into urban and suburban use.[48] In Pennsylvania, the rate of sprawl has increased tremendously over the past two decades.[49] Between 1982 and 1997, 1.14 million acres of land were developed, accounting for one-third of all development in Pennsylvania's history and averaging almost four acres of newly developed land per resident.[50]

The costs of sprawl include lost farmland, damaged environmental resources, and land inefficiency.[51] In Pennsylvania, the trend is particularly pronounced. During the 1990s, Pennsylvania saw the construction of 546,000 new homes while the state added only 281,000 new households, and almost three-quarters of this development occurred in the outer suburbs.[52] Despite the new residential and commercial construction in the outer suburbs, minorities and the poor remain concentrated in Pennsylvania's cities, creating some of the most segregated areas in the United States.[53] The movement of jobs into the outer suburbs without a corresponding rise in affordable suburban housing isolates low-income workers from job opportunities.[54] The decentralization that sprawl brings and continuing urban decline are closely related problems.[55]

44. 53 PA. STAT. ANN. § 10604 (West 1997 & Supp. 2007). For the text of this provision and the commonwealth court's interpretation of its meaning within the affordable housing context, see *infra* notes 154-59 and accompanying text.

45. Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 10 (2001).

46. The Pennsylvania Supreme Court has found restrictions on "type, design, location, and intensity" of housing to be reasonable when related to a municipality's efforts to control sprawl. *In re* Petition of Dolington Land Group, 839 A.2d 1021, 1032 (Pa. 2003).

47. *Id.* at 1028 n.8.

48. Dennison, *supra* note 43, at 388.

49. THE BROOKINGS INST., *supra* note 30, at 47.

50. *Id.* at 47.

51. *Id.* at 47-48.

52. *Id.* at 33-34.

53. *Id.* at 36. While the population of the outer suburbs increased by twelve percent in the last decade, the urban and older suburban population declined by two percent. THE BROOKINGS INST., *supra* note 30, at 28.

54. *Id.* at 61.

55. *Id.* at 56; *see also* Orfield, *supra* note 32, at 877 (arguing that sprawl increases urban racial segregation as white urban residents move from city or inner suburbs to newly built housing in outer suburbs).

Growth management describes policies that plan for future growth and "seek[] to accommodate growth sensibly, not to limit or prevent it."[56] Similarly, the smart-growth movement advocates higher-density development concentrated around public transit and other infrastructure to contain development and restrict sprawl.[57] While growth management has historically been linked to discriminatory policies that restricted the availability of affordable housing,[58] there is now substantial evidence that growth management and affordable housing need not be mutually exclusive.[59] In fact, some scholars have proposed that the only politically viable alternative to exclusionary zoning is growth management, because dissatisfied citizens will urge local officials to take action against the overdevelopment and congestion that are characteristic of today's suburbs.[60] Affordable housing can be an important component of a growth-management plan.[61]

B. State Efforts Against Exclusionary Zoning

Though the U.S. Supreme Court has held that there is no federal constitutional right to affordable housing,[62] state courts and legislatures have taken a variety of approaches to attempt to generate affordable housing and combat exclusionary zoning. Pennsylvania is one of the few states in which the judiciary has actively dealt with exclusionary zoning, and Pennsylvania is

56. Anthony Downs, *Introduction* to GROWTH MANAGEMENT AND AFFORDABLE HOUSING, *supra* note 23, at 1, 3.

57. James A. Kushner, *Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL. L. & POL'Y 45, 49 (2002-2003).

58. *See* Richard P. Voith & David L. Crawford, *Smart Growth and Affordable Housing*, *in* GROWTH MANAGEMENT AND AFFORDABLE HOUSING, *supra* note 23, at 82, 87 (suggesting that "zoning restrictions and other local regulations have been used historically to systematically exclude certain racial or economic groups").

59. *See* Arthur C. Nelson et al., *The Link Between Growth Management and Housing Affordability: The Academic Evidence*, *in* GROWTH MANAGEMENT AND AFFORDABLE HOUSING, *supra* note 23, at 117, 158 (reviewing literature on effect of growth-management policies and housing affordability, and concluding that successful growth-management policies include expanded affordable housing options for low-income families).

60. *Id.* at 156.

61. *See* Daniel Carlson & Shishir Mathur, *Does Growth Management Aid or Thwart the Provision of Affordable Housing?*, *in* GROWTH MANAGEMENT AND AFFORDABLE HOUSING, *supra* note 23, at 20, 24, 62-63 (pointing to several states in which affordable housing is part of growth-management laws); *see also* Jonathan D. Weiss, *Preface: Smart Growth and Affordable Housing*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 165, 169 (2003) (noting that sprawl can decrease availability of affordable housing).

62. Catherine Durkin, Comment, *The Exclusionary Effect of "Mansionization": Area Variances Undermine Efforts to Achieve Housing Affordability*, 55 CATH. U. L. REV. 439, 444-45 (2006) (citing Lindsey v. Normet, 405 U.S. 56, 74 (1972)). In *Lindsey*, the Court held that there was no constitutional guarantee of housing of a certain quality and stated that "[w]e do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill." 405 U.S. at 74. For a discussion of the constitutional issues surrounding exclusionary zoning, see generally Meyers, *supra* note 25.

considered to have some of the most developed case law on the subject in the country.[63] The Pennsylvania courts have battled exclusionary zoning on the basis of property uses, however, rather than on the basis of the affordability of housing.[64] This approach contrasts sharply with New Jersey's social-justice-oriented *Mt. Laurel* doctrine, which requires that each municipality provide for its fair share of affordable housing.[65] The judiciaries and legislatures of other states, including California, Connecticut, Massachusetts, Michigan, New Hampshire, New York, Oregon, Rhode Island, Virginia, and Washington, have also taken a variety of approaches to combating exclusionary zoning.[66]

1. New Jersey and *Mt. Laurel*

In its 1975 landmark decision of *Southern Burlington County NAACP v. Township of Mount Laurel* (*Mt. Laurel I*),[67] the New Jersey Supreme Court invalidated a zoning ordinance that excluded almost all low- and moderate-income individuals by providing for only single-family detached housing with restrictive minimum lot-size and building-size requirements.[68] Based on due process rights under the state constitution, the court held that such zoning was contrary to the general welfare and that the township could not justify the zoning based on limiting the number of children in public schools or for environmental reasons.[69] Establishing the "fair share" requirement with which New Jersey would struggle for decades, the court held:

> We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.[70]

Eight years later, the New Jersey Supreme Court reaffirmed this holding

63. *See, e.g.*, Jeffrey M. Lehmann, *Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 229, 240 (2003) (suggesting that Pennsylvania has "the most clearly articulated tests to prevent exclusionary zoning").

64. *See, e.g.*, BAC, Inc. v. Bd. of Supervisors, 633 A.2d 144, 147 (Pa. 1993) (noting proper exclusionary zoning analysis focuses on uses of property).

65. See *infra* Part II.B.1 for a discussion of New Jersey's *Mt. Laurel* doctrine. *See also* James L. Mitchell, *Will Empowering Developers to Challenge Exclusionary Zoning Increase Suburban Housing Choice?* 23 J. POL'Y ANALYSIS & MGMT. 119, 131 (2004) (comparing effectiveness of affordable housing creation in Pennsylvania and New Jersey).

66. See *infra* Parts II.B.2-3 for a discussion of the variety of approaches states have taken to eliminating exclusionary zoning.

67. 336 A.2d 713 (N.J. 1975).

68. For a thorough discussion of the *Mt. Laurel* decisions, see Span, *supra* note 45, at 48-72.

69. *Mt. Laurel I*, 336 A.2d at 730-31.

70. *Id.* at 724-25.

and provided more specific guidance for implementation of this broad policy goal in *Southern Burlington County NAACP v. Township of Mount Laurel* (*Mt. Laurel II*).[71] In response, the New Jersey legislature enacted the Fair Housing Act of 1985,[72] which required every municipality to adopt a housing plan to meet the fair-share requirement and created a statewide Council on Affordable Housing to develop policy and review municipal housing plans.[73]

The *Mt. Laurel* decisions and resulting legislation generated significant scholarly debate, though little empirical research has been conducted to determine the effectiveness of New Jersey's attempt to generate affordable housing.[74] Though judicial and legislative efforts have produced a considerable amount of less expensive housing, some have noted that those occupying such housing "tend to be of relatively high socioeconomic status but at a low point in their lifetime earning potential," such as students, divorced individuals, and the retired.[75]

2. In the Courts

Only a handful of state courts besides New Jersey and Pennsylvania have invalidated zoning because it is exclusionary.[76] States including Massachusetts, Virginia, and Michigan have struck down certain minimum lot-size requirements but have not "stated a legal rule that will consistently result in invalidation."[77] Courts in other states, including New Hampshire, New York, and Illinois, have found zoning restrictions on multifamily housing to be unreasonable for a variety of reasons, including economic infeasibility of development, unreasonable municipal action exceeding the police power, and inadequate accommodation of regional housing needs.[78]

3. In the Legislatures

State legislatures have taken a variety of approaches in an effort to increase the availability of affordable housing.[79] State-override statutes permit state

71. 456 A.2d 390, 418-59 (N.J. 1983) (describing procedure for lower courts to review municipal ordinances to ensure adequate opportunities for affordable housing development).

72. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 2001 & Supp. 2006).

73. Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of* Mount Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1271 (1997).

74. *Id.* at 1273, 1301-05 (discussing scholars' interest in New Jersey's anti-exclusionary zoning program, and detailing their studies' findings that program has generated some low- to moderate-income housing but that goals of allowing low-income families, especially minorities, to move from urban to suburban housing have not been accomplished).

75. Span, *supra* note 45, at 68; *see also* Cummins, *supra* note 27, at 371 (arguing that legislation primarily benefits marginal middle-income or temporarily low-income whites and has largely ignored minority groups and genuinely low-income individuals).

76. Lehmann, *supra* note 63, at 240.

77. *Id.* at 242-43 (discussing case law and legal rules applied in these state courts).

78. *Id.* at 245-47.

79. For a thorough discussion of state legislative action against exclusionary zoning, see Lehmann, *supra* note 63, at 235-40.

governments to review local zoning to determine if it excludes affordable housing uses.[80] This process generally favors the developer and is known as a "builders' remed[y]."[81] Other state and local governments have passed inclusionary zoning statutes and ordinances, providing financial or other incentives to developers to build affordable housing.[82] Fair-share legislation requires local governments to provide for a certain proportion of affordable housing based on a number of factors, including existing availability and projected future need.[83] Other states require comprehensive community plans to include affordable housing.[84] Nevertheless, some have argued that these legislative efforts have not generated much truly affordable housing.[85]

Though Pennsylvania passed the Affordable Housing Act[86] in 1992, it does not place any restrictions or affirmative duties on municipalities.[87] The Act merely established the Pennsylvania Housing Advisory Committee, which is required to report on various statewide housing needs and policies.[88]

C. Fair Share in Pennsylvania

In Pennsylvania, municipalities are not permitted to completely exclude multifamily housing[89] and must provide for their "fair share" of various housing

80. Goetz et al., *supra* note 29, at 35.

81. *Id.* (internal quotation marks omitted) (quoting Britton v. Town of Chester, 595 A.2d 492, 497-98 (N.H. 1991)) (describing state-override statutes as requiring developer's initiative to challenge local zoning decisions).

82. *Id.* at 36. For example, the New Jersey Fair Housing Act requires inclusionary zoning techniques, such as rewarding developers who build affordable housing with increases in the permitted density of the property, tax abatements, infrastructure improvements, donations of municipal land, and public financial support. N.J. STAT. ANN. § 52:27D-311 (West 2001 & Supp. 2006); Cummins, *supra* note 27, at 364-65. For a discussion of inclusionary zoning practices, see generally Porter, *supra* note 23; Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 981 (2002); Brian R. Lerman, Note, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 385 (2006); Jennifer M. Morgan, Comment, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 369 (1995). For further discussion of inclusionary zoning practices, see *infra* Part III.D.2.

83. Goetz et al., *supra* note 29, at 37-38.

84. *Id.* at 38.

85. *See* Cummins, *supra* note 27, at 370 ("Despite their tremendous potential, Fair Share policies continue to have only limited effectiveness."). *See generally* Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 38-68 (1993) (examining California's fair-share housing laws, and finding that noncompliance and lack of enforcement have contributed to statutes' lack of effectiveness).

86. 35 PA. STAT. ANN. §§ 1691.1-1691.6 (West 2003).

87. *See* Precision Equities, Inc. v. Franklin Park Borough Zoning Hearing Bd., 646 A.2d 756, 761 n.8 (Pa. Commw. Ct. 1994) (finding that Act does not place duty on municipalities to provide their fair share of affordable housing).

88. 35 PA. STAT. ANN. § 1691.5.

89. Fernley v. Bd. of Supervisors, 502 A.2d 585, 586 (Pa. 1985); Appeal of Girsh, 263 A.2d 395, 398 (Pa. 1970).

types.[90] Though this requirement is based on due process rights under the state constitution[91] rather than judicially mandated affordable housing, early decisions concerned municipalities restricting growth in order to exclude "newcomers."[92] Nevertheless, the Pennsylvania Supreme Court has clarified that the fair-share test applies only to uses of property, rather than classes of people able to afford the housing.[93] Therefore, when evaluating whether a municipality has provided its fair share of various housing types, Pennsylvania courts do not consider the affordability of the housing.[94]

1. Exclusion of Newcomers and Provision for Growth

In the earliest cases to deal with exclusionary zoning, the Pennsylvania Supreme Court denounced and invalidated zoning that apparently had been designed to restrict growth and maintain the character of the community.[95] Instead, the court found that municipalities have an affirmative duty to allow for growth within their borders.[96] In *National Land & Investment Co. v. Kohn*,[97] the Pennsylvania Supreme Court held Easttown Township's four-acre minimum lot-size requirement to be unconstitutional in light of expanding populations and resulting demand for housing in the Philadelphia suburb.[98] Specifically, the court found that, while zoning is an important tool, it must not be used by municipal officials to "shirk their responsibilities" when faced with "the increased responsibilities and economic burdens which time and natural growth invariably bring."[99]

The court found that the township's proffered justification of maintaining open space and preserving the character of its community appeared to be based in part on concerns that old, large homes would become neighbors to small, inexpensive homes, which the court classified as an exclusionary attempt that would not promote general welfare.[100] The court concluded that "[a] zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration

90. Surrick v. Zoning Hearing Bd., 382 A.2d 105, 110 (Pa. 1977); Twp. of Willistown v. Chesterdale Farms, Inc., 341 A.2d 466, 468 (Pa. 1975).

91. *Surrick*, 382 A.2d at 107-08.

92. *Girsh*, 263 A.2d at 398-99; Nat'l Land & Inv. Co. v. Kohn, 215 A.2d 597, 612 (Pa. 1965).

93. BAC, Inc. v. Bd. of Supervisors, 633 A.2d 144, 147 (Pa. 1993).

94. *See id.* (relying on land use rather than affordability of housing in evaluation).

95. *See Girsh*, 263 A.2d at 398 (finding it "unacceptable" for municipality to effectively choose to freeze population growth through zoning ordinances); *Nat'l Land*, 215 A.2d at 610-13 (rejecting argument for rezoning to preserve community "character" because that goal could be achieved in ways other than excluding multifamily housing).

96. *See Girsh*, 263 A.2d at 398-99 (finding it to be municipality's duty to provide for future population growth); *Nat'l Land*, 215 A.2d at 610 (providing that municipalities should not utilize zoning in order to evade obligations).

97. 215 A.2d 597 (Pa. 1965).

98. *Nat'l Land*, 215 A.2d at 610-13.

99. *Id.* at 610.

100. *Id.* at 612.

of public services and facilities can not be held valid."[101]

In *Appeal of Girsh*,[102] the Pennsylvania Supreme Court applied *National Land* to invalidate a zoning ordinance that failed to provide for multifamily housing, although such use was not expressly prohibited by the zoning.[103] The court held that the lack of zoning for apartments excluded people who would be able to live in the community if the apartments were built.[104] Importantly, the developer in *Girsh* was seeking to build luxury apartments, and the court did not consider the affordability of these units to low-income individuals once built.[105] The court reaffirmed *National Land* and held that the township must "bear its rightful part of the burden" associated with population growth in spite of the township's concerns about the strain the apartment complex would place on its municipal services and roads, as well as the changing character of the community.[106]

In *Township of Willistown v. Chesterdale Farms, Inc.*,[107] the Pennsylvania Supreme Court expanded on the principles in *National Land* and *Girsh* to find that zoning for apartments in only eighty acres of a township of 11,589 acres is "tokenism" and therefore exclusionary.[108] The court found that the constitutional prohibition on preventing newcomers from living within a township "is not limited to total exclusion, but also selective admission."[109] Citing New Jersey's landmark *Mt. Laurel I* decision, the court held that the zoning ordinance at issue was unconstitutionally exclusionary because it did not provide for a "fair share" of township acreage for multifamily housing.[110] In response, the dissent argued that the plurality failed to define "fair share" or explain why Willistown, a rural community of only 9128 residents, failed to satisfy the test.[111]

2. *Surrick*'s Fair-Share Test

In the principal case of *Surrick v. Zoning Hearing Board*,[112] the Pennsylvania Supreme Court invalidated a zoning ordinance in which only 1.14% of the township's total acreage was zoned in a district that permitted

101. *Id*. For a discussion of how the Pennsylvania Supreme Court has abandoned this line of reasoning relating to people rather than uses, see *infra* Part II.C.4.

102. 263 A.2d 395 (Pa. 1970).

103. *Girsh*, 263 A.2d at 396, 398.

104. *Id.* at 397.

105. *Id.* at 396. The court seemed aware, however, of the connotation apartments have to some individuals, noting that "[i]t should be pointed out that much of the opposition to apartment uses in suburban communities is based on fictitious emotional appeals which insist on categorizing all apartments as being equivalent to the worst big-city tenements." *Id.* at 399 n.5.

106. *Id.* at 398-99.

107. 341 A.2d 466 (Pa. 1975).

108. *Willistown*, 341 A.2d at 467 (internal quotation marks omitted).

109. *Id.* at 468.

110. *Id*.

111. *Id.* at 469-70 (Pomeroy, J., dissenting).

112. 382 A.2d 105 (Pa. 1977).

apartments.[113] For the first time, the court clearly stated that it was employing a substantive due process analysis in the preceding line of cases to find zoning to be exclusionary when it did not bear a substantial relationship to public welfare.[114] The court emphasized the individual right to enjoy private property under the Pennsylvania Constitution[115] and the due process rights of the Fifth and Fourteenth Amendments of the federal Constitution, which require reasonable use of the state police power.[116]

Surrick established a tripartite test to determine the constitutionality of zoning ordinances alleged to be exclusionary in order to ascertain whether communities provided their "fair share" of housing.[117] The first prong of the test requires examining "whether the community in question is a logical area for development and population growth" like the communities in *National Land* and *Girsh*.[118] Factors involved in this analysis include projected population growth and the location of the community.[119] The second prong of *Surrick*'s test analyzes the current level of development within the community, including the use of population data, percentage of undeveloped land, and the percentage of land available for multifamily housing.[120]

Upon finding that the community is in the path of development and not already highly developed, the court must finally examine whether the zoning has an exclusionary effect.[121] The *Surrick* court emphasized that the relevant inquiry focuses on effect rather than purpose; exclusionary intent is unnecessary to demonstrate that an ordinance is unconstitutionally exclusionary.[122] The court must also consider the extent of the exclusion, including the percentage of available land for multifamily housing in light of population growth and the total percentage of available land.[123]

Here, the court noted for the first time that past decisions invalidating exclusionary zoning have been on the basis of exclusion of uses rather than

113. *Surrick*, 382 A.2d at 106-07.

114. *Id.* at 108.

115. PA. CONST. art. 1, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.").

116. *Surrick*, 382 A.2d at 108; Appeal of Girsh, 263 A.2d 395, 397 n.3 (Pa. 1970).

117. *Surrick*, 382 A.2d at 110-11.

118. *Id.* at 110.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Surrick*, 382 A.2d at 110-11. When it is alleged that zoning violates the Equal Protection Clause because of discriminatory race- or class-based zoning, a different analysis applies. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 255-56 (1977) (noting that judicial deference cannot be justified when discriminatory purpose is "motivating factor" in decision).

123. *Surrick*, 382 A.2d at 111. Applying this test, the court found that the township was in a logical area for growth as a Philadelphia suburb and was not so developed as to preclude multifamily housing. Finding the provision of only 1.14% of the township's land for apartments to be a partial exclusion of multifamily dwellings, the court held that the township had not provided its "fair share" of multifamily housing. *Id.* at 111-12.

exclusion of certain classes of people.[124] Just two pages earlier in the opinion, however, the court found that the fair-share principle requires municipalities to "meet the legitimate needs of *all categories of people* who may desire to live within its boundaries."[125] There, the court noted the citation to *Mt. Laurel I* in *Willistown* as the inspiration for Pennsylvania's fair-share test, though the court stated that "[w]e are not bound by New Jersey's purported 'vast expansion of zoning principles.'"[126]

The Pennsylvania Supreme Court later clarified in *Fernley v. Board of Supervisors*[127] that the fair-share test only applies to partial (de facto), rather than total (de jure), exclusions of multifamily housing.[128] An ordinance totally excluding multifamily housing is unconstitutional unless the municipality can demonstrate that the exclusion promotes public health, safety, morals, and general welfare.[129] Otherwise, areas not in the path of growth (and therefore not required to provide a fair share of various types of housing) could completely exclude multifamily housing.[130] The court noted that population growth is not necessarily correlated to housing demand.[131] That is, families who wish to live in Schuylkill Township but who cannot afford to do so because of the lack of multifamily housing are excluded even if there is no independent population pressure on the township.[132]

3. Categories of Multifamily Housing

The *Surrick* fair-share test does not require the provision of "every conceivable use" or even different categories of multifamily housing.[133] In the companion cases of *In re Appeal of Elocin, Inc.*[134] and *In re Appeal of M.A. Kravitz Co.*,[135] developers challenged zoning as exclusionary where provisions for townhouses were not made, though the townships allowed other forms of multifamily housing.[136] Both challenges failed.[137] The court held that "[w]e have

124. *Id.* at 110 n.10.

125. *Id.* at 108 (emphasis added).

126. *Id.* at 109 n.8. Justice Roberts, concurring, disliked the fair-share standard, finding that the reasoning had never commanded a majority, but stated that he would still invalidate the ordinance as unreasonable. Justice Roberts highlighted the difficulty New Jersey has had in formulating and implementing its fair-share standard and argued that courts are not well positioned to deal with the complicated issues involved. He concluded: "We would do well to continue to steer clear of 'fair share.'" *Surrick*, 382 A.2d at 114-15 (Roberts, J., concurring).

127. 502 A.2d 585 (Pa. 1985).

128. *Fernley*, 502 A.2d at 586-88 (holding unconstitutional ordinance which totally prohibited multifamily housing because township failed to assert legitimate public purpose for exclusion).

129. *Id.* at 587.

130. *See id.* at 588 (rejecting argument that township's zoning ordinance was not exclusionary because there was little probability of community growth).

131. *Id.*

132. *Id.*

133. *In re* Appeal of Elocin, Inc., 461 A.2d 771, 773 (Pa. 1983).

134. 461 A.2d 771 (Pa. 1983).

135. 460 A.2d 1075 (Pa. 1983).

136. *Elocin*, 461 A.2d at 772; *Kravitz*, 460 A.2d at 1077.

never found an ordinance unreasonable solely because it fails to provide for a particular use."[138]

Nevertheless, dissents in both cases argued that townhouses serve different housing needs than do apartments or other forms of multifamily housing, and different designs should therefore be considered separately under the fair-share analysis.[139] The *Kravitz* dissent argued that townhouses are "a legitimate residential use which persons of modest means demand to satisfy their right to own a home" and that townhouses provide the opportunity to own or rent private dwellings with many of the benefits of single-family housing.[140] Because this legitimate use was completely excluded under the township's zoning, the dissent would have held that the township had not met its fair share of multifamily housing and could not "close [its] doors to moderate and low income persons who desire to own homes in such communities."[141] While the dissent focused on low-income individuals and the need for affordable housing by recognizing the major differences between various designs of multifamily housing, this has not been the approach followed by the Pennsylvania Supreme Court.

4. Focus on Classes of Uses, Not Classes of People

Though there has been some language in this line of cases regarding the need for affordable housing as it pertains to exclusionary zoning and the fair-share test, in 1993 the Pennsylvania Supreme Court made clear that its analysis focuses on property rights rather than any goals of social justice. In *BAC, Inc. v. Board of Supervisors*,[142] the court clarified that *Surrick* recognized "a clear distinction between restrictions on uses of property and exclusions of classes of people" and "only the former is the proper subject of the analysis we synthesized."[143] Because *Surrick* was based on the constitutional right to own and enjoy property, exclusion of classes of people simply does not factor into the analysis.[144] Therefore, the court rejected a developer's claim that the township was unconstitutionally excluding low-income individuals by failing to provide

137. *Elocin* held that Springfield Township, a suburb of Philadelphia, was not a logical place for growth because it was almost entirely developed and had already provided its fair share of multifamily housing where twelve percent of all homes in Springfield were multifamily. 461 A.2d at 773. *Kravitz* held that Wrightstown Township, an outer Philadelphia suburb, was not a logical place for development due to its lack of major highways, mass transit, and significant employment centers; because the township had not made an effort to shirk its municipal responsibility, the court upheld the zoning ordinance. 460 A.2d at 1082-83.

138. *Kravitz*, 460 A.2d at 1081.

139. *Elocin*, 461 A.2d at 774 (Nix, J., concurring and dissenting) (arguing that townhouses provide "distinct legitimate use"); *Kravitz*, 460 A.2d at 1084-85 (Hutchinson, J., dissenting) (arguing that design of multifamily housing is relevant to whether zoning ordinance is exclusionary).

140. *Kravitz*, 460 A.2d at 1084-85 (Hutchinson, J., dissenting).

141. *Id.* at 1087.

142. 633 A.2d 144 (Pa. 1993).

143. *BAC*, 633 A.2d at 147.

144. *Id.*

zoning for mobile-home parks because the developer's argument was based on allowances for a class of people rather than a class of uses.[145] This approach is in clear contrast to New Jersey's *Mt. Laurel* doctrine, where municipalities are affirmatively required to provide housing for low-income individuals.[146]

Applying *BAC*, the commonwealth court in *Precision Equities, Inc. v. Franklin Park Borough Zoning Hearing Board*[147] similarly rejected a developer's claim that a borough did not provide its fair share of small lot sizes and was therefore exclusionary to low- and moderate-income people.[148] The Zoning Hearing Board had denied the developer's challenge, finding that nothing would prevent the developer from building expensive homes on smaller lots in light of the fact that the developer's primary goal is to maximize profit.[149] Therefore, allowing smaller lot sizes would not guarantee a fair share of low- and moderate-income housing.[150] The court agreed that the developer had not guaranteed affordable housing, and found that New Jersey, in its aggressive approach, "has recognized that reduction in lot size alone will not normally result in housing affordable by low and moderate income people."[151] This inquiry is irrelevant under Pennsylvania law, however, because fair share in Pennsylvania focuses on uses of land "rather than attempting to use zoning as a socio-economic tool to create housing for various classes of people."[152] The court concluded that this was the better approach, given the considerable difficulty New Jersey has experienced in implementing its fair-share policy.[153]

In *Heritage Building Group, Inc. v. Plumstead Township Board of Supervisors*,[154] a developer challenged an ordinance for not providing a fair share of affordable multifamily housing as allegedly required by Section 604 of the MPC, which requires that zoning is designed:

"To provide for the use of land within the municipality for residential

145. *Id.*

146. See *supra* Part II.B.1 for a discussion of New Jersey's *Mt. Laurel* doctrine.

147. 646 A.2d 756 (Pa. Commw. Ct. 1994).

148. *Precision Equities*, 646 A.2d at 758, 760.

149. *Id*. at 758; *see also* C&M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd., 820 A.2d 143, 158-59 (Pa. 2002) (invalidating one-acre minimum lot size because it was not substantially related to township's interest in preserving farmland, where primary justification for lot-size requirement offered by township was to prevent building of *large* houses on *small* lots).

150. *Precision Equities*, 646 A.2d at 758.

151. *Id.* at 760 n.4 (citing S. Burlington County NAACP v. Twp. of Mount Laurel (*Mt. Laurel II*), 456 A.2d 390, 418-21 (N.J. 1983)).

152. *Id.*

153. *Id*. The court also rejected an equal protection challenge waged by the developer on the ground that the lot-size requirements were really racial classifications because racial minorities are more likely than whites to be low income and require affordable housing. *Id.* at 760-61. The court found this connection "too tenuous" in light of findings that New Jersey's fair-share policy has resulted in more housing for homeowners who are "overwhelmingly white and suburban in origin." *Precision Equities*, 646 A.2d at 761 n.6 (citing James J. Hartnett, Note, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 124 n.221 (1993)).

154. 833 A.2d 1205 (Pa. Commw. Ct. 2003).

> housing of various dwelling types encompassing all basic forms of housing, including single-family and two-family dwellings, and a reasonable range of multifamily dwellings in various arrangements, mobile homes and mobile home parks, provided, however, that no zoning ordinance shall be deemed invalid for the failure to provide for any other specific dwelling type."[155]

The developer argued that the citation to *Mt. Laurel* in both *Willistown* and *Surrick* indicated that Pennsylvania law requires a fair share of affordable housing for all classes of people.[156] The commonwealth court responded that *Surrick*'s citation included the disclaimer "'[w]e are not bound by New Jersey's purported vast expansion of zoning principles"[157] and that the Pennsylvania Supreme Court clearly stated in *BAC* that *Surrick* applies only to the "line of cases striking down zoning schemes for restricting or excluding certain uses of property, not classes of people."[158] Therefore, following *BAC* and *Precision Equities*, the court held that Section 604 of the MPC does not require a municipality to provide affordable multifamily housing for low- to moderate-income individuals.[159]

5. Continued Viability of the Fair-Share Test

In 2003, the Pennsylvania Supreme Court reaffirmed *Surrick* in *In re Petition of Dolington Land Group*,[160] finding that *Surrick* "is sufficiently flexible in its proper application to accommodate the evolution of public land use priorities and concerns."[161] For the first time, the court considered the application of *Surrick*'s fair-share test in light of the "pressing problem" of sprawl in Pennsylvania.[162] The court noted that between 1982 and 1997, developed land increased by 41.3% even though there was essentially no population growth.[163]

In *Dolington*, a group of landowners challenged joint municipality zoning[164]

155. *Heritage*, 833 A.2d at 1212 (quoting 53 PA. STAT. ANN. § 10604(4)).

156. *Id.*

157. *Id.* at 1212 (alteration in original) (internal quotation marks omitted) (quoting Surrick v. Zoning Hearing Bd., 382 A.2d 105, 109 n.8 (Pa. 1977)).

158. *Id.* at 1212-13 (quoting BAC, Inc. v. Bd. of Supervisors, 633 A.2d 144, 146 (Pa. 1993) (internal quotation marks omitted)).

159. *Id.* at 1213.

160. 839 A.2d 1021 (Pa. 2003).

161. *Dolington*, 839 A.2d at 1027.

162. *Id.* at 1028 n.8.

163. *Id*.

164. Jointures are a form of regional land-use planning, authorized by the MPC. 53 PA. STAT. ANN. §§ 10801-A to 10821-A (West 1997 & Supp. 2007). These sections were added in 2000 as part of the "Growing Smarter" initiative, designed to give municipalities greater tools with which to combat sprawl and effectively plan their communities. Dennison, *supra* note 43, at 402. For a thorough discussion of the goals of the Growing Smarter program, see Dennison, *supra* note 43, at 402-07. As an incentive for municipalities to plan jointly, jointures offer some protection from curative amendment challenges by providing that the court must consider the availability of uses within the several municipalities involved in the joint planning rather than the particular municipality where the property

as exclusionary because of the small proportion of land zoned for multifamily housing.[165] While declining to consider fully how *Surrick* applies to multimunicipal zoning, the court essentially applied the test to find that neither the jointure as a whole nor the municipality in which the questioned land was located were in the path of growth, therefore failing the threshold inquiry of *Surrick*.[166] Importantly, the court acknowledged that the percentage of land available for multifamily housing in the jointure (3.58%) cannot be properly evaluated without considering the need for multifamily housing in the community.[167] Finding that the provision in the zoning met the need for multifamily housing, the court held that the zoning did not produce an exclusionary effect or unreasonably restrict the landowner's property rights.[168]

While declining to overrule *Surrick*, the court indicated that its factual underpinnings have been undermined by changing social priorities, including increased concern for environmental protection, farmland preservation, and the need to contain sprawl.[169] Noting these priorities, the court found that such concerns could justify a municipality's decision to impose development restrictions of type, design, location, and intensity.[170]

D. Exclusionary Zoning Challenges: The Curative Amendment Process

When landowners desire to develop their land in a way prohibited by local zoning, they may allege that the zoning is exclusionary under the fair-share case law.[171] Pennsylvania has established a curative amendment process whereby landowners can challenge the validity of a local zoning ordinance that prohibits or restricts the use of their property.[172] In filing the curative amendment with the

is situated. 53 PA. STAT. ANN. § 11006-A(b.1) (West Supp. 2007); Dennison, *supra* note 43, at 406. Interestingly, the Growing Smarter initiative lists the development of "affordable and other types of housing in numbers consistent with the need for such housing" as one of the purposes behind the changes, though there is no affirmative obligation on jointures to provide for affordable housing. 53 PA. STAT. ANN. § 11101(12).

165. *Dolington*, 839 A.2d at 1024-25.

166. *Id.* at 1029-30.

167. *See id.* at 1030 (noting that percentage of land available for multifamily dwellings under zoning ordinance "'must be considered in light of current population growth pressure, within the community as well as the region, and . . . the total amount of undeveloped land in the community'" (quoting Surrick v. Zoning Hearing Bd., 382 A.2d 105, 111 (Pa. 1977))).

168. *Id.* at 1030, 1034.

169. *Id.* at 1032.

170. *Dolington*, 839 A.2d at 1032.

171. For a discussion of the Pennsylvania fair-share case law, see *supra* Part II.C.

172. 53 PA. STAT. ANN. § 10609.1(a) (West 1997 & Supp. 2007). Curative amendments are very similar to substantive challenges, which predate the 1972 amendments to the MPC, and a landowner may elect to pursue either course. The primary difference is that curative amendments are heard before the municipality's governing body (such as the Board of Supervisors) and substantive challenges are heard before the municipality's Zoning Hearing Board. *See* Jan Z. Krasnowiecki & LB Kregenow, *Zoning and Planning Litigation Procedures Under the Revised Pennsylvania Municipalities Planning Code*, 39 VILL. L. REV. 879, 885-87 (1994) (comparing curative amendments and substantive challenges). Substantive challenges and curative amendments are also available to landowners seeking to develop their land into commercial uses (e.g., quarries or car dealerships) prohibited by zoning

municipality, "the landowner seeks to 'cure' a perceived defect in the zoning ordinance in order to allow a particular development or use favored by the landowner."[173] The curative amendment process was added to the MPC in 1972 "to insure that affordable housing was available in suburban communities, where exclusionary zoning was common."[174]

After filing a request for a curative amendment, the landowner is entitled to a hearing on the issue,[175] and the governing body may decide to grant, modify, or deny the cure.[176] In deciding whether the curative amendment has merit, the municipality considers the impact of the proposed development on municipal services and facilities, regional housing needs, suitability of the site based on natural characteristics and the impact of the development on these resources, and the projected impact on agriculture and other public-welfare issues.[177] In effect, the municipality seeks to ensure that it has not entirely excluded certain residential uses, and, if the municipality is a logical place for growth under *Surrick*, to determine whether it has provided its fair share of various housing types. If the municipality denies the curative amendment, the landowner may appeal to state court.[178]

E. Doctrine of Definitive Relief

When a municipality loses a curative amendment challenge in state court, which the landowner brought after the municipality's governing board denied the curative amendment, the court will normally order a change in the zoning affecting the property.[179] Upon invalidating a zoning ordinance, the doctrine of definitive relief allows the court to order the requested relief on behalf of the successful challenger.[180] This "site-specific" remedy will often result in a

ordinances. This Comment focuses exclusively on residential rather than commercial uses.

173. Dennison, *supra* note 43, at 400.

174. *Id.* at 401 (citing 1972 Pa. Laws 333). For a discussion of how the curative amendment process is not achieving these goals, see *infra* Part II.F. *See also* Krasnowiecki & Kregenow, *supra* note 172, at 879 ("The 1972 MPC was designed to tip the balance in favor of new development and against the exclusionary tendencies of local governments.").

175. 53 PA. STAT. ANN. § 10609.1(a).

176. *Id.* § 10609.1(b),(c).

177. *Id.* § 10609.1(c).

178. *Id.* § 10609.1(b).

179. *Id.* (indicating that entire zoning ordinance is not thereby invalidated); Dennison, *supra* note 43, at 401 (citing GOVERNOR'S CTR. FOR LOCAL GOV'T SERVS., 1999 ANNUAL REPORT ON LAND USE 23 (2000)).

180. *See* Casey v. Zoning Hearing Bd., 328 A.2d 464, 469 (Pa. 1974) (finding that anything less than definitive relief would be "grossly inequitable" to developer after developer invested effort and capital in legal challenge). The developer must still comply with other municipal requirements, however, such as building codes, before receiving the definitive relief from the court. *Id.* The principle of definitive relief is codified at 53 PA. STAT. ANN. § 11006-A(c). The court may grant relief upon a showing of preliminary plans or sketches, provided that the developer submits other documents before final relief is granted. *Id.* § 11006-A(e). In the commercial use analogue, the Pennsylvania Supreme Court has held that de facto exclusion in a severable provision does not require site-specific relief. H.R. Miller Co. v. Bd., 605 A.2d 321, 325-26 (Pa. 1992) (affirming lower courts' refusal to grant site-

development being built in an area ill equipped or ill suited for that type of development.[181] If a municipality amends its zoning in an attempt to cure a constitutional problem after the developer has challenged the zoning, the doctrine of definitive relief allows the court to order the developer's requested relief for the property in question even if the municipality has determined that use to be better suited for other property available in the community.[182] Such judicial orders will often result in the developer and municipality stipulating to a different use of the property, such as building large single-family homes on small lots rather than the multifamily housing for which the developer brought the curative amendment challenge.[183] Even the threat of a curative amendment challenge and this definitive relief will often persuade a municipality to negotiate with a developer before or during judicial proceedings. Advocates of the definitive relief doctrine argue that courts must be able to issue complete remedies to challengers to protect them from retaliatory municipalities.[184] Furthermore, it is unlikely that a landowner would invest the time and money required by litigation to secure zoning changes if such changes did not apply to their property.[185]

F. Curative Amendments Used as a Tool to Build Luxury Housing

1. "Sue and Switch"

There is significant evidence that developers are using the curative amendment process and doctrine of definitive relief "to build what they want, where they want" for the purpose of constructing luxury suburban homes rather

specific relief to quarry company when land was in residential area and zoning ordinance could be cured merely by striking five-hundred-foot setback requirement). This distinction has not been applied in residential-use cases in Pennsylvania.

181. Dennison, *supra* note 43, at 401 (citing GOVERNOR'S CTR. FOR LOCAL GOV'T SERVS., *supra* note 179, at 23).

182. *See* Fernley v. Bd. of Supervisors, 502 A.2d 585, 588-91 (Pa. 1985) (approving developer's plans for multifamily complex in area zoned for one-acre lot-size minimums, even though township had provided for ample zoning for multifamily housing elsewhere in municipality after developer filed his challenge). The concurrence in *Fernley* argued that this was an "absurd" application of the doctrine of definitive relief and that municipalities should be permitted to make a good-faith effort to amend their zoning to comport with constitutional requirements. *Id*. at 595 (McDermott, J., concurring); *see also* Bd. of Supervisors v. Barness, 382 A.2d 140, 143 (Pa. Commw. Ct. 1978) (approving definitive relief for developer even though comprehensive plan that cured zoning ordinance's constitutional infirmity was being prepared before developers sued).

183. *See* Buckingham Township, *supra* note 10 (listing thousands of units of multifamily housing approved by court, and listing single-family homes, high-end townhouses, and mobile-home community built instead).

184. *See* Krasnowiecki & Kregenow, *supra* note 172, at 894 ("Local governments that have demonstrated their exclusionary bent cannot be trusted to treat the challenger fairly . . . .").

185. *See id.* at 900 ("The purpose of definitive or site specific relief is to reward the challenger for pointing out constitutional infirmities in the zoning ordinance; otherwise, no one will have the incentive to do so.").

than affordable housing.[186] Though lawmakers originally envisioned the curative amendment process as a means by which to combat exclusionary zoning practices,[187] the process has instead given developers a powerful tool to wield over municipalities, generating "[a] proliferation of upscale housing."[188] Developers often utilize a "sue and switch"[189] tactic, wherein they propose to build mobile homes or multifamily housing with a desire instead to build single-family housing.[190] For example, developers may wish to build large homes on small lots, a use that may be prohibited by a municipality's minimum lot-size requirements but not unconstitutionally excluded.[191] Often, the threat of building mobile homes or multifamily housing is enough to compel municipalities to allow the developer to build the desired single-family homes instead. If a developer successfully sues for definitive relief, the municipality then has a strong incentive to negotiate with the developer.[192] One luxury-home builder called the curative amendment process "the big hammer" that developers use to force their plans through municipalities.[193] A public official called it "'pure assault . . . purely blackmail-oriented.'"[194]

This "sue and switch" technique is not uncommon.[195] The Heritage Conservancy has documented at least seven instances in the past twenty years of developers filing curative amendments to build mobile homes in municipalities that excluded such use and, after judicial success, building single-family homes or townhouses instead.[196] One township manager said that developers are using mobile homes "'as a smoke screen.'"[197]

Public officials have repeatedly called for changes to the curative amendment process. Before the state legislature made changes to the MPC in 2000 with the Growing Smarter legislation, local officials called for a revision of

186. Diane Mastrull & Evan Halper, *Land-Use Battles Frustrate Pa. Towns*, PHILA. INQUIRER, Mar. 12, 2000, at A1.

187. Dennison, *supra* note 43, at 401; *see also* Mastrull & Halper, *supra* note 186 (stating that law was designed "to provide a legal mechanism to make sure that housing for everyone was built in the suburbs, where exclusionary zoning was common").

188. Mastrull & Halper, *supra* note 186; *see also* Evan Halper, *Gathering Support for Preserving Farmland: Volleys of Costly Court Challenges by Developers Have Led Local Officials to Band Together and Seek State Help*, PHILA. INQUIRER, Mar. 7, 1999, at BC1 (detailing costs of curative amendments for municipalities).

189. ADAM LIOZ, PENNENVIRONMENT, LAND USE IN PENNSYLVANIA: AN ANALYSIS OF CHANGES TO PENNSYLVANIA'S MUNICIPALITIES PLANNING CODE IN 2000, at 18 (2001), *available at* http://static.pennenvironment.org/reports/landusereport8_01.pdf.

190. Mastrull & Halper, *supra* note 186.

191. For a description of this process, see Mastrull & Halper, *supra* note 186.

192. See *infra* Part III.B for a discussion of municipal motivations to negotiate with developers to avoid many units of multifamily housing.

193. Mastrull & Halper, *supra* note 186 (internal quotation marks omitted).

194. *Id.* (alteration in original) (quoting Damon Aherne, chairman of Tinicum Township Planning Commission).

195. LIOZ, *supra* note 189, at 18; Mastrull & Halper, *supra* note 186.

196. Mastrull & Halper, *supra* note 186.

197. *Id.* (quoting Allen Heist, township manager of West Vincent Township in Chester County).

the curative amendment process.[198] One Bucks County coalition called curative amendments "the single greatest vehicle for development sprawl" and "nothing more than a way to circumvent our communities' land use plans."[199] The coalition argued that "[t]he process is a charade, funded and borne by the individual taxpayers of Pennsylvania, profiting only the developers. It must be changed."[200] As part of the Growing Smarter initiative, Governor Tom Ridge's administration held fifty-three public forums across Pennsylvania on land use, finding that "[p]robably no other issue generated more frustration . . . than the curative amendment."[201] The Governor's Center for Local Services suggested that the legislature amend the MPC to allow for non-site-specific curative amendments.[202]

Nevertheless, the resulting Growing Smarter legislation provided only a "modicum of relief" against the misuse of curative amendments.[203] The legislation focused on facilitating regional planning and provided that reviewing courts must consider the availability of uses within the several municipalities joined in regional planning rather than the particular municipality where the property is situated.[204] Requests from public officials to rein in the misuse of the curative amendment process, such as eliminating the doctrine of definitive relief in order to better allow municipalities to plan effectively, went largely unheeded.[205]

2. One Example: Buckingham, Pennsylvania

Buckingham Township in Bucks County, Pennsylvania, is a prime example of developers' manipulation of the fair-share requirement and the curative amendment process to build expensive single-family housing.[206] In 1978, the

198. For a discussion of the Growing Smarter legislation, see *supra* note 164. For thorough analyses of the legislation, see generally LIOZ, *supra* note 189, and Dennison, *supra* note 43.

199. Press Release, Pa. Dep't of Envtl. Prot., Local Government Coalition Calls for Land Use Reform-(Nov. 6, 1998) (on file with author) (internal quotation marks omitted).

200. *Id.* (internal quotation marks omitted); *see also* Robert J. Mason, *Confronting Sprawl in Southeastern Pennsylvania: New Options for Communities*, 23 TEMP. ENVTL. L. & TECH. J. 23, 38 (2004) (detailing study's findings that many municipal officials in Montgomery and Chester Counties in Pennsylvania find curative amendments to be impediment to effective planning).

201. Mastrull & Halper, *supra* note 186 (alteration in original) (internal quotation marks omitted).

202. Dennison, *supra* note 43, at 398.

203. *Id.* at 386.

204. 53 PA. STAT. ANN. § 11006-A(b.1) (West 1997 & Supp. 2007); Dennison, *supra* note 43, at 406.

205. *See* Dennison, *supra* note 43, at 386 (describing "modicum of relief" legislature provided to municipalities by giving them greater protection against curative amendments when engaged in joint planning).

206. It is beyond the scope of this Comment to conduct an empirical analysis of curative amendment challenges since the law's inception in 1972, but such a study would be quite useful to determine exactly how developers are using the process. While not necessarily statistically significant, the history of Buckingham's experience with curative amendments illustrates how the curative amendment process functions in practice and helps inform the legal analysis.

commonwealth court in *Board of Supervisors v. Barness*[207] upheld seven landowners' challenges to Buckingham's zoning ordinance which required single-family homes on minimum lot sizes of 10,000 square feet.[208] The ordinance admittedly excluded multifamily housing and mobile-home parks, and the township was in the process of preparing a new comprehensive plan to cure the zoning's constitutional infirmity when landowners sued the township after it denied their request for a curative amendment.[209]

Six of the landowners had submitted plans for apartments and townhouses, and the other landowner had proposed a mobile-home park.[210] The court of common pleas had determined that these uses were unconstitutionally excluded from Buckingham under the old zoning and refused to consider the zoning changes because they had not been advertised before the landowners filed the curative amendment request.[211] The commonwealth court affirmed, finding that the township had not overcome its burden of demonstrating that a threat to health, safety, and general welfare existed such as to justify the exclusion of multifamily dwellings and mobile-home parks.[212] The lower court ordered Buckingham to issue building permits once the developers complied with the building code and other administrative requirements, and the commonwealth court affirmed.[213]

For the most part, however, the proposed housing was never built. Instead, the landowners developed expensive single-family housing, negotiated with the township after the courts approved more than 7000 units of multifamily housing.[214] The successful curative amendment resulted in over 1100 single-family homes.[215] These homes, in several different developments, sell from $400,000 to $750,000.[216] Some multifamily housing was built—272 townhouses—but these routinely sell for over $425,000 today,[217] illustrating why multifamily housing is not necessarily synonymous with affordable housing.

While the mobile-home park was indeed built, "Buckingham Springs" is a community with homes currently selling for approximately $200,000, plus land rental costs of over $400 a month.[218] Though technically comprising mobile

207. 382 A.2d 140 (Pa. Commw. Ct. 1978).

208. *Barness*, 382 A.2d at 141.

209. *Id.* at 141-42.

210. *Id.* at 142.

211. Schlanger v. Buckingham Twp. Bd. of Supervisors, 29 Bucks Co. L. Rep. 280, 283-85 (Pa. Ct. Com. Pl. 1976).

212. *Barness*, 382 A.2d at 142. The township had asserted interests justifying its attempts to constrain development, including the inconvenience and expense of increased public demand for facilities and the need to protect the character of the community. The court responded that "all of the law . . . is against them." *Id.*

213. *Id.* at 142 n.2. For a further discussion on the doctrine of definitive relief, see *supra* Part II.E.

214. Buckingham Township, *supra* note 10.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

homes, this community is hardly "affordable" for any low-income resident.[219]

Buckingham had a significant incentive to negotiate with these landowners once they had won definitive relief from the courts. The court of common pleas approved ten units per acre for the proposed multifamily housing, and five mobile homes per acre for the proposed mobile-home park.[220] If built as proposed and approved by the court, Buckingham would have been home to 7400 new households living in multifamily housing and 755 new households living in mobile homes.[221] In 1978, the year of the commonwealth court decision, Buckingham was primarily rural and only beginning to deal with the development pressures, which would rapidly escalate in the next thirty years. The 1970 census indicated that Buckingham was home to only 5150 residents and 1609 housing units.[222] Adding 8155 new households is a significant burden for any municipality.[223]

Instead, 1184 single-family homes were built along with 272 luxury townhouses and 646 expensive mobile homes.[224] The township approved these homes in the face of the massive development otherwise mandated by the court.[225] The landowners could not have won a curative amendment challenge against the township to build these single-family homes because their legal argument was based on the exclusion of multifamily housing and mobile homes from the township's zoning.

In 2005, Buckingham Township enacted new "Living Communities" zoning, which requires developers to build a variety of types of housing, as well as provide for open-space set-asides and commercial or civic spaces.[226] For tracts larger than thirty acres with twenty or more dwelling units planned, the ordinance provides for small lot sizes and requires that the unit types be

219. For a discussion of housing affordability in Pennsylvania, and Bucks Country in particular, see NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2006: PENNSYLVANIA (2006), *available at* http://www.nlihc.org/oor/oor2006/data.cfm?getstate=on&getcounty=on&county=2224&state=PA.

220. Buckingham Township, *supra* note 10.

221. *Id.*

222. Bucks County Planning Commission, *supra* note 2.

223. Nevertheless, concerns about strain on infrastructure and resources have been repeatedly rejected by the Pennsylvania Supreme Court as a legitimate government interest. *See, e.g.*, Appeal of Girsh, 263 A.2d 395, 398-99 (Pa. 1970) (holding that municipalities must "bear [their] rightful part of the burden" and allow for population growth). The court did acknowledge in *Dolington*, however, that environmental protection, farmland preservation, and the need to contain sprawl are all considerations that may be properly taken into account when a municipality imposes development restrictions of type, design, location, and intensity. *In re* Petition of Dolington Land Group, 839 A.2d 1021, 1032 (Pa. 2003).

224. Buckingham Township, *supra* note 10.

225. Mastrull & Halper, *supra* note 186.

226. The ordinance provides:

> A living community ("LC") is a development that allows for residential housing of various dwelling types encouraging all basic forms of housing including single-family and two-family dwellings, and a range of multifamily dwellings in various arrangements, mobile homes, and mobile home parks, in accordance with the specific district requirements.

BUCKINGHAM, PA., ZONING ORDINANCE § 405.B.B14 (2005).

mixed.[227] No more than fifty percent of the units can be single-family detached housing, and the remaining fifty percent must be composed of at least two other housing types.[228] Additionally, "[t]o promote diversity," the ordinance prohibits the different types of housing units from being segregated within these "Living Communities" neighborhoods.[229]

The "Living Communities" zoning was enacted as part of Buckingham's defensive plan against curative amendments and to force developers to "respond to actual needs of a community."[230] It provides for a mix of housing types and small lot sizes.[231] Though these are the changes that developers have been requesting in Pennsylvania when arguing that a municipality's zoning is exclusionary, new development has all but stopped in Buckingham now that developers are actually required to build various types of housing.[232] The "Living Communities" zoning has not yet been legally challenged by developers.[233]

3. Another Example: Southampton, Pennsylvania

Evidence suggests that Buckingham has not had a unique experience with curative amendments. For example, in *Stahl v. Upper Southampton Township Zoning Hearing Board*,[234] a property owner challenged the zoning ordinance of Upper Southampton, a Philadelphia suburb, for unduly restricting mobile-home parks.[235] Though the ordinance provided for mobile homes, the property owner argued that the minimum lot-size and density requirements amounted to a de facto exclusion of mobile homes because building them would be economically infeasible.[236] The Commonwealth Court of Pennsylvania found that the property owners did not meet their burden of proving that the township did not provide a fair share of land for mobile homes because there was no evidence in the record as to the township's percentage of undeveloped land.[237] Nevertheless, the court held that the zoning ordinance unduly restricted the development of mobile homes because the density and minimum lot-size requirements made the

227. *Id.*

228. *Id.*

229. *Id.* § 405.B.B14.D.2.d.

230. Interview with Raymond Stepnoski, Twp. Manager, Buckingham Twp. (Nov. 22, 2006); *see also* Matthew P. Blanchard, *Tide Turns in Fight Against Sprawl*, PHILA. INQUIRER, May 3, 2001, at BC1 (describing how curative amendment process has changed municipal planning).

231. BUCKINGHAM, PA., ZONING ORDINANCE § 405.B.B14.

232. Interview with Raymond Stepnoski, *supra* note 230. Mr. Stepnoski stressed that Buckingham's zoning change was not an attempt to force development out of Buckingham and into neighboring communities and that the shift of development pressures is an unintended consequence of the new zoning. *Id.*

233. *Id.* Mr. Stepnoski said that Buckingham does not expect any legal challenges because "[t]he concept of a living community is one that derived from careful consideration of development trends and community desires." *Id.*

234. 606 A.2d 960 (Pa. Commw. Ct. 1992).

235. *Stahl*, 606 A.2d at 961.

236. *Id.* at 961-62.

237. *Id.* at 963.

ordinance's provision for mobile-home parks "illusory" and a de facto exclusion.[238] The court approved the property owner's request for decreased lot-size and density requirements for a mobile-home park.[239]

The developer never built mobile homes on this tract of land.[240] Instead, the developer negotiated with the township to build fifty-five single-family homes on small lots, which the neighbors preferred to the prospect of a mobile-home park.[241] Today, these homes have market values of approximately $450,000.[242]

III. DISCUSSION

Though curative amendments were intended to combat exclusionary zoning and help create an adequate supply of affordable housing,[243] developers have instead manipulated the process to force upscale housing into unwilling municipalities.[244] Curative amendments impose costly burdens on municipalities, which must go to great expense to defend themselves against developers. Also, curative amendments and the doctrine of definitive relief undermine a municipality's ability to plan effectively for development. Successful curative amendments too often result in luxury suburban housing rather than affordable housing.[245] In great part, this result is due to the Pennsylvania case law, which does not require that the housing built be affordable,[246] and the doctrine of definitive relief, which does not require the developer to build the type of housing for which he sued if he settles or later negotiates with the municipality.[247]

Therefore, several changes are suggested.[248] First, developers should be awarded non-site-specific relief so that municipalities can better plan for new development. Second, municipalities should enact inclusionary zoning ordinances to require developers building within their borders to construct affordable housing. Third, municipalities within a region, including neighboring cities, should work together to combat sprawl so that urban areas are reinvigorated and affordable housing can be built in both cities and suburbs.

238. *Id.* at 966.

239. *Id.* at 967-68.

240. Interview with Joseph Golden, Twp. Manager, Upper Southampton Twp. (Feb. 22, 2007).

241. *Id.*

242. *Id.*

243. Dennison, *supra* note 43, at 401.

244. See *supra* Part II.F for a description of how developers can manipulate the curative amendment process.

245. See *infra* Part III.B for a discussion of how curative amendments have not succeeded in effectively generating affordable housing.

246. *See* BAC, Inc. v. Bd. of Supervisors, 633 A.2d 144, 147 (Pa. 1993) (noting that fair-share analysis considers restrictions on property uses rather than exclusions of classes of people).

247. See *supra* Part II.E for an explanation of the doctrine of definitive relief.

248. See *infra* Part III.D for a discussion of these suggested solutions.

A. Burdens Imposed on Municipalities by Curative Amendments

The curative amendment process imposes significant burdens on municipalities. One township supervisor protested that the municipal planning process has been disrupted and compromised by "'repeated curative amendments that sap our energies, deplete our budget, and[,] worst of all, threaten to upset all of our planning and zoning.'"[249]

First, fighting curative amendments is extremely expensive. Because developers can repeatedly file curative amendments for the same parcel, one township solicitor said that "'[p]art of the game plan of most of these developers who file these type of challenges is to bludgeon local governments into conceding because of the cost[s].'"[250]

Extensive curative amendment challenges can cost a municipality thousands of dollars in extra meeting costs and hundreds of thousands of dollars in litigation costs.[251] Curative amendments can drive up the cost of housing, as developers also spend hundreds of thousands or even millions of dollars in legal fees against municipalities.[252] Though the lawsuits continue, municipalities have been winning the battles more often by crafting their zoning more carefully to enable it to sustain legal challenge.[253]

Second, curative amendments, and especially the doctrine of definitive relief, compromise a municipality's ability to plan for growth in designated areas and in certain ways. One study of municipal officials in Montgomery County and Chester County in Pennsylvania found that many saw curative amendments as "an obstacle to achieving local planning objectives."[254] When a developer wins a challenge, he is entitled to build on his property either what he proposed or what he negotiated with the municipality, subject only to building codes and other administrative regulations.[255]

249. Mastrull & Halper, *supra* note 186 (quoting Kate Harper, Lower Gwynedd Township Supervisor, Statement to Kim Coon, Governor Ridge's Top Land-Use Advisor (Summer 1999)).

250. Halper, *supra* note 188 (quoting John Rice, Solicitor, Bedminster and Plumstead Townships).

251. *See id.* (noting that each extra meeting costs about $1,000.00); Mastrull & Halper, *supra* note 186 (noting that Plumstead Township; Wrightstown, Upper Makefield, and Newtown Townships, collectively; and Bedminster Township have spent $500,000, $380,000, and $170,000, respectively, in legal fees).

252. Mastrull & Halper, *supra* note 186.

253. *See* Blanchard, *supra* note 230 ("'We no longer think growth can be stopped. . . . Those would be illegal thoughts, . . . Growth is to be managed, directed, controlled.'" (first alteration in original) (quoting Eric Schaffhausen, Bedminster Supervisor)).

254. Mason, *supra* note 200, at 38.

255. *See* 53 PA. STAT. ANN. § 11006-A(c) (West 1997 & Supp. 2007) (stating that court may approve described development in full or in part and, if approved in part, then governing body may adopt alternative restrictions that are in accordance with court's order); Casey v. Zoning Hearing Bd., 328 A.2d 464, 468-69 (Pa. 1974) (establishing doctrine of definitive relief by holding that municipality may not prevent successful zoning challenger from proceeding with development by adopting curative measure not in place prior to filing of challenger's application). The "suitability of the proposed site and various health and safety considerations" may also be evaluated by the court. Fernley v. Bd. of Supervisors, 502 A.2d 585, 589 (Pa. 1985).

In *Fernley v. Board of Supervisors*,[256] the township had amended its zoning to cure the constitutional infirmity of failing to provide for apartment buildings but had not considered or advertised the zoning change until the developer filed a curative amendment.[257] The court granted definitive relief, subject to compliance with the township's building codes.[258] Justice McDermott's concurring and dissenting opinion agreed that the ordinance was unconstitutionally exclusionary but found that the decision granting the developer site-specific relief was "absurd" because it "mandat[ed] the approval of a huge multi-family complex, situated in the middle of a single-acre-zoned community, based on the rather fortuitous circumstance that the absentee owner of this land arrived at the court house prior to an apparently well-intentioned zoning amendment."[259] Justice McDermott argued that "[c]ommunities should be permitted to make a good faith attempt to amend their ordinances, without having a possible white elephant foisted upon them to forever remind them of their past errors."[260]

As a result of losing a cure, a municipality may feel that it has no choice but to negotiate with the developer or face a use on a piece of property that is in discord with its zoning and planning. Curative amendments cause a municipality to "'lose[] control over its ability to plan for the orderly development of its community.'"[261] One of former Governor Ridge's top advisers said that "'[t]here are very good plans out there that are being undermined by the curative amendment process.'"[262]

Developers argue, however, that site-specific relief is necessary to "'keep local government honest'"[263] and prevent retaliation by municipalities.[264] Also, without the site-specific relief, the court or municipality could conclude that the use was better suited to a parcel of property the developer does not own, thus removing the developer's financial incentive for filing curative amendments.[265]

Effective planning is also inhibited by unpredictability. "Fair share" has never been specifically quantified so that municipalities can be assured that their zoning meets all of the constitutional requirements.[266] As a result, developers

256. 502 A.2d 585 (Pa. 1985).

257. *Fernley*, 502 A.2d at 587-88.

258. *Id.* at 590.

259. *Id.* at 595 (McDermott, J., concurring and dissenting).

260. *Id.*

261. Mastrull & Halper, *supra* note 186 (quoting Stephen Harris, attorney who used curative amendment process to develop quarry in Plumstead Township, Bucks County).

262. *Id.* (quoting Kim Coon, adviser to former Governor Ridge).

263. *Id.* (quoting Duane Searles of Home Builders Association of Bucks and Montgomery Counties).

264. *See* Casey v. Zoning Hearing Bd., 328 A.2d 464, 468 (Pa. 1974) ("[A]n applicant, successful in having a zoning ordinance declared unconstitutional, should not be frustrated in his quest for relief by a retributory township.").

265. Mastrull & Halper, *supra* note 186.

266. *See* Twp. of Willistown v. Chesterdale Farms, Inc., 341 A.2d 466, 469 (Pa. 1975) (Pomeroy, J., dissenting) (noting that plurality failed to define "fair share" or explain why township at issue did

can seize on and exploit this uncertainty to force through housing projects by threatening to file a curative amendment.[267]

B. Curative Amendments Do Not Effectively Generate Affordable Housing

Developers' manipulation of the curative amendment process, and municipalities' response to it, all obscure the crisis in Pennsylvania's growing suburbs: the need to create affordable housing. Because developers are not required to build the housing type for which they sued (if they then negotiate with the municipality), successful curative amendments are by no means guaranteed to result in affordable housing. There is great irony in the fact that a law envisioned to combat exclusionary zoning and ensure affordable housing is instead being manipulated to force luxury housing into communities that have carefully tried to plan for their growth.[268] Buckingham's township manager stated that "[c]urative amendments have not, as originally intended, corrected zoning injustices in municipalities" and have instead actually created *more* housing that is unaffordable to low- or moderate-income families.[269] Furthermore, "[i]t seems that [the drafters of the curative amendment process] never considered how [the process] could be exploited."[270]

Developers, not social-justice groups, are the entities bringing curative amendment challenges against municipalities. Appropriately, developers' primary concern is building a marketable product that will generate profit, not furthering a social goal of providing affordable housing.[271] A vice president of a building association stated in a panel discussion on the costs of sprawl that "[b]uilders are willing to build what they can sell, and if that's what sells, they'll build it. If a 15-story building sold in Lancaster County, you'd see 15-story apartment buildings all over the county."[272] By vesting so much power in developers with the builders' remedy of the definitive relief doctrine, courts allow developers to build what is profitable and marketable rather than what is affordable. Trying to combat the legitimate problem of exclusionary zoning should not rest on what developers choose to build.

When developers surreptitiously propose to build multifamily housing or mobile homes, in hopes that the municipality will agree to single-family homes instead, developers seize on fears that low-income people will inhabit the

not satisfy test).

267. Mastrull & Halper, *supra* note 186.

268. *Id.*

269. Interview with Raymond Stepnoski, *supra* note 230.

270. *Id.*

271. Mr. Stepnoski noted that "[t]he housing industry is no different than any other widget producing industry. There's a product and a profit. The goal is to maximize profit. There are a few notable exceptions, however these tend to be local developers and not the nationally recognized companies." *Id.*

272. Rick Brown, Executive Vice President, Bldg. Indus. Ass'n of Lancaster, Remarks at an Hourglass Foundation Public Forum: Costs of Sprawl 21 (June 7, 2000) (transcript available at http://www.hourglassfoundation.org/hgf/lib/hgf/white_papers/costs_of_sprawl_6-7-00_transcript.doc).

wealthy suburbs by "'wav[ing] the bloody flag of affordable housing.'"[273] In this way, the curative amendment process may further "stratify and exclude people."[274] In early decisions, the Pennsylvania Supreme Court expressed concern over public officials and residents wanting to exclude low-income individuals from their community. For example, in *National Land & Investment Co. v. Kohn*,[275] the court found that "[w]hat basically appears to bother intervenors is that a small number of lovely old homes will have to start keeping company with a growing number of smaller, less expensive, more densely located houses."[276] Similarly, in *Appeal of Girsh*,[277] the court noted that "much of the opposition to apartment uses in suburban communities is based on fictitious emotional appeals which insist on characterizing all apartments as being equivalent to the worst big-city tenements."[278]

It is important to note that municipalities may have legitimate reasons for wanting to control development, including multifamily housing. Sprawl is of paramount concern to many public officials, particularly in the Philadelphia metropolitan area, and many municipalities have limited infrastructure with which to handle increased development.[279] For example, new development may necessitate more schools, public utilities, and traffic control.[280] As a result, local taxes rise, which harms low- and middle-income people already living in the suburban community.[281] Additionally, suburban sprawl hurts low-income individuals who live in the cities being decimated by population loss and decreased tax bases.[282]

Therefore, when negotiations between a municipality and developer result in single-family homes rather than multifamily housing, this does not necessarily reflect distaste for affordable housing or the lower-income individuals who may reside there. Instead, the municipality may be trying to limit the number of new households in its community in an effort to control sprawl and growth. For example, the successful curative amendments in Buckingham Township in 1978[283] resulted in 1184 single-family homes, 272 townhouses, and 646 mobile

273. Mastrull & Halper, *supra* note 186 (quoting Dan Hoffman, Policy Director, Pennsylvania Low-Income Housing Coalition).

274. *Id.* (quoting Joanne Denworth, president of 10,000 Friends, a coalition of conservation and environmental groups).

275. 215 A.2d 597 (Pa. 1965).

276. *Nat'l Land*, 215 A.2d at 612.

277. 263 A.2d 395 (Pa. 1970).

278. *Girsh*, 263 A.2d at 399 n.5.

279. *See* Mason, *supra* note 200, at 33 (detailing survey results that indicated that local officials in Chester and Montgomery Counties are concerned about sprawl, even in municipalities not experiencing high rates of development).

280. THE BROOKINGS INST., *supra* note 30, at 46-63.

281. *Id.*

282. *Id.*

283. *See*, *e.g.*, Bd. of Supervisors v. Barness, 382 A.2d 140, 141, 144 (Pa. Commw. Ct. 1978) (noting township's failure to cure its invalid zoning ordinance).

homes, rather than 7400 units of multifamily housing and 755 mobile homes.[284] By negotiating with the landowners, Buckingham prevented over 6000 additional housing units from being built.[285] Nevertheless, it remains critical for courts and observers to be vigilant in monitoring municipal bias against low-income families and affordable housing.

C. Problems with Focusing on Property Rather than People

The manipulation of the curative amendment process, designed to combat exclusionary zoning and instead used to generate luxury suburban housing, has resulted because the fair-share analysis on which the curative amendment process is built does not require the provision of affordable housing. Instead, municipalities need only provide for a variety of housing uses, with no requirement that any of these uses (including multifamily housing and mobile homes) be affordable.

The Pennsylvania Supreme Court has made clear that the fair-share test is based on property rights rather than a social need for affordable housing. In *BAC, Inc. v. Board of Supervisors*,[286] the court clarified that the fair-share test inquires as to the exclusion of uses of property rather than classes of people.[287] Therefore, while the fair-share test requires municipalities to provide for some form of multifamily housing, there is no requirement that the housing be affordable to low- or moderate-income families. Additionally, municipalities are not required to provide for various types of multifamily housing, even though apartments may be significantly more affordable than townhouses.[288]

The court's requirement of various housing types may acknowledge the need for affordable housing, as the court has employed its fair-share analysis to invalidate large minimum lot sizes and exclusion of multifamily housing.[289] Nevertheless, dense single-family housing, multifamily housing, and mobile homes are not by definition "affordable." One scholar noted that, "[w]hile multi-family housing is often cheaper than single-family housing, it need not be."[290] For example, the townhouses built in Buckingham as a result of the 1978 curative amendment now sell for over $400,000 and the mobile homes sell for over $200,000, plus they cost over $400 a month in land rent.[291] Even single-family homes on small lots can be expensive; for example, the trend of "mansionization" in the inner suburbs describes the tearing down of small homes on small lots and building large, luxury homes in their place.[292]

284. Buckingham Township, *supra* note 10.

285. *See id.* (allowing total of 8155 housing units, but building only 2102 units).

286. 633 A.2d 144 (Pa. 1993).

287. *BAC*, 633 A.2d at 147.

288. See *supra* Part II.C.3 for a discussion of how courts do not differentiate between different forms of multifamily housing.

289. Span, *supra* note 45, at 38-39.

290. *Id.* at 43.

291. Buckingham Township, *supra* note 10.

292. Durkin, *supra* note 62, at 467-68.

There are other undercurrents throughout the Pennsylvania Supreme Court's decisions that reflect concern for creating affordable housing. For example, the plurality in *Township of Willistown v. Chesterdale Farms, Inc.*[293] and majority in *Surrick v. Zoning Hearing Board*[294] cited New Jersey's *Southern Burlington County NAACP v. Township of Mount Laurel* (*Mt. Laurel I*)[295] decision as support for its development of the fair-share test despite the fact that *Mt. Laurel I* focuses on affordability rather than providing for various housing types as required by Pennsylvania's property rights doctrine.[296] Though the Pennsylvania Supreme Court in *BAC* roundly rejected the notion that the fair-share test is concerned with housing affordability,[297] the citations shed some light onto the concerns motivating the development of the fair-share requirement.

As the test is formulated and applied, however, housing affordability simply does not factor into the analysis. While it is unclear that Pennsylvania would benefit from an extensive approach to affordable housing like New Jersey,[298] what is clear for now is that the curative amendment process is not effectively generating affordable housing.

D. Proposed Solutions

Given the extraordinary need for affordable housing in Pennsylvania, the misuse of the curative amendment process and the inability of the fair-share test to guarantee the production of affordable housing are particularly problematic. The following are some possible solutions, designed to stop abuses of the curative amendment process and generate meaningful affordable housing.

1. Allow Non-Site-Specific Judicial Relief for Successful Challenges

If a developer successfully challenges a zoning ordinance as exclusionary, the municipality should be permitted to accommodate the use in the most appropriate location, depending on its infrastructure restrictions and planning goals. The doctrine of definitive relief simply does not make sense given the "sue and switch" tactics employed by developers. If a zoning ordinance excludes a housing use, the municipality should be able to plan for where that use would be best accommodated. Also, limiting the number of times a developer may file a curative amendment on a given property would reduce the burden on municipalities, which must constantly defend against such attacks.[299]

293. 341 A.2d 466 (Pa. 1975).

294. 382 A.2d 105 (Pa. 1977).

295. 336 A.2d 713 (N.J. 1975).

296. *Surrick*, 382 A.2d at 109; *Willistown*, 341 A.2d at 468.

297. BAC, Inc. v. Bd. of Supervisors, 633 A.2d 144, 147 (Pa. 1993).

298. *See* Mitchell, *supra* note 65, at 131 (finding that less expensive housing types in Philadelphia metropolitan area were more abundant than in New Jersey municipalities); *see also* Wish & Eisdorfer, *supra* note 73, at 1273, 1301 (discussing their study's findings that New Jersey's program has generated some low- to moderate-income housing, but noting that some important goals have yet to be achieved).

299. LIOZ, *supra* note 189, at 42.

Alternatively, there should be a good-faith exception for municipalities that mistakenly believe that their zoning is constitutional and comports with the fair-share requirements. Given the vagueness of the fair-share test, which has never been quantified by the Pennsylvania Supreme Court, municipalities should have an opportunity to correct their zoning without being forced to accommodate a development that may be ill suited for the location (and is unlikely to result in affordable housing). Under current doctrine, a municipality that recognizes the constitutional infirmity in its zoning but fails to publicly announce changes before a curative amendment is filed is unable to defend itself based on the new zoning.[300] This approach suggests that Pennsylvania's anti-exclusionary zoning case law and curative amendment procedures are punitive rather than corrective and highlights the focus on property rights rather than social justice.

2. Encourage Municipalities to Enact Inclusionary Zoning Ordinances

Many cities and several states across the country have adopted inclusionary zoning ordinances.[301] Such programs generally provide developers with a variety of incentives, including density bonuses, relaxation of development requirements, or an expedited permit process in return for building affordable housing units.[302] By enacting such ordinances, municipalities can be progressive in providing for affordable housing rather than be in a defensive position against curative amendment challenges. Finally, municipalities can craft inclusionary zoning ordinances in the way most appropriate to the housing needs of their community and in accordance with their planning goals.

3. Control Sprawl

Sprawl itself decreases the availability of affordable housing.[303] For example, single-family homes on large lots may lead to housing segregation by property values.[304] Municipalities should work together to control sprawl and create affordable housing. The "smart growth" movement, a proposed solution to sprawl, advocates sustainable development and the furtherance of several principles, including environmental protection, economic competitiveness, and equity.[305] One of the principal goals of smart growth includes the expansion of housing choices and housing affordability.[306] Similarly, growth management distinguishes itself from exclusionary zoning practices by seeking to "preserve public goods, improve social equity and minimize adverse impacts of

300. *See, e.g.*, Bd. of Supervisors v. Barness, 382 A.2d 140, 143-44 (Pa. Commw. Ct. 1978) (approving definitive relief for developer even though comprehensive plan that cured zoning ordinance's constitutional infirmity was being prepared before developers sued).

301. For a discussion of inclusionary zoning practices, see generally Porter, *supra* note 23, Kautz, *supra* note 82, Lerman, *supra* note 82, and Morgan, *supra* note 82.

302. Porter, *supra* note 23, at 227-28.

303. Weiss, *supra* note 61, at 169.

304. *Id.*

305. *Id.* at 165.

306. *Id.* at 167.

development while still accommodating new housing and economic growth."[307] In fact, "[g]rowth management is an attempt to regulate land uses in ways that do not result in social exclusion."[308] Additionally, inclusionary zoning can be an integral part of smart growth by creating a diverse, integrated community, promoting high-density development (which preserves open space and reduces traffic), and requiring alliances between the public, private, and nonprofit sectors to ensure success.[309] By pursuing smart-growth and growth-management policies, regions and municipalities can better plan for development and refocus efforts on generating affordable housing.

IV. CONCLUSION

It is critical for courts, legislatures, and interested citizens to fight zoning that is truly exclusionary. Exclusionary zoning has been historically used as a technique to keep out "undesirable" residents, including minorities and low-income families, and therefore requires our vigilance. Similarly, efforts to generate affordable housing in both the cities and the suburbs should be lauded and expanded. Pennsylvania's current approach to combating exclusionary zoning with the curative amendment process is ineffective and counterproductive. By focusing on property rights rather than people and their need to live in decent, affordable housing, Pennsylvania's "fair share" case law removes the focus from low- and moderate-income Pennsylvanians and instead places power in the hands of developers, who generally do not have a profit incentive to build affordable housing. Additionally, curative amendments impede municipalities' ability to plan effectively for development and meet the needs of the community. Therefore, the curative amendment process should be revised to provide protection to municipalities acting in good faith and to remove this tremendous weapon from developers. By implementing inclusionary zoning ordinances and pursuing policies of growth management, municipalities can focus their efforts on creating affordable housing rather than fighting developers.

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307. ARTHUR C. NELSON ET AL., THE BROOKINGS INST. CTR. ON URBAN & METRO. POLICY, THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE (2002), *available at* http://www.brook.edu/es/urban/publications/growthmang.pdf.

308. Nelson et al., *supra* note 59, at 127.

309. Porter, *supra* note 23, at 214-15.

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