Judicial Relief in Exclusionary Zoning Cases: Pennsylvania's Definitive Relief Approach

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JUDICIAL RELIEF IN EXCLUSIONARY ZONING CASES:
PENNSYLVANIA'S DEFINITIVE RELIEF APPROACH

I. INTRODUCTION

The past decade has witnessed substantial changes in the legal theories that courts apply in suits challenging the validity of zoning ordinances alleged to be exclusionary.1 Although the ordinance is still accorded a presumption of validity,2 several courts, especially those of New Jersey and Pennsylvania,3 have eased the plaintiff’s burden by considering the interests of the region, rather than only those of the particular community, in determining whether the ordinance meets the general welfare of the community.4 Yet these changes, while aimed at eliminating exclusionary zoning, have afforded plaintiffs little relief because remedies have remained static.5 Even in the landmark decision of National Land & Investment Co. v. Kohn,6 the court enforced its order by traditional and ineffective relief.7 Since the usual prohibitive or injunctive relief does not enable the plaintiff-developer to proceed with his plans, those who have successfully attacked exclusionary ordinances have received few tangible benefits from their victories.

Recently, however, the Pennsylvania courts have attempted to develop an effective remedy for plaintiffs who attack the exclusivity of an ordinance. After declaring the ordinance invalid, the courts, using a definitive relief approach, have ordered the issuance of building permits upon the developer’s compliance with certain conditions. This Comment


Exclusionary zoning has been defined as the use of “the instrument of zoning to exclude housing which is within the financial abilities of low- and moderate-income families . . .” Rubinowitz, Exclusionary Zoning: A Wrong in Search of a Remedy, 6 U. MICHA. J.L. REFORM 625 (1973). Examples of exclusionary zoning include devices such as the exclusion of certain uses and large lot requirements. See generally Comment, A Survey of the Judicial Responses to Exclusionary Zoning, 22 SYRACUSE L. REV. 537 (1971).


5. See text accompanying notes 10-18 infra. But see Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 191, 336 A.2d 713, 734 (1975), wherein the court ordered the township to adopt a “fair share” approach to its zoning system. For an explanation of this approach see text accompanying note 27 infra.


7. See text accompanying notes 10-12 infra.
examines the development of definitive relief in Pennsylvania. The first section discusses those factors which rendered traditional relief ineffective as a judicial remedy. The Comment then focuses upon the evolution of definitive relief in Pennsylvania, with emphasis upon the impact of the amendments to the Municipalities Planning Code (MPC).8 The final section analyzes three aspects of definitive relief as applied by Pennsylvania tribunals: the role of the courts in zoning challenges; the success of definitive relief as a remedy; and the problems attending the use of definitive relief which remain unresolved.

II. INEFFECTIVENESS OF TRADITIONAL RELIEF

When an ordinance was found to be exclusionary, the traditional remedy was to declare it invalid and permit the municipality to enact a new ordinance.9 Such an approach was ineffective for two reasons: it often left the plaintiff without relief; and it failed to insure that the municipality level problem would be remedied.

First, the municipality could comply with the court’s order by rezoning land other than that of the developer who had successfully attacked the ordinance, thereby frustrating the developer-plaintiff. Three important Pennsylvania cases illustrate this remedial ineffectiveness. In National Land,10 the court held that the four acre minimum lot requirement of the township was unconstitutional.11 When the municipality threatened to rezone for a minimum three acres, the landowner accepted a two acre requirement rather than litigate the validity of this proposed ordinance; but, as of 1975, the land remained undeveloped.12 Similarly, in Girsh Appeal,13 although plaintiff successfully attacked the ordinance on the ground that it failed to provide for apartments,14 he was unable to proceed with his development. Subsequent to the court’s ruling, the municipality rezoned to create an apartment district that did not include land owned by the successful challenger.15 Because of the protracted

11. Id. at 533, 215 A.2d at 613.
12. Hartman, supra note 9, at 162 n.12.
14. The court held that the failure of the township's zoning scheme to provide for apartments was unconstitutional even though they were not specifically excluded. Id. at 240-41, 263 A.2d at 396-97.
15. Hartman, supra note 9, at 161-62.
litigation necessary to challenge this new ordinance, changed economic circumstances had made the land unprofitable to develop at the density desired by the owner when relief was finally granted.\textsuperscript{18} Again, in Concord Township Appeal,\textsuperscript{17} after the court invalidated the ordinance, the township effectively prohibited development by imposing subdivision controls and water, sewer, and site planning requirements on the plaintiff’s property.\textsuperscript{18}

Second, the traditional approach has been criticized as ineffective because such relief fails to insure that the exclusionary effect would be remedied on a municipality level.\textsuperscript{19} Under the traditional relief approach, the new ordinance enacted by the municipality could remain exclusionary because it did not ensure that the excluded use would actually be built.\textsuperscript{20} Thus, the traditional relief approach has not provided satisfactory answers to the problems of exclusionary zoning.\textsuperscript{21}

An underlying reason for this two-pronged ineffectiveness is that the traditional standing rules allow only landowners to bring these suits. As one commentator has noted:

The traditional rule, however, is that standing is afforded only to an “aggrieved person,” one who suffers “a pecuniary impact upon some property interests by way of the zoning enactment.” Thus in all states except New Jersey the rights of excluded persons can be vindicated only by the landowner/developer.\textsuperscript{22}

\textsuperscript{16} Id.; see text accompanying notes 38-41 infra.

\textsuperscript{17} 439 Pa. 466, 268 A.2d 765 (1970). In this case, the court held two and three acre minimum lot requirements for single family dwellings unconstitutional. Id. at 478, 268 A.2d at 767.

\textsuperscript{18} Hartman, supra note 9, at 162 n.12.

\textsuperscript{19} See, e.g., Rubinowitz, supra note 1.

\textsuperscript{20} See text accompanying notes 12-18 supra. This is particularly true in cases involving exclusion of low- and moderate-income housing. One commentator criticized this approach because it could not achieve its aim of providing housing:

This [traditional] relief, however, never directly achieves the ultimate goal of the litigation; it merely removes one of the many barriers to the production of low and moderate income housing in a particular municipality. Mallach, Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation, 6 Rutgers-Camden L.J. 653 (1975). See also Williams, Doughty, and Potter, Exclusionary Zoning Strategies: Effective Lawsuit Goals and Criteria, in 1 Management and Control of Growth 477 (R. Scott ed. 1975).

\textsuperscript{21} See Rubinowitz, supra note 1, at 638-39; and Hartman, supra note 9, at 160-62.


Pennsylvania has held that nonresidents of the municipality in question are not persons aggrieved within the meaning of its statute. Commonwealth v. Bucks County, 8 Pa. Cmwlth. 295, 302 A.2d 897 (1973). See Pa. Stat. Ann. tit. 53, § 11005 (1972). However, a more recent case undermines that general proposition in a specific situation. The commonwealth court held that non-resident members of a civic association which had standing to challenge the ordinance because of its resident
Therefore, if these exclusionary ordinances are to be challenged, the landowner-plaintiff should be given incentives, such as relief specific to his proposal, to initiate these challenges. However, from the landowner-plaintiff's point of view, the inadequacy of traditional relief, as illustrated by Girsh and other decisions, can only discourage the investment of time and money in zoning ordinance challenges.

Moreover, even the recent developments in judicial remedies have not been aimed at the developer-plaintiff's problems. For example, the New Jersey Supreme Court, in *Southern Burlington County NAACP v. Township of Mount Laurel*, adopted the regional fair share approach, by which the court ordered the municipality to accommodate its fair share of the regional low- and moderate-income housing need. This approach has definite advantages in eliminating exclusionary zoning; but members thereby had derivative standing to sue. Raum v. Board of Supervisors, 20 Pa. Cmwlth. 426, 443, 342 A.2d 450, 458 (1975). But see Warth v. Seldin, 422 U.S. 490 (1975).

23. See text accompanying notes 10-18 supra.

24. Casey v. Zoning Hearing Bd., ___ Pa., ___ A.2d ___ (1974). One method of dealing with this problem would be to declare the ordinance invalid as applied to the particular parcel rather than invalid on its face. Elias, supra note 9, at 168. While such an approach may allow the individual to proceed with his plans, it would be inadequate in suits based on exclusion of uses. Several suits would be required to achieve the effect of opening up an entire community. Additionally, as illustrated by the result in *National Land*, such an approach may not even allow the specific project to continue. See text accompanying notes 11 & 12 supra.


Statewide legislative solutions have been proposed as the only effective tool to combat exclusionary zoning and one such law in Massachusetts appears to be successful. See Note, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U.L. Rev. 37, 47-50 (1974).

However, several commentators have noted that such solutions will not be adopted in the near future in some states; furthermore, it is quite possible that they will not be a panacea even when implemented. See, e.g., R. LINOWES & D. ALLENSWORTH, *The Politics of Land Use: Planning, Zoning and the Private Developer* 164-65 (1973). These commentators have argued that "[s]tate planning is not the answer. This is not because there is something inherently wrong with state planning (for there is not) or that the states should not be encouraged to set up stronger planning agencies. It is just that one should be aware of what is likely to come from this level. Planning and zoning have traditionally been local responsibilities. Nothing has happened to suggest that state planning and zoning will be any better. The same political forces are operative at both levels." Id. at 165.


27. 67 N.J. at 187-88, 336 A.2d at 731-32. In this case, the court held Mount Laurel's zoning ordinance to be invalid since, in its land use regulations, the township failed to accommodate its fair share of the regional need for low- and moderate-income housing. Id. at 191-92, 336 A.2d at 734.

since it permits the locality to zone around a successful challenger, it would be as ineffective as the traditional approach with regard to the relief given individual plaintiffs where only a landowner has standing.

The problem for the courts in developing effective remedies in this area lies in striking the delicate balance between providing adequate relief to the plaintiff and avoiding disruption of a municipality's planning scheme. This problem arises when the landowner-developer is the sole plaintiff with standing in these suits because he is the only plaintiff who requires the incentive of specific relief. Thus far, the balance has favored the municipality, resulting in ineffective and inequitable relief for the plaintiff.

III. DEFINITIVE RELIEF IN PENNSYLVANIA

The use of definitive relief in successful validity challenges followed two courses of development in Pennsylvania. In cases initiated

29. However, the New Jersey standing rules do not present the incentive problem since nonresidents have standing to sue. See note 22 and accompanying text supra. For nonresidents seeking access to housing, declaratory or injunctive relief would be sufficient.

30. See Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 167 N.E.2d 406 (1960), which held a zoning ordinance invalid as applied to a particular tract, stating:

Because zoning cases are tried in this manner [in light of a specific alternative proposal, such as a curative amendment, to the tract's present zoning], two equally undesirable consequences may ensue if . . . the property is left unzoned as the result of a decree declaring a zoning ordinance void. The municipality may rezone the property to another use classification that still excludes the one proposed, thus making further litigation necessary . . . . The present case illustrates the other possibility: — that a decree which was induced by evidence which depicted a proposed use in a highly favorable light would not restrict the property owner to that use, and he might thereafter use the property for an entirely different purpose.

31. See note 29 infra.


33. The term "definitive relief" was used in an article by Professor Krasnowiecki and subsequently employed by the Supreme Court of Pennsylvania in Casey v. Zoning Hearing Bd., __ Pa. __, 328 A.2d 464, 469. See Krasnowiecki, supra note 30, at 1082.
prior to the effective date of the amendments to the MPC$^{34}$ several courts, relying upon their judicial powers, employed this approach to conclude protracted litigation.$^{35}$ In cases arising after the amendments became effective, other courts relied upon the specific legislative authorization of section 101$^{36}$ in using definitive relief.$^{37}$

The rationale for the use of definitive relief in the earlier cases is unclear. In *Girsh Appeal*,$^{38}$ the Supreme Court of Pennsylvania held the township's ordinance invalid because it contained no provision for apartment uses.$^{39}$ Subsequently, the township amended the ordinance but did not zone plaintiff's land for apartments.$^{40}$ The challenger sought a building permit despite this adverse classification and, in conclusion of the litigation which followed the denial, the supreme court ordered that the permit issue upon compliance with the township's building code.$^{41}$ Although this action was taken without an opinion, the court continued to employ this approach and subsequently attempted to propound a rationale.$^{42}$

In *Casey v. Zoning Hearing Board*,$^{43}$ the ordinance was attacked as invalid because it failed to zone for multi-family housing and required a two acre minimum lot size.$^{44}$ Holding that this ordinance was exclusionary, the commonwealth court directed that the building permits be issued upon the filing of the appropriate plans.$^{45}$ Although the supreme court affirmed the invalidation of the ordinance, it vacated the appellate court's order as to relief.$^{46}$ Addressing the relief issue, the court noted that this case was governed by principles other than the MPC because it was initiated prior to their effective date.$^{47}$ The court then stated that the


$^{36}$ For the text of section 1011, see note 64 infra.


$^{39}$ Id. at 240-41, 263 A.2d at 396-97; see note 14 supra.

$^{40}$ See text accompanying note 15 supra.


$^{42}$ See text accompanying note 49 infra.


$^{44}$ Id. at ___, 328 A.2d at 466.

$^{45}$ Id.

$^{46}$ Id. at ___, 328 A.2d at 470.

$^{47}$ Id. at ___, 328 A.2d at 469 n.12.
Girsh order "implicitly held that courts in this Commonwealth do have such power [to grant definitive relief]."\footnote{48} This assertion as to the power of the courts was further supported by equity and efficacy arguments. The court reasoned that this type of relief is necessary to prevent such a suit from becoming a farce and that the challenger's investment should be protected.\footnote{49} The court stressed, however, that it could not directly order a permit, since other regulations which were in effect on the date of the original application first had to be satisfied by the developer.\footnote{50} The court remanded to the township's zoning board in order for that body to pass upon the developer's compliance with these regulations and ordered that upon compliance therewith, the permit would issue.\footnote{51} The trial court was ordered to retain jurisdiction over the process.\footnote{52}

A subsequent case, Township of Willistown v. Chesterdale Farms, Inc.,\footnote{53} which was apparently decided upon preamendment principles also,\footnote{54} held that the ordinance was exclusionary, even though it provided some acreage for apartment use, because this allotment did not constitute the township's fair share of such use.\footnote{55} In its relief, the court, citing Casey, ordered that "zoning approval for appellee's tract of land be granted and that a building permit be issued"\footnote{56} upon the developer's compliance.

\footnote{48} Id. at ___, 328 A.2d at 469.
\footnote{49} Id. The court stated: "Obviously, if judicial review of local zoning action is to result in anything more than a farce, the courts must be prepared to go beyond mere invalidation and grant definitive relief." To forsake a challenger's reasonable development plans after all the time, effort and capital invested in such a challenge is grossly inequitable. \footnote{Id., quoting Krasnowiecki, supra note 30, at 1082.}
\footnote{50} ___ Pa. at ___, 328 A.2d at 469. The majority opinion read: However, we are not justified in ordering the immediate issuance of this building permit when the right thereto is conditioned on other prior approvals which have not been given . . . . Rather, he [appellee-landowner] must satisfy requirements of the other sources of control (i.e., subdivision controls, building codes, etc.) before such permit may issue. \footnote{Id.}
\footnote{51} Id. at ___, 328 A.2d at 469-70.
\footnote{52} Id. at ___, 328 A.2d at 470.
\footnote{53} ___ Pa. ___ , 341 A.2d 466 (1975).
\footnote{54} Willistown was initiated before the effective date of the MPC amendments (August 1, 1972); therefore, as in Casey these amendments did not affect the disposition of the case. In addition, there was no mention in this decision of the power granted by the amendments.
\footnote{55} ___ Pa. at ___, 341 A.2d at ___. Subsequent to the Girsh decision in 1970, the Township of Willistown passed an ordinance providing eighty acres for apartment usage. \footnote{Id. at ___, 341 A.2d at 467.} The court, holding that the ordinance was exclusionary, stated: This record convinces us that the township zoning ordinance which provides for apartment construction in only 80 acres out of a total of 11,589 acres in the township continues to be "exclusionary" in that it does not provide for a fair share of the township acreage for apartment construction. \footnote{Id. at ___, 341 A.2d at 468.}
\footnote{56} Id. at ___, 341 A.2d at 468.
with administrative requirements and other reasonable controls. 57 The judicial order of zoning approval was an extension of the type of relief previously awarded in Girsh and Casey. 58 Although the practical results may be the same, in no previous case had the court actually ordered the municipality to place a plaintiff's property within a particular zoning classification. 59

With the exception of the brief remarks in Casey, 60 all three of these supreme court cases lack a sound articulation of the justification for using definitive relief. It is submitted that although bad faith on the part of the municipality seems to be a strong factor in awarding definitive relief, 61 the rationale in Casey is the underlying basis. While bad faith may have been a factor in Girsh and Willistown, 62 the considerations of equity mentioned in Casey 63 were present in all three. The court has recognized that definitive relief protects the developer's investment in the challenge and attempts to ensure that plaintiff's victories result in tangible benefits.

Subsequent to the effective date of the amendments to the MPC, the cases have relied upon section 1011, which conferred upon the courts

57. Id. at ___, 341 A.2d at 468-69. The court required that the landowner comply with the administrative requirements of the zoning ordinance and other reasonable controls, including building, subdivision, and sewage regulations, which are consistent with this opinion. . . . The trial court shall retain jurisdiction to oversee the granting of the necessary permits authorized by this opinion. Id. (citation omitted).

58. For the relief granted in the Girsh order, see text accompanying note 41 supra; for the relief granted in Casey, see text accompanying note 45 supra. These cases did not order any zoning approvals.

59. It is submitted that the extent of the court's power to use definitive relief is confused by the Willistown decision. Not only does this order go beyond precedent, it also seems to stand alone when viewed in conjunction with the decisions which interpreted the court's power under the MPC. Those subsequent cases indicate that the court will not decide specifically how a tract should be zoned. See, e.g., Gorski v. Township of Skippack, 19 Pa. Cmwlth. 346, 339 A.2d 624 (1975). It is submitted that the order in Willistown exceeds the limits to which the court should intervene in these types of cases. See Ellick v. Board of Supervisors, 17 Pa. Cmwlth. 404, 415-17, 333 A.2d 239, 246-47 (1975); Olson v. Warminster Township Bd. of Supervisors, 19 Pa. Cmwlth. 514, 522, 338 A.2d 748, 752 (1975), wherein the commonwealth court reversed the lower court order which required the township to adopt the owner's curative amendment.

60. See note 49 and accompanying text supra.

61. In Girsh and Willistown, an element of bad faith on the part of the municipality may have accounted for this relief, but this factor is not mentioned in either decision. In his dissenting opinion in Casey, Chief Justice Jones argued that such bad faith was the basis for the Girsh order and that Casey did not present a question of bad faith. ___ Pa. at ___, 328 A.2d at 470-71 (Jones, C.J., dissenting). Later, in Willistown, consideration of the township's good faith attempt to provide for apartments may have influenced the court's order. ___ Pa. ___, 341 A.2d 466, 469 (1975) (Pomeroy, J., dissenting).

62. See note 61 supra.

63. See text accompanying note 49 supra.
the authority to order approval of a developer's plans and thus grant definitive relief. The leading case of Ellick v. Board of Supervisors was an attempt to resolve several questions concerning zoning challenges under the amendments. As part of this attempt, the Ellick court outlined the role of the courts when such a challenge is successful: 1) the court may not control the manner in which or the extent to which the ordinance is to be amended by the municipality; 2) the court has virtually unlimited power of review and disposition over the plans submitted by the developer; 3) the court must pass upon the reasonableness of the

64. PA. STAT. ANN. tit. 53, § 11011 (1972).
The statute provides in pertinent part:
If the court finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality . . . it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order. The court shall retain jurisdiction of the appeal during pendency of any such further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner . . . .

65. 17 Pa. Cmwlth. 404, 333 A.2d 239 (1975). Ellick involved a challenge, undertaken pursuant to the new procedures in Article X of the MPC, to a zoning ordinance which banned townhouses. Id. at 406, 333 A.2d at 242. The commonwealth court reversed the lower court and held that the ordinance was invalid. Id. at 420-21, 333 A.2d at 249.

66. 17 Pa. Cmwlth. at 410-11, 333 A.2d at 244. In particular, the court emphasized the need to accompany challenges with "plans and other materials describing the use of [sic] development proposed by the landowner . . . ." Id. One of the purposes of these plans is to furnish the basis for relief if the challenge succeeds. Henszey & Novak, supra note 64, at 195. The scope of these plans was discussed in a later case. See note 81 and accompanying text infra. The court also discussed the role of the governing body. 17 Pa. Cmwlth. at 411-13, 333 A.2d at 244-45. Should the governing body find its ordinance defective, it must allow the landowner to develop his land as proposed in his plans and materials, provided these are reasonable. Id. at 411, 333 A.2d at 244 (emphasis added). The governing body may still require the landowner to comply with all reasonable regulations applicable to the class of use proposed by the owner. Id. at 412, 333 A.2d 244-45 (emphasis added).

67. Id. at 415, 333 A.2d at 246. This proposal, the curative amendment, is a requirement of a validity challenge which is submitted to the municipality's governing body pursuant to section 1004(2)(d) of the MPC. PA. STAT. ANN. tit. 53, § 11004 (2)(d) (1972). The amendment, which should cure the defects in the challenged ordinance, is merely a suggestion to aid the governing body in its deliberations. Henszey & Novak, supra note 64, at 200. For an example of a curative amendment see Record, at 11-16, Gorski v. Township of Skippack, 19 Pa. Cmwlth. 346, 339 A.2d 624 (1975).

68. 17 Pa. Cmwlth. at 416, 333 A.2d at 246.
restrictions imposed by the municipality upon this type of development.69 The Ellick court warned that by exercising definitive relief in this manner, the municipality would run the risk of having a use approved by the courts which runs counter to the municipality’s comprehensive plan of development.70 Thus, the court has a duty to review, on reasonableness grounds, both the developer’s plans and the municipality’s other land use controls over this project. However, the court will not concern itself with the developer’s curative amendment for eliminating the zoning deficiency. In terms of the development of definitive relief, the significance of Ellick is twofold: 1) there is no requirement, as in Casey, that the restrictions imposed upon the developer be in effect on the date of the original application for a curative amendment;71 and 2) the court will not deal with the challenger’s proposed curative amendment.72

After Ellick, the definitive relief approach became fairly well established in Pennsylvania. The legislative authority of section 1011 eased any doubts as to the rationale for justifying the use of this remedy. Both section 1011 and Ellick suggest that definitive relief can be used in any challenge where the ordinance is found invalid.73 However, in Gorski v. Township of Skippack74 the township argued that this approach usurped the legislative power of the local body.75 The commonwealth court rejected this contention because it did not have the power to order “any amendment to the zoning ordinance,”76 including the developer’s curative amendment. This function belongs entirely to the governing body.77

Although these strong statements regarding disposition of the curative amendment seem to foreclose its consideration by a court, the case of Kaufman & Broad, Inc. v. Board of Supervisors78 obfuscates the issue.

69. Id. at 416, 333 A.2d at 247. It should be noted that the court expressed dissatisfaction with the role assigned to the courts by the legislature and twice noted the burden it would place on lower courts. Id. at 414, 417, 333 A.2d at 246, 247.

70. Id. at 417, 333 A.2d at 247.

71. See text accompanying note 50 supra. Under Ellick, the only restriction upon the regulations which can be imposed by the municipality is that they not be unreasonable or burdensome. 17 Pa. Cmwlth. at 411-12, 333 A.2d at 244.

72. This statement appears to be inconsistent with the later order by the Supreme Court of Pennsylvania in Willistown. See text accompanying note 56 supra.

73. See note 95 and accompanying text infra.

74. 19 Pa. Cmwlth. 346, 339 A.2d 624 (1975). In this case, the commonwealth court upheld a lower court ruling that the zoning ordinance, which failed to provide for apartment uses, was invalid. Id. at 350-51, 339 A.2d at 626-27.

75. Id. at 351, 339 A.2d at 627.

76. Id.

77. Id. In addition, the Gorski court further emphasized the supervisory role of the court in the remand process. Id. at 352, 339 A.2d at 627. While the lower court order called for issuance of a permit upon filing of plans in compliance with the local building code, the appellate court stressed that “it is improper for the courts to simply refer cases back to the municipality without any direction.” Id. The court also noted that lower courts should “note explicitly” their continuing supervision. Id.

78. 20 Pa. Cmwlth. 116, 340 A.2d 909 (1975). In Kaufman, the ordinance was challenged as exclusionary because it failed to provide for townhouses. Prior to
In *Kaufman*, the commonwealth court held that because the challenger’s curative amendment was overbroad, it could not order its adoption. Such language, which implies that if the amendment were otherwise proper, a court could make such an order, seems to contradict previous holdings as to the court’s handling of the amendment issue.

However, the *Kaufman* case further elaborated upon the court’s review of the developer’s plans. The court hinted that a developer could not submit plans which presented an unreasonable means of curing the defective ordinance in the hope that upon a finding of invalidity he could proceed with any type of development he chose. The court’s review of the developer’s plans is guided by the same rule of reasonableness which guides its review of the township’s regulations.

In summary, the definitive relief approach adopted by the Pennsylvania courts has attempted to remedy the failure of traditional relief to provide the developer with the benefit of his victory while allowing the municipality to retain control over development. The approach has developed to this point: upon finding the ordinance invalid, the court can review the plans and materials submitted by the developer; if they are

oral argument on appeal, the township stipulated that the ordinance was exclusionary as to this use. *Id.* at 120, 340 A.2d at 911. Other challenges involved the exclusion of fourplex and condominium units. The court remanded as to the fourplex issue. *Id.* at 128, 340 A.2d at 915. The condominium issue was held not to be proper in the proceedings before the court. *Id.* at 120, 340 A.2d at 911. 79. *Id.* at 123, 340 A.2d at 912. The court noted that the MPC does not provide standards for the curative amendment. *Id.* at 121, 340 A.2d at 911. However, it found that the developer’s proposal, which called for a Planned Residential Development (PRD), was much broader than necessary and suggested that the amendment should have been limited to providing for townhouses. *Id.* at 122, 340 A.2d at 912. The language used by the court in its conclusion confuses the issue of the court’s power:

[W]e conclude that appellant’s curative amendment submission is overbroad. We cannot directly order its adoption. 

*Id.* at 123, 340 A.2d at 912. While this statement implies that, had the submission not been overbroad, the court would have had the power to so order, it is submitted that the second sentence follows from the *Kaufman* court’s extensive quotation from *Ellick* dealing with the court’s power. *Id.* However, it should be noted that the *Willistown* decision appears to imply such power. See text accompanying note 56 *supra*. As to the practical and legal considerations in formulating a curative amendment, see Henszey & Novak, *supra* note 64, at 199–202.

80. See text accompanying notes 72 & 76 *supra*.

81. 20 Pa. Cmwlth. at 125–26, 340 A.2d at 913–14. The *Kaufman* court noted a problem which arises under this approach to relief. Although the PRD amendment proposal was overbroad, the possibility remained that, because this was the plan submitted by the landowner, he could proceed with it. Citing and quoting from *Ellick*, the court noted that a successful challenger must be permitted to develop according to his submitted plans even if the use would contradict the comprehensive plan. *Id.*

82. *Id.* at 127, 340 A.2d 914. The court again quoted *Ellick* to emphasize that the developer’s proposal must be reasonable before he can gain the benefit of a successful challenge. *Id.*

In an article on the procedural aspect of zoning validity challenges, two commentators noted that, although *Kaufman* seems to hold that relief is determined by the plans submitted, this is limited by the requirement that such plans be reasonable. Henszey & Novak, *supra* note 64, at 198.
reasonable, it can order that the development be approved and the necessary permits issue, provided the plans and materials conform to other reasonable restrictions of the township not inconsistent with the declaration of invalidity. The trial court retains jurisdiction over the municipality's review.

IV. AN ANALYSIS OF DEFINITIVE RELIEF

Although definitive relief represents a commendable attempt to formulate a badly needed judicial remedy, its application has created problems which could blunt its effectiveness. Moreover, it is submitted that “definitive relief,” as administered by the Pennsylvania courts, falls short of the full implications of that term. These shortcomings are best perceived by examining definitive relief, as applied by Pennsylvania tribunals, from three perspectives: 1) the role assumed by courts in zoning challenges; 2) the success of definitive relief as a remedy; and 3) the problems with this approach still awaiting resolution.

A. The Role of the Courts

First, courts in general, and Pennsylvania courts in particular, have shunned the role of superzoning body. Although one commentator characterized the Girsh order as a “highly visible judicial incursion” into the legislative perogative, it is submitted that the later development of definitive relief has reduced the court's intrusion into these matters.

83. See text accompanying note 119 infra.
84. See notes 100 & 101 and accompanying text infra.
85. See note 30 supra.
86. Hartman, supra note 9, at 169. Another commentator who examined the original Girsh decision stated: “Declaring the code unconstitutional was thus the only proper relief the court could have granted.” Washburn, Apartments in the Suburbs: In re Appeal of Joseph Girsh, 74 Dick. L. Rev. 634, 652 (1969-70). That author disapproved the issuance by several lower federal courts of building permits and other broader remedies. He argued that those orders were justified by the racial discrimination aspect of those cases, but that the Girsh court “would not have been justified in making a broader decree.” Id. at 653. The author was aware of the aftermath of this decision, but noted it as a defect in the process. Id. at 653-54.

It is submitted that definitive relief is a proper order for the court. Although the use of equitable remedies is usually limited to violations of constitutional rights, the court has the power to enforce its orders. See Krasnowiecki, supra note 30, at 1062-65. This issue is mooted, however, by the passage of section 1011 of the MPC which provides the power to grant definitive relief. See note 64 supra.

87. This author has found only two cases in which the courts ordered that the necessary permits be issued without a remand to either the lower court or the local authorities. In Girsh, the Supreme Court of Pennsylvania ordered that a building permit be issued in order to conclude a prolonged litigation. It has been suggested that bad faith on the part of the municipality played a key role in that order. See note 61 and accompanying text supra.

In Thornbury Corp. v. Upper Uwchlan, 23 Chest. Co. Rep. 348 (1975), the landowner challenged the ordinance as exclusionary because certain commercial uses were prohibited and because a two acre minimum lot requirement was applied to
The courts have generally remanded the cases to enable the municipality to pass upon the plans of the developer with regard to its other land use regulations.\textsuperscript{88} The proper articulation of the court's role is that in \textit{Gorski},\textsuperscript{89} wherein the court emphasized both that the municipality can correct the ordinance in any manner not inconsistent with the decision, and that the court may not order any amendment to the zoning ordinance.\textsuperscript{90} The \textit{Kaufman} decision may indicate a shift from this position to the extent that it appears to permit consideration of the curative amendment.\textsuperscript{91} As two commentators have noted, the probable consequence of \textit{Kaufman} is that an improper curative amendment may affect the court's consideration of the merits of the appeal.\textsuperscript{92}

Because the use of definitive relief can create planning problems,\textsuperscript{93} the courts should develop standards to determine those situations in which definitive relief will be applied. The MPC clearly provides that this relief is authorized if the ordinance is found to be exclusionary because of a restriction of a use or development.\textsuperscript{94} Thus far, the courts have not made distinctions based upon the type of exclusionary ordinance involved.\textsuperscript{95} The wording of the statute seems applicable to ordinances which make no provision for a use, as well as to those which restrict on the basis of large lot requirements or other such controls. The courts, therefore, have applied definitive relief to both types of cases. Bad faith on the part of the municipality has been advanced as a possible standard for deciding whether to use this type of remedy.\textsuperscript{96} However, the courts have apparently not accepted that standard\textsuperscript{97} for it appears that such
relief is available regardless of the intent of the municipality. It should be noted that in Girsh and Willistown, where direct approval was ordered without further remand, bad faith may have influenced the relief granted.98

Assuming that the courts will apply this relief in most cases, it is submitted that ordering the issuance of a permit is a decision-making process for which a court is well suited. It is a decision for which the standards have been delineated in a code (a building code) which the court could examine for proper application to the facts at hand. The standards for the continuing supervision of the court are, therefore, more concrete.99 Such a review does not usurp the legislative prerogative as would the policy decision of what zone should be where in a municipality, i.e., rezoning a plaintiff's tract. Thus, this remedy poses no serious problems to the traditional role of the court in this field of law.

B. The Success of Definite Relief as a Remedy

The second area for analysis is the success of definitive relief as a judicial remedy. It has been suggested that any remedy, to be successful, should: 1) conclude the litigation; 2) protect the substantive rights of the litigants;3) provide for supervision and flexibility in enforcement; and 4) be effective.100 While the definitive relief approach meets some of these standards, it fails to fulfill others. The first factor is certainly an aim, although not always a result, of the Pennsylvania approach. While the Girsh order concluded a long series of disputes,102 subsequent cases may have been less effective. The generally followed approach of remanding the case to the municipality involves the court in the supervision of review by administrative officials, and these actions could potentially

98. See note 61 and accompanying text supra.
99. Cf. Fasano v. Board of County Comm'rs, 264 Ore. 574, 580-81, 507 P.2d 23, 26-27 (1973), wherein the court held that a rezoning decision was a quasi-judicial decision in which it could examine whether the standards for such a change were properly applied to the particular facts. But cf. Cleaver v. Board of Adjustment, 414 Pa. 367, 374, 200 A.2d 408, 413 (1964), wherein the court noted that such rezoning decisions are committed solely to the discretion of the legislative body. However, Willistown may indicate a shift in this attitude because that case ordered a rezoning. See text accompanying note 56 supra.
100. Criteria one and two were provided by Mr. Hartman:
Because courts do in fact decide exclusionary zoning cases, they should provide remedies that successfully conclude the litigation and protect the substantive rights involved.
Hartman, supra note 9, at 177 (footnote omitted).
101. Criteria three and four were suggested by Mr. Rubinowitz from his study of relief in constitutional rights cases:
Several principles of fashioning appropriate relief in the vindication of federal constitutional rights can be distilled from these cases. First, the remedy must be effective: it must maximize the actual relief sought . . . . Second, the court must be flexible and consider the use of all available techniques . . . . Third, courts must supervise these cases until such time as full relief has been provided.
Rubinowitz, supra note 1, at 637.
102. See text accompanying note 41 supra. Even this order did not ensure that the landowner's project would be built because the long delay made it unprofitable. See text accompanying note 16 supra.
prolong the litigation. Still, this supervision is advantageous because it enables the developer to obtain necessary orders to speed the proceedings or overcome any unreasonable regulations.

With respect to the second criterion, it is submitted that definitive relief functions, both directly and indirectly, to protect the substantive rights of the parties involved in the litigation. Directly, the order to issue permits protects the landowner's rights which have been adjudged violated by the ordinance of the municipality. Indirectly, the interests of excluded persons are protected by the unique congruity of interests which is a necessary derivative of the fact that, in most states, only a landowner-developer has standing to sue.

The development in the courts of the remanding process with retention of jurisdiction by the lower court fulfills the third criterion of flexibility and supervision. Section 1011 of the MPC enables the courts to tailor the order to the specific circumstances of each individual case and they have applied this approach in a flexible manner.

The final, and perhaps the most important criterion is that the remedy should be effective. In analyzing the effectiveness of definitive relief, two aspects must be considered: 1) whether this method will allow the municipality to continue to plan its development; 2) whether it will help to build the housing or use that was formerly excluded.

As for the first consideration, the definitive relief approach as currently applied is subject to criticism to the extent that it provides an ad hoc remedy when the problem calls for a broad-scale solution.

103. For a discussion of administrative delays in zoning, subdivision, and building permit controls, see R. Babcock & F. Bosselman, Exclusionary Zoning: Land Use Regulation and Housing in the 1970's 14-17 (1973) [hereinafter cited as Babcock & Bosselman].

104. The commonwealth court has noted:

We further noted that the lower court may even refer some or all of the elements of the plan back to the governing body while the court, pursuant to the statute, retains jurisdiction. During this period the court may issue such supplementary orders as it deems necessary to protect the rights of the landowner.


105. See note 100 and accompanying text supra.

106. See text accompanying note 22 supra.

107. See note 101 and accompanying text supra.

108. For the text of section 1011, see note 64 supra.

109. See, e.g., Kaufman & Broad, Inc. v. Board of Supervisors, 20 Pa. Cmwlth. 116, 340 A.2d 909 (1975), where the court stated:

This case [is] remanded to said court to allow it to exercise its broad supervisory powers of review over the submitted plans of Kaufman and Broad, Inc., and for its remand to the Board of Supervisors of West Whiteland Township (a) to construe the term “fourplex unit”; (b) to determine whether or not fourplex units are unconstitutionally excluded uses under the ordinance . . .

Id. at 128, 340 A.2d at 915.

110. See note 101 and accompanying text supra.

111. Several commentators have advocated regional or statewide plans as the only effective solution to the exclusionary zoning problems. See Mallach, Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation, 6
Although the ordinance has been invalidated, the immediate dividends are reaped by the challenger in the form of approval for his development; but the municipality can continue to delay planning for the previously excluded uses on a large-scale basis. Because the problems of what constitutes a reasonable restriction and when such restrictions must be in effect remain unresolved, the municipality still possesses the tools to avoid a solution on both the macro and micro levels.

Other problems arise, however, if the courts impose a broader solution and permit developers who were not parties to the litigation to receive building permits after the ordinance is invalidated. The Ellick court noted, in dicta, that the municipality faced the risk of having a use authorized by the court which did not conform to its comprehensive plan. While no case has decided whether nonparty developers would also be entitled to permits if an ordinance were voided, one author has described the problems which developed in a suburban community after Casey:

While this rule [Casey] should discourage unconstitutional zoning, it could also result in further unplanned sprawl. For example, in Buckingham Township . . . more than half a dozen curative amendments have been filed for development in the proposed agricultural zone which would more than triple the population of the township. This statement illustrates the potential disruption of a comprehensive plan which could result from this type of relief. It is submitted that the courts should be cautious in their exercise of power in order to avoid such disruption. A possible solution to the planning issue would be to combine definitive relief with an order to zone for a fair share of the excluded use.

With regard to the second consideration, it is arguable that definitive relief does not ensure the construction of low- and moderate-income housing. The foundation for such an argument is that Pennsylvania law is not oriented to that goal. Some commentators have suggested that Pennsylvania's approach in exclusionary zoning cases cannot handle such

RUTGERS-CAMDEN L.J. 653, 677–86 (1975) (suggesting state allocation schemes and regional share-the-growth models as alternatives); Rubinowitz, supra note 1, at 668–69 (advocating combination of single site and regional relief).

112. See text accompanying notes 119–35 infra.

113. 17 Pa. Cmwlth. at 417, 333 A.2d at 247. The court stated:

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

Id.


115. This approach would protect the developer’s rights and eliminate the piece-meal objection to the approaches which are currently used. See Rubinowitz, supra note 1, at 658–64. However, a problem for courts to consider is whether the developer would have a nonconforming use with all its attendant implications.
challenges because it deals only with total or virtually total exclusion of a certain use and not with exclusion of an economic group. The cases previously discussed involved apartments and townhouse developments which were not designed for low or moderate income groups. The problem with this argument is that definitive relief is neither limited to a particular situation nor tied to the theories now developed. Any attempt to ensure adequate housing necessarily depends upon variables other than zoning. However, the definitive relief approach can be a potentially effective tool in a developer-initiated challenge based upon the exclusion of an economic group because the court would order the permits to issue and retain supervision to ensure compliance with its order.

A conclusion as to the success of this remedy must be postponed until further developments occur. However, it is submitted that, while keeping in mind planning considerations, the conscientious use of definitive relief combined with the fair share theory could be an effective tool in dealing with exclusionary ordinances.


118. Cf., e.g., Crow v. Brown, 332 F. Supp. 382 (N.D. Georgia 1971), aff'd per curiam, 457 F.2d 788 (5th Cir. 1972). In that case the county legitimately zoned tracts for apartments, but subsequently denied building permits upon discovering that these would be used by low income black tenants. The court found a violation of equal protection and ordered, inter alia, that the permits be issued. Id. at 395.

Although this case involved a violation of constitutional rights rather than the issue of exclusionary zoning, it is submitted that the courts could adapt the definitive relief approach to meet any challenges on racial or economic exclusion. See Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), aff'd, 425 F.2d 1037 (10th Cir. 1970).

119. A court utilizing the fair share approach orders the municipality to zone sufficient land to accommodate its share of the regional need for low- and moderate-income housing. See Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 188-89, 336 A.2d 713, 732-33, appeal dismissed, 423 U.S. 808 (1975). The use of such an order would ensure that the township level problem would be handled. Combined with an order for definitive relief, the court could also provide relief on the individual level. The combination could ease the planning problem by allowing the municipality to plan where the new zones will be placed without interference from other developer's suits. However, there may be resistance to combining these approaches. Justice Pashman, in his concurrence in Mount Laurel, noted:

[T]he affirmative duty to plan and provide for regional needs does not require the municipality to make any specific piece of property available for low or moderate income housing, absent a showing that there are inadequate alternative sites realistically available for that type of development. . . . To permit a developer to come in at a later date and demand, as a matter of right, that a piece of property not presently zoned to permit development of low or moderate cost housing be so zoned, is to undermine the entire premise of land use regulations.

67 N.J. at 213-14, 336 A.2d at 746 (Pashman, J., concurring).
C. Unresolved Problems

The remaining section of this analysis concerns two problems stemming from the use of definitive relief which remain unresolved. The Ellick decision empowered courts to order that a developer’s reasonable plans be approved by a municipality subject to any “reasonable” restrictions, other than zoning, on development. Two problems arise from this grant of power: 1) what the courts will consider to be reasonable restrictions; and 2) when these restrictions must be in effect in order to apply to the developer’s plans. The resolution of these issues will provide some clue as to how well this remedy will achieve its aim of permitting the developer to gain the benefit of his victory. With respect to the first problem, the cases to date have done little to define the term “reasonable.” For example, in O'Connell v. Wrightstown Township Board of Supervisors, the court set out the regulations with which the developer must comply:

The governing body can require assurance of compliance with all reasonable building requirements, safety measures, sewage regulations, and water requirements, as well as all other reasonable zoning, building, subdivision and other regulations generally applicable to the class of use or construction proposed by the landowner.

However, as is evident from this statement the court failed to articulate what types of restrictions would be considered reasonable; in fact, it avoided this issue. Although the township attempted to justify its ordinance on grounds of the unsuitability of the particular land for the proposed use and unavailability of sewers, the court left consideration of these practical problems for the local administrators on remand. Generally, the courts have remanded such issues to the appropriate municipal body. While this is laudable in terms of a theoretical separation of areas of power and expertise, it does little to develop guidelines for litigation

120. See text accompanying note 71 supra.
121. However, one commentator has noted:
   
   [I]t is highly unlikely that any significant litigation will develop after the court has referred plans back to the local governing body; the parties will have a tendency to work out an acceptable resolution based upon the specifics of the court order. As a consequence, the question of what is encompassed by a referral back to the local agency may be subject to a good deal of confusion.
122. 26 Bucks Co. L. Rep. 344 (1975). In that case, the court found exclusionary an ordinance which imposed minimum lot size requirements on approximately 75% of the property within the municipality. Id. at 349.
123. Id. at 350 (emphasis added).
124. Id. at 350. The township argued that the surface configuration of appellant’s properties made them unsuitable for the lot size he preferred for development. Id.
One commentator criticized the Casey decision because no position was taken by the court in the situation where the land was manifestly unsuitable for the desired use.
125. 26 Bucks Co. L. Rep. at 350.
or planning. Such reluctance to confront the reasonableness issue also tends to perpetuate the possibility of a township's continuing its exclusionary practices through the use of controls other than zoning. This development would shift the focus of litigation to these other controls, which, as commentators have noted, have an exclusionary effect and involve administrative delays.

The second problem is whether the municipality can impose ex post facto regulations on the developer. Two cases are illustrative of this issue. In O'Connell, the court noted that upon review by the governing body, the developer's plans were subject to regulations "now or hereafter" applicable to the particular class of use contemplated. By contrast, in Waynesborough Corp. v. Easttown Township Zoning Hearing Board, the court, upon finding the ordinance exclusionary, limited the township's review on remand to the developer's compliance with those regulations in effect on the date of the original application. The O'Connell court seemed to follow Ellick, while the Waynesborough court appeared to follow Casey. Although the cases are split in handling this issue, the stronger argument is that of Casey — that the restrictions must be in effect on the date of the original challenge. However, it could be argued from the planner's viewpoint that, by necessity, since the use was previously excluded, there could not be any regulations of this use in existence. This argument suggests two possible solutions: either the municipality should be given a chance to develop regulations which would

126. Although the O'Connell court retained jurisdiction to review subsequent action by the municipality, it seemed willing to allow the governing body to make the final decision as to the development. The court did not indicate that, if the township refused to issue permits because of the developer's noncompliance with subdivision or sewer controls based upon the same arguments which were advanced to justify the old zoning, it would likewise strike those controls as exclusionary. See 26 Bucks Co. L. Rep at 350-51.

127. The commonwealth court seemed to sense the beginning of such a shift:
Such cases [as the one before the court] evidence the fact that the battleground between those who would build apartments and those who would resist their construction has shifted from the heights of constitutional debate, lost by the latter in Girsh Appeal . . . to the beaches of local administrative procedures.


130. Id. at 350.


132. Id. at 375-76.

133. Id. at 377.


135. See note 134 supra.
then be applied; or the project should proceed without any restrictions, since no restrictions regarding this type of use were in effect on the "date of original application." The latter alternative would be disruptive of planning and, therefore, unacceptable.

Thus, it is submitted that the Casey approach, which requires that the regulations be in effect at the time the suit is initiated, is valid only when there are regulations in effect for that use or a similar use which could reasonably be applied to the previously excluded use. Otherwise, the township should be permitted to enact reasonable regulations, such as a building code, for the excluded use.

V. CONCLUSION

The definitive relief approach is subject to some of the criticisms raised against the traditional judicial remedy, such as an inability to ensure a broad-scale solution. Unless several problems are resolved, the remedy may fail in some cases to be definitive even for the developer-plaintiff. However, this remedy does provide a needed judicial tool to deal with the exclusionary zoning problem. The definitive relief approach provides the developer-plaintiff with an incentive to initiate zoning challenges. In addition, it encourages municipalities to correct any potentially defective ordinances in order to avoid disruption of their comprehensive plans. Although this relief will not in itself guarantee the increased availability of low- and moderate-income housing, it strikes down a major barrier to those objectives and ensures that at least some projects will result. The remedy also provides a temporary but necessary judicial weapon to combat exclusionary practices until a reformation of the zoning power and process emerges from the legislatures. Finally, if combined with the fair share approach, as suggested in Willistown, definitive relief would provide an even more effective judicial solution for this wrong in search of a remedy.

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137. See note 118 and accompanying text supra.
138. See note 56 and accompanying text supra.
139. See Rubinowitz, supra note 1.