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# ADULT SUPERVISION REQUIRED: THE COMMONWEALTH OF MASSACHUSETTS'S RECKLESS ADVENTURES WITH AFFORDABLE HOUSING AND THE ANTI-SNOB ZONING ACT

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**Abstract:** Recognizing that municipalities are inherently selfish and that they would intentionally exclude certain land uses and structures, the majority of states have required that their cities and towns plan for and accommodate undesirable land uses within their borders. The planned incorporation of undesirable and desirable land uses is a fundamental attribute of states that require and enforce the preparation of coordinated and rationally developed comprehensive plans. This Article discusses the approach taken in Massachusetts—a non plan state—and its myopic and regressive mechanism for compelling the construction of affordable housing. The Article suggests that the Massachusetts example is a failure of law and policy and that the statute, both abusive and abused, must be repealed. In its stead, Massachusetts must look to the success of numerous other states that have incorporated the development of affordable housing—and other land uses—within a rationally developed, and legally meaningful, comprehensive plan.

## INTRODUCTION

The use of zoning as a form of land-use control dates back to Napoleon[1] and, in the United States, to Boston's efforts to impose building height restrictions within established "districts."[2] Zoning has been sanctioned as a legitimate police power by the U.S. Supreme Court on countless occasions[3] and in each of the fifty states.[4] Relentlessly criti-

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[1] JAMES METZENBAUM, THE LAW OF ZONING 12–13 (2d ed. 1955).

[2] Welch v. Swasey, 214 U.S. 91, 108 (1909) (upholding Boston's differing height restrictions and classification of districts).

[3] *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 591 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 373 (1926).

[4] DANIEL R. MANDELKER ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 212 (6th ed. 2005).

cized as exclusionary,[5] and so confusing that it must be "written by Abbott and Costello,"[6] zoning remains the most common form of land-use regulation in the nation and is relied upon by every major city and by the majority of cities and towns throughout the country.[7]

A bedrock principle of zoning is that it is locally adopted and administered.[8] Counties, cities, and towns adopt and enforce zoning, not the respective states nor the federal government.[9] Zoning is myopic in practice—it looks neither to regional needs nor statewide concerns. Rather, zoning considers only those land-use goals articulated by the legislative body of the local government.[10]

Long ago, state legislatures recognized that, if left alone, municipal governments would ignore the concerns of their neighboring communities and, most notably, fail to accept what was later termed as each municipality's "fair share"[11] of undesirable land uses.

Locally undesirable land uses include those that are undesirable from a neighborhood perspective, such as landfills and airports.[12] But undesirable land uses also include those that are *anticipated* to be

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[5] *See* James C. Clingermayer, *Heresthetics and Happenstance: Intentional and Unintentional Exclusionary Impacts of the Zoning Decision-making Process*, 41 URB. STUD. 377, 378 (2004) ("In a very real and obvious sense, all zoning is exclusionary, for it prohibits certain kinds of activities or structures in certain places."). *See generally* Norman Williams, Jr. & Thomas Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971) (providing a land-use and economic analysis of the exclusionary zoning problem).

[6] *See* Alan Ehrenhalt, *The Trouble with Zoning*, GOVERNING, Feb. 1998, at 28 (referring to the complexities of the Minneapolis Zoning Ordinance).

[7] The City of Houston remains the only major city in the United States without a formal zoning code. Kris Hudson, *Houston's Twilight Zone: Projects Rise in Odd Spots*, WALL ST. J., Oct. 17, 2007, at B1.

[8] *See generally* ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT: UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1926), *available at* http://www.planning.org/growingsmart/pdf/SZEnabling Act1926.pdf (providing a sample act that states could adopt to enable cities and municipalities to zone).

[9] *See id.* at 4–5.

[10] *See id.*

[11] *See* Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1005 (1993) (describing New York City's "fair share" criterion that each borough "bear its fair share of undesirable land uses").

[12] *See* AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR THE MANAGEMENT OF CHANGE 5-6 to -7 (Stuart Meck ed., 2002) (identifying categories of Locally Undesirable Land Uses (LULUs) and Not in My Backyards (NIMBYs) as including airports, landfills, prisons, group homes, and solid waste facilities, among others). Below-market-rate housing and rental housing developments are not listed as LULUs or NIMBYs. *See id.*

deemed undesirable. In this instance, it is the state legislature that anticipates municipal opposition.

The result of this reality—that local governments are inherently selfish—is that the state preempts[13] or marginalizes[14] predicted neighborhood opposition. The preemption efforts in many states have been exceedingly progressive. These states have concluded that while these plans and regulatory requirements must incorporate issues of statewide and regional concerns, local governments know best how to plan for and regulate their respective land uses. These states are so-called "plan states" and are characterized as states that require their cities and towns to adopt meaningful and enforceable plans pursuant to articulated requirements established by the state legislature.[15] While the city or town has significant latitude in how the plans are developed, enforced, and revised, the planning requirements nonetheless force the city or town to incorporate a fair share of defined undesirable uses.[16]

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[13] Examples of preemptive efforts are found throughout the nation and are characterized by the state's reliance on the supremacy clause found within every state constitution. As "creatures" of the state, local governments are subject to the give and take of police powers. *See* City of Trenton v. New Jersey, 262 U.S. 182, 189–90 (1923). The U.S. Supreme Court noted:

> A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the State.

*Id.*; *see also* Hunter v. City of Pittsburgh, 207 U.S. 161, 179 (1907) ("In all these respects the State is supreme . . . .").

[14] *See* Been, *supra* note 11, at 1048–49. Been argues, in relevant part, that the environmental justice movement seeks equity with regard to the placement of undesirable land uses and, as such, can be considered to be arguing against the flip side of past practices of cities and towns to restrict beneficial municipal services to only wealthy areas of the community. In both cases—the siting of undesirable land uses in disproportionately poor neighborhoods and the intentional withholding of public services and public benefits to poor neighborhoods—the state has played a key role. In the former example, the state has barred local governments from prohibiting or regulating the particular land use. In the latter example, the state has allowed local governments to expand municipal infrastructure without regard to a rational plan. *Id.* at 1002–05, 1015–16.

[15] *E.g.*, Daniel J. Curtin, Jr. & Jonathan D. Witten, *Windfalls, Wipeouts, Givings, and Takings in Dramatic Redevelopment Projects: Bargaining for Better Zoning on Density, Views, and Public Access*, 32 B.C. ENVTL. AFF. L. REV. 325, 328–29 (2005).

[16] *See* Daniel J. Curtin, Jr., Ramapo*'s Impact on the Comprehensive Plan*, 35 URB. LAW. 135, 135–36 (2003); Curtin & Witten, *supra* note 15, at 328–30; Edward J. Sullivan & Matthew J. Michel, Ramapo *Plus Thirty: The Changing Role of the Plan in Land Use Regulations*, 35 URB. LAW. 75, 82–83 (2003).

In other states, labeled as "non plan" states,[17] state preemption efforts have been maddeningly regressive and dysfunctional. The efforts are regressive because, while the state strips local governments of the ability to regulate in specified areas, the state provides no mechanism for local governments to coordinate properly for—plan for—the very uses the state demands that cities and towns accommodate.

This Article explores the preemptive efforts employed by Massachusetts, a decidedly non plan state,[18] in the field of below-market-rate—so-called affordable—housing development. The following discussion is an update of an earlier exposé of the Massachusetts affordable housing statute.[19]

## I. Preempting and Marginalizing Municipal Opposition to Undesirable Land Uses

Recognizing the likelihood of local opposition to certain land uses, states have routinely employed their preemptive powers either to block local opposition or to impose limitations on local powers. States have little choice; some land uses are deemed of such statewide or regional importance that any other response would allow local governments simply to preclude—impose barriers to[20]—these undesirable land uses. At issue is how best to employ these preemptive powers. One option is to impose land-use requirements by requiring the fulfillment of a comprehensive plan.[21] For land uses that the state deems *required*, cities and towns have the opportunity to site these uses in accordance, and consistent, with the municipality's plan. Another option—the one discussed in this Article—is for the state to strip local controls almost in their entirety, unless and until the municipality meets the state prescribed objective.

The difference between the two options is stark. In the former, cities and towns are allowed to plan best for the land uses that occur within their borders, while fulfilling the state's mandate on a schedule, and in a manner, that suits both the ends—provision of mandated land uses—and the means—compliance with the locally adopted comprehensive plan. In

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[17] *E.g.*, Curtin & Witten, *supra* note 15, at 328–30.

[18] *Id.*

[19] *See generally* Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. Envtl. Aff. L. Rev. 509 (2003) (discussing the affordable housing crisis, specifically in Massachusetts).

[20] "Barriers" is a frequent descriptor of the application of zoning and other land-use controls used by affordable housing advocates. *See, e.g.*, Regulatory Barriers Clearinghouse, http://www.huduser.org/rbc (last visited Mar. 27, 2008).

[21] Curtin & Witten, *supra* note 15, at 328–30.

the latter, planning is nonexistent; the state's end goal trumps the mechanics of achieving it.

While this Article uses the Massachusetts affordable housing statute as an example of the wrong approach to creating affordable housing, or governance in general, a different example should prove helpful. First, imagine that a state, in order to fulfill the governor's policy of improving public health and general environmental goals, required every city and town to preserve no less than twenty-five percent of its remaining undeveloped land as parks and open spaces. Cities and towns would be free to preserve open spaces and develop parks through a variety of regulatory and nonregulatory techniques.[22]

Every five years, the state's department of environmental protection would publish a state open space inventory, as noted in Table 1.[23] Communities that met the open space minimums would be free to allow new residential and nonresidential development, subject to state zoning authority. However, cities and towns that had not met the open space minimums would be preempted from approving any new residential or nonresidential development not otherwise protected pursuant to the vested rights[24] provisions found in state law. In other words, noncompliance with the state-established minimum open space requirements would suspend permit approval for new development.

Table 1: Example open space inventories

| Community | Total Municipal Land Area | Qualifying Open Space | Additional Open Space Required |
|---|---|---|---|
| City A | 9 square miles | 450 acres | 990 acres |
| Town B | 21 square miles | 1320 acres | 12,120 acres |

[22] Massachusetts cities and towns could fulfill the legislative mandate by requiring open space within standard (grid) subdivisions, MASS. GEN. LAWS ch. 41, § 81U (2006), and cluster subdivisions, MASS. GEN. LAWS ch. 40A, § 9 (2006), or through the expenditure of Community Preservation Act funds, MASS. GEN. LAWS ch. 44B (2006), bonding, borrowing, or solicitation of donations.

[23] Table 1 is modeled after the Massachusetts Department of Housing and Community Development's (DHCD) Chapter 40B Subsidized Housing Inventory, which contains a listing of the state's 351 cities and towns and their status with respect to housing units that DHCD counts toward the community's ten percent affordable housing quota. Department of Housing & Community Development, Chapter 40B Subsidized Housing Inventory (SHI) as of March 14, 2008, http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm [hereinafter SHI].

[24] *See* Brad K. Schwartz, Note, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719, 721–26 (2001) (providing a general discussion of vested rights in development decisions). The doctrine of vested rights is a principle of equitable estoppel—at some point, a developer has invested so much that the government should be estopped from changing the zoning regulations. *Id.* at 722.

The result of this fictional statute would be chaos. Cities and towns would revolt, perhaps, arguing that the state's directive of open space, while certainly well meaning, trumps local control, is the antithesis of planning, ignores the interconnectedness of municipal and regional land-use issues, and is singularly myopic. Such a statute would impose a one-size-fits-all policy for a diverse state and elevate one municipal governance issue above and beyond all others. The statute would undoubtedly never pass and, if it did, would not likely survive. The flaw of the statute is not its intended objective—more open space—but rather the mechanism for achieving it—a draconian usurpation of local planning authority in an area where local planning authority is required.

Though the subject matter of this hypothetical statute—open space—is different, its shortcomings are identical to those of Massachusetts' affordable housing statute, the intended subject matter of which is the creation of below-market-rate housing.[25]

## II. The Workings of the Massachusetts Anti-Snob Zoning Act: Anarchy in Motion

Adopted in 1969, the purported purpose of the Massachusetts Anti-Snob Zoning Act[26] was to provide much-needed housing for re-

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[25] *See* Mass. Gen. Laws ch. 40B (2006). The Massachusetts comprehensive permit statute is a one-size-fits-all statute. It makes no distinction among the state's unique geologic or topographic regions or among the state's cities, suburbs, or relatively rural towns. That each and every community—both Boston and Lee, for instance—must attain the same standard is testimony to the drafters' myopia and the Legislature's continued unwillingness to appreciate that Boston (population approximately 589,141) is different from Lee (population approximately 2021). *See* Boston, Massachusetts (MA) Detailed Profile, http://www.city-data.com/city/Boston-Massachusetts.html (last visited Mar. 27, 2008); Lee, Massachusetts (MA) Detailed Profile, http://www.city-data.com/city/Lee-Massachusetts.html (last visited Mar. 27, 2008). More disturbing, the statute presumes that Lee is, should, or will become, simply an expansion of urban growth from Boston westward. "The wilderness, the isolated farm, the plantation, the self-contained New England town, the detached neighborhood are things of the American past. All the world's a city now and there is no escaping urbanization, not even in outer space." Morton White & Lucia White, *The American Intellectual Versus the American City*, *in* American Urban History: An Interpretive Reader With Commentaries 354–55 (Alexander B. Callow, Jr. ed., 1969).

[26] Mass. Gen. Laws ch. 40B (state comprehensive permit statute). Chapter 774 of the Acts of 1969 was referred to in the original house bill (5429) as the "Anti-Snob Zoning Act." Act of Aug. 23, 1969, ch. 774, 1969 Mass. Acts 712. The statute is commonly referred to as the "Anti-Snob Zoning Act" by its supporters. *See* Eric Reenstierna, *One Reason to Like Anti-Snob Zoning*, Boston Globe, Aug. 13, 2007, at A11 ("With 40B, the state found a more creative solution. It changed the rules. The change left developers free to do what developers do—make a profit—and, in the process, solve the housing problem. The state accomplished that without spending a cent.").

turning Vietnam veterans, and to break down the barriers erected by the suburbs to the construction of affordable sale and rental housing.[27]

Previous efforts have discussed in detail the workings of the statute, including interpretations of how the statute could or should work.[28]

In practice, the statute provides a developer with a blank check to build an unlimited number of dwelling units on a parcel of land zoned for a different use or for a density far different from that proposed. Increasing the value of the blank check given to developers, the Supreme Judicial Court of Massachusetts (SJC) recently concluded that a board of appeals is empowered to approve nonresidential uses and structures

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[27] Now codified as 760 Mass. Code Regs. 56.01 to 56.08, without reference to Vietnam veterans, the regulations state the goal of reducing "regulatory barriers that impede the development of such housing." 760 Mass. Code Regs. 56.01 (2008). Much has been written regarding the history of the statute and the curious timing of the adoption by the Legislature—by a two vote majority—in the wake of Boston's "forced busing" and the racial crises that followed. *See* Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 Va. L. Rev. 535, 550 (1992). Suggestions that the adoption of the Act as retribution against the suburbs that supported the integration of the Boston schools is beyond the scope of this Article. *See id.* at 548–50 (chronicling the history of the statute and acknowledging it as one of "retribution" and "vengeance" against the suburbs); Cynthia D. Lacasse, The Anti-Snob Zoning Law: The Effectiveness of Chapter 774 in Getting Affordable Housing Built (June 1987) (unpublished Master's thesis, Massachusetts Institute of Technology) (on file with author). "According to Robert Engler, it was passed by a coalition of urban legislators in retaliation for the passage of a racial imbalance bill four years earlier that 'Boston legislators . . . felt . . . was being shoved down their throat by liberal suburban legislators.'" *Id.* at 6.

More recently, advocates for the statute have introduced other justifications, most notably as a solution to the "brain drain" facing eastern Massachusetts. *See* Greater Boston Chamber of Commerce, Preventing a Brain Drain: Talent Retention in Greater Boston 4, 23 (2003), *available at* http://www.bostonchamber.com/policy/talent_retention.pdf (blaming the alleged loss of talent to other jurisdictions—the brain drain—on a shortage of affordable housing). *But see* Heather Brome, New England Pub. Policy Ctr., Is New England Experiencing a Brain Drain?: Facts About Demographic Change and Young Professionals 10 (2007), *available at* http://www.bos.frb.org/economic/neppc/dp/2007/neppcdp0703.pdf (providing evidence that New England's supply of educated young workers is not shrinking, and, in fact, "the region still maintains a larger share of young professionals relative to the size of its population than any other region").

[28] *See, e.g.*, Mark Bobrowski, *Affordable Housing v. Open Space: A Proposal for Reconciliation*, 30 B.C. Envtl. Aff. L. Rev. 487 (2003); Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience With a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. New Eng. L. Rev. 381 (2001); Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 B.C. Envtl. Aff. L. Rev. 437 (2003); Witten, *supra* note 19; Christopher Baker, Note, *Housing in Crisis—A Call to Reform Massachusetts's Affordable Housing Law*, 32 B.C. Envtl. Aff. L. Rev. 165 (2005).

within a comprehensive permit project where the underlying zoning otherwise permitted the commercial activity.[29]

Where the land is zoned for industrial use, the developer may propose residential dwellings. Where the land is zoned for dwelling units at a density of two units per acre, the developer may propose ten, twelve, or twenty units per acre. Where the height limitation of structures in the community is thirty-five feet, the developer may propose a dwelling height of fifty or eighty feet. Heretofore, it was commonly presumed that a grant of a comprehensive permit was for the construction of housing only, and not principal or ancillary *commercial* uses or structures.[30]

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[29] Jepson v. Zoning Bd. of Appeals of Ipswich, 876 N.E.2d 820, 829–30 (Mass. 2007). The SJC noted:

> Flexibility, such as that demonstrated by the minimum percentage of affordable housing units required under the statutory scheme, promotes the continued development of affordable housing by providing economic incentives (such as financial cross-subsidization derived from rental income of market-rate units) to developers so they can include in their projects needed affordable housing. Extending that flexibility to allow an incidental commercial component under the umbrella of the comprehensive permit provides additional incentives, including economic, to developers to establish affordable housing, and serves to further the development of needed affordable housing.

*Id.* Seizing the moment, the DHCD codified new regulations that permit nonresidential uses and structures within comprehensive permit developments. *See* 760 MASS. CODE REGS. 56.01–.08 (2008). Note the definition of Project: "A Project may contain ancillary commercial, institutional or other non-residential uses, so long as the non-residential elements of the Project are planned and designed to: (a) complement the primary residential uses; and (b) help foster vibrant, workable, livable, and attractive neighborhoods consistent with applicable local land use plans." *Id.* at 56.02. The regulations do not define the catchy phrases "vibrant," "workable," "livable," or "attractive." Consistent with the abandonment of predictable outcomes that has defined the statute since 1969, the new regulations leave every neighborhood susceptible to a developer's inclusion of a Wal-Mart, liquor store, or movie theater within a comprehensive permit project. After all, Wal-Mart, liquor stores, and movie theaters certainly add to the vibrancy, workability, livability, and attractiveness of neighborhoods—at least from the perspective of the developer.

[30] Landers v. Bd. of Appeals of Falmouth, 579 N.E.2d 1375, 1376 (Mass. App. Ct. 1991). The implications of the SJC decision in *Jepson*, coupled with DHCD's unprecedented maneuver to wrest zoning control away from cities and towns, will, without question, be the death of zoning in Massachusetts. The historic and time-tested means of amending zoning for land-use changes through the legislative process will become obsolete, as it has regarding changes allowing greater density. Empowered with the ability to include commercial uses within a comprehensive permit project, the statute, already representing legislative anarchy, will cause immeasurable chaos. Not only will neighborhoods be subject to unlimited density, those same neighborhoods will be subject to unlimited residential densities *and* commercial development.

### A. *Applicants for a Comprehensive Permit*

An applicant must: (1) be a public, nonprofit, or "limited dividend"[31] organization; (2) provide evidence that the project is "fundable" by a subsidizing agency under a low- or moderate-income housing program;[32] and (3) provide evidence of "site control"[33] in order to receive a comprehensive permit.[34]

### B. *The Application to the Board of Appeals*

Once these three conditions have been met, the applicant may thereafter apply to the local board of appeals for a comprehensive

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[31] 760 MASS. CODE REGS. 56.02 (2008) (defining a "limited dividend organization" as one that agrees to be bound by an agreement entered into with a subsidy agency to limit a project's profits to set by the subsidizing agency). "Typically the regulatory agreement limits the profits of developers of a 40B home ownership project to no more than 20% of total allowable development costs, and through this provision developers are deemed to be a 'limited dividend organization' meeting the requirements set forth in Chapter 40B." Letter from Gregory W. Sullivan, Inspector Gen., to the Joint Comm. on Hous. (Oct. 23, 2007), *available at* http://www.mass.gov/ig/publ/40b_hearing_letter.pdf.

[32] Proof of "fundability" is perfected by the receipt of a "project eligibility" letter from a recognized state agency, most notably the Massachusetts Housing Finance Agency (MassHousing). *See* 760 MASS. CODE REGS. 56.04(6). Once fundability is established, the project remains fundable unless the project eligibility letter is withdrawn. *See id.* at 31.01(2)(f). MassHousing identifies itself as "the state's affordable housing bank." MassHousing, https://www.masshousing.com (last visited Mar. 27, 2008). It has been designated as the "project administrator" for the New England Fund, a funding program of private banks that has been declared a "federal" subsidy source for the purposes of 40B by the Housing Appeals Committee and the SJC. *See* Town of Middleborough v. Hous. Appeals Comm., 870 N.E.2d 67, 70–71 (Mass. 2007); FHLBBoston, Housing & Economic Growth, Funding Programs, New England Fund, http://www.fhlbboston.com/community development/fundingprograms/nef/03_02_03e_legislation.jsp (last visited Mar. 27, 2008). The Inspector General's office attacked MassHousing for "moving in a direction which would further compromise the oversight process by excluding the municipalities from actively participating in the process as monitoring agents" and for overseeing a process that is "broken." Letter from Gregory W. Sullivan, Inspector Gen., to Thomas Gleason, Executive Dir., MassHousing (Sept. 13, 2006), *available at* http://www.mass.gov/ig/publ/masshous.pdf. MassHousing subsequently attacked the Town of Marion when the Town challenged the Agency's malfeasance in issuing a project eligibility letter. Town of Marion v. Mass. Hous. Fin. Agency, 861 N.E.2d 468, 470–72 (Mass. App. Ct. 2007). MassHousing accused the Town of Marion of filing a frivolous complaint and sought costs and double attorney's fees where the Town alleged that MassHousing failed to perform the due diligence required of it under the comprehensive permit regulations. *Id.* at 471–72. Note that MassHousing sought costs and double attorney's fees, not the developer of the comprehensive permit project. *See id.* MassHousing's request was denied. *Id.* at 472.

[33] 760 MASS. CODE REGS. 56.04(4)(g) (explaining that site control is established where the applicant can demonstrate a sufficient interest in the site).

[34] *Id.* at 56.04(1)(a)–(c).

permit.[35] The board's powers to condition the approval of the application, or deny the application outright, are dramatically limited by statute,[36] Housing Appeals Committee decisions,[37] and appellate court holdings.[38]

It is fiction to suggest that the board of appeals has any substantive control over the project or process, save forcing the applicant to spend time and money going through the local approval process.[39] The

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[35] MASS. GEN. LAWS ch. 40B, § 20 (2006); 760 MASS. CODE REGS. 56.04(1)(a)–(c) (enumerating the three condition precedent requirements in order to be eligible to submit an application for a comprehensive permit).

[36] MASS. GEN. LAWS ch. 40B, § 23 (providing the Housing Appeals Committee with two alternative resolutions for comprehensive permit disputes, depending on the origin of the appeal: (1) those that resulted from a *permit denial*, and (2) those that resulted from a *permit approval with conditions* that the developer complains render the project "uneconomic"). Where the permit was *denied* by the local board of appeals, the Housing Appeals Committee is empowered to vacate the decision and order the issuance of a new permit. *Id.*

Where the comprehensive permit is approved by the local board of appeals, the Housing Appeals Committee's powers do not include annulling or vacating the board's decision, but rather are limited to modifying the board's decision. *Id.* ("If the committee finds, in the case of an approval with conditions and requirements imposed, that the decision of the board makes the building or operation of such housing uneconomic . . . *it shall order such board to modify or remove any such condition or requirement* . . . and to issue any necessary permit or approval . . . ." (emphasis added)).

[37] *See* Witten, *supra* note 19, at 533. Note, also, that the courts afford considerable deference to an agency's interpretation of its own regulatory and statutory authority. *See, e.g.*, Town of Middleborough v. Hous. Appeals Comm., 870 N.E.2d 67, 76 (Mass. 2007); Warcewicz v. Dep't of Envtl. Prot., 574 N.E.2d 364, 366 (Mass. 1991); Hellman v. Bd. of Registration in Med., 537 N.E.2d 150, 152 (Mass. 1989).

[38] *See, e.g.*, *Middleborough*, 870 N.E.2d 67 (Mass. 2007); Planning Bd. of Hingham v. Hingham Campus, LLC, 780 N.E.2d 902 (Mass. 2003); Bd. of Appeals of Hanover v. Hous. Appeals Comm., 294 N.E.2d 393 (Mass. 1973); Cohasset Water Comm'n v. Cohasset Zoning Bd. of Appeals, No. 05-P-746, 2007 WL 136631 (Mass. App. Ct. Jan. 19, 2007); Zoning Bd. of Appeals of Greenfield v. Hous. Appeals Comm., 446 N.E.2d 748 (Mass. App. Ct. 1983).

[39] Many have suggested that the local board has discretionary authority in its review of comprehensive permit applications. This discretion is an illusion. *See, e.g.*, *Zoning Bd. of Appeals of Greenfield*, 446 N.E.2d at 754 n.13. The court stated:

> [B]ut the statute does not require that a noncomplying city or town issue a permit in every case where the ten percent test has not been met. In such a case the statute imposes a general test of reasonableness predicated on the regional need for low and moderate income housing; the number of low income people in the affected municipality; health and safety considerations; and the promotion of compatible site and building design and preservation of open spaces. We think the statute provides an adequate decisional framework for dealing with the problem of proposed developments which could cause a community to overshoot substantially the ten percent benchmark for low and moderate income housing.

*Id.* (citation omitted). Even the Citizens' Housing and Planning Association (CHAPA), a vocal and active supporter of the statute, had trouble offering an answer to its own ques-

Chairman of the Housing Appeals Committee shared his personal views of the comprehensive permit statute in an article where he suggested that the comprehensive permit law was one not of "command-and-control regulation," but rather "market-based, incentive-based regulation."[40]

Anyone who has participated in the comprehensive permit process, from initial filings with the board of appeals to a decision from the Housing Appeals Committee, must wonder whether she has participated in the same process as the one discussed by the Chairman.[41]

The comprehensive permit process is precisely a command-and-control system, notwithstanding the Chairman's attempt to label it otherwise. Worse, DHCD has orchestrated a process whereby cities and towns are led to believe that the comprehensive permit statute is their statute and one that they can use in a creative and opportunistic manner.[42] But the facts are irrefutable. The statute takes away all local authority and leaves nothing in its place. First, the comprehensive permit application is developer, not municipality, driven. It is the developer who decides where the project will be located, how many units the pro-

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tion, "Do Communities Have Control Over the Proposed Development?" Citizens' Housing & Planning Association, Fact Sheet on 40B: The State's Affordable Housing Zoning Law 3 (Oct. 2007), http://www.chapa.org/pdf/40BFactSheetOctober2007.pdf. The Fact Sheet answered the question as follows:

> Zoning boards and other town officials often work with developers to modify the project. Furthermore, the zoning board may include conditions and requirements on any aspect of the project such as height, density, site plan, utility improvements, or long-term affordability—provided these conditions do not make the development economically unfeasible.

*Id.*

[40] Werner Lohe, *The Massachusetts Comprehensive Permit Law: Collaboration Between Affordable Housing Advocates and Environmentalists*, LAND USE L. & ZONING DIG., May 2000, at 3.

[41] The author has acted as counsel in numerous Housing Appeals Committee matters representing cities and towns and intervenors. He cannot recall any proceeding before the Committee wherein command and control—that is the Committee's command and control—did not dominate the proceedings and the outcome.

[42] *See* Edith M. Netter, MASS. HOUS. P'SHIP, LOCAL 40B REVIEW AND DECISION GUIDELINES 1–2 (2005), *available at* https://www.masshousing.com/portal/server.pt/gateway/PTARGS_0_210_365_0_0_18/Local40B%20ReviewDecisionGuidelines.pdf.

> In light of the changes to Chapter 40B in practice and regulation, the guidelines outlined below attempt to assist communities in reviewing comprehensive permit projects in a way that maximizes the opportunity for a successful outcome. A successful outcome could mean a project approval or in appropriate instances, a denial. These guidelines suggest that a negotiated outcome will, in most cases, garner the best result for a community.

*Id.* at 2.

ject will contain, and whether to offer on- or off-site improvements to mitigate the impact of the development. Second, the application can be in complete derogation of any plan or policy adopted by the community. There is no requirement, even where the municipality has adopted and approved a "master plan, comprehensive plan, or community development plan," that a comprehensive permit developer complies with the plan.[43] Third, the ticket to apply to the board of appeals—the project eligibility letter—cannot be challenged independent of the comprehensive permit,[44] and, in the words of the ticketing agency, MassHousing, is simply a "business judgment" decision.[45] Fourth, the very issues that matter most to the community once the project is built—ensuring affordability and monitoring excess profits—have been stripped away by the Housing Appeals Committee.[46]

### C. *The Housing Appeals Committee and the Department of Housing and Community Development*

In one of several decisions on the same subject, the Housing Appeals Committee recently ruled that, notwithstanding the fraud uncovered by the Inspector General's office and the pleas from the Inspector General to ensure municipal participation in the cost-certification and monitoring process, as it is "broken,"[47] the Committee ruled that a

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[43] *See* 760 MASS. CODE REGS. 56.07(3)(g) (2008) ("The Committee may receive evidence of and shall consider" whether a city or town has a plan and its results in implementing that plan).

[44] Town of Marion v. Mass. Hous. Fin. Agency, 861 N.E.2d 468, 471 (Mass. App. Ct. 2007) ("[T]he funding eligibility determination is merely an interim step in the administrative process.").

[45] *See* Brief on Behalf of Defendant Massachusetts Housing Finance Agency at 20, *Town of Marion*, 861 N.E.2d 468 (No. 05-P-1848). In opposing the Town of Marion's claim that MassHousing failed to perform the due diligence required prior to issuing a project eligibility letter for a comprehensive permit project, MassHousing stated that it was not required to "solicit or defer to local opinions about which projects should or should not be funded. It creates a housing bank, not a forum or tribunal. It provides absolutely no basis for a challenge by a community to any eligibility or funding decision by MassHousing." *Id.* at 23–24.

[46] The *Committee* must be distinguished from the *Chairman*. The Chairman, or the Committee's additional hearing officer, conducts the adjudicatory hearings. 760 MASS. CODE REGS. 56.06(7)(e). The Housing Appeals Committee consists of five members, one of whom is the Chairman. The remaining four Committee members, while they sign decisions rendered by the Committee, do not attend the adjudicatory hearings and do not vote in a public meeting. Upon information and belief, opportunities to present arguments before the full Committee have never been permitted. "Do not arouse the wrath of the great and powerful Oz. I said come back tomorrow." The Wizard of Oz (MGM 1939).

[47] *See* Letter from Gregory W. Sullivan, *supra* note 32.

town's attempts to ensure that the affordable housing units were properly preserved "'[were] clearly not matters of local concern,'" that "MassHousing may unilaterally decided those issues," and that "the condition in the comprehensive permit requiring submission to and approval by the Board of a draft Regulatory Agreement is improper and thus void."[48]

Quite simply, there is no legal basis for the Housing Appeals Committee's or DHCD's eristic position—only an assertion of über authority that, until recently, has gone unchallenged by cities and towns. The statute itself empowers the board of appeals to address an unlimited range of issues through appropriate conditions on the comprehensive permit.[49] No other section of chapter 40B, any regulation, or any judicial decision limits the scope of issues that boards may address through conditions to ensure that 40B developers do not "enrich themselves at the expense of the municipalities and their affordable housing initiatives,"[50] as DHCD and MassHousing have failed to do.

DHCD can cite to no statute, regulation, or judicial decision prohibiting the board from imposing regulatory conditions based on a municipality's valid local concerns, and consistent with its affordable housing needs—for example, limiting the project to ownership, rather than rental units; setting aside the project's affordable units for local residents; or ensuring the perpetual affordability of units through a restriction of its own design.

It is fair to ask why DHCD is so insistent that it has exclusive authority with respect to regulatory conditions that the statute reserves to boards of appeals. Why, where a municipality has granted a comprehensive permit for the construction of affordable housing is the agency so adamant that it, not the town, select the monitoring agent? Similarly, why would the agency, not the town, specify how cost certification will be conducted and by whom? Why would the agency, not the town, determine how to monitor the sale or rental of affordable units and by whom? Such regulatory and monitoring conditions, while unnecessary in the realm of conventional development, are unfortunately necessary

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[48] Groton Residential Gardens, LLC, No. 05-26, slip op. at 11, 13 (Mass. Housing Appeals Committee Aug. 10, 2006) (quoting CMA, Inc., No. 89-25, slip op. at 7 (Mass. Housing Appeals Committee June 25, 1992)) (involving the Groton Board of Appeals); *see also* Attitash Views, LLC, No. 06-17, slip op. at 1 (Mass. Housing Appeals Committee Oct. 15, 2007) (involving the Amesbury Zoning Board of Appeals).

[49] *See* MASS. GEN. LAWS ch. 40B, § 21 (2006).

[50] *See* Letter from Gregory W. Sullivan, *supra* note 32 (noting that "the cost certification and monitoring process is 'broken'").

in chapter 40B permitting, in order to prevent "the transfer of profit from a municipality's affordable trust fund to a developer's personal bank account."[51] To the extent that a town might benefit from agency expertise with respect to programmatic and regulatory issues, such expertise may be placed at the town's disposal by way of technical assistance rather than by way of threat and assertions of supremacy.

It is also fair to ask why DHCD continues to insist on its own expertise, and that of MassHousing, with respect to regulatory issues in light of MassHousing's well-documented and abysmal failure to provide adequate oversight of the regulatory components of chapter 40B projects—such as the cost certification and limited dividend requirements.

As a result of MassHousing's inability or unwillingness to perform its oversight obligations for New England Fund and Housing Starts projects, "reported developer profits were routinely and substantially understated," resulting "in many cases . . . [of] profit windfalls to the developers which deprived the respective municipalities of the excess profits that should have been paid to the municipality under the regulatory agreements."[52]

In light of the failure of MassHousing and DHCD to perform their oversight obligations, one might expect DHCD to rethink its claims of

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[51] *See* Letter from Gregory W. Sullivan, Inspector Gen., to Aaron Gornstein, Executive Dir., CHAPA (Dec. 6, 2006), *available at* http://www.mass.gov/ig/publ/40bchapa.pdf; *see also* Letter from Gregory W. Sullivan, Inspector Gen., to Ben Tafoya, Chairman, Bd. of Selectman, Town of Reading, and Peter Hechenbleikner, Town Manager, Town of Reading (Jan. 2, 2007), *available at* http://www.mass.gov/ig/publ/40b_reading.pdf (detailing results of an independent audit of a New England Fund project in Reading, finding gross understatement of developer profit, impermissible land valuations, related-party transactions, and other abuses).

[52] *See* Letter from Gregory W. Sullivan, Inspector Gen., to Thomas R. Gleason, Executive Dir., MassHousing (Sept. 13, 2006), *available at* http://www.mass.gov/ig/publ/masshous.pdf. The Inspector General specifically noted the failure of designated monitoring agents to identify such abuses:

> In general the cost certification "audits" performed against these financial statements by the appointed monitoring agent either failed to uncover or challenge these apparent abuses and reinforced the developer's understated profit margins.
>
> In the opinion of this Office, many municipalities have a false sense of security that effective cost certification monitoring and enforcement is being conducted by the subsidizing agencies on their behalf. The reality is that developers are taking advantage of a weak oversight system and are enriching themselves at the expense of the municipalities and their affordable housing initiatives. Thus, local initiatives to expand and create affordable housing, with these excess profits, have been thwarted by the apparent manipulation by developers in a poorly-monitored oversight system.

*Id.*

expertise. At the very least, one might expect some introspection on the part of both agencies—none appears to be forthcoming.

### D. *The Comprehensive Permit*

The applicant's sole obligation is to provide twenty or twenty-five percent of the dwelling units within the project for rent or sale to those designated by the subsidy program as meeting affordable criteria.[53] Simply put, for a return of an unlimited density and a project not bound by any local rule or regulation, the applicant is required to set aside a percentage of the dwelling units at an affordable rental or sale price.[54] The benefits to the developer are obvious. Where zoning would allow ten dwelling units, a developer may propose one hundred, with seventy-five—i.e., sixty-five more than would otherwise be allowed—sold without restriction. The benefits to the community are far less obvious.

While it is true that the community now has an additional twenty-five below-market-rate dwelling units, these units are built at a location and density of the developer's, not the municipality's, choosing. The density bonus afforded the developer—one hundred units as opposed to ten—has not been anticipated by the city or town's school, police, or fire departments. The bonus has not been incorporated into capital plans or budgets, nor wastewater treatment or water supply planning needs.

Where a board of appeals approves the application with conditions that the applicant finds objectionable, or denies the application, the developer has the right to appeal to the Housing Appeals Committee, a five-member agency established to review and adjudicate appeals from disgruntled developers pursuant to chapter 40B, section 22.[55] Chronicled elsewhere, the Housing Appeals Committee has shown little—if any—sympathy to the concerns expressed by boards of appeals.[56] In recent decisions, the Committee has scaled a new level of arrogance, holding, for example, that the statute permits the appropriation of

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[53] *See* MassHousing, Housing Starts Process and Guidelines 3 (2007), *available at* https://www.masshousing.com/portal/server.pt/gateway/PTARGS_0_2_376_0_0_18/HS_Guidelines.pdf (twenty-five percent of the dwelling units required to be set aside); MassDevelopment, Housing, www.massdevelopment.com/custom/housing.aspx (last visited Mar. 27, 2008) (twenty percent of the dwelling units to be set aside to qualify for low income housing tax credit). The subsidizing agency establishes the number of dwelling units that are to be set aside at below market rates. *See* MassHousing, *supra*, at 3; MassDevelopment, *supra*.

[54] *See* MassHousing, *supra* note 53, at 3; MassDevelopment, *supra* note 53.

[55] Mass. Gen. Laws ch. 23B, § 5A (2006).

[56] *See* Witten, *supra* note 19, at 533.

municipal land to assist a developer's comprehensive permit application.[57] In a narrowly tailored decision, the SJC reversed the Superior

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[57] Wash. Green Dev., LLC, No. 04-09, slip op. at 17–18 (Mass. Housing Appeals Committee Sept. 20, 2005) (involving the Groton Board of Appeals).

> Though this Committee has the power to order approval of an easement, the question remains as to whether it is justified under the facts presented. . . . . The town has not drawn our attention to, nor do we see from all the evidence presented to us, any harm that can possibly be done by slight regrading and removing of vegetation along a strip of land that is approximately ten feet wide at its widest point. We find that such changes do not raise a sufficient local concern to outweigh the regional need for affordable housing. We therefore conclude that [Groton Electric Light Department's] refusal to grant an easement is not consistent with local needs, and we will order it.

*Id.* The Superior Court upheld the Committee's decision, referring to the lost property right as "minimal" and referenced the SJC's holding in *Board of Appeals of Maynard v. Housing Appeals Committee. See* Zoning Bd. of Appeals of Groton v. Hous. Appeals Comm., No. 053733L, 2007 WL 1540233, at *2 (Mass. Super. Ct. Feb. 9, 2007) (citing Bd. of Appeals of Maynard v. Hous. Appeals Comm., 345 N.E.2d 382, 385–86 (Mass. 1976)) (concluding the comprehensive permit statute empowers a board of appeals—and the Housing Appeals Committee—to eliminate the need for a town meeting vote to extend a municipal sewer line). The Committee was not troubled by the fact that the statutes clearly require legislative approval as a required condition precedent to the conveyance of interests in municipal real property, choosing instead to conclude that the comprehensive permit statute trumps even property disposition requirements imposed upon local governments. *See* MASS. GEN. LAWS ch. 30B, § 16 (2006) (requiring process for conveying interests in municipal real property with a value greater than $25,000); MASS. GEN. LAWS ch. 40, § 3 (2006) (requiring process for conveying interests in municipal property acquired by cities and towns by purchase); MASS. GEN. LAWS ch. 40, § 15 (requiring process for conveying interests in municipal property acquired by a means other than purchase, such as by abandonment); *Groton*, 2007 WL 1540233 at *2. While the *Groton* matter involved the conveyance of an easement, the principle relied upon in *Groton*—that chapter 40B allows a board of appeals and the Housing Appeals Committee to order, summarily, the transfer of municipal property notwithstanding no less than two statutory requirements prohibiting it without compliance with due process—will most certainly be used by entrepreneurial developers in the future. *See id.* A developer who needs access through public property—the Boston Public Gardens, for example—can, following the *Groton* decision, simply ask the local board of appeals to approve the same, and if the local board declines, the Housing Appeals Committee's largesse awaits. Even more perverse, if the Housing Appeals Committee can order an interest in *municipal property* to be conveyed to a private developer, then certainly the same Committee can order *private property* to be conveyed to a private developer. After all, the Committee could argue, private property taken from *A* (a landowner) would be serving the same public purpose by providing it to *B* (the developer) as was found constitutional in *Kelo v. City of New London*, among other cases. *See, e.g.*, 545 U.S. 469, 479, 483–84 (2005). These hypothetical situations are not exaggerated. *See* Town of Middleborough v. Hous. Appeals Comm., 870 N.E.2d 68, 76 (Mass. 2007) ("[W]e recognize that '[w]here the focus of a statutory enactment is reform,' as is true of the [comprehensive permit] act, 'the administrative agency charged with its implementation should construe it broadly so as to further the goals of such reform.'" (quoting Mass. Fed'n of Teachers, AFT, AFL-CIO v. Bd. of Educ., 767 N.E.2d 549, 559 (Mass. 2002)) (second alteration in original) (citation omitted)).

Court's holding and reaffirmed that the Housing Appeals Committee lacks the authority to override state, as opposed to local, laws and regulations.[58]

A board of appeals may avoid a developer's appeal to the Housing Appeals Committee only by demonstrating that the city or town affordable housing is "consistent with local needs," a formulistic determination included in both statute and regulation.[59] As discussed below, however, a board of appeals is not precluded from approving comprehensive permit applications—one or all—even after the municipality has achieved the "consistent with local needs" standard.[60]

### E. *Judicial Review of Comprehensive Permit Decisions*

In a remarkable decision, the SJC held that an abutter to a comprehensive permit development did not have standing to challenge the project with respect to a claim of depreciation of property values.[61] The Court concluded that an abutter to a 115-unit rental housing project, located in a zoning district that was limited to single-family dwellings, could not raise property devaluation as a cognizable claim sufficient to confer standing.[62]

The Court's holding in *Standerwick v. Zoning Board of Appeals of Andover* is singularly painful in a long list of holdings regarding the comprehensive permit statute.[63] The courts have demonstrated little regard

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[58] *See* Zoning Bd. of Appeals of Groton v. Hous. Appeals Comm., SJC-10028, 2008 WL 820294, at *4–5 (Mass. Mar. 31, 2008).

[59] MASS. GEN. LAWS ch. 40B, § 20 (2006) (providing three mechanisms for achieving consistency with local needs status: (1) ten percent of a municipality's housing stock subsidized; (2) one and one half percent of the municipality's land area being comprised of subsidized housing; or (3) at least three-tenths of one percent of the municipality's land area, or ten acres, is subject to dwelling unit construction pursuant to the statute within a one year period); 760 MASS. CODE REGS. 56.03 (2008) (providing four additional mechanisms for achieving consistency with local needs status: (1) "Recent Progress Toward Housing Unit Minimum"; (2) the project is a large scale project; (3) approval of a Housing Production Plan; and (4) "Related Applications").

[60] Boothroyd v. Zoning Bd. of Appeals of Amherst, 868 N.E.2d 83, 84–85, 88–89 (Mass. 2007).

[61] Standerwick v. Zoning Bd. of Appeals of Andover, 849 N.E.2d 197, 200 (Mass. 2006).

[62] *Id.* at 200, 201, 206 ("The preservation of real estate values of property abutting an affordable housing development is clearly not a concern that the G.L. c. 40B regulatory scheme is intended to protect.").

[63] *See, e.g.*, Town of Middleborough v. Hous. Appeals Comm., 870 N.E.2d 67, 80 (Mass. 2007) (noting federal subsidy for use in a comprehensive permit project includes loans originating from private banks that are members of the Federal Home Loan Bank of Boston, a private, for-profit corporation); *Boothroyd*, 868 N.E.2d at 88–89 (stating comprehensive permits may be issued by a board of appeals notwithstanding community's consistent

with local needs standards as the proper measurement is the *regional* need for affordable housing); *Standerwick*, 849 N.E.2d at 200; Dennis Hous. Corp. v. Zoning Bd. of Appeals of Dennis, 785 N.E.2d 682, 690–91 (Mass. 2003) (explaining comprehensive permit statute allows local board of appeals to waive historic district regulations, adopted by the Legislature, applicable to Route 6A on Cape Cod); Planning Bd. of Hingham v. Hingham Campus, LLC, 780 N.E.2d 902, 903 (Mass. 2003) (deciding comprehensive permit statute does not extend standing to challenge a comprehensive permit to a municipal planning board); Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. P'ship, 767 N.E.2d 584, 586 (Mass. 2002) ("[W]here a comprehensive permit itself does not specify for how long housing units must remain below market, the Act requires an owner to maintain the units as affordable for as long as the housing is not in compliance with local zoning requirements."); Bd. of Appeals of Hanover v. Hous. Appeals Comm., 294 N.E.2d 393, 424 (Mass. 1973) (concluding comprehensive permit statute does not violate equal protection or due process guarantees).

On February 5, 2008, the SJC heard oral argument in an appeal of an Appeals Court decision overturning a Superior Court holding that an abutter to a comprehensive permit project loses his right to appeal under chapter 40B, section 21 (referencing chapter 40A, section 17) where the Housing Appeals Committee rules in favor of the applicant in the applicant's appeal to the Committee under chapter 40B, section 22. Taylor v. Bd. of Appeals of Lexington, 865 N.E.2d 1140 (Table) (2007) (granting further appellate review); Taylor v. Bd. of Appeals of Lexington, 863 N.E.2d 79, 84–86 (Mass. App. Ct. 2007) *review granted*, 865 N.E.2d 1140 (Table) (2007). The Appeals Court recognized the abutter's statutory right of appeal and held that chapter 40B provides for "two distinct avenues of appeal" from the issuance of a comprehensive permit by a municipal board. *Taylor*, 863 N.E.2d at 82. As argued by the applicant, a decision by the Housing Appeals Committee trumps or moots an abutter's appeal pursuant to chapter 40B, section 21. *Id.* at 83.

The two types of comprehensive permit appeals—the abutter's appeal for judicial review under chapter 40A, section 17 and the developer's administrative appeal—differ greatly in both substance and procedure. These differences give rise to two different types of appellate record, and present issues to the trial court in a significantly different posture. Consequently, neither appeal may be substituted for the other or may be said to moot the other. Appeals to the Housing Appeals Committee are not intended as the equivalent of court proceedings with the use of discovery, motions practice, and trial to achieve resolution of all disputed issues between parties. Rather, such appeals are intended to provide an expedited form of review for the developer on a narrow range of issues. By design, Housing Appeals Committee proceedings do not air and adjudicate the full range of issues arising from the grant of a comprehensive permit, such as the claims of abutters. The scope of issues that abutter-interveners are permitted to raise, and present relative evidence, has been further narrowed by decisions of the Committee. *See, e.g.*, Grandview Realty, Inc., No. 05-11, slip op. at 3–4 (Mass. Housing Appeals Committee Feb. 10, 2006) (involving the Lexington Zoning Board of Appeals).

The Committee has repeatedly held, for example, that abutter-interveners are not permitted to raise programmatic or financial issues relating to project proposals, or to challenge the existence of jurisdictional prerequisites for comprehensive permit applications. *See, e.g.*, *id.* The administrative record on appeal to the Superior Court under chapter 30A, section 14, therefore, contains no evidence on programmatic, financial, or jurisdictional issues—or any other issues excluded by the hearing officer at his or her discretion—that abutter-interveners sought to preserve. Since, under chapter 30A, section 14, review is confined to the administrative record, there is no subsequent opportunity during Superior Court proceedings for the abutter-interveners to place evidence in the record regarding their claims. MASS. GEN. LAWS ch. 30A, § 14(5) (2006). Finally, due to the different standards of review in the two types of appeals, an issue raised by an abutter

for the consequences of unpredictable land-use decisions and whether infliction of such injury on individuals—abutters—to comprehensive permit projects serves the statute's purported goal of producing affordable housing. It is not as if the courts do not recognize the obvious—that the costs and investments one makes in purchasing a home are enormous.[64]

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seeking judicial review under chapter 40A, section 17 is in an entirely different posture than the same abutter raising an issue in appeal under chapter 30A, section 14. The judge reviewing a comprehensive permit under chapter 40A owes no deference to the board, and makes independent findings of fact. *See* MASS. GEN. LAWS ch. 40A, § 17 (2006). The judge reviewing a decision of the Housing Appeals Committee must defer to agency discretion and is limited to the facts found in the administrative record. MASS. GEN. LAWS ch. 30A, § 14(5). An abutter in a chapter 40A appeal is able to place evidence in the record regarding programmatic issues, upon which the trial judge may make findings of fact. *See* MASS. GEN. LAWS ch. 40A, § 17. The same abutter, *assuming* he or she is granted intervener status, will be precluded from placing such evidence in the administrative record—and thus prevented from having the issue reviewed by the trial court on appeal under chapter 30A. As a result, abutters face a wholly different burden proving their case before a judge in a chapter 30A appeal of a chapter 40B permit as compared to a chapter 40A appeal.

In addition, the SJC has accepted on direct appellate review a related case from Middlesex Superior Court, *Taylor v. Housing Appeals Committee*, consolidated with a Norfolk Superior Court case, *Board of Appeals of Canton v. Housing Appeals Committee*, where the two courts reached different conclusions as to when a municipality is entitled to measure consistency with local needs. Supreme Judicial Court, Amicus Announcement, SJC-10048 and SJC-10057, http://www.mass.gov/courts/sjc/amicus/sjc-10048-10057.html (last visited Mar. 27, 2008). In the Norfolk decision, a Superior Court judge ruled that the measurement occurs when the Housing Appeals Committee renders its decision. Zoning Bd. of Appeals of Canton v. Hous. Appeals Comm., Civ. Action No. 2005-1868 (Mass. Super. Ct. Nov. 10, 2006) (Grabau, J.). The Middlesex Superior Court judge ruled that the measurement occurs much earlier; when the board of appeals files its decision with the local clerk. Taylor v. Hous. Appeals Comm., Civ. Action No. 2005-2910-B (Mass. Super. Ct. Apr. 5, 2007) (Kottmyer, J.).

[64] *See* Vazza v. Bd. of Appeals of Brockton, 269 N.E.2d 270, 274 (Mass. 1971) ("Purchasers of real estate are entitled to rely on the applicable zoning ordinances or by-laws in determining the uses which may be made of the parcel they are buying . . . . For many persons, particularly those purchasing houses, this is the largest single investment in their lives."). More recently, in a dissenting opinion in a case involving the question of when expansions to a preexisting nonconforming structure required a special permit pursuant to chapter 40A, section 6, Justice Cordy wrote, "Requiring homeowners to run such an administrative gauntlet impedes and burdens the upgrade of a large part of our housing stock, much of which (except perhaps along the water or on the island of Martha's Vineyard) is relatively 'affordable.'" Bransford v. Zoning Bd. of Appeals of Edgartown, 832 N.E.2d 639, 651 (Mass. 2005); *see also* Bjorklund v. Zoning Bd. of Appeals of Norwell, 450 Mass. 357, 357 (2008) (reexamining and upholding the *Bransford* decision). "The expansion of smaller houses into significantly larger ones decreases the availability of would-be 'starter' homes in a community, perhaps excluding families of low to moderate income individuals." *Id.* at 363 (Justices Cordy and Ireland dissenting).

Justice Cordy's "relatively 'affordable'" comment has been raised by many with reference to the requirements of the comprehensive permit statute. Mobile homes are relatively affordable, yet they do not count toward a municipality's affordable housing stock. Dwelling units that sell at or below eighty percent of median income, but unencumbered by

The court's interpretation of chapter 40B, section 20 in *Standerwick* allows an abutter to a comprehensive permit project to raise claims of injury with regard to the project's impacts on the "health or safety of the occupants of the proposed housing or of the residents of the city or town" but not with regard to impacts to her property or her health or safety.[65] The holding in *Standerwick* destroys an abutter's statutory right of appeal by reducing to generalized—as opposed to particularized—her claims of injury; generalized claims of injury are not sufficient to confer standing.[66] This outcome may have been intended:

> [W]e have no hesitation in concluding that granting standing to challenge the issuance of a comprehensive permit under G.L. c. 40B, § 21, to those who claim a diminution in the value of their property frustrates the intent of the Legislature. . . .
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> . . . It would grant standing to challenge a comprehensive permit to persons who object to the construction of any affordable housing project simply by claims that the introduction of affordable housing for low and moderate income persons would cause their property values to drop.[67]

No appraisal is required to conclude that the presence of a 115-unit apartment building abutting single-family dwellings in a rural portion of the community will cause the single-family dwellings to lose market value. Common sense alone suffices. That some of the dwell-

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anything other than the real estate market, do not count toward a municipality's affordable housing stock. These units do not count simply because the development industry does not profit from their construction—for example, mobile homes are not *stick built* and are not manufactured in Massachusetts. Further, these units do not count because the development and real estate industry has little incentive to see cities and towns achieve "consistent with local needs" status by the incremental addition of accessory apartments that, while truly affordable and serving an obvious need—such as the housing of a relative or low wage worker—do not align with their singularly myopic and selfish motives. "'Allowing mobile homes to be counted undermines the integrity of Chapter 40B.'" Jenn Abelson, *Bill Puts a Mobile Spin on Affordable Housing*, BOSTON GLOBE, May 18, 2004, at B1 (quoting Aaron Gornstein, Executive Director of Citizens Housing and Planning Association, regarding a bill put forward by the Massachusetts House of Representatives allowing cities and towns to count one half of their mobile homes toward their subsidized housing inventory). "'This sets a dangerous precedent,' Gornstein said. 'If mobile homes are approved, it kicks the door open to counting other types of housing that are not truly affordable housing.'" *Id.* The bill did not pass.

[65] MASS. GEN. LAWS ch. 40A, § 20; *Standerwick*, 849 N.E.2d at 210–11.

[66] *See Standerwick*, 849 N.E.2d at 210–11 ("When the persons challenging a permit concede that they have nothing more than unfounded speculation to support their claims of injury, our law does not require that a developer come forward with expert evidence to challenge every such speculative injury.").

[67] *Id.* at 206.

ing units will be rented at affordable prices is irrelevant to the diminution of value. While it may be true that the inclusion of below-market-rate rental units will make the matter worse for the abutters, it cannot be reasonably disputed that the values of the abutting single-family dwellings will be dramatically impacted.[68]

Adding to the irony of *Standerwick* is the fact that, had Ms. Standerwick been an abutter to a 115-unit rental housing project permitted by special permit pursuant to the state zoning act and the town's local zoning bylaw, her claims of property devaluation would have been sufficient to confer standing.[69] It would have been the exact same project, yet it would have yielded a different result for Ms. Standerwick.

A comprehensive permit project provides no opportunity for the abutter to assert property devaluation as grounds for standing to file litigation.[70] A project permitted by zoning, of the exact same density—and including below-market-rate dwellings—allows the abutter to raise

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[68] The effect of apartment buildings on single-family neighborhoods similar to the one at issue in *Standerwick* has been extensively discussed, but no empirical analysis exists regarding the impact a large rental housing project would have on abutting single-family properties. *See generally* Ingrid Gould Ellen et al., *Does Federally Subsidized Rental Housing Depress Neighborhood Property Values?* (N.Y. Univ. Law Sch. Working Paper, Paper No. 05-04, 2005), *available at* http://www.furmancenter.nyu.edu/publications/fedrentalC_march05ffr.pdf (discussing analysis of public housing project impacts on property values in New York City with citations to decades of previous investigations).

The Supreme Court addressed this issue in the landmark zoning decision of *Village of Euclid v. Ambler Realty Co. See* 272 U.S. 365, 394–95 (1926). The Court stated:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

*Id.*

[69] *See* MASS. GEN. LAWS ch. 40A, §§ 8–9; Witten, *supra* note 19, at 547 n.148.

[70] *See Standerwick*, 849 N.E.2d at 210–11.

property devaluation as grounds for injury.[71] This discrepancy in results is untenable.[72]

That Ms. Standerwick is barred from raising property devaluation as grounds of injury in an appeal of a comprehensive permit project, but is not barred from raising the same claim with regard to a project of the exact same size filed pursuant to local zoning, fails to satisfy the basic standard of rationality.[73]

Even if the intent of the statute is to encourage or require cities and towns to ensure that each has at least ten percent of its housing stock set aside as affordable, the *Standerwick* court's holding implicitly suggests that the town's failure to reach the ten percent mandate is Ms. Standerwick's fault. Only she and her fellow abutters will suffer the consequences of the town's inability or unwillingness to achieve the state's targets. Those in other parts of town might have sympathy for Ms. Standerwick and her neighbors, but more likely they will delight in silence knowing that Ms. Standerwick may very well have protected them from future comprehensive permit projects in their backyards.

There are those who suggest that Ms. Standerwick's plight could have been avoided if the town had simply conformed to the statute's

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[71] *See* MASS. GEN. LAWS ch. 40A, §§ 9, 17.

[72] While the *Vazza* court recognized a home buyer's *financial* investment, the *Standerwick* court may have overlooked a home buyer's *emotional* investment. *See* discussion *supra* note 64. *Compare Standerwick*, 849 N.E.2d at 210–11 (deciding abutters do not have standing to challenge a comprehensive permit because their property values drop), *with* Vazza v. Bd. of Appeals of Brockton, 269 N.E.2d 270, 274 (Mass. 1971) (noting that buying a home is one of the largest purchases a person makes in her life, and so, she should be able to rely on applicable local zoning laws). The American dream of homeownership, though, must certainly be defined both as an emotional and a financial investment. *See* Yai Listokin, *Confronting the Barriers to Native American Homeownership on Tribal Lands: The Case of the Navajo Partnership for Housing*, 33 URB. LAW. 433, 445 (2001) ("Because they want to build on ancestral land that they will occupy for many years, the Navajo often wish to build a home that will meet their needs for a lifetime.").

[73] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959–60 (Mass. 2003) ("The Massachusetts Constitution requires, at a minimum, that the exercise of the state's regulatory authority not be 'arbitrary or capricious.'"); Commonweath v. Henry's Drywall Co., 320 N.E.2d 911, 915 (Mass. 1974). Under both the equality and liberty guarantees, regulatory authority must, at very least, serve "a legitimate purpose in a rational way"; a statute must "bear[] a reasonable relation to a permissible legislative objective." Rushworth v. Registrar of Motor Vehicles, 596 N.E.2d 340, 344 (Mass. 1992); *see, e.g.*, Mass. Fed'n of Teachers v. Bd. of Educ., 767 N.E.2d 549, 561–62 (Mass. 2002) (equal protection); Coffee-Rich, Inc. v. Comm'r of Pub. Health, 204 N.E.2d 281, 287 (Mass. 1965) (due process). "Any law failing to satisfy the basic standards of rationality is void." *Goodridge*, 798 N.E.2d at 960.

clear requirements—simply put—construct ten percent of the town's housing stock as affordable. Such suggestions are wrong.[74]

Remarkably, again, the SJC recently ruled that the longheld belief that achieving the Holy Grail of the comprehensive permit statute—ten percent of the housing stock being affordable—would not provide protection against new comprehensive permit projects. In *Boothroyd v. Zoning Board of Appeals of Amherst*, the Court held that achieving the Holy Grail is not quite enough.[75] Cities and towns must consider the regional need for affordable housing, even where the local needs are satisfied—i.e., the ten percent quota is reached.[76]

The holding in *Boothroyd* is further complicated by the courts' prior decisions making clear that a comprehensive permit applicant is without appeal to the Housing Appeals Committee in cities or towns that are consistent with local needs.[77] These holdings explicitly suggest to municipalities that once the goal has been achieved, neighborhoods can thereafter be protected from the ruleless process that defines the statute.

The SJC reiterated that chapter 40B was a "particularized solution," crafted by the Massachusetts Legislature to address its concern that cities and towns would use their zoning powers to exclude low- and moderate-income groups.[78] The Legislature was concerned "with ensuring that every city and town in the Commonwealth [had] available a certain minimum amount of affordable housing stock."[79] Chap-

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[74] *See* Boothroyd v. Zoning Bd. of Appeals of Amherst, 868 N.E.2d 83, 88–89 (Mass. 2007).

[75] *Id.* This fact highlights the regressive and absurd impact of the statute. Progressive cities and towns, theoretically, will achieve the state's mandate while "snob" communities will not. Is it the abutter's fault, as in the case of *Standerwick*, that the town's leadership and legislative body consists of snobs? Even if the abutter is not a snob herself, she suffers the consequences and is without options. Other than simply accepting her fate, the abutter's other choice is to move to a nonsnob community, leaving the community of snobs behind. As discussed in this Part, however, the nonsnob community is responsible for the housing the snob communities have failed to produce. *See id.* Simply put, the abutter can find no safe harbor from the ravages of the comprehensive permit statute, regardless of where she lives in Massachusetts.

[76] *Id.*

[77] *See, e.g.*, Zoning Bd. of Appeals of Greenfield v. Hous. Appeals Comm., 446 N.E.2d 748, 750–51 (Mass. App. Ct. 1983) ("[The Housing Appeals Committee] cannot order the issuance of a comprehensive permit . . . where the locality has fulfilled its minimum low or moderate income housing obligation under one of the criteria set forth in G.L. c. 40B, § 20.").

[78] Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. P'ship, 767 N.E.2d 584, 592 (Mass. 2002) (citing Bd. of Appeals of Hanover v. Hous. Appeals Comm., 294 N.E.2d 393, 402–03 (Mass. 1973)).

[79] *Id.*

ter 40B thus "reflects the Legislature's careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements, while foreclosing municipalities from obstructing the building of a minimum level of [affordable] housing."[80] To maintain this "careful balance," the Legislature enacted a scheme in which a city or town's autonomy may be overruled *only where the municipality has failed to provide the minimum requirements of affordable housing as defined by the statute*:

> [C]entral to the legislative scheme is the requirement that an override of local zoning authority's decision to deny an application to build affordable housing is available only to the extent that a city or town has not met its share of affordable housing units as delineated in the Act. *Once a town has met its minimum obligations, local zoning requirements are deemed "consistent with local needs," and the [Housing Appeals Committee] is without authority to order a local zoning board to issue a comprehensive permit.* To the extent that a city or town does not have an adequate supply of affordable housing (measured in the Act as a percentage of existing housing or of land in each town) its local autonomy in zoning matters is curtailed. *Once its obligation is met, the override power delegated to the [Committee] is extinguished.*[81]

This statutory scheme—in which a municipality satisfying certain minimum affordable housing requirements retains authority to deny or condition comprehensive permits—arguably realizes and affects chapter 40B's *multiple* goals. Chapter 40B is concerned not only with the creation of affordable housing, but also with a municipality's particularized planning responsibilities: "the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces."[82]

The SJC has noted that "the interest in the provision of critically needed affordable housing must be balanced against the statutorily authorized interests in the protection of the safety and health of the

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[80] *Id.* at 592–93 (footnote omitted) (citation omitted).

[81] *Id.* at 593 (citations omitted) (emphasis added); *see Zoning Bd. of Appeals of Greenfield*, 446 N.E.2d at 750–51.

[82] MASS. GEN. LAWS ch. 40B, § 20 (2006).

town's residents, development of improved site and building design, and preservation of open space."[83]

Note, however, that while the comprehensive permit applicant is without appeal to the Housing Appeals Committee, being consistent with local needs does little to protect the community from the continued anarchy imposed by the statute. Moreover, the holding in *Boothroyd* defeats one of the very incentives of the statute—the development of affordable housing in accordance with a long-range plan.[84]

Allowing—or perhaps ensuring[85]—that cities and towns continually approve comprehensive permits may be pragmatically important given that achieving the "consistent with local need" standard is fleeting. Once obtained it is easily and promptly lost as each market-rate dwelling unit approved puts the community further behind in its quota. Left open for analysis is the equity to the abutters of future comprehensive permit projects.

These abutters—and we are all abutters—should be able to rely on their community's achievement of the statutory Holy Grail, thereby turning to zoning and other locally adopted land-use controls to guide the community's future, but they cannot. The abutter to open lands, built-upon lands, or *underutilized lands* has no knowledge of what will occur on the property next door. This is a perplexing result given the SJC's holding in *Vazza v. Board of Appeals of Brockton*.[86]

As discussed below, it cannot be fairly argued that the statute merely reinforces home rule, that is, that boards of appeals are simply exercising their authority pursuant to local concerns.[87] First, the statute mandates compliance with the comprehensive permit formulas. Compliance with these formulas could hardly be labeled as an exercise of home rule authority. Worse, the statute allows a board of appeals to

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[83] Standerwick v. Zoning Bd. of Appeals of Andover, 849 N.E.2d 197, 206 (Mass. 2006); *see also Bd. of Appeals of Hanover*, 294 N.E.2d at 413.

[84] *Bd. of Appeals of Hanover*, 294 N.E.2d at 413 (noting the alternative definitions of consistency with local needs in chapter 40B, section 20 "define precisely the municipality's minimum housing obligations 'under the statute and permit it to do some intelligent, long-range planning about how and where the necessary housing shall be built'" (quoting Allan G. Rodgers, *Snob Zoning in Massachusetts*, 1970 ANN. SURV. OF MASS. L. 487, 490)).

[85] Boothroyd v. Zoning Bd. of Appeals of Amherst, 868 N.E.2d 83, 89 (Mass. 2007) ("A municipality's attainment of its minimum affordable housing obligation in many cases does not eliminate the need for affordable housing within its borders. . . . Application of the regional needs test, however, ensures that local boards of appeal will balance the competing considerations involved.").

[86] *See* discussion *supra* note 64.

[87] *See* Witten, *supra* note 19, at 521. The Massachusetts Constitution contains a home rule amendment. MASS. CONST. amend. art. II, §§ 1–9.

continually grant comprehensive permit approvals without any standards, guidelines, or rational objectives, except for the production of new housing units. Lastly, and unfortunately, members of the board of appeals, dutifully complying with the statute's endless requirement to become consistent with local needs and remain compliant, are under relentless pressure to continue to approve comprehensive permit projects.[88]

Following *Boothroyd* and *Standerwick*, the plight of Ms. Standerwick and countless other abutters throughout the state has become more tenuous when the town is consistent with local needs. Ms. Standerwick cannot raise property devaluation as grounds to appeal the issuance of a comprehensive permit notwithstanding that the town has met its statutory obligations. Second, and worse yet, Ms. Standerwick is now responsible to ensure satisfaction of an undefined and undefinable regional housing need. At least where the community was not consistent with local needs, the measurement of inconsistency was the municipality itself. Post-*Standerwick*, the SJC has introduced a new and utterly unattainable standard.

Neither the *Boothroyd* court nor the statute provides guidance as to how to measure the regional need for affordable housing. Given the SJC's deference to the Housing Appeals Committee in the Committee's interpretation of its own regulations, it cannot be reasonably predicted how far the Committee will go in defining regional housing needs. But, if past practice is any guide, the Housing Appeals Committee will go far to ensure that the ends trump the means, and regional housing needs will be broadly and grossly interpreted. For example, will Ms. Standerwick and her neighbors be responsible for the regional housing needs of Andover and its neighboring communities, the Boston metropolitan area, eastern Massachusetts, or the entire Commonwealth? A cynic might even suggest that it is not beyond the Housing Appeals Commit-

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[88] Psychologist Stanley Milgram wrote:

> The essence of obedience is that a person comes to view himself as the instrument for carrying out another person's wishes, and he therefore no longer regards himself as responsible for the actions. Once this critical shift of viewpoint has occurred, all of the essential features of obedience follow. . . .
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> . . . .
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> . . . This may illustrate a dangerously typical arrangement in a complex society: it is easy to ignore responsibility when one is only an intermediate link in a chain of actions.

Stanley Milgram, *The Perils of Obedience*, HARPER'S MAGAZINE, Dec. 1973, at 62.

tee to define the Commonwealth's regional housing needs as including the five additional states in the New England region.[89]

In a state that has all but abolished regional governments,[90] the SJC's reference to regional consideration is unfortunately analogous to the plight of greyhounds chasing the dog track's mechanical rabbit. While the greyhound is led to believe it can catch the rabbit, and it never does, in a similarly deceptive fashion, municipalities and their residents have been led to believe that they can achieve the ten percent threshold and the race will be over.[91]

## III. The Repeal of Chapter 40B, Sections 20 to 23

The comprehensive permit statute cannot be reformed; it must be repealed.[92] Reformation efforts, like rearranging deck chairs on the

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[89] As the Commonwealth's cities and towns have all but achieved the Legislature's purported goal of ten percent subsidized housing when viewed statewide, the Housing Appeals Committee would need to look beyond the state's borders to argue that the regional need for subsidized housing outweighs the abolition of local land-use controls. The total number of housing units in the Commonwealth is 2,526,963 and the number of dwelling units that count is 241,630. *See* SHI, *supra* note 23. Accordingly, 9.6% of the Commonwealth's housing stock meets DHCD's arbitrary definition of affordable. *Id.*

[90] Citizen Information Service, Historical Data Relating to the Incorporation and Abolishment of Counties in the Commonwealth of Massachusetts, http://www.sec.state.ma.us/cis/cisctlist/ctlistcounin.htm (last visited Mar. 27, 2008) (noting the county governments were abolished in the counties of Franklin, Middlesex, Hampden, Worcester, Hampshire, Essex, Berkshire, and Suffolk between 1996 and 2000). Two notable exceptions: county governments remain on Martha's Vineyard and Cape Cod. Cape Cod Commission Act, 1989 Mass. Acts 716; Martha's Vineyard Commission Act, 1977 Mass. Acts 831.

[91] Boothroyd v. Zoning Bd. of Appeals of Amherst, 868 N.E.2d 83, 89 (Mass. 2007) ("Finally, our conclusion does not 'needlessly infringe[]' on the 'settled property rights of abutters.' Rather, our conclusion takes into account that the Legislature 'has clearly delineated that point where local interests must yield to the general public need for housing.'" (quoting Bd. of Appeals of Hanover v. Hous. Appeals Comm., 294 N.E.2d 393, 423 (Mass. 1973))). Under the existing statutory scheme, the municipality will never be in compliance.

[92] Not satisfied with the damage wrought by the comprehensive permit statute, the legislature adopted several "smart growth" laws in 2005 and 2006. *See* Mass. Gen. Laws ch. 40R (2006); Mass. Gen. Laws ch. 40S (2006). A critique of these laws is beyond the scope of this Article, except to add that none of the Commonwealth's regulatory efforts to increase density through "smart growth" or "transit-oriented developments" contain reciprocal offsets for the preservation of open space elsewhere in the Commonwealth. *See* Mass. Gen. Laws ch. 40R; Mass. Gen. Laws ch. 40S. While it may seem smart to intensify the densities of existing neighborhoods by granting developers "streamlined permitting procedures," as described in Massachusetts General Law chapter 43D, there is nothing smart about quadrupling densities in one neighborhood without requiring the beneficiary developer to protect development rights elsewhere in the community or region. *See* Mass. Gen. Laws ch. 40R; Mass. Gen. Laws ch. 40S; Mass. Gen. Laws ch. 43D (2006). These laws permit a city or town lawfully to adopt spot zoning districts that, thereafter, are under

Titanic prior to its sinking, will do little to promote affordable housing and protect due process principles. What portions of the statute can be reformed? Reduce the ten percent goal?[93] Require "Adult Supervision" by state agencies?[94] Establish maximum densities?[95] Prohibit commercial development within a comprehensive permit application?[96] Ensure that abutters have the right of appeal consistent with normative land-use practices?[97] Delete the limited dividend organization as a viable ap-

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the control of the DHCD. The districts allow for high-density development as a premise for creating smart growth but neither promise nor are capable of delivering a corresponding off-set of land preserved elsewhere in the community—or the Commonwealth—in exchange for the densities allowed in the smart growth district.

One author wrote of people living on the Gulf Coast after Hurricane Katrina:

> There are, for example, several thousand Vietnamese in Biloxi: they came to work on the shrimp boats and stayed to build houses and raise families. According to Uyen Le, who works for a Vietnamese community organization, many of them left behind a world where only poor people walk everywhere and a car is a sign of success. "That's the American dream: you get your own lot, and you get your own little house, and you get your own car," she explained. "And now you're talking about these walkable neighborhoods, and some people will say, 'I came to America so I could drive.'" Some of these New Urbanist ideas don't really match up for this area.

Jim Lewis, *Battle for Biloxi*, N.Y. Times Mag., May 21, 2006, *available at* 2006 WLNR 8713505; *see also* William W. Buzbee, *Sprawl's Political-Economy and the Case for a Metropolitan Green Space Initiative*, 32 Urb. Law. 367, 383–89 (2000) (arguing for reinvestment in urban open space as a means to offset sprawl); Michael Neuman, *The Compact City Fallacy*, 25 J. of Plan. Educ. & Res. 11, 23 (2005) (arguing that reducing urban sprawl by creating compact cities may not be sustainable and that city "standing alone" is not sustainable); Barbara Melamed Huggins, Wrong Again: Massachusetts's Affordable Housing Statute and Smart Growth Zoning (May 2005) (unpublished Master's thesis, Tufts University Department of Urban and Environmental Policy and Planning) (on file with author).

[93] For example, the Legislature could establish a lower threshold, such as five percent of the housing units in the community must be subsidized.

[94] *See* Testimony of Massachusetts Inspector General Gregory Sullivan on October 23, 2007 Dealing with Rampant Financial Abuses and Alleged Criminal Activity Regarding Implementation of the State's Chapter 40B "Affordable Housing" Statute, http://www.navlog.org/ma_ig_40b.pdf [hereinafter Testimony]. For example, empower cities and towns to oversee the entire comprehensive permit process and remove any responsibilities from DHCD and MassHousing.

[95] For example, the Legislature could allow a maximum density of no greater than two times the underlying zoning within the locus on which the project is proposed.

[96] For example, the Legislature could prohibit such mixed uses without local legislative zoning approval. Unless the local legislative body desires to site nonresidential uses within a comprehensive permit project and adopts zoning that affirmatively permits the same, the authority to destroy existing neighborhoods cannot be delegated to the board of appeals and, thereafter, the Housing Appeals Committee.

[97] For example, the Legislature could affirmatively reverse the holding of *Standerwick v. Zoning Board of Appeals of Andover* by legislative enactment. *See* 849 N.E.2d 197, 210–11 (Mass. 2006).

plicant?[98] While each of the above assurances would make the statute more equitable, they do nothing to fix its core flaw: the complete lack of integration among municipal competing interests and critical concerns. Only by combining these core, competing, and critical concerns into a comprehensive document—a plan—can the statute's fatal flaws be resolved.

In recognition that the statute is irreparably flawed, ten citizens of the Commonwealth filed a petition in the summer of 2007 with the Massachusetts Attorney General seeking to repeal the statute.[99] Although the petition was certified by the Massachusetts Attorney General, and over 70,000 signatures were obtained,[100] the Secretary of State refused to certify over half of the signatures due to stray marks found on the petition.[101] Upon resubmission of the petition in 2009, it is anticipated that the numerous organizations represented by counsel (40B advocates)[102] that fought the Attorney General's certification will, once again, restate their argument that repeal of the statute will constitute a regulatory taking and, therefore, will violate the Massachusetts Constitution.[103] They argue, incorrectly, that the initiative petition violated

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[98] For example, the Legislature could remove the for-profit developer as a qualified entity that may apply for a comprehensive permit.

[99] Initiative Petition for a Law Relative to Comprehensive Permits and Regional Planning, No. 07-02, July 30, 2007, *available at* http://www.mass.gov/Cago/docs/Government/petition07-02.rtf [hereinafter Initiative Petition].

[100] 66,593 signatures were required. *See* Initiative Petition Process, 2007–2008, http://www.mass.gov (search for "Initiative Petition Process, 2007–2008") (last visited Mar. 27, 2008).

[101] Moving Massachusetts Forward, http://www.repeal40b.com/press2.htm (last visited Mar. 27, 2008).

[102] Ten organizations, including the DHCD, MassHousing, Massachusetts Housing Partnership, Citizens' Housing and Planning Association, and the Affordable Housing Committee of the Real Estate Bar Association, filed arguments with the Massachusetts Attorney General's office in opposition to the initiative petition. Letter from Peter Sacks, Deputy Chief, Gov't Bureau, Office of the Attorney Gen., to Deborah Goddard, Gen. Counsel, Dept. of Hous. and Comm. Dev., Michael Rabieh, Goulston & Storrs, and Kurt A. James and Theodore C. Regante, Affordable Hous. Comm. (Sept. 6, 2007) (on file with author) (certifying the initiative petition).

[103] *See* MASS. CONST. amend. art. 48, § 2. Article 48, section 2 of the Massachusetts Constitution prohibits an initiative petition from including the following:

> No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the gen-

Article 48 of the Massachusetts Constitution as it would affect a taking of property without compensation to comprehensive permit holders who do not obtain building permits as of January 1, 2009.[104]

While the Attorney General rejected the 40B advocates' position and certified the initiative petition,[105] it is anticipated that the 40B advocates would appeal any recertification by the Attorney General. The SJC should reject any such challenge to the initiative petition.

### A. *A Regulatory Taking Is Well-Defined: The Petition Does Not Constitute a Regulatory Taking*

A regulatory taking resulting from a government's legislative action does not occur unless: (1) the legislation results in a permanent physical occupation of private property,[106] and/or (2) the legislative action leaves a landowner with no reasonable economic value or use.[107]

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> eral court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.

*Id.*

[104] The initiative petition states:

> Be it enacted by the People, and by their authority:
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> SECTION 1: Chapter 40B, sections 20 through 23, inclusive of the General Laws are hereby repealed.
> SECTION 2: *No provision of this act shall be interpreted as applying to, affecting, amending, or otherwise impairing the provisions of any project approved by a board of appeals or the Housing Appeals Committee pursuant to G.L. c.40B, s.20–23 before the effective date of this Act, provided that said project has been issued a building permit pursuant to the State Building Code for at least one (1) dwelling unit.*
> SECTION 3: The provisions of this act are severable, and if any provision of this act is found to be unconstitutional, contrary to law, or otherwise invalid by a court of competent jurisdiction, then the other provisions of this act shall continue to be in effect.
> SECTION 4: This act shall take effect January 1, 2009.

Initiative Petition, *supra* note 99 (emphasis added) (formatting omitted).

[105] *See* Letter from Peter Sacks, *supra* note 102.

[106] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982). The determination of whether government's actions constitute a regulatory taking where *adjudicative* decisions are under review, which is not the case here—e.g., those where the landowner claims that government has worked a regulatory taking by imposing unreasonable conditions as a quid pro quo for the grant of a special permit or variance—are governed by the "nexus" and "proportionality" tests established by the Supreme Court in a long line of cases and commentary including *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

[107] *E.g.*, Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003, 1017 (1992); Pa. Cent. Trans. Co. v. City of N.Y., 438 U.S. 104, 130–31 (1978); U.S. Gypsum Co. v. Executive Office of Envtl. Affairs, 867 N.E.2d 764, 776–77 (Mass. App. Ct. 2007); Zanghi v. Bd. of Appeals of Bedford, 807 N.E.2d 221, 224 (Mass. App. Ct. 2004).

A regulatory taking has been held to have occurred where the government's actions result in a permanent physical occupation of private property.[108] The 40B advocates did not suggest that the initiative petition would result in the permanent physical occupation of private property. Thus the first possible prong of a regulatory takings analysis is not implicated by the petition.

The 40B advocates do argue, however, the second possible prong of regulatory takings analysis that the initiative petition would result in a taking with respect to comprehensive permit holders who did not obtain building permits by the effective date of January 1, 2009. A regulatory taking does not exist unless it effectively deprives the landowner of all economically beneficial or viable use of the land.[109] To establish a regulatory taking, the 40B advocates must demonstrate that the repeal of the statute leaves the property "'economically idle'" and that the plaintiff retains no more than a "token" interest."[110]

The loss of one property interest among a *bundle* of property rights does not, alone, constitute a taking, even if that one property right, and the economic value associated with it, is completely eliminated.[111] This principle is often referred to as the "whole parcel doctrine."[112] Moreover, the fact that the challenged regulation was enacted *after* the landowner's acquisition of the property does not alter the outcome.[113]

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[108] *Lorretto*, 458 U.S. at 421.

[109] *E.g.*, *Lucas*, 505 U.S. at 1017; *U.S. Gypsum Co.*, 867 N.E.2d at 776–77; *Zanghi*, 807 N.E.2d at 224.

[110] *E.g.*, Gove v. Zoning Bd. of Appeals of Chatham, 831 N.E.2d 865, 872 (Mass. 2005) (quoting Palazzollo v. Rhode Island, 533 U.S. 606, 631 (2001)).

[111] *See Pa. Cent.*, 438 U.S. at 130–31.

[112] *See, e.g.*, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002); Andrus v. Allard, 444 U.S. 51, 65–66 (1979) ("[T]he destruction of one 'strand' of the bundle [of property rights] is not a taking, because the aggregate must be viewed in its entirety.").

[113] *See Gove*, 831 N.E.2d at 867 (deciding a bylaw prohibiting construction of a single-family house on lot in a flood plain was not a regulatory taking, even though owner had acquired the lot years prior to the adoption of the bylaw); Long Cove Club Assocs. v. Town of Hilton Head Island, 458 S.E.2d 757, 758 (S.C. 1995) (noting rezoning that nullified pre-existing "Development Permit" did not constitute a taking); Flynn v. City of Cambridge, 418 N.E.2d 335, 339–40 (Mass. 1981) (concluding that adoption of a condominium conversion ordinance was not a taking, even as to owners whose units were purchased prior to the effective date of the ordinance).

### B. *Chapter 40B Creates No Vested Rights*

The 40B advocates argue that the issuance of a comprehensive permit endows the holder with certain *vested rights* or *vested property interests* equivalent to those created under chapter 40A.[114]

The vested rights referenced—such as those pertaining to special permits and subdivision plans—are creatures of statute.[115] That is, they are defined by statute, and their protections afforded only to those specific circumstances described in the statute.[116] There exists no comparable language in any section of chapter 40B creating a vested right in an issued comprehensive permit. Absent specific language establishing such rights under chapter 40B, none can be inferred. *Expressio unius est exclusion alterius.*[117]

Moreover, the Commonwealth's appellate courts have made it abundantly clear that protections created under chapter 40A cannot be imported into chapter 40B, where chapter 40B does not contain the specific language creating such protections.[118]

Had the Legislature intended to provide comprehensive permit recipients with the vested rights enumerated under chapter 40A, it would have done so—either in the original enactment of chapter 40B or by amendment. The Legislature is "'presumed to understand and intend all consequences' of its acts,"[119] and "to be aware of existing

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[114] *See* MASS. GEN. LAWS ch. 40A, § 6 (2006).

[115] *See id.*

[116] *See id.* (enumerating specifically zoning protection for: (1) building or uses "lawfully in existence or lawfully begun"; (2) special permits issued prior to an advertisement for a zoning change; (3) undersized lots of "at least five thousand square feet of area and fifty feet of frontage"; (4) up to three undersized lots held in common ownership of "at least seven thousand five hundred square feet of area and seventy-five feet of frontage"; (5) preliminary subdivision plans of land; (6) definitive subdivision plans of land; and (7) use freezes for approval not required plans).

[117] Bagley v. Illyrian Gardens, Inc., 519 N.E.2d 1308, 1310 (Mass. 1988).

[118] *See, e.g.*, Planning Bd. of Hingham v. Hingham Campus, LLC, 780 N.E.2d 902, 905 (Mass. 2003) (deciding it was "improper" to consider standing under chapter 40A where the permit issued under chapter 40B); Cardwell v. Bd. of Appeals of Woburn, 807 N.E.2d 207, 210–11 (Mass. App. Ct. 2004) (emphasizing that provision for constructive approval found in chapter 40A cannot be imported into chapter 40B); *see also* Standerwick v. Zoning Bd. of Appeals of Andover, 849 N.E.2d 197, 204, 210–11 (Mass. 2006) (noting "interests protected by G.L. c. 40B differ from, and in some respects are inconsistent with, those protected by G.L. c. 40A," including the remarkable holding that standing claims differ with respect to 40A and 40B projects).

[119] *See* Boston Water & Sewer Comm'n v. Metropolitan Dist. Comm'n, 562 N.E.2d 470, 474 (Mass. 1990) (quoting Rambert v. Commonwealth, 452 N.E.2d 222, 224 (Mass. 1983)).

statutes when it amends a statute or enacts a new one."[120] Although the 40B advocates suggest that the provisions of chapter 40A apply by analogy to chapter 40B—or that they provide a parallel to chapter 40B—the courts have held otherwise.

Further support for the argument that possession of a comprehensive permit does not constitute a vested right is found throughout decisions of the Housing Appeals Committee. First, as the Committee has repeatedly held that "the comprehensive permit itself is preliminary," the permit is based solely on preliminary drawings and plans.[121]

Second, a comprehensive permit: (1) *as required by* 760 Mass. Code Regs. 56.07(5)(b), may not permit "the building or operation of housing . . . less safe than the applicable building and site plan requirements of the subsidizing agency";[122] (2) *as required by* 760 Mass. Code Regs. 56.04(7), necessitates approval from the "designated entity that issued the Project Eligibility . . . determination";[123] and (3) *as required by* chapter 40B, section 20, 760 Mass. Code Regs. 56.04(1)(b) cannot be used and is not effective without the issuance of a federal

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[120] *See* Mulhern v. MacLeod, 808 N.E.2d 778, 782 (Mass. 2004) (quoting Commonwealth v. Russ R., 744 N.E.2d 39, 43 (Mass. 2001)).

[121] *E.g.*, Oxford Hous. Auth., No. 90-12, slip op. at 4 (Mass. Housing Appeals Committee Nov. 18, 1991) (involving the Oxford Zoning Board of Appeals). The Housing Appeals Committee stated:

> The adequacy of the design work done by a developer, which is normally reflected in architectural or engineering plans, is frequently questioned before this Committee. Since this sort of challenge is often based on a misunderstanding of the requirements under our regulations, we will describe the scheme envisioned by the statute and regulations in some detail, in the hope of laying this issue to rest.
>
> Beginning with its earliest cases, the Committee has made it clear that plans submitted for comprehensive permit approval are preliminary . . . . The rationale for this rule is that the comprehensive permit itself is preliminary in the sense that no construction can proceed until a building permit has been issued. The building permit is not issued until the appropriate officials have reviewed final construction drawings and insured that the project will comply with various state codes and all local requirements not waived by the comprehensive permit.

*Id.* at 3–4 (footnote omitted); *see also* Marion v. Mass. Hous. Fin. Agency, 861 N.E.2d 468, 471 (Mass. App. Ct. 2007) (holding that the issuance of a Project Eligibility letter, the only method of complying with former Massachusetts Code Regulations 31.01(1)(b), "is merely an interim step in the administrative process"); 760 MASS. CODE REGS. 56.04(2) (2008) (formerly 760 MASS. CODE REGS. 31.02 (2007)) (describing filing requirements for comprehensive permit applicants and emphasizing the nominal and preliminary requirements for filing, including preliminary plans and drawings).

[122] 760 MASS. CODE REGS. 56.07(5)(b).

[123] *Id.* at 56.04(7).

or state subsidy to the developer.[124] Many federal or state subsidies, such as the Low-Income Housing Tax Credit program,[125] are highly competitive and available to only a limited pool of applicants and only during a limited period each calendar year.

Third, a comprehensive permit expires by its own terms if construction authorized by the comprehensive permit has not begun by the date set by the local board of appeals or Housing Appeals Committee.[126]

Receipt of a comprehensive permit cannot be said to create, categorically, vested rights. The statute and the applicable regulations impose nominal filing requirements, subject the applicant to numerous and discretionary conditions imposed *subsequent* to receipt of the comprehensive permit, and leave the recipient subject to the unbridled authority of the subsidizing agency to grant a required subsidy and the local board of appeals to place any expiration date it chooses on a comprehensive permit.

### C. *The Ad Hoc, Fact-Based Inquiry Entailed in Regulatory Takings Analysis Is Beyond the Scope of the Attorney General and SJC's Review of the Initiative Petition*

In *Yankee Atomic Electric Co. v. Secretary of the Commonwealth* (*Yankee Two*), the SJC considered the question of whether the Attorney General had correctly certified an initiative petition seeking to prohibit generation of electric power by commercial nuclear power plants in Massachusetts.[127] The Attorney General's certification of the petition had been challenged by the two nuclear power plant companies then operating in Massachusetts, that argued that the petition would effect a regulatory taking and would violate Article 48 of the Massachusetts Constitution.[128] The SJC had issued a decision previously on this case (*Yankee One*), ordering the Attorney General to conduct a limited ex-

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[124] Town of Middleborough v. Hous. Appeals Comm., 870 N.E.2d 67, 74 (Mass. 2007) (discussing the subsidy requirement of the statute).

[125] *See* 760 MASS. CODE REGS. 54.01–.16 (2000).

[126] *See id.* at 56.05(12)(c); *see also* Forestview Estates Assocs., Inc., No. 05-23, slip op. at 7–8 (Mass. Housing Appeals Committee Mar. 5, 2007) (concluding that a comprehensive permit lapsed pursuant to 760 Mass. Code Regs. 31.08(4), now 760 Mass. Code Regs. 56.05(12)(c), where the holder did not seek an extension of the permit prior to it lapsing) (involving the Douglas Board of Appeals).

[127] *Yankee Atomic Electric Co. v. Secretary of the Commonwealth* (*Yankee Two*), 526 N.E.2d 1246, 1247 (Mass. 1988).

[128] *Id.*

amination of the facts relating to the initiative petition.[129] The Attorney General did so and affirmed his certification, concluding "that the petition [did] not establish, on its face, that it effects a regulatory taking."[130] In upholding the certification, the SJC held that due to the ad hoc and fact-dependent nature of regulatory takings analysis, the Attorney General's inquiry was to be limited.[131]

*Yankee Two* is highly instructive, if not dispositive of the initiative petition to repeal chapter 40B. As with the petition in *Yankee Two*, the initiative petition proposes "not a permanent physical occupation or confiscation of property, but instead a regulation of use of property," and "[a]s such the question is whether the 'regulation goes too far.'"[132] As the SJC noted, answering the question of whether a regulation "goes too far" involves regulatory takings analysis which is "peculiarly fact dependent, involving 'essentially ad hoc, factual inquiries.'"[133] Under *Yankee Two*, the issues in the initiative petition—whether the potential nullification of a comprehensive permit "goes too far," and thus whether a taking of property will occur— "will involve the kind of lengthy factual determination which [Article] 48 does not require or allow to the Attorney General at this time."[134]

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[129] Yankee Atomic Elec. Co. v. Sec'y of the Commonwealth (*Yankee One*), 525 N.E.2d 369, 375 (Mass. 1988).

[130] *Yankee Two*, 526 N.E.2d at 1248.

[131] *Id.* at 1249–50.

> Our review . . . reveals issues (1) which are relevant to the question whether a taking would ensue from the proposed legislation, and (2) which have not been, and should not be, determined through the Attorney General's limited examination of the facts at this time. The petition proposes not a permanent physical occupation or confiscation of property, but instead a regulation of use of property. As such the question is whether the "regulation goes too far." Answering this question involves regulatory takings analysis which is peculiarly fact dependent, involving "essentially ad hoc, factual inquiries." We conclude that at least some of the relevant inquiries which may arise in the ultimate determination whether a taking of property has occurred will involve the kind of lengthy factual determination which art. 48 does not require or allow to the Attorney General at this time.

*Id.* (citations omitted).

[132] *Id.* (citation omitted) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

[133] *Id.* (quoting Pa. Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978)).

[134] *Id.*

## IV. After Chapter 40B, Sections 20 to 23: A Recipe for Building Affordable Housing in Massachusetts

The comprehensive permit statute relies on tired and worn innuendo—opponents of 40B projects are "NIMBYs" and "snobs"—and has been driven for thirty-eight years by real estate developers and others who have long fed at the "pig fest," as described by the Commonwealth's Inspector General.[135] The statute is punitive; it obliterates all local land-use, fiscal, and planning control; it ignores the countless other critical issues facing cities and towns today; and it imposes a one-size-fits-all policy that insults the distinctions between Cape Cod and Cape Ann, the Berkshires and the Blackstone Valley.

Although cloaked in unassailable objectives, such as assisting returning Vietnam veterans find housing,[136] the statute remains a perverse attempt to cram city-like densities, building types, and large-scale infrastructure into suburban and rural towns. It has no roots in sound land-use planning principles, no counterpart anywhere else in the nation, and results in the destruction of neighborhoods, marginal lands,

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[135] Christine McConville, *Profits Probed in Housing Program*, Boston Globe, Oct. 10, 2006, at A1. The Inspector General's "pig fest" remarks signaled the beginnings of a thorough investigation into the imbedded corruption of the comprehensive permit process. *Id.* Most recently, in testimony before a Massachusetts Senate and House Joint Committee on Housing, Inspector General Gregory W. Sullivan stated, "This 40B scandal represents one of the biggest abuses in state history, in my opinion, in terms of dollars and lack of oversight. Now we have new people in charge under the administration. We're calling for Adult Supervision to come in and rectify these problems." Testimony, *supra* note 94; *see also* Letter from Gregory W. Sullivan, Inspector Gen., to Susan Tucker, Senate Chair, Joint Comm. on Hous., and Kevin Honan, House Chair, Joint Comm. on Hous. (Oct. 23, 2007), *available at* http://www.mass.gov/ig/publ/40b_hearing_letter.pdf.

[136] Currently, the regulations state that the avowed purpose is to "reduce regulatory barriers that impede development of such housing." 760 Mass. Code Regs. 56.01. The goal of "reduc[ing] regulatory barriers" curiously comports with the mission statement and goals of the development community and their agents, perhaps explaining why the DHCD is derisively referred to as the "Department of Housing and its Community of Developers." *See* AvalonBay Communities, Inc., Community Profile, http://www.avalonbay.com/Template.cfm?Section=CompanyProfile (last visited Mar. 27, 2008) ("AvalonBay Communities, Inc. is in the business of developing, redeveloping, acquiring and managing high-quality apartment communities in the high barrier-to-entry markets of the United States."); *see also* NAHB, National Association of Home Builders, Barriers to Affordable Housing, http://www.nahb.org/generic.aspx?genericContentID=3516 (last visited March 27, 2008) ("Overcoming obstacles such as outdated and overly restrictive zoning, and inadequate infrastructure, tax issues, and land availability need to be addressed."); NGA Ctr. for Best Practices, Issue Brief, Integrating Affordable Housing with State Development Policy, http://www.nga.org/cda/files/0411AFFORDABLEHOUSING.pdf (last visited March 27, 2008) ("[Chapter 40B, sections 20 to 23] aim[] to encourage the development of affordable housing by reducing the barriers created by local approval processes, local zoning, and other restrictions.").

and any rational reason for why local residents would ever again attend town or city council meetings to adopt or support land-use regulations.

It is not disputed that chapter 40B results in the construction of new housing. But at what cost? The Commonwealth could have safer roads and cleaner water if the income tax rate were doubled, but it is doubtful that such action would be tolerated. The ends do not justify the means in a democratic society, yet 40B remains the ultimate ends versus means legislation—but not for long.

The answer to what is next is easy. Massachusetts must join with the numerous other states that have adopted comprehensive land-use planning legislation that enables cities and towns to impose, among other things, inclusionary zoning requirements and to collect impact fees.[137] States as diverse as California,[138] Maryland,[139] and Rhode Island[140] build more affordable housing units than Massachusetts through burden sharing between the developer and the community.[141] Unlike chapter 40B—which is nothing more than a gift of taxpayer dollars to private developers—inclusionary zoning, impact fees,

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[137] *See* Witten, *supra* note 19, at 546–51.

[138] *See generally* CAL. COAL. FOR RURAL HOUS., NON-PROFIT HOUS. ASS'N OF N. CAL., INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION (2003), *available at* http://www.oaklandnet.com/BlueRibbonCommission/PDFs/BlueRibbon10-NPH.pdf (providing a detailed discussion of California's inclusionary zoning practices).

[139] *See* Montgomery County, Maryland, Department of Housing & Community Affairs, Moderately Priced Dwelling Unit (MPDU) Program in Montgomery County, Maryland, http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_p/mpdu/Summary_new.asp (last visited Mar. 27, 2008).

[140] R.I. GEN. LAWS § 45-22.2-6 (2007) (comprehensive planning rules include a requirement for the planning for and production of affordable housing and penalties for failure to produce affordable housing consistent with the plan); R.I. GEN. LAWS § 45-53-1 to -9 (2007) (low- and moderate-income housing).

[141] 40B advocates, most notably CHAPA, relentlessly tout the accomplishments of the statute. *See* Citizens' Housing & Planning Association, *supra* note 39, at 1 (stating that 26,000 affordable homes were created since the early 1970s using chapter 40B). In comparison, Montgomery County, Maryland's inclusionary housing ordinance has resulted in the creation of over 11,500 affordable dwelling units in the County. NICHOLAS BRUNICK, BUS. AND PROF'L PEOPLE FOR THE PUB. INTEREST, THE IMPACT OF INCLUSIONARY ZONING ON DEVELOPMENT 6 (2004), *available at* http://www.bpichicago.org/documents/impact_iz_development.pdf. Brunick writes:

> In fact, in many communities, development under inclusionary zoning has continued so robustly that it has led local officials to consider slowing development in the interest of protecting rural and open space. In Loudon County, Virginia, the nation's fourth fastest growing county, the decade-old inclusionary zoning program was recently amended because it was producing so much new construction that local officials were concerned about its effect on Loudon's shrinking amounts of rural countryside.

*Id.* at 6–7.

and development agreements require developers to participate in the creation of affordable housing, not just profit from it.

The repeal of the statute provides an opportunity for the Commonwealth to adopt meaningful planning and regulatory provisions that require cities and towns to plan for—and build—affordable housing in a manner that is consistent with local and regional plans. These plans will finally incorporate other key municipal concerns into a comprehensive plan for the community. Development of housing will be a required element of city and town plans, but not the only element. Cities and towns will be free to plan for construction of rental and for-sale housing, housing for those earning well below eighty percent of the state's median income, and housing for family members within existing dwellings, without fear of retribution from developers who are offered a blank check by the Commonwealth's DHCD.

## V. The Plan

An underlying premise of this Article is that the establishment of a comprehensive planning process for the Commonwealth's cities and towns, whether it is to promote affordable housing production or convenient road systems, should no longer be debated. Academic and professional literature is replete with juried discussions highlighting the benefits and logic of the preparation by cities and towns of comprehensive plans linking those plans to the regulations designed to make them work.[142] Lengthy repetition of this process should no longer be necessary.

### A. *The Planning Requirement*

Cities and towns would be required to adopt a comprehensive plan within a prescribed period of time—such as three years—following the adoption of the planning legislation by the Legislature. The plan would be required to include no less than the state-mandated planning elements—e.g., housing, open space, recreation, public safety, infrastructure, finance, etc.—and could include optional elements chosen by the municipality—such as noise. The plan would be required to identify the mechanisms and a timeframe for implementation of the plan's

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[142] *See, e.g.*, 83 Am. Jur. 2d *Zoning and Planning* § 22 (1992) (legal effect of adopting comprehensive plan); Bobrowski, *supra* note 28; Curtin & Witten, *supra* note 15; Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 Harv. L. Rev. 1154 (1955); Sullivan & Michel, *supra* note 16.

elements and the minimum requirements set by statute.[143] The plan's elements would be required to be horizontally consistent, and, as discussed below, vertically consistent.[144] The plan would be certified by a state planning agency for consistency with the state-mandated planning elements. The plan would be required to be updated at least every five years, but no more often than three times per year.[145]

### B. *Tools for Implementing the Plan*

Zoning and other land-use controls would be required to be consistent with the plan. Cities and towns would have the authority to adopt impact fees,[146] transfer development rights,[147] enter into development agreements,[148] and adopt inclusionary zoning[149] requirements,

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[143] For example, the statute would establish a minimum percentage of land area to be set aside in cities and towns for rental housing and/or for-sale housing. Cities and towns would be required to produce a specified number of dwelling units for rent or sale to those earning specified percentages of median income. Cities and towns would have a period of time within which to demonstrate compliance with the statute and the adopted plan. Similarly, the statute could establish a minimum percentage of land area to be set aside for such uses as recreational opportunities, permanent open space protection, commercial and industrial development.

[144] *See infra* Part V.B.

[145] *See* CAL. GOV'T CODE § 65,358(b) (West 1997 & Supp. 2008) (limiting the number of times the mandatory elements within a comprehensive plan may be revised).

[146] Impact fees allow a municipality to collect fees for the proportionate impact of new development. *See, e.g.*, Witten, *supra* note 19, at 546 n.147.

[147] Transfers of development rights allow a municipality or group of communities to authorize the transfer of development rights from one parcel to another, with the transferor parcel being subject to a permanent restriction against additional development. *See generally* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997); Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587; Rick Pruetz & Angela Pruetz, *Transfer of Development Rights Turns 40*, PLANNING & ENVTL. L., June 2007, at 3 (presenting background information on transfers of development rights and examples of success stories); Sarah J. Stevenson, Note, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329 (1998) (discussing the *Suitum* case and, specifically, the role of banks in transfers of development rights).

[148] Development agreements allow a municipality to contract with a land developer for public benefits in exchange for granting the developer protection against changes in applicable land-use regulations. *See generally* Schwartz, *supra* note 24 (providing a detailed discussion of development agreements).

[149] Inclusionary zoning requires a developer of land to provide affordable housing units—rental or sale—or pay fees in lieu of the units as a cost associated with the creation of new market-rate units. Unlike the comprehensive permit statute, which is a gift of density without any reciprocal costs to the developer, inclusionary housing regulations ensure that impacts of new market-rate land development are offset by the creation of affordable housing units. Inclusionary zoning statutes have been extraordinarily successful throughout the country. Such statutes have been upheld by appellate courts in various states and, perhaps most importantly, produce affordable housing without destroying local plans,

such that at least some of the costs of development would be borne by the developer and not, as is currently the case, solely by the community.[150] The zoning act would be revised, holistically, to require vertical consistency with adopted plans,[151] remove the broad vested rights provisions found within chapter 40A, section 6,[152] and ensure judicial deference to municipal land-use decisions consistent with the adopted plan and subsequent regulations.[153]

### C. *Penalties for Noncompliance with the Plan*

Consistent with California's planning legislation, cities and towns that fail to adopt or revise a comprehensive plan consistent with the

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zoning regulations, neighborhoods, and the real property values of homeowners who purchase property with the belief that the zoning ordinances adopted by their legislature are intended to protect, not defeat, their investment backed expectations. *See generally* Cecily T. Talbert & Nadia L. Costa, *Inclusionary Housing Programs: Local Governments Respond to California's Housing Crisis*, 30 B.C. ENVTL. AFF. L. REV. 567 (2003) (discussing the conflict between affordable housing and environmental protection).

[150] *See* Shelley Ross Saxer, *Planning Gain, Extractions, and Impact Fees: A Comparative Study of Planning Law in England, Wales, and the United States*, 32 URB. LAW. 21, 21–22 (2000) (discussing strategies in England, Wales, and the United States to force land developers to "internalize the externalities" of development impacts).

[151] *See* Curtin & Witten, *supra* note 15 at 333. *See generally* CAL. GOV'T CODE § 65,860(a)(2) (West 1997 & Supp. 2008) (requiring that land uses authorized by zoning be "compatible" with the objectives of the comprehensive plan); Haines v. City of Phoenix, 727 P.2d 339 (Ariz. 1986) (interpreting a state statute and holding that municipal zoning regulations must be consistent—in harmony—with adopted comprehensive plans); Fasno v. Bd. of County Comm'rs, 507 P.2d 23 (Or. 1973) (holding that all zoning changes must be consistent with the comprehensive plan).

[152] *See* MASS. GEN. LAWS ch. 40A, § 6 (2006). Efforts to revise the zoning act have been underway for years without success. The drafters have been unwilling to integrate the zoning act and the comprehensive permit statute as one. Rather, the drafters have chosen to propose revisions to the zoning act solely, leaving the comprehensive permit statute untouched. What good is a reformed zoning act when a developer has at its disposal a blank check in the form of a comprehensive permit? When would a developer ever file for approval pursuant to zoning? Add to the feeding trough set by the current comprehensive permit statute the right to build commercial uses within the *project*—as proposed by DHCD. *See* 760 MASS. CODE REGS. 56.02 (2008). One wonders whether the legislature should simply abolish the zoning act in toto. If chapter 40B is not repealed, the zoning act will be simply surplusage and courses in Massachusetts land use law can be shortened from a full semester to one day.

[153] *See* A Local & Reg'l Monitor v. City of L.A., 20 Cal. Rptr. 2d 228, 239 (Cal. Dist. Ct. App. 1993) (holding that where a land-use regulation is consistent with a municipally adopted comprehensive plan, the regulation can be reversed by a reviewing court only if it is based on evidence from which no reasonable person could have reached the same conclusion); *see also* Curtin & Witten, *supra* note 15, at 332–33.

mandatory planning requirements run the risk of their zoning ordinances and bylaws being declared void ab initio.[154]

## Conclusion

State attempts to impose land-use decisions on local government are the antithesis of the well-accepted principle of home rule. While there is little question that states have the authority and responsibility to impose their preemptory authority on occasion, ill-advised imposition of such authority has measurable drawbacks.

As discussed in this Article, the Massachusetts Anti-Snob Zoning Act provides a good, if not sad, example of a statute that has simply gone too far in asserting compliance with a state mandate through a hopelessly flawed and corrupt process. The repercussions of this ill-advised, regressive, and illogical statute are far reaching, as the very policy issue the statute portends to address has become the victim of its goals. Affordable housing will not be constructed in Massachusetts in any meaningful way while this transparent mockery of due process remains law.

Only the driver of the statutory bus, the Massachusetts DHCD, and its agents[155] profiting from the anarchy that defines the statute, appear to be continuing to ignore what havoc the statute has wrought upon cities and towns and the production of affordable housing. Unwilling to engage in any form of self-reflection, unable to admit failure, and most regrettably, incapable of observing the successes in other states in the production of affordable housing, the Commonwealth holds onto a statute now thirty-eight years old and written by

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[154] *See* Res. Def. Fund v. County of Santa Cruz, 184 Cal. Rptr. 371, 374 (Cal. Ct. App. 1982) ("Since consistency with the general plan is required, absence of a valid general plan, or valid relevant elements or components thereof, precludes any enactment of zoning ordinances and the like.").

[155] In a remarkable attempt to portray 40B developers as victims of abutters seeking to protect themselves against the unregulated ravages of comprehensive permit projects, the CHAPA published a recent report relying on a "proprietary database" discussing the efforts of "[a] small number of attorneys [that] have represented a significant fraction of the abutters and municipal entities who have appealed local and [Housing Appeals Committee] zoning approvals." Citizens' Hous. & Planning Assoc., Zoning Litigation and Affordable Housing Production in Massachusetts 1, 3 (2008), *available at* http://www.chapa.org/pdf/CHAPAZoningAppealsandAffordableHousingReportFinal.pdf. CHAPA's report suggests that the delay in construction of several of the eighty-four projects identified in the report's sample is the result of abutter challenges, as opposed to, for example, the collapse of the housing market, investigations by the Inspector General, unsupportable land purchase prices, or the impact legal fees charged by the developers' counsel have on developer profits. *See id.* at 2.

urban legislators as payback to Boston's suburbs for supporting school integration in the 1960s.

As with most bad laws, the Anti-Snob Zoning Act will soon be remembered as a sad chapter in Massachusetts's byzantine and sometime corrupted politics.[156] An enlightened legislature should replace the statute with the tools and techniques so successfully used elsewhere—mandatory comprehensive planning coupled with progressive regulatory and creative nonregulatory tools.

Rather than cities and towns fighting developers and their plans for development, development consistent with articulated and adopted plans will be welcome. Rather than developers destroying articulated and adopted plans with ill-advised developments of unlimited density—and lining their pockets at the expense of municipal residents—developers will become part of the solution, not just another obstacle in the production of affordable housing.

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[156] "A significant four-year study of organized crime in Massachusetts was undertaken by a special crime commission authorized by the legislature and concluded in 1957. The 1957 report categorized conditions as the existence in society of a widespread state of lawlessness" Dwight S. Strong, *New England: The Refined Yankee in Organized Crime*, 347 ANNALS AM. ACAD. POL. & SOC. SCI. 40, 46 (1963) (citing COMMONWEALTH OF MASS., REPORT OF THE SPECIAL COMMISSION REVIVED AND CONTINUED FOR THE PURPOSE OF INVESTIGATING ORGANIZED CRIME AND OTHER RELATED MATTERS, S. 799, at 114 (1957)). "Some public officials and business concerns devise unscrupulous ways to seek personal gain. There is a lack of public morality. Corruption grows." *Id.* at 50.