Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?

Rusty Russell
EQUITY IN EDEN: CAN ENVIRONMENTAL PROTECTION AND AFFORDABLE HOUSING COMFORTABLY COHABIT IN SUBURBIA?

Rusty Russell*

Abstract: State-based affordable housing initiatives have survived decades of controversy. Two of the most successful—in Massachusetts and New Jersey—encourage homebuilders to bypass local regulations when zoning ordinances limit available land. Opponents assert that these programs invite developers to pillage open space, impairing wetlands and promoting sprawl. This Article examines the low- and moderate-income housing programs established by the so-called “Anti-Snob Zoning Act” in Massachusetts and the Mount Laurel doctrine in New Jersey. Drawing on Oregon’s integrated planning regime as a point of contrast, it analyzes the potential for tension between policies that advance affordable housing in the suburbs and the asserted municipal interest in safeguarding the local environment. Finding that elements of the legal and regulatory structure appear to promote this conflict, the Article concludes with the observation that a more coherent statewide planning system could better integrate affordable housing and the environment, and offers thoughts on how to alter the perception that the two are adversaries.

INTRODUCTION

This Article examines the potential for conflict—and congruence—between the benchmark state efforts of Massachusetts and New Jersey to site affordable housing in municipalities that historically have opposed it, and initiatives by communities and their citizens to

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* J.D., Harvard Law School. Mr. Russell teaches environmental law in the graduate program at Tufts University, and has taught property law at Northeastern University School of Law, as well as environmental law and policy courses at Boston College Law School, Brown University, and Boston University. He also consults with government agencies and nonprofit organizations on environmental matters. The author thanks Jean Healey, a second-year student at Northeastern University School of Law, for assisting in the research for this Article.
protect the local environment. When not pretextual, such initiatives seek to address the health and safety impacts of disaggregated living patterns, consumption of open space, short- and long-term harm to ecosystems, and loss of biodiversity. The State of Oregon’s land use planning system serves as a point of contrast, and accusation.

I. THE EQUITY DIMENSION

Policies favoring environmental protection and affordable housing are sometimes said to conflict because they embody differing perspectives on the principle of equity. Environmentalism tends to focus on intergenerational distribution—equity over the long term. A fundamental concern is the extent to which the present generation can defer the costs of its activities. Affordable housing policy, conversely, concentrates more intensely on existing inequalities. These include disparities in available resources for shelter, as well as the ability of local government to supply services such as education, fire and police protection, and public works. Considerations of intergenerational equity frequently yield to more immediate demands.

1 See, e.g., Werner Lohe, Command and Control to Local Control: The Environmental Agenda and the Comprehensive Permit Law, 22 W. NEW ENG. L. REV. 355, 361 (2001) [hereinafter Lohe, Environmental Agenda] ("[I]f anything, affordable housing is set in opposition to environmental issues."). The Article suggests that Massachusetts’s affordable housing need could be addressed through the controversial Comprehensive Permit Law, if coordinated with emerging approaches to land use planning. See Massachusetts Low and Moderate Income Housing Act, MASS. GEN. LAWS. ch. 40B, §§ 20–23 (2000); Lohe, Environmental Agenda, supra, at 362–64; see also Peter H. Schuck, Judging Remedies: Judicial Approaches to Housing Segregation, 37 HARV. C.R.-C.L. L. REV. 289, 293 (2002) (referring to the "unanticipated effects [arising from] the conflict between exclusionary zoning (and other laws often justified by environmental and aesthetic considerations) and the goal of improving access for low-income people to the suburbs by reducing their housing costs"); Andrew Jacobs, New Jersey’s Housing Law Works Too Well, Some Say, N.Y. TIMES, Mar. 3, 2001, at A1 ("In the realm of laws with unintended consequences, a chapter could be devoted to the [New Jersey affordable housing] doctrine . . . ."); Werner Lohe, The Massachusetts Comprehensive Permit Law: Collaboration Between Affordable Housing Advocates and Environmentalists, LAND USE L. & ZONING DIG., May 2000, at 4–9 (providing an earlier and somewhat expanded version of the same analysis); Clark L. Ziegler, Will “Smart Growth” Drive Up Housing Costs in Massachusetts?, HOUSING PARTNERSHIP NETWORK (Mass. Hous. P’ship, Boston, Mass.) Winter 2000, at 1 (noting that "the smart growth movement . . . at the moment . . . seems to be a part of the problem"); http://www.mhp.net/termsheets/winternewsletter_00.pdf (last visited Apr. 24, 2003).


remedies supported by housing advocates appear to favor housing over the environment, despite repeated expressions of concern for the latter. But the relationship between the two is more complex. Feigned environmentalism may not save any trees, yet it may be decisive in obstructing low-cost housing.5

Another major source of tension is governmental. It surfaces when a decision to promote affordable housing, usually made at the state level, collides with local financial needs and political limitations. Under the authority typically delegated by state constitutions, municipalities can and do provide a wide range of public services.6 In the usual case, a sizable percentage of the local budget must be raised through property assessments,7 and K–12 education can easily consume half of it or more.8 A direct relationship exists between the level and quality of municipal services, and the structure of local zoning regulations.9

As a result of this interplay, current residents of a given community work hard to maximize their own economic prospects.10 By deciding what package of services to offer and how to cultivate the most robust tax base to pay for it, communities exercise powers delegated by the state legislature to shift as much of their costs as possible onto the citizens of other towns and cities.11 This permutation of the famil-

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4 See, e.g., CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 199 (1996) (noting that, under the New Jersey approach, "judges were inclined to dismiss claims of environmental disruption [and] in some instances ... may have ... refuse[d] to face up to environmental problems posed by particular projects").


7 See MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 18–19, 88–89 (2002). On average, property taxes account for nearly three-quarters of all local revenue. Id. at 89. In the New York, Philadelphia, Boston, and Portland, Oregon metropolitan areas, property taxes are the only generalized means of raising such revenue across the metropolitan area. Id. at 18–19.

8 Richard Briffault, Our Localism: Localism and Legal Theory (pt. 2), 90 COLUM. L. REV. 346, 352 n.37 (1990) (noting that school spending consumes half to two-thirds of most suburban budgets).


10 See id. at 162–64. Fischel argues that local governments are, in fact, highly responsive to their taxing residents and that the latter, if anything, are "too reluctant to trade environmental amenities for fiscal gains." Id. at 205. But Fischel does not directly address a narrower issue considered here—whether affluent communities "over-protect" the environment in the service of zoning regimes designed to suppress low- and medium-income housing. See id.

11 See id. at 184–85.
iar “tragedy of the commons” ensures that many municipalities will “over produce” land that is off-limits to low-cost housing. This objective may be advanced by a variety of antiquated zoning and land use practices that inhibit the transition to a more diverse and affordable housing stock.

A strain of local environmentalism animated by variations on the NIMBY theme can add to this tension. The problem arises when local environmental solicitude serves as camouflage for less wholesome agendas. Intentionally, or by indirection, existing residents seek to maximize their net benefits by pursuing strategies that limit or eliminate affordable housing, particularly housing for growing families. The cost of municipal services that these residents demand may exceed their property tax allotment, whether paid directly or through rent. Education costs incurred by families will nearly always exceed tax receipts, unless the family owns an expensive home.

Given these conditions, the meaning of environmental protection takes on increasing subjectivity. To housing advocates and those who seek affordable shelter in suburban communities, saving the local environment may serve as code for exclusionary zoning and all it conceals. To those who seek to protect the environment, an aggres-

12 Garrett Hardin, The Tragedy of the Commons, 162 Science 1243, 1243 (1968).
13 See id.
14 Indeed, the term NIMBY (“not in my back yard”) is said to have gained currency from a 1991 report by the Advisory Commission on Regulatory Barriers to Affordable Housing. See Eric S. Belsky & Matthew Lambert, Joint Ctr. for Hous. Studies, No. W01-9, Where Will They Live: Metropolitan Dimensions of Affordable Housing Problems 5 (2001), available at http://www.jchs.harvard.edu (publications); Mass. Executive Office for Admin. & Fin., Pol’y Report No. 4, Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts, at iii (2000).
17 See Note, supra note 5, at 1137.
18 All zoning “is exclusive in that it excludes something.” Span, supra note 16, at 8. The term “exclusionary zoning” generally refers to zoning practices that permit a municipality to minimize the possibility that members of groups classified on the basis of race, ethnicity, income, or physical or mental disability will choose to live in the jurisdiction. See Daniel R. Mandelker, Land Use Law §§ 1.10, 7.01 (5th ed. 2003).
19 Data and commentary are divided over the extent to which affirmative exclusion signals discrimination based on race, class, or other invidious grounds. See Fischel, supra note 9, at 271; Lohe, Environmental Agenda, supra note 1, at 360; Florence Wagman Rois-
sive affordable housing policy may be received as the lumbering intervention of a distant and ill-informed regulatory state.  

This Article extensively analyzes the Massachusetts and New Jersey approaches to affordable housing and then compares these approaches with Oregon’s system. The first two are widely considered to be the pathbreaking affordable housing initiatives in the nation. The third incorporates housing into a much broader set of planning goals. The Massachusetts and New Jersey programs parallel one another. The Oregon system significantly differs. Together they illustrate the range of strategies attempted with some success so far. This Article examines each of these approaches for evidence that, in intent, structure, or result, a particular approach may cause conflict between legitimate local environmental programs and the more equitable distribution of housing. To accomplish this task, it is necessary to investigate the relationship among local governmental structure, local and regional environmental quality, and affordable housing policy.  

II. LOCAL ENVIRONMENTAL CONCERNS  

Degradation of air, water, and land—the fundamental elements of an ecosystem—eventually harms almost all living things and every human community. Impacts big and small spill with abandon across political boundaries of all dimensions. Yet, in the end, their effects are felt locally. Unfortunately, cities, towns, and myriad other municipal divisions may not offer a sound platform from which to address environmental risk.  

Some threats are addressed primarily at the national level, although several major environmental laws delegate significant responsibility to the states, allowing them to impose stricter environmental standards. Through state delegation, this cooperative federalism extends to municipalities, which typically enjoy broad latitude in ad-

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21 See id.


dressing matters of local concern. As a result of this delegated authority, cities and towns may adopt additional controls, especially those that address particular sensitivities.

This might be sufficient to protect the environment if the federal environmental statutes achieved their objectives. But they often cannot. A significant reason is that these laws, along with their many state counterparts, do not adequately address the expansion of existing environmental risk or new risk, and they do not specify a defensible level of risk reduction.

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24 See Richard Briffault, Our Localism: The Structure of Local Government Law (pt. 1), 90 Colum. L. Rev. 1, 10–17 (1990) (observing that forty-one states currently provide home rule to local governments).


28 For instance, apparently without engaging in a detailed consideration of the science, Congress enacted the acid rain allowance-trading program embodied in Title IV of the
One of the major drivers—arguably, the major driver—of environmental risk is intensifying human occupation of the 2.7 billion-acre land area\textsuperscript{29} of the United States.\textsuperscript{30} When that growth is unplanned, or poses untoward environmental risk, it is commonly referred to as "sprawl." The definition of sprawl, like its essence, is nebulous.\textsuperscript{31} Nonetheless, its impacts are widely acknowledged, and include: (1) a preference for the consumption of undeveloped "greenfields";\textsuperscript{32} (2) scattered, "leapfrog," strip, or low-density development;\textsuperscript{33} (3) housing that delivers a great deal of personal space to meet the demands of individuals or individual nuclear families;\textsuperscript{34} (4) employment patterns calling for lengthy commutes;\textsuperscript{35} (5) economic conditions requiring more household members to be employed outside the home and, as a result, more automobiles and driving per household;\textsuperscript{36} (6) increased segregation of land uses, which cuts residential areas off from the loci of consumption and employment; and (7) development that does not relate to its surroundings, either in use, size, structure, or appearance.\textsuperscript{37}

Sprawl is a dynamic that favors chaotic patterns of growth and reinforces environmental risk. That risk comes in all sizes—some is exceedingly local, some widespread. By definition, out-of-control development consumes land unwisely. Too much undeveloped acreage is taken, and it is taken too quickly. Sprawl development ignores potential sites in more built-up areas in favor of the lower prices of exurban greenfields.\textsuperscript{38} Even with an exaction aimed at compensating

\textsuperscript{31} \textit{Id.}
\textsuperscript{32} See \textit{id.} at 802.
\textsuperscript{33} \textit{Id.} at 802 n.2.
\textsuperscript{34} See \textit{id.}
\textsuperscript{35} See Roisman, \textit{supra} note 15, at 99.
\textsuperscript{37} See Mandelker, \textit{supra} note 30, at 802.
local government for the required infrastructure, much of the externalized costs will continue to be borne by the wider community.\(^{39}\)

The environmental impact of sprawl arises from two mutually reinforcing phenomena: (1) inefficient use of land\(^ {40}\) and (2) a significant disconnect between the political jurisdiction having control over key land use decisions, and the jurisdictions that must bear the negative consequences of those decisions.\(^ {41}\) In the face of wasteful demand, many municipalities under price inputs (undeveloped land and services), and thus create an incentive to use those inputs at an inefficiently high level. But because others elsewhere pay part of their cost, the municipality has little reason to desist. The incentive to do so is further reduced because most of the benefits of the development remain local.\(^ {42}\) Those burdened by the impacts will find objection difficult, facing significant costs just to discover they are victims, and even more to organize a legal or political response.\(^ {43}\) It may simply be impossible to challenge such local actions successfully.

It is also well settled that cities and towns have an incentive to encourage certain types of development, and to discourage others.\(^ {44}\) Because they are small, compete with many other political subdivisions, and enjoy the benefit of customized legal tools, these communities often find it easier to avoid what they perceive is bad than to entice the good.\(^ {45}\)


\(^{40}\) See FISCHEL, supra note 9, at 232 (stating that "[s]prawl is caused by using an excessive amount of land for housing").

\(^{41}\) Another disconnect, although perhaps one of necessity, is the almost total failure of policymakers to engage in a serious dialogue about the "possible federal role in addressing the problems associated with sprawl and other land use harms." Buzbee, supra note 36, at 61 n.9. At present, it appears that no significant governmental institution is seriously considering the federalization of any aspect of local land use planning or any other area traditionally managed by municipalities. See Solid Waste Agency v. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (quoting his opinion in Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 44 (1994), Chief Justice Rehnquist notes: "[R]egulation of land use [is] a function traditionally performed by local governments.").

\(^{42}\) See Buzbee, supra note 36, at 84–85.

\(^{43}\) See id. at 89.

\(^{44}\) ORFIELD, supra note 7, at 89.

\(^{45}\) See S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 723 (N.J. 1975) [Mount Laurel] ("Almost every [municipality] acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base . . . ").
Desirable development earns a positive fiscal dividend—\(^{46}\) that is, it returns more in local taxes than it consumes in municipal services. Commercial development of all types generally qualifies, as does a narrow spectrum of residential uses, including housing for the elderly, \(^{47}\) units restricted to one or two bedrooms, and expensive single-family homes. The latter, due in part to efficiency and in part to demand, tend to be sited on large lots in large subdivisions. The ideal conditions for development of this type often are found in natural areas, lying far from employment, education, and urban centers. \(^{48}\)

The result is environmental degradation. Its impacts are widespread and difficult to trace, and do not easily lend themselves to effective local regulation. Even assuming that preemption is not an obstacle, often the most that a community can do to address it is to impose high costs on its residents and voters in exchange for a range of benefits that are far more broadly distributed, both in distance and in time. Needless to say, regulatory initiatives of this type do not receive a high priority. Typically, a homeowner’s most valuable asset is his or her home \(^{49}\) and any threat to that asset’s value will be stoutly resisted. \(^{50}\)

Despite this, the myriad impacts of sprawl are well documented and growing. \(^{51}\) Decreases in population density have greatly out-

\(^{46}\) Id.; ORFIELD, supra note 7, at 88–93.

\(^{47}\) Anthony Flint, Planners Turn to “Seniors Only” Housing: Age Restrictions on Developments Help Check overcrowding in Schools, BOSTON GLOBE, Feb. 26, 2002, at A1 (reporting that nearly 15% of all planned affordable housing in Massachusetts is age-restricted).

\(^{48}\) See Buzbee, supra note 36, at 65–67.


\(^{50}\) ORFIELD, supra note 7, at 99 (noting that one reason the American “political system places a high value on local autonomy . . . [is] because the actions of local governments have a direct impact on the economic well-being of voters, primarily through their effect on home values . . . . [L]ocal control creates a powerful incentive for voters to monitor those actions . . . .”). This phenomenon is described in detail by Fischel. FISCHEL, supra note 9, at 232 (“A nation of homeowners is likely to be a nation of NIMBYs, and their anxieties are likely to be manifest in zoning laws.”). On the other hand, the value imputed to local autonomy springs to some extent from the fragmented nature of the political system itself. See GERARD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 80 (1999). In 1997, 87,453 local governmental units existed in the United States, and 39,044 of them were general-purpose bodies. U.S. CENSUS BUREAU, GOVERNMENT ORGANIZATION: 1997 CENSUS OF GOVERNMENTS, at v (1999), available at http://www.census.gov/prod(gc97/gc971-1.pdf (last visited Mar. 25, 2003).

stripped population growth over the past five decades. The trend has been particularly dramatic in urbanized areas. In Massachusetts, for instance, developed land area expanded at a rate more than six times higher than the rate of population growth. At the national level, the trend has been similar, if not as pronounced. Demographics and employment are mutually reinforcing. The data show that as the suburban population has increased, so have the number of suburban jobs.

The effects of sprawl also must be considered in connection with tasks that municipal governments typically undertake. These include the provision of local services, zoning and land use planning, and revenue collection.


Between 1995 and 1990, the population of the nation’s major metropolitan areas increased by 128% (from 84 to 193 million), while the size of those areas grew by 181% (from 208,000 square miles to 585,000 square miles). Gregory D. Squires, Urban Sprawl and the Uneven Development of Metropolitan America, in URBAN SPRAWL: CAUSES, CONSEQUENCES & POLICY RESPONSES 6 (Gregory D. Squires ed., 2002). During the 1990s, land consumption advanced at about twice the rate of population. By decade’s end, consumption outpaced population growth nearly threefold. David Rusk, Growth Management: The Core Regional Issue, in REFLECTIONS ON REGIONALISM 78 (Bruce Katz ed., 2000). Indeed, from 1982 to 1997, population nationwide increased by 17%, but the land area converted to urbanized uses grew by 47%. Elizabeth Becker, 2 Acres of Farm Lost per Minute, Study Says, N.Y. TIMES, Oct. 4, 2002, at A22. By the latter part of the decade, development was consuming farmland at an estimated rate of fifty acres an hour. Dan Eggen, A Growing Issue: Suburban Sprawl, Long Seen as a Local Problem, Emerges as a Hot Topic in State, National Politics, WASH. POST, Oct. 28, 1998, at A3. Four years later, a second study concluded that the rate of loss was approaching 120 acres an hour. Becker, supra, at A22.

Michael Lewyn, Suburban Sprawl: Not Just an Environmental Issue, 84 MARQ. L. REV. 301, 302 (2000) (noting that by the end of the 1990s, two-thirds of all new jobs were being created in the suburbs, down slightly from the 95% peak recorded in the preceding decade); Douglas R. Porter, Reinventing Growth Management for the 21st Century, 23 WM. & MARY ENVTL. L. & POL’Y REV. 705, 708 (1999); Anthony Flint, State Weighs Steps to Stem Rampant Sprawl: Officials Are Pushing “Smart Growth” Efforts, BOSTON GLOBE, July 8, 2001, at B1 [hereinafter Flint, Pushing Smart Growth]; Bruce Katz & Jennifer Bradley, Divided We Sprawl, ATLANTIC MONTHLY, Dec. 1999, at 28 (stating that in 1996, 2.7 million people moved from a central city to a suburb; fewer than a third of that number went the opposite way); Laura Mansnerus, Trying to Hold Back the Sprawling Suburbs Through “Smart Growth”: Patterns Encouraged for 50 Years Haunt Mount Laurel, Where “It’s as Bad as It Gets,” N.Y. TIMES, June 20, 1999, § 14NJ, at 1.

See Downs, supra note 49, at 1.
As unplanned and premature development, sprawl results in a host of environmental insults. Its effects range from the highly-localized to small but significant contributions to major national and international concerns. Sprawl is at least partially responsible for increases in:

(1) Air pollution and climate change emissions resulting from the purchase and excessive use of fuel-inefficient vehicles by relatively affluent suburbanites;
(2) nonpoint source pollution of water bodies, caused by runoff from paved areas, as well as infiltration from faulty or under-regulated septic systems;
(3) loss of wetlands and open space;
(4) ecosystem fragmentation, and the resultant loss of habitat and species; and
(5) inefficient consumption driven by non-renewable, limited, and polluting inputs, such as water, electricity, and on-site fossil fuels like natural gas, heating oil, and propane.

To address sprawl, the environmental and planning community has lately focused on "smart growth," the subject of numerous recent political initiatives. Smart growth, although fuzzy around the
edges, generally straddles the boundary between the reactive and the innovative. Smart growth planning retrospectively attempts to correct years of sprawl-inducing policies, including Euclid-inspired zoning; the over-reliance on local governments to regulate development and land use; and suburb- and automobile-oriented governmental subsidies. It also looks forward, opening a broad tent to new ideas that promise to be environmentally benign, as well as equitable and aesthetically pleasing.

III. Affordable Housing: Background

Sprawl may be the primary force behind environmental degradation in suburbia, but to what extent does affordable housing policy intensify diffuse, inefficient patterns of development? That question must be addressed within the broader context of the rise of American suburbanization and powerful government policies that have supported and reinforced it for decades.

The suburban ideal has deep roots. For at least two centuries, "the easy availability of housing and land has distinguished the United States from other nations of the world." Over that time, frontier ideology of a particularly American character sharpened into a distaste

Michael Janofsky, In Towns That Slowed Growth, Backlash Stirs, N.Y. Times, Feb. 9, 2003, at A7 (reporting that economic downturn was causing some municipalities to reject growth-control policies).

See, e.g., Oliver A. Pollard III, Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies, 19 Va. Envtl. L.J. 247, 253 (2000) ("Smart growth is still an evolving concept . . . ; there is no agreed-upon definition of the term . . . ."). The phrase is said to have been coined in Massachusetts. Flint, Pushing Smart Growth, supra note 55, at B1.

Village of Euclid v. Ambler Realty Co. was the Supreme Court's validation of what continues to be the fundamental approach to local zoning in the United States. See generally 272 U.S. 365 (1926).

The federal mortgage tax deduction provides subsidies worth more than $50 billion per year. Given graduated income tax rates, those subsidies are greater for wealthier taxpayers. Peter Dreier, Editorial, Sprawl's Invisible Hand, Nation, Feb. 21, 2000, at 6; see Sam Stonefield, Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool, 22 W. New Eng. L. Rev. 323, 345 & n.77, 346 (2001) (noting that the combined federal subsidy to homeowners exceeded $74.7 billion in 1993; in contrast, the subsidy for low-income housing assistance was $18 billion).


Id. at 190.
for urban life, and reinforced a "drift . . . toward the periphery." Government policy responded to and intensified this migration. Between the mid-1930s and mid-1970s, for example, the Federal Housing Administration issued $119 billion worth of mortgage insurance, directly abetting the spreading carpet of suburbia. Even without the strong hand of the federal government, the "national distrust of urban life and communal living"76 ensured that residential diffusion would continue. Yet that hand repeatedly did intervene, and, in some cases, ensured that the only private housing the average middle-class family could afford was a suburban tract home.77 As historian Kenneth Jackson noted, "[T]here were two necessary conditions for American residential deconcentration—the suburban ideal and population growth—and two fundamental causes—racial prejudice and cheap housing."78 Government responded to these conditions in a manner that reinforced their causes.79

73 Id. at 217.
74 Id. at 216.
75 Id. at 215.
76 Id. at 288.
77 JACKSON, supra note 71, at 293. In addition to mortgage insurance issued by the Federal Housing Administration (FHA) for properties located almost exclusively in the suburbs (but generally not in cities), these policies include decades of federal (and to some extent state) highway subsidies and the massive federal residential mortgage tax deduction.
78 Id. at 287.
79 The FHA, according to Jackson, "exhorted segregation and enshrined it as public policy." Id. at 213. "Multitudes of studies" confirm the results: "racial composition [is] . . . a clear component in the formation of spatially isolated suburban districts," with recent data suggesting that "this balkanization has continued in the 1990s." BELSKY & LAMBERT, supra note 14, at 5; see DAVID L. KIRP, ET AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA 168 (1995) (noting that "racism was a way of life"). Section 937 of the 1938 FHA Underwriting Manual provides:

Quality of Neighborhood Development . . . Areas surrounding a location are investigated to determine whether incompatible racial and social groups are present, for the purpose of making a prediction regarding the probability of the location being invaded by such groups. If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same racial classes. A change in social or racial occupancy generally contributes to instability and a decline in values.

Homeownership remains a central feature of the American Dream. It also presents a central policy challenge. The challenge arose directly from the suburbanization that started in the early part of the century and accelerated significantly as a result of government assistance after the Second World War.\textsuperscript{80}

The fragmentation of the suburbs, from the central city and from each other, has contributed to the continuing perception that the supply of housing cannot meet perceived and projected demand.\textsuperscript{81} This affordable housing “crisis”\textsuperscript{82} is rendered more acute by the problem of diffusion—a problem that is worse for some communities than others.

Suburbs were developed as a haven for the middle- and upper-middle classes. Today, more people live there than in either cities or rural areas.\textsuperscript{83} Although government policy after 1945 opened up these areas to a wider segment of the populace, that slice remained almost exclusively white and relatively affluent.\textsuperscript{84} Suburban municipalities perpetuated this imbalance by exercising zoning and other regulatory power in a manner that tended to increase the price of land and thus the price of housing. Economically rational cities and towns possessed a strong interest in attracting residents and businesses that could pay their own way, and fending off those that could not.\textsuperscript{85} Small governmental units arose on the currents of population, and state law evolved to facilitate suburban incorporation and protect new municipalities from annexation.\textsuperscript{86} These two forces helped to infuse communities with a strong self-interest in their own brand of uniformity.\textsuperscript{87}

\textsuperscript{80} Lewyn, supra note 55, at 303–05.
\textsuperscript{81} See id.
\textsuperscript{82} The precise extent of the crisis varies by location, and by observer. Compare Letter from Robert C. Ellickson, Professor, Yale Law School, Letter to the Editor, N.Y. TIMES, July 6, 2002, at A26 (“There is no ‘housing crisis’ nationwide.”), with United States Representative Bernard Sanders, Letter to the Editor, N.Y. TIMES, July 6, 2002, at A26 (“This country is facing a severe crisis in affordable housing.”). Most appear to agree that it has been going on for so long that the phrase “affordable housing crisis” has “practically become a cliché.” Paul K. Stockman, Note, Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing, 78 VA. L. REV. 535, 535 n.1 (1992).
\textsuperscript{84} BELSKY & LAMBERT, supra note 14, at 4.
\textsuperscript{85} Id.; see discussion supra Part II.
\textsuperscript{86} Briffault, supra note 8, at 361–62 (identifying the relationship between broadening notions of community as a prerequisite to municipal incorporation, and the ascendancy of zoning as the primary means of achieving and enhancing the uniformity that became the hallmark of community).
\textsuperscript{87} Id.
Ultimately, the widespread fragmentation of local government yielded high levels of suburban segregation.  

These complex changes have generated continuing, intense concern about affordable housing. It embodies several discrete issues. They include: (1) inadequate shelter in the core of many urban areas; (2) lack of racial and ethnic diversity; (3) a wide gap between the location of affordable housing and the workplace; (4) barriers confronting middle-class families who seek to relocate to more affluent suburbs; (5) obstacles preventing the elderly from remaining in their home communities; and (6) the overall lack of housing options that lie within the economic reach of lower-income groups.

IV. State Programs: Massachusetts, New Jersey, and Oregon

The question posed by this analysis is whether, and to what extent, three key approaches to affordable housing affect the local environment, for good or ill. These are the affordable housing programs developed in Massachusetts, New Jersey, and Oregon. Each State has followed a different path. In 1969, Massachusetts implemented an administrative process through the Massachusetts Low and Moderate Income Housing Act, often called the “Anti-Snob Zoning Act,” the “Comprehensive Permit Law,” or just “40B.” New Jersey’s approach was announced by the state supreme court in a series of decisions arising out of the Mount Laurel litigation. It rests on state constitutional principles. Oregon’s system is part of a broader statewide land use
program designed to direct growth and housing to identified areas in or near urban centers. 94

The earliest of these efforts, the Massachusetts program, offers builders a waiver of most local land use restrictions if they agree to construct housing that meets low- and moderate-income guidelines. 95 The New Jersey approach, announced in 1975 and converted into an administrative process a decade later, attempts more directly to identify local and regional need for affordable housing, and permits builders to sue municipalities that fail to establish a state-certified program to meet that need. 96 Oregon’s approach, which differs significantly from the others, addresses housing in the context of nineteen statewide planning goals. These goals must be achieved by each county and by the Portland metropolitan area, or the communities risk losing state aid. 97

A. The Massachusetts Comprehensive Permit Law: A Bright Line Test

The Massachusetts program, though no stranger to controversy, 98 offers the virtue of simplicity. This is achieved through a combination of bright-line triggers and a passive approach that requires a relatively modest level of administrative oversight.

The Comprehensive Permit Law empowers public or specified private developers to site qualifying low- and moderate-income housing 99 without regard to zoning restrictions, or other local land use

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95 Massachusetts was the first state in the nation to enact a zoning override. Since then, only three other states have followed a similar path. The Rhode Island and Connecticut statutes closely resemble the Massachusetts approach. See Affordable Housing Land Use Appeals Act, CONN. GEN. STAT. §§ 8–30g (1999 & Supp. 2002); Rhode Island Low and Moderate Income Housing Act, R.I. GEN. LAWS §§ 45-53-1 to -53-8 (1999 & Supp. 2002). The third is California, but courts have deferred to local determinations of housing need, and no zoning overrides have yet been issued under California’s statutory provisions. CAL. GOV’T CODE §§ 65580–65589.8 (West 1995 & Supp. 2003); see Ben Field, Why Our Fair Share Housing Laws Fail, 34 SANTA CLARA L. REV. 35, 73 (1993).


97 See Liberty, supra note 93, at 10,369 nn.11–14, 10,379 n.172.


99 The project developer must be a public agency, or a limited dividend or nonprofit corporation. MASS. REGS. CODE tit. 760, § 31.01 (2002). The housing itself, to be rented or sold, must be “subsidized by federal and/or state government and/or local housing authority under any program to assist the construction or substantial rehabilitation of low-
regulations, in any city or town where less than 10% of the housing stock is considered affordable. 100 Through its zoning board of appeals, a municipality may authorize affordable housing by issuing a comprehensive permit that replaces all other local approvals. 101 Depending on the specific requirements of federal- or state-sponsored housing programs, at least 20 to 25% of the units in the project must be priced below market. 102 The local appeals board may deny the application outright or attach conditions before approving the comprehensive permit. 103 If those conditions render the project "uneconomic," or if the permit is simply denied, the developer may appeal to an administrative agency, the Housing Appeals Committee (HAC). 104 HAC will reverse the local board of appeals and permit the project to go forward unless the municipality demonstrates that the conditions it has imposed are consistent with local needs. 106 Basically, the local appeals board must first show that "valid health, safety, envi-


101 The local zoning board of appeals is granted “the same power to issue permits or approvals as any local board or official who would otherwise act with respect to [the application to construct affordable housing].” Massachusetts Low and Middle Income Housing Act, MASS. GEN. LAWS ch. 40B, § 21 (2000). Although the statute does not otherwise establish standards to guide this process, the comprehensive permit program clearly contemplates that the local board’s decision will be “consistent with local needs.” See id. §§ 20-21.

102 Under the Local Initiative Program, the most popular 40B program of the 1990s, if at least 25% of the units in a qualifying rental development are not affordable, the municipality may include in its total “subsidized housing inventory” (the numerator employed in calculating the 10% threshold) only the affordable units. Otherwise, it may count all of the units in the project, whether affordable or not. MASS. REGS. CODE tit. 760, § 45.06(3) (2002).


104 MASS. GEN. LAWS. ch. 40B, § 22; MASS. REGS. CODE tit. 760, § 31.02. The Housing Appeals Committee was established within the Department of Housing and Community Development. MASS. GEN. LAWS ch. 23B, § 5A (2000).

105 The applicant bears the burden of demonstrating that the local board’s conditions render the project “uneconomic.” MASS. REGS. CODE tit. 760, § 31.06(1).

106 MASS. GEN. LAWS. ch. 40B, § 23.
vironmental, design, open space or other local concern . . . supports such denial [or conditions], and then, that such concern outweighs the regional housing need."\(^{107}\) Furthermore, if denial or conditional approval is based on a lack of municipal services or infrastructure, the local appeals board also must demonstrate that it would not be technically or financially feasible to provide them—with financial constraints relevant only "where there is evidence of unusual topographical, environmental, or other physical circumstances . . . ."\(^{108}\)

This burden is difficult to meet, given the regulatory presumptions that HAC regulations impose: if a city or town does not satisfy one of four affordable housing thresholds—the primary one being that affordable housing units exceed more than 10% of the community's total housing stock\(^ {109} \)—there arises a rebuttable presumption that "substantial regional housing need . . . outweighs local concerns."\(^ {110} \) Unless the municipality meets one of the statutory minima and is, therefore, conclusively presumed to have satisfied the "local needs" test, it will most certainly either lose its appeal outright or be required to settle the matter on terms favorable to the developer.\(^ {111} \)

Not surprisingly, the top priority of the Massachusetts affordable housing program is the development of low- and moderate-income housing, not environmental protection.\(^ {112} \) Nonetheless, the Comprehensive Permit Law embodies an awareness that legitimate environmental concerns must be taken into account.\(^ {113} \) Indeed, the power

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107 MASS. REGS. CODE tit. 760, § 31.06(6)–(7).
108 Id. § 31.06(8).
109 As of March 2003, only thirty-two of the state's 351 cities and towns met the 10% threshold, and most of these fall into one of three categories: older cities, very small towns, or municipalities with a particular interest in social justice (e.g., Amherst, Cambridge, Greenfield, Northampton). Anthony Flint, Zoning at Issue in Affordable Housing, BOSTON GLOBE, Mar. 31, 2003, at B2.
110 MASS. GEN. LAWS. ch. 40B, § 20; MASS. REGS. CODE tit. 760, § 31.06(4). Two other, less commonly used thresholds exist as well. MASS. REGS. CODE tit. 760, §§ 31.04(2), 31.07(1)(d). A fourth presumption, added by regulatory amendment effective December 20, 2002, permits a municipality to conclusively satisfy the local needs test for up to two years by developing an affordable housing plan and then meeting interim milestones. MASS. REGS. CODE tit. 760, § 31.07(1)(i).
111 MASS. REGS. CODE tit. 760, § 31.08(1). A recent regulatory amendment, however, creates a conclusive presumption that shields local action where the municipality has developed an affordable housing plan approved by the state Department of Housing and Community Development. Among other things, the provision requires consistent annual progress in meeting the 10% threshold. Id. § 31.07(1)(i)3.c.
113 See Lohe, Environmental Agenda, supra note 1, at 362.
delegated to local appeals boards to issue a single municipal permit that overrides local zoning—and the power of disappointed developers to obtain one on appeal—has no impact on the enforcement of state or federal environmental laws and regulations. Even some decisions of local conservation commissions and boards of health are unaffected by 40B, because the State has delegated to these bodies the authority to administer a “comprehensive state statutory or regulatory program”—such as the Wetlands Protection Act or septic system permitting under title 5 of the State Environmental Code.

Several elements of the Massachusetts affordable housing program should, at least in theory, deflect the perception that the Comprehensive Permit Law weakens environmental protection. First, the 40B program includes incentives that encourage the development of affordable rental housing. A municipality may count all units—both market-rate and below-market—in calculating its 10% affordable housing threshold, an advantage generally not available if mixed-income housing is to be sold. Because rental projects are more likely to achieve higher levels of density, they naturally fit better into a community’s environmental goals. Second, as discussed below, the 40B process rewards planning.


117 Although claims persist that the Comprehensive Permit Law is harming the environment, little authoritative evidence exists to support them. See, e.g., Flint, Romney, supra note 98, at A1; Anthony Flint, Housing Plan Raises Growth Concerns, Boston Globe, Nov. 24, 2002, at B1; Anthony Flint, Grafton Fights Losing Battle on Development, Boston Globe, Sept. 29, 2002, at B1. Such claims have been a part of the affordable housing controversy for some time, in Massachusetts and elsewhere. See Kirp et al., supra note 79, at 85, 87.


Third, although various thresholds—particularly the 10% affordability target—may be low, once one of them has been met, communities have greater discretion in determining whether, and how, to pursue additional affordable development. Thus, despite the goal of the 40B program to enhance income diversity on a geographical basis, it may not be the engine of unplanned rural development that some critics claim.

Fourth, although a choice by city residents to relocate to affordable housing in the suburbs might contribute to sprawl, virtually no data suggest that this has happened. Moreover, as a general proposition, the Comprehensive Permit Law appears to function more successfully in urban environments. Of the thirty-two municipalities

lished report, on file at the State Library of Massachusetts)). More than a decade ago, a special state commission recommended that cities and towns develop local housing plans to comply with the 40B requirement that affordable housing application decisions be consistent with local needs. See discussion infra Part IV.A.

120 Statewide affordable housing need was estimated to be 100,000 units at end of the 1990s, but the approximate rate at which the Comprehensive Permit Law added affordable units between 1970 and 2000 was about 600 per year. 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, 392, 394 (2001) (asserting that the "number of units built still falls far short of the need").


122 See Eric J. Gouvin, Rural Low-Income Housing and Massachusetts Chapter 40B: A Perspective from the Zoning Board of Appeals, 23 W. NEW ENG. L. REV. 1, 21–23 (2001) (arguing that the point at which marginal environmental impact exceeds marginal affordable housing benefit has a geographic component that the current law ignores).

123 One conclusion is that not a lot is happening. Much of the 40B housing of the past has consisted of relatively expensive single-family homes, either for the elderly, or for those of moderate income. Eighty percent of the area average income can be substantial in some suburban communities. Weston, for instance, the state’s wealthiest town, had a median income of nearly $110,000 in 1989. MASS. INST FOR SOC. & ECON. RES., REPORT No. 92-02 SUMMARY OF INCOME CHARACTERISTICS IN 1989: MASSACHUSETTS CITIES, TOWNS, AND SELECTED OTHER AREAS; 1990 CENSUS OF POPULATION AND HOUSING (1992), at http://www1.miser.umass.edu/datacenter/population/topical2.xls (last visited Feb. 23, 2003). In addition, the currently popular Local Initiative Program (LIP) allows 70% of the units to be reserved for those with local ties. And although LIP projects must set aside 10 to 15% of 40B units for minorities, it is not clear that these units are being marketed to target groups. Krefetz, supra note 120, at 411 & n.135; Stonefield, supra note 68, at 334 n.33 (noting the lack of "reliable data on the Massachusetts ... housing units built pursuant to the override statute["])..

124 Krefetz, supra note 120, at 411 n.135 (stating that "systematic records on the characteristics of all the projects’ occupants are not kept by any state agency"). The Krefetz study is an excellent resource, and at the moment it is the only source of data about many aspects of the 40B program. See Stonefield, supra note 68, at 334 n.33.

125 See Krefetz, supra note 120, at 393.
over the threshold by year 2003, nineteen were cities or older industrial centers such as Boston, Worcester, Lowell, and Holyoke.126

Finally, the Massachusetts affordable housing program, unlike those in New Jersey and Oregon, requires that the projects receive some type of subsidy.127 Environmental impacts will vary depending on the structure of the subsidy program.

Application of the affordable housing mandate on a town-by-town basis, in combination with a trend towards intra-project cross-subsidization,128 has made 40B appear to be more threatening to the environment than its authors may have intended. At the moment, much 40B development consists of non-rental units in the form of detached dwellings.129 This promotes sprawl.

Specifically, for the past decade, the subsidy program of choice has been the Department of Housing and Community Development's (Department) Local Initiative Program (LIP), which requires local participation and approval.130 At first blush, it would seem that the impacts of LIP housing would be relatively modest. A LIP project must be approved by the local executive, and up to 70% of its units may be reserved for those with local ties. In addition, the projects tend to be small, usually no more than twenty-five units, and often no more than eight.131 But that is not precisely so.

LIP projects satisfy the public support requirement by accepting technical assistance from the Department. In the absence of a monetary subsidy, builders compensate in two ways for the lower profit or loss they must take on the affordable units. First, they stick to moderate-income housing; then they ensure that 75% of the units are offered at market rate.132 These dual imperatives pull them in one di-

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126 In the past thirty years, only about 20% of the affordable housing constructed in Massachusetts was 40B housing, although more recently that percentage has increased sharply as state and federal housing subsidies have been trimmed or phased out. Nonetheless, without the Comprehensive Permit Law, "the locations of this housing would be . . . much more heavily concentrated in the cities and 'inner ring' suburbs." Id. at 395.

127 See discussion supra note 99.

128 This has followed the collapse of more direct government housing subsidies. Forton, supra note 100, at 665 (finding that "state and federal funds have all but dried up").

129 See Krefetz, supra note 120, at 410–11; Ziegler, supra note 1, at 1 (stating that nearly 90% of all Massachusetts housing development at end of the 1990s consisted of single-family homes).

130 Id. at 410 (finding that nearly half of all comprehensive permits sought in the 1990s were LIPs). Other funding also played a role and may have provided some counterweight to trends toward sprawl. Id. at 414.

131 Id. at 410.

132 Id. at 412–13.
rection, toward single-family housing. In fact, some 90% of all LIP projects consist of single-family homes. The affordable component has been reserved for middle-income owners, with priority often accorded to those with local ties or the elderly.133

A growing number of 40B units in the past few years have qualified under a non-governmental program, the New England Fund (NEF).134 Operated by the Federal Home Loan Bank of Boston, the NEF provides affordable housing loans through member banks. In the past, many local lenders have supported sprawl-inducing “greenfield” projects. But as a result of HAC’s recent round of regulatory amendments, the Department may designate a public or quasi-public entity to issue site approvals for NEF housing, and later monitor compliance with the Comprehensive Permit Law.135 Thus the State is empowered to adopt review criteria to examine whether these projects induce sprawl or otherwise harm the environment.136

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133 Id. at 410. About 30% of the affordable units supplied by the 40B program are reserved for the elderly and another 12% for a mixture of families and the elderly. Id. at 399.

134 Stubborn Ltd. P’ship v. Barnstable Bd. of Appeals, No. 98-01, slip op. at 7 (Mass. Hous. App. Comm. Mar. 5, 1999) (jurisdictional decision) (holding that the NEF program satisfied 40B). If appeals to HAC are a guide, the number of NEF projects has increased rapidly in the past few years. E-mail from Werner Lohe, Chairman, HAC, to Rusty Russell (Jan. 31, 2003, 11:09:29 EST) (on file with author); E-mail from Kristen Vanasse, counsel and clerk, HAC, to Rusty Russell (Mar. 6, 2003, 9:56 EST) (on file with author) (73% of open cases before HAC involve NEF program); see Massachusetts Department of Housing and Community, Total Number of Units with Project Eligibility Letters by Subsidy Program; 3/2/01-2/12/03 (2003) (unpublished table) (on file with author).

135 See MASS. REGS. CODE tit. 760, § 31.01(1)(a), 2(f) (2002).

136 Recent amendment of the State’s affordable housing regulations permits cities and towns to apply Massachusetts Community Preservation Act (CPA) funding to qualifying affordable housing projects. The CPA permits municipalities to adopt a real estate tax surcharge of up to 3% to fund, among other things, housing for low- and moderate-income families, individuals and senior citizens. MASS. GEN. LAWS ANN. ch. 44B, §§ 3-7 (West 2000); MASS. REGS. CODE tit. 760, § 30.02 (2002). It requires that preference be accorded to the adaptive “reuse of existing buildings or construction of new buildings on previously developed sites.” MASS. GEN. LAWS. ch. 44B § 5. Within a given community, this will tend to minimize environmental impacts. Signed into law in September 2000, the CPA provides for up to $25 million a year in state aid to cities and towns that vote to adopt it. As of April 8, 2003, fifty-nine municipalities (of 351) had done so. Adopting communities tend to be situated in several suburban blocks, particularly northwest and southeast of Boston. By April 2003, fifty-eight housing units had been created under the CPA, with forty more awaiting local approval. At least some of these units will qualify as affordable under 40B. They are scattered primarily among relatively affluent suburbs along Boston’s outer ring. See TRUST FOR PUBLIC LAND Web site, http://www.tpl.org/tier3_cdl.cfm?content_item_id = 11075&folder_id = 1045 (last visited Apr. 21, 2003). Given its modest scale, the CPA adds relatively little environmental risk to the 40B program, particularly given the current tendency of suburban municipalities to use CPA grants for land acquisition, not housing. EUCHNER & FRIEZE, supra note 25, at 41; see Anthony Flint, Open Space, Not Hous-
Less direct influences on developers also play a role. Though data are lacking, it is predictable that a builder will prefer to seek a comprehensive permit for a site that is not otherwise desirable or developable. Such a site is likely to offer three advantages: (1) low development costs; (2) relatively few potentially objecting neighbors; and (3) the opportunity to bypass local regulatory constraints, such as zoning restrictions or subdivision review by planning boards. The first advantage is likely to be more available in relatively undeveloped areas. As for the second, nearby residents may cause political problems and, if able to demonstrate special damages, may sue in superior court to challenge a comprehensive permit. The third feature is relevant because it creates the circumstances under which the regulatory relief offered by 40B becomes a valuable commodity. Thus, the paradigmatic 40B parcel is more likely to be situated within reach of existing infrastructure, yet outside the ambit of sensitive areas regulated by state environmental laws—such as wetlands or rare species habitat.

Together, these forces create a weak incentive, promoting dispersed development and its sprawl-related impacts. Furthermore, the Massachusetts affordable housing program does little to integrate the fundamental goals of the Comprehensive Permit Law with concern

137 E.g., MASS. GEN. LAWS ch. 41, § 81M (2000).
138 Weisman & Adams, supra note 53, at 6 & n.4 ("[T]he economics of the subsidy often recommend a low-density location.").
140 One observer also has pointed out that the Comprehensive Permit Law’s requirement that a qualified developer be a nonprofit, a public agency, or a limited dividend organization “at a practical level ... probably excludes many smaller ... builders.” Stonefield, supra note 68, at 326. If so, this might lead to larger projects, which require larger open spaces.
about the environmental impacts of sprawl. The former approach looks at numbers; the latter at dynamic systems.

HAC has made an effort to fill this gap. Although characterized at times as distant and insensitive to local concerns, the five-member HAC appears to strike a cautious balance between housing and the environment. It serves as a sort of truth squad to counteract the municipal predilection to determine that affordable housing must yield to the community’s strongly held environmental values. The numbers alone underscore the inherent power of the Comprehensive Permit Law. As of 1999, developers had filed more than 300 appeals of local decisions, and one half had been formally adjudicated. Of these, HAC reversed ninety-four and upheld eighteen, a ratio of more than five-to-one. Many decisions involved allegations by the local appeals board that the proposed development failed to meet local needs because of harm to the environment.

Nonetheless, a review of relevant decisions supports the view that HAC has taken to heart its obligation to balance housing and the environment in the course of evaluating the frequently-voiced concerns that a proposed 40B development will compromise public health, consume valuable open space, and degrade natural surroundings. Cases before HAC raise environmental issues in several distinct, albeit overlapping, settings. The first involves allegations by the municipality that local policies establish a protective standard precluding the proposed affordable housing project. Sometimes it is based on general environmental concerns, rather than local regulation. HAC will accord such “standards” little weight. It is interesting to note that no decisions so far appears to have presented a direct conflict between local environmental regulation and affordable housing.

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141 Weismann & Adams, supra note 53, at 6 (stating that “nothing in the [Comprehensive Permit Law] encourages developers to follow locally selected patterns of density or dwelling type”).
143 Krefetz, supra note 120, at 396-98. These figures actually understate the effectiveness of the override process because a number of cases were settled, almost certainly on terms favorable to the developer. Local boards approved fewer than 20% of the applications, and slightly more than half were approved with conditions. Id. The appeals rate for outright denials is over 90%, and for conditional approvals is about 48%. Id.
144 See MASS. REGS. CODE tit. 760, § 31.07(2)(b) (2002).
146 If local regulations overlap, HAC will determine which ones apply. See, e.g., C.S.R. Mgmt., Inc. v. Yarmouth Bd. of Appeals, No. 95-01, slip op. at 7 (Mass. Hous. App. Comm.
In the second setting, a developer demonstrates that a city or town seeks to apply local environmental standards more rigorously in the face of an affordable housing proposal.\textsuperscript{147} HAC has made it clear that a city or town will not be heard to argue that, if approved, the 40B proposal will be the straw that breaks the environment's back, at least where the municipality has been more lax with other, market-rate projects.\textsuperscript{148} As HAC wrote a decade ago, where "there is no clear-cut standard to be reviewed, . . . the Committee has often found as a factual matter that there is no significant danger to the public health or safety."\textsuperscript{149}

A third setting involves a failure of proof. This is perhaps the most troubling because the ultimate judgment by the local agency (here, the appeals board) is not accorded the level of deference customary in many appellate forums. Rather, HAC reviews the evidence de novo,\textsuperscript{150} with the municipality under a heavy burden to demonstrate the importance of its environmental concerns. In effect, HAC sits as a quasi-environmental regulator, but without the depth of expertise typically available to a larger agency.\textsuperscript{151} When the developer's experts disagree with the local board, HAC may be called upon to resolve complex scientific questions.\textsuperscript{152} Given that the municipality

\textsuperscript{147} Massachusetts Low and Middle Income Housing Act, Mass. Gen. Laws ch. 40B, § 20 (2000) (stating that local requirements must be applied "as equally as possible to both subsidized and unsubsidized housing" for a local board's ruling to be "consistent with local needs").


\textsuperscript{151} HAC usually has had a staff of three full-time employees. Due to budget cuts, it has been reduced to two, including the committee chairman. E-mail from Werner Lohe, HAC Chairman, to Rusty Russell, (Jan. 6, 2003, 12:46:15 EST) (on file with author). Contrast the New Jersey Council on Affordable Housing, which has approximately twelve staff members and a budget of $1.6 million, with the Oregon Department of Land Conservation and Development, which has a staff of about forty-two in the early 1990s, and a $7 million budget. Liberty, supra note 93, at 10,372 n.68; Telephone Interview with E.J. Miranda, Spokesperson for the New Jersey Department of Community Affairs (Feb. 9, 2003).

bears the burden of proof, HAC usually finds for the project proponent. 153

A fourth setting is directly related to sprawl: Does a municipality have the power to deny access to local infrastructure like water and sewer service, or to require that the developer pay for the marginal increase in load on the existing system? HAC decided recently that the local board may require a 40B developer to mitigate “specific” problems created by the new development itself. 154 But it did not explain in detail how to differentiate the specific from the general, except to suggest that mitigation measures must take place in the vicinity of the project itself. 155 It is difficult to assess what effect HAC’s approach will have, particularly if local efforts to internalize marginal costs are not applied equally to all development.

Overall, HAC’s decisions send a message that major environmental concerns will be reviewed with care only when they are presented with specificity. When a town asserted that its density restrictions were linked to environmental protection, HAC observed that “no meaningful analysis is possible at that level of generality.” 156

When, in a rare opinion affirming the local board’s decision, HAC upheld the installment of septic systems—rather than a sewer tie-in—for a twelve-unit low-income housing project, it required that monitoring wells be installed and operated under the supervision of the town’s planning board. 157

In another recent case, a builder sought to construct a two-family house with one affordable unit on a vacant lot in a residential area near a town center, a project HAC described as “a textbook example of in-fill housing.” 158 HAC noted that the recycling of existing lots


155 Id.


"typically raises fewer environmental concerns than so-called 'greenfields' development," and represents "smart growth" winning out over "urban sprawl." Finally, in late 2002, HAC again tackled the problem of sprawl, requiring that a permit be issued for a ten-story apartment building with 183 units of mixed-income rental housing to be located near a large suburban mall, other shopping areas, transit nodes, a state park, and a rail trail.

Recently, HAC set forth its clearest statement to date of what might be called the principle of planning priority—the idea that in appropriate cases a local board's denial of a permit will be upheld if the project is inconsistent with a municipal plan, provided the plan is bona fide and sufficiently inclusive. For example, by a three-to-two vote, in _Stubborn Limited Partnership v. Barnstable Board of Appeals_, HAC upheld the denial of a comprehensive permit for a thirty-two-unit retirement condominium located on the town harbor.

HAC has articulated a two-part test to evaluate comprehensive plans. The first part focuses on whether the plan is legitimate and viable, promotes affordable housing, and has been implemented in the project's proposed location. The second part of the test is to determine how much weight to give the plan in light of the results of the first part, as well as the extent to which "the provisions of the plan are unnecessarily restrictive as applied specifically to the proposed project." In _Stubborn_, HAC found that the Town of Barnstable had indeed developed strategies to stimulate affordable housing, including new multifamily housing districts, construction incentives, and detailed municipal plans that focused on housing. In addition, the comprehensive plan had been implemented in the section of town where the

159 Id.

160 This idea had been gestating for some time. See, e.g., _Hilltop Pres. Ltd. P'ship_, No. 00-11, slip op. at 27 (stating that if a local zoning bylaw is consistent with master plan, and the plan "provides sufficiently for affordable housing, we will give it deference"); _KSM Trust_, No. 91-02 slip op. at 6 ("[HAC] has long held ... that comprehensive or master plans are to be given considerable weight ... "); _Harbor Glen Assocs. v. Bd. of Appeals of Hingham_, No. 80-06, slip op. at 6–15 (Mass. Hous. App. Comm. Aug. 20, 1982); _Planning Office for Urban Affairs, Inc. v. N. Andover Bd. of Appeals_, No. 74-03, slip op. at 13–16 (Mass. Hous. App. Comm. May 5, 1975).

161 No. 98-01, slip op. at 7–15 (Mass. Hous. App. Comm. Sept. 18, 2002) (decision on the merits noting that one quarter of the units were to be affordable).

162 Id. at 6. HAC suggested that in subsequent cases it also might consider the extent to which the plan had actually achieved results. Id.

163 Id. at 14–15.
affordable housing project would be built, and without exception, this area had been zoned for marine business use.\(^{164}\)

In reaching its conclusion, HAC rejected the developer's argument that "housing would be friendlier to the environment than the marine use proposed by the [local appeals] Board."\(^ {165}\) While noting that any project could have an impact on the environment, HAC treated marine-related development as almost a rarity of nature: "Harbors are distinct, limited resources, and the interest in preserving them is even stronger than many of the more general planning interests articulated in local comprehensive plans."\(^ {166}\)

Although the Stuborn ruling does not answer every question,\(^ {167}\) it signals that municipalities willing to envision a future that includes affordable housing will find ways to achieve their overall land use goals, provided this is accomplished through a comprehensive planning process that is concrete and enforceable. This is the sort of planning regime that is likely to mitigate sprawl.\(^ {168}\)

B. New Jersey's Regional Fair Share: A Constitutional Directive

Unlike the Comprehensive Permit Law, which has been copied by several other jurisdictions,\(^ {169}\) the evolution of New Jersey's approach to affordable housing is \textit{sui generis}.\(^ {170}\) A reformist New Jersey

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\(^{164}\) Indeed, this area encompassed twenty-seven of only eighty-three acres in the entire town zoned for such uses. \textit{Id.} at 8–10, 14.

\(^{165}\) \textit{Id.} at 13.

\(^{166}\) \textit{Id.} at 13, 14.

\(^{167}\) For example, will HAC require proof that affordable housing units are in final planning stages, under construction, or in the ground? To what extent will HAC defer to less remarkable zones? How clear, detailed, and mandatory must the plan be? What is the scope of the "least restrictive alternative" test? \textit{See id.}

\(^{168}\) \textit{Compare} Lohe, \textit{Environmental Agenda}, \textit{supra} note 1, at 359 (recent cases "indicate that if towns take control of their own planning processes in a meaningful way and put affordable housing on their agenda, their autonomy will be respected"), \textit{with} Joel S. Russell, \textit{Massachusetts Land-Use Laws—Time for a Change, LAND USE L. & ZONING DIG.}, Jan. 2002 (under current Massachusetts land use law, "the zoning regulation is the guiding law of the community and the master plan is largely irrelevant" because it is not enforceable), http://www.planning.org/LULZD/masslaws.htm (last visited Apr. 17, 2003). An Act to Promote Land Use Reform in Massachusetts, a bill that would mandate that local master plans (which already are required) be consistent with locally adopted zoning was introduced into the 2003 state legislative session. S. 1174, 2003 Gen. Ct. (Mass. 2003). The measure updates Massachusetts's land use planning system, but does not call for specific smart-growth techniques. \textit{See} Russell, \textit{supra}.

\(^{169}\) \textit{See} sources cited \textit{supra} note 95.

\(^{170}\) New Hampshire has been the only jurisdiction to take up this call, and only by half-measure. \textit{See} Britton v. Town of Chester, 595 A.2d 492, 496–97 (N.H. 1991) (deriving \textit{Mount Laurel} type remedy from state zoning enabling statute, but rejecting "the calculation of
Supreme Court announced a new doctrine founded on the state constitution that became the first step in the articulation of more detailed requirements for creating statewide low- and moderate-income housing opportunities.\textsuperscript{171} Both the case that announced first principles, and the subsequent one that sharpened them into a powerful program, involved the then-small township of Mount Laurel,\textsuperscript{172} located about ten miles east of Camden, in southern New Jersey.\textsuperscript{173} A third decision often regarded as the final step in the judicial development of the State's affordable housing policy found that the legislative response to the first two rulings—to establish an administrative process to implement the policy—did not violate New Jersey's nascent constitutional right to affordable housing.\textsuperscript{174} The history and political and social drama of what is widely known as the \textit{Mount Laurel} doctrine have been recounted in extensive and illuminating detail elsewhere.\textsuperscript{175}

In some ways, the \textit{Mount Laurel} doctrine, as modified by the New Jersey Fair Housing Act of 1985,\textsuperscript{176} is not unlike the Massachusetts Comprehensive Permit Law. Both programs give builders preference in siting affordable units until a municipality has met certain housing targets. Both are overseen by small administrative agencies.\textsuperscript{177} And

\textsuperscript{171} \textit{Mount Laurel I}, 336 A.2d 713, 728 (N.J. 1975).
\textsuperscript{172} Mount Laurel's population had been rapidly expanding—the result in part of sprawling movement out of urban areas—when the first lawsuit was filed in 1971. According to the \textit{Mount Laurel I} decision, the population in Mount Laurel was 2817 in 1950, 5429 in 1960, and 11,221 in 1970. \textit{Id.} at 718. Today, it is 40,221. Of that total, 7% are African-American, compared with 13.5% for all of New Jersey, and 12% for the United States as a whole. For Hispanic/Latino populations, it is 2%, 13%, and 12.5%, respectively. See \textit{Mount Laurel Township, N.J. WEB SITE, CENSUS 2000}, \url{http://www.mountlaurel.com/census1.htm} (last visited Mar. 15, 2003).
\textsuperscript{176} Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 2001 & Supp. 2002) (creating the Council on Affordable Housing (COAH)).
\textsuperscript{177} See discussion supra note 151.
both incorporate environmental protection into their decision-making processes.

In New Jersey, the most densely populated state in the nation,\textsuperscript{178} the potential environmental impacts of affordable housing were recognized in \textit{Southern Burlington County NAACP v. Mount Laurel (Mount Laurel I)}, more than a quarter century ago. In that case, Justice Frederick Hall announced that the New Jersey Constitution required every developing municipality in the state to meet its fair share of the region's affordable housing needs.\textsuperscript{179} Mount Laurel I left many matters unresolved, such as the nature of the fair-share obligation and the manner in which its fulfillment would be policed. The court's treatment of environmental preservation was similarly vague: "This is not to say that land use regulations should not take due account of ecological or environmental factors or problems. Quite the contrary. Their importance . . . should always be considered."\textsuperscript{180}

Eight years later, in \textit{Southern Burlington County NAACP v. Mount Laurel (Mount Laurel II)}, the New Jersey Supreme Court held that each municipality in a "growth area" must remove obstacles to affordable housing and take affirmative remedial steps to attract it—requiring, if necessary, developer incentives and housing set-asides.\textsuperscript{181} Perhaps most importantly, the justices announced the so-called "builder's remedy." This permitted a disappointed developer to sue a municipality that had not provided its "fair share" of affordable housing. The

\textsuperscript{178} Mansnerus, \textit{supra} note 55, at 1.

\textsuperscript{179} \textit{Mount Laurel I}, 336 A.2d 713, 724 (N.J. 1975). The court stated:

\begin{quote}
We conclude that every [developing] municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity . . . for low- and moderate-income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.
\end{quote}

\textit{Id.}

\textsuperscript{180} Id. Justice Pashman's concurrence did not help in this regard:

\begin{quote}
By environment, I mean not just land or housing, but air and water, flowers and green trees. There is a real sense in which clean air belongs to everyone, a sense in which green trees and flowers are everyone's right to see and smell. The right to enjoy these is connected to a citizen's right to life, to pursue his own happiness as he sees fit provided his pursuit does not infringe another's rights.
\end{quote}

\textit{Id.} at 750 (Pashman, J., concurring).

\textsuperscript{181} 456 A.2d 390, 441–52 (1983).
trial court could then waive that community’s zoning regulations to allow construction of higher-density housing, provided that at least 20% of the units satisfied low- and moderate-income guidelines.\footnote{Id. at 452-53.}

The *Mount Laurel II* court, expressing its optimism that “meeting housing needs is not necessarily incompatible with protecting the environment,”\footnote{Id. at 479 n.68 (“In fact, . . . the kind of higher density development that is necessary to provide lower income housing can actually result in far less environmental pollution than traditional suburban development patterns.”). This is the anti-sprawl argument, and it has a lot of force. But it has not carried the day in New Jersey. See infra Part VI.B.} attempted to strike a balance between “everyone’s right” to green trees and flowers, and a constitutionally grounded opportunity to secure affordable housing all across the Garden State.\footnote{See *Mount Laurel I*, 336 A.2d at 750 (Pashman, J., concurring).} Throughout its more than 110 pages, Chief Justice Wilentz’s opinion offered frequent reassurances that municipalities’ newly-quantified obligation “to provide a realistic opportunity [to satisfy] a fair share of the region’s present and prospective low and moderate income housing need”\footnote{*Mount Laurel II*, 456 A.2d at 418.} did not extend to settings in which growth should be discouraged, such as open spaces, conservation land, prime farmland, and “environmentally sensitive areas.”\footnote{Id. at 420 (“We reassure all concerned that *Mount Laurel* is not designed to . . . leave our open spaces and natural resources prey to speculators . . . . No forests or small towns need be paved over and covered with high-rise apartments as a result of today’s decision.”).}

The court made several improvements upon *Mount Laurel I*. It transferred implementation to three handpicked trial judges\footnote{Id. at 418-19.} with orders to award a builder’s remedy, a type of one-stop development approval, to qualifying affordable housing projects.\footnote{Id. at 452-53.} It broadened the housing obligation to include communities not in the process of development.\footnote{Id. at 418.} Further, it articulated centralized planning guidelines to help the trial courts and municipalities strike a balance between environmental protection and affordable housing.\footnote{See id. at 422-52.}

Two years later, the state legislature approved the Fair Housing Act, which established the Council on Affordable Housing (COAH), an agency under the leadership of an eleven-member council appointed by the governor.\footnote{Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 2001 & Supp. 2002).} The New Jersey Supreme Court held shortly thereafter that this transfer of day-to-day implementation of
the *Mount Laurel* doctrine from the judicial to the administrative branch did not violate the state constitution.\(^{192}\) COAH continues to be guided by these constitutional principles, and the environmental guidelines articulated in *Mount Laurel I* and *II*. Questions remain, however, about how well those guidelines are working.

New Jersey's *Mount Laurel* doctrine and the Massachusetts 40B program differ in one key respect: the former is founded on state constitutional principle, the latter is not. Otherwise, both derive much force from variations on a single theme, the builder's remedy. In Massachusetts, builders must be public entities, nonprofits, or limited dividend corporations; proposed projects must receive public assistance of some sort; and generally at least 25% of the units must be "affordable." Proponents may obtain a local permitting waiver until the municipality has met a specified affordability threshold, which is typically 10%.

Despite the "steel"\(^ {193}\) that, eight years later, Chief Justice Wilentz sought to inject into the more credulous *Mount Laurel I* decision, the New Jersey affordable housing doctrine remains amorphous, and its enforcement heavily depends on a builder's remedy that in many ways resembles Massachusetts's 40B permit override mechanism. There are significant differences, however, between New Jersey's builder's remedy and 40B. First, need in New Jersey is based on a complex calculation that varies from municipality to municipality. Second, COAH has developed a certification process, which, in theory, now shields communities from builder's lawsuits for ten years.\(^ {194}\) Third, the builder of a project in which, generally, at least 20% of the units will be offered at low- and moderate-income prices may sue a resistant municipality to override local permitting requirements. Finally, through the much criticized Regional Contribution Agreement (RCA), a community can discharge up to half of its *Mount Laurel* obligation by funding affordable housing elsewhere, usually in economically disadvantaged urban areas.\(^ {195}\)

From the standpoint of environmental protection, however, the key departure from Justice Hall's pathbreaking opinion was the *Mount
Laurel II court’s linking of constitutionally-mandated housing opportunities to New Jersey’s nascent statewide planning process. The State Development Guide Plan (SDGP)\textsuperscript{196} was issued without fanfare after several years of drafts and public hearings. In 1980, the SDGP offered the court “a statewide blueprint for future development.”\textsuperscript{197} In Mount Laurel disputes, the SDGP would “ensure that the imposition of fair share obligations will coincide with the State’s regional planning goals and objectives.”\textsuperscript{198}

The court spoke of the SDGP as though its authority was self-evident,\textsuperscript{199} even though it contained no obvious enforcement mechanism and was drawn up by an obscure agency. Yet, the SDGP served as a useful foil.\textsuperscript{200}

The SDGP classifies land by development priority. It identifies areas suited to rapid development, with others to be given lower priority or maintained as open space, conservation land, environmentally sensitive ecosystem or farm.\textsuperscript{201} By connecting the newly announced statewide affordable housing obligation to what he expansively characterized as a comprehensive growth plan, Chief Justice Wilentz was able to discard the vague “developing community” limitation and extend the Mount Laurel doctrine statewide, while avoiding the accusation that the court had set New Jersey’s powerful development industry loose upon the countryside.

The Mount Laurel II court understood that, through the builder’s remedy, it had created its own blueprint for market-driven housing reform.\textsuperscript{202} Indeed, “it [would] be the unusual case that concludes the


\textsuperscript{197} Mount Laurel II, 456 A.2d at 423.

\textsuperscript{198} Id.

\textsuperscript{199} See id. at 424–29.


\textsuperscript{201} Haar lists the current classifications as: “(1) metropolitan planning area; (2) suburban planning area; (3) fringe planning area; (4) rural planning area; (5) rural/environmental[ly] sensitive planning area (agricultural preservation district); and (6) environmentally sensitive planning area.” HAAR, supra note 4, at 105 n.51. The last three categories are now basically two: rural areas and those that are environmentally sensitive. See N.J. OFFICE OF SMART GROWTH, NEW JERSEY STATE DEVELOPMENT AND REDEVELOPMENT PLAN 186 (2001), available at: http://www.nj.gov/dca/osg/docs/stateplan030101.pdf (last visited Feb. 28, 2003).

\textsuperscript{202} Merely ordering that towns rezone to allow low-income housing would not work if other more profitable housing could be constructed on the same site. But the builder’s
locus of the *Mount Laurel* obligation is different from that found in the SDGP."203 The thumb has remained on housing's side of the scale.

Nonetheless, in practice, as in Massachusetts, lower courts could refuse to grant a builder's remedy "only if the proposed development . . . is contrary to sound planning principles, or represents a *substantial* environmental hazard."204 Did this mean that more substantial proof of environmental risk would be required unless the municipality engaged in a formal planning process? Maybe. Muddying the waters further, the justices stated:

[A] builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning. We emphasize that the builder's remedy should not be denied solely because the municipality prefers some other location for lower income housing, even if it is in fact a better site.205

Lower courts have come up with slightly different formulations of this directive.206 The current view parallels that of Massachusetts: the municipality bears the burden of proving that a "site is environmentally constrained" or that the project represents "bad planning."207

Although statewide planning and housing policies in New Jersey were thus formally merged, did the participants in these two processes know that a union had taken place? This much is certain: statewide planning became more rigorous after *Mount Laurel II*.208 In 1986, for
example, the governor signed the State’s planning act into law. Nonetheless, planning efforts have not been rigorous enough to avoid the environmental impacts of the *Mount Laurel* doctrine reliably.

At present, the successor to the SDGP, the New Jersey State Development and Redevelopment Plan (SDRP), remains an advisory document. The State Planning Commission does not have the authority to enforce it. A few courts have begun to apply some of the SDRP’s provisions, however, and at least one agency has incorporated the SDRP’s goals directly into its regulations. Ironically, that agency is COAH. As a condition of certifying that a municipality is providing its fair share of *Mount Laurel* units—a designation that provides significant protection from builders’ lawsuits for ten years—COAH requires that the city or town demonstrate that it has met SDRP guidelines. Specifically, it must show that its low- and moderate-income housing has been directed towards the appropriate planning areas, and generally steered away from those designated as rural or environmentally sensitive.

COAH regulations require that municipalities exclude environmentally sensitive areas from their inventory of land potentially suitable for affordable housing. This exclusion encompasses specific areas along the coast and in the Meadowlands, as well as much of the Pinelands, a huge area in southeastern New Jersey. In addition, communities may exclude flood hazard areas, slopes, and inland wetlands.

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212 Id.

213 See discussion supra note 194.


215 In those planning areas, “the Council shall require inclusionary development [e.g., affordable housing] to be located in centers . . . .” Id. § 93-5.4(c).

216 Id. § 93-4.2. The regulations note that when the state legislature requires that other natural resources be identified and protected, COAH “shall include such resources in its criteria and guidelines” for calculating the amount of land available for housing.

217 Id.
Yet, COAH’s authority is not great. Most of it is exercised in the certification of local affordable housing plans. Like many agencies, COAH wields significant discretion in determining which provisions—so-called "housing elements"—are acceptable.

Does this result in a sufficient level of environmental protection? COAH has been criticized for approving local plans that promote sprawl. Moreover, only 265 of the state’s 566 cities and towns have petitioned for certification. COAH has awarded final approval to 199 of them, which represents just over a third of all jurisdictions.

In addition, the agency convinced SRDP to allow affordable housing in agricultural and environmentally sensitive areas “when properly safeguarded.”

Apart from the possibility that those safeguards will prove inadequate, a systemic problem has arisen. First, much of the area not set aside as rural or environmentally sensitive is located in already-developed cities and older suburbs. A significant percentage of this area may not be well suited to new development. Second, successive revisions of the state plan have led to the protection of an increasing

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219 At times, it has been accused of abusing that discretion. See Payne, General Welfare and Regional Planning, supra note 200, at 1116 (describing COAH’s substantive certification of a 3000-unit mixed-income development on land primarily designated as rural and environmentally sensitive). Courts have not been immune either. “[I]n some instances,” Professor Haar speculates, “they may have gone so far as to refuse to face up to environmental problems . . . .” HAAR, supra note 4, at 199.


221 N.J. COUNCIL ON AFFORDABLE HOUS. (COAH), DEP’T OF CMTY. AFFAIRS, COAH’S MUNICIPAL STATUS REPORT [hereinafter COAH’S STATUS REPORT] (providing information on the status of municipalities within COAH’s jurisdiction as of December 4, 2000). Although certification does not block development, it does mean that a municipality has planned for it. This potentially reduces the risk of sprawl induced by builders’ suits.

222 Id. Professor Payne argues that the actual rate is much lower, possibly no more than 12.6%, because some of the certified communities have little or no obligation to provide affordable housing. John M. Payne, Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts, 20 VT. L. REV. 665, 676–77 (1996) [hereinafter Payne, Norman Williams]. Moreover, COAH has excused some heavily developed municipalities from the fair-share requirement. Id. at 679.


224 HAAR, supra note 4, at 195 n.26.

inventory of agricultural and environmentally sensitive areas.\textsuperscript{226} Finally, understanding of environmental risk has grown considerably since the first \textit{Mount Laurel} suit was brought. The convergence of these forces is "potentially a time bomb,"\textsuperscript{227} which could cause an explosion of poorly planned development in rural areas that now are valued as open space. Simply because COAH requires that greenfield development be clustered does not make it environmentally sound. Moreover, it does not greatly reduce the impact of one environmental risk that housing has the capacity to heighten: sprawl.\textsuperscript{228}

Although some of the 301 municipalities that have not filed housing plans are weak candidates for certification, many are not. Those that have failed to file are targets for builder's remedy lawsuits. Thus, the power to harmonize housing and environmental goals remains in the hands of the courts.\textsuperscript{229} The future of certification is difficult to predict, but the builder's remedy has been effective, albeit controversial,\textsuperscript{230} in the past. Between 1983 and 1986, before COAH was established, more than 100 homebuilders brought lawsuits against approximately seventy municipalities.\textsuperscript{231} In the past few years, dozens of additional lawsuits have been filed, and the recent record suggests that municipalities have lost most of them.\textsuperscript{232}

Although many New Jersey cities and towns, under the pressure of the \textit{Mount Laurel} doctrine, have rezoned to permit affordable housing, the builder's remedy appears to be driving the process. Moreover,

\textsuperscript{227} Haar, supra note 4, at 195 n.26.
\textsuperscript{228} Id. at 199 n.41.
\textsuperscript{229} Although \textit{Mount Laurel II} directed that cases be assigned to only three trial judges, since 1986 COAH has taken over day-to-day implementation of the constitutional mandate, meaning that \textit{Mount Laurel} litigation has been cycled through the trial court's ordinary statewide assignment system. Span, supra note 16, at 61 n.256.
\textsuperscript{230} Because it became a "lightening rod for opposition to the \textit{Mount Laurel} Doctrine," Professor Payne writes, "[t]he court's attempts to condition the builder's remedy on compliance with environmental and other sound planning considerations was [sic] simply drowned out . . . ." John M. Payne, \textit{Reconstructing the Constitutional Theory of Mount Laurel II}, 3 \textit{WASH. U. J.L. \\& POL'Y} 555, 563 (2000) [hereinafter Payne, \textit{Reconstructing}].
\textsuperscript{231} Payne, Norman Williams, supra note 222, at 677 n.49.
\textsuperscript{232} Jacobs, supra note 1, at 11. A partner in one law firm has won more than sixty such suits in recent years and compares defendant towns to "baby harp seals. They can slither and squeal, but no municipality seems to have won a \textit{Mount Laurel II} lawsuit." KIRP ET AL., supra note 79, at 105; see also Span, supra note 16, at 62 n.259 (noting that sixty-five municipalities sued from 1987 to 1999). Although builder's remedies, in theory, are available in COAH proceedings, they are far easier to obtain in court. Span, supra note 16, at 63 n.257.
most affordable housing units thereby created—whether a result of a successful builder’s suit or a local housing plan (perhaps developed under threat of litigation)—include both market-rate and below-market units. This approach raises environmental concerns.

The predominant development strategy—the builder’s remedy—is closely associated with sprawl. It is a blunt instrument applied on a case-by-case basis, the antithesis of sound planning. It favors the construction of freestanding housing over rental units, and much of the former is single-family. For two general reasons, it is partial to large parcels. First, developers finance the low-cost units through cross-subsidies, and try to construct as many profitable units as possible. Second, development costs tend to be lower in less urbanized settings. The result is additional pressure on COAH’s less-than-completely successful effort to incorporate state planning policies into its affordable housing program. And, because the builder’s remedy effectively sets 20% as the maximum ratio of low-cost units to market-rate units, the strategy of choice in New Jersey is one that calls for a great deal of market-rate housing to create one unit for its intended beneficiaries—whoever they may be. Finally, the market itself may favor single-family units, and the Mount Laurel approach follows the market. A recent decision of the New Jersey Supreme Court confirmed that, in the face of such demand, an inclusionary housing plan may not satisfy a municipality’s fair-share obligation if it provides too much multifamily housing and too little single-family housing.

This decision effectively permits one of the primary determinants of

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233 See Payne, Reconstructing, supra note 230, at 559 n.8.
234 See Note, supra note 5, at 1133.
235 See Payne, Lawyers, Judges and the Public Interest, supra note 174, at 1700 (asserting that rental units—arguably the most efficient from an environmental standpoint—lose money).
236 See text supra notes 137–141.
237 Although, formally, the Mount Laurel II decision left the ratio to the judgment of the trial court, the justices appear to have viewed the 20% affordability requirement as a floor. 456 A.2d at 452 n.37 (N.J. 1983) (observing that “20 percent appears to us to be a reasonable minimum”). Perhaps not surprisingly, it has become a ceiling. This tends to increase the environmental impacts of inclusionary developments in New Jersey. HAAR, supra note 4, at 111.
238 But not always. COAH regulations permit a set-aside of only 15% for rental units. N.J. ADMIN. CODE tit. 5, § 92-14.4(c) (2002); see Toll Bros. v. Township of W. Windsor, 803 A.2d 53, 98 (N.J. 2002) (Stein, J., dissenting) (urging that the 15% set-aside not bind trial courts supervising the builder’s remedy).
239 See supra text accompanying notes 89–90.
240 Toll Bros., 803 A.2d at 82–86.
sprawl, a land-intensive lifestyle, to gain a stronger foothold in the affordable housing process.

In addition, the Mount Laurel fair-share obligation applies more or less equally to all cities and towns, and this favors more dispersed development than otherwise might be the case.\textsuperscript{241} The Mount Laurel I court noted that “[f]requently it might be sounder to have more of such housing, like some specialized land uses, in one municipality in a region than in another, because of greater availability of suitable land, location of employment, accessibility of public transportation or some other significant reason.”\textsuperscript{242} But the idea of regional development “nodes” was rejected because, under New Jersey law, the municipalities in which these were sited would be required to bear the impact of likely decreases in the ratio of property tax revenue to the cost of providing local services.\textsuperscript{243} New Jersey, like most states, requires that each city and town enforce zoning and levy property taxes individually.\textsuperscript{244}

The environmental community is split over the effectiveness of the current approach.\textsuperscript{245} One influential group recently proposed a system that engrafts an affordable housing requirement, as a fixed percentage of total development, on municipalities that are in a growth phase.\textsuperscript{246} Proponents contend that this “growth share” strategy offers several advantages. It is fairer, more effectively protects the environment, permits stronger integration of regional planning and housing policies, will be easier to administer, and—importantly—will create more affordable housing.\textsuperscript{247} The proposed system would site that housing in a manner that makes environmental sense, without bringing into play the equity issues raised by Regional Contribution Agreements.\textsuperscript{248} But any move to embrace this, or any other approach,

\textsuperscript{241} All else equal, this means that even very rural towns (like Mount Laurel itself) potentially must provide affordable housing. Conversely, more established suburbs may be able to avoid it simply because they offer little or no land attractive to developers. Unfortunately, the “clustering” of affordable housing in established suburbs—municipalities that are served by transit, as well as those close to employment, commercial, and recreational opportunities—will be far better for the environment, and need not be any less supportive of the goals underlying the Mount Laurel doctrine.

\textsuperscript{242} 336 A.2d 713, 732 (N.J. 1975). Such an approach would be more effective from an environmental standpoint.

\textsuperscript{243} Id. at 732–33.

\textsuperscript{244} Id.

\textsuperscript{245} Jacobs, supra note 1, at A1.

\textsuperscript{246} See N.J. Future Web site, supra note 220.

\textsuperscript{247} Id.

\textsuperscript{248} Regional Contribution Agreements (RCAs) have been roundly criticized by housing advocates on the grounds they undermine the integration that the Mount Laurel doctrine was expected to promote. See COAH’s Status Report, supra note 221 (noting that as
will have to come from the legislative branch of state government. Ever since it resoundingly endorsed delegation to COAH in 1986, the New Jersey Supreme Court has done nothing to encourage the belief that it would revisit and adjust the sweeping principles it announced in Mount Laurel I, or to involve itself in matters of program design. In New Jersey, affordable housing doctrine teeters uncomfortably between a policy excursion and comprehensive planning.

C. Oregon: Statewide Integrated Planning

Oregon is different. It started planning years ago, and at that time it focused on growth, not housing. With only a few partial exceptions, nothing like the Oregon approach exists—or has ever existed—in the United States. Planning, Oregon-style, is widely regarded to be the gold standard. The key and often unstated question is whether the Oregon way is portable.

Since enactment of Senate Bill 100, sometimes referred to as the Oregon Land Use Planning Act of 1973 (Land Use Act), Oregon has attempted to balance environmental and economic concerns within a unified system that carefully weighs regional political considerations. The Land Use Act set statewide planning requirements and established the institutional structure to carry them out. First, the Land Use Act required that all cities and counties adopt new comprehensive land use plans consistent with statewide planning goals. It also required those entities to promulgate regulations to implement

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249 Indeed, in Hills Development Co. v. Township of Bernards, the court repeated nearly a dozen times that implementation of the State's affordable housing policies by the executive and legislative branches was superior to implementation by the judiciary. 510 A.2d 621 (N.J. 1986); see Paula A. Franzese, Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat, 18 SETON HALL L. REV. 30, 50 (1988).

250 See N.J. FUTURE WEB SITE, supra note 220.

251 See id.


254 1973 Or. Laws 80 (codified as amended at OR. REV. STAT. §§ 197.005–.860 (2001)).

255 See Liberty, supra note 94, passim (describing the structure in detail).

256 OR. REV. STAT. § 197.175(2) (a)–(b).
the comprehensive plans, and to ensure that the new rules also were consistent with statewide goals.257

To implement this new program, the Land Use Act created a seven-member citizens body, the Land Conservation and Development Commission (LCDC), and established an agency, the Department of Land Conservation and Development (DLCD), to provide it with staff support.258 The LCDC adopted fourteen—soon after increased to nineteen—statewide planning goals.259 At least half of the goals directly address environmental and natural resource matters, and virtually all are related to environmental protection.260

The Land Use Act required each local and regional comprehensive land use plan to be submitted to the LCDC to ensure consistency with the statewide program.261 The LCDC was empowered to order a municipality to bring its plan or regulations into compliance with state goals.262 If a plan was not developed or was inconsistent with those goals, then consistency review for each of that jurisdiction’s development decisions could be required on an individual basis—an extraordinarily time-consuming and expensive process.263 Municipal and county plans have, by now, largely been submitted and approved,264 so the LCDC enforces the statewide planning policies embodied in its goals by periodically auditing all local plans and review-

257 Id. § 197.175.
258 Id. § 197.075–.095.
259 See OR. DEP’T OF LAND CONSERVATION & DEV., 19 STATEWIDE PLANNING GOALS & GUIDELINES [hereinafter 19 GOALS] (listing and providing links to pdf files for each of the nineteen goals), available at http://www.lcd.state.or.us/goalhtml/goals.html (updated Nov. 1, 2002).
260 See id.
261 OR. REV. STAT. §§ 197.040(2)(d), 197.251(1)–(2), (4)–(6). Specifically, plans developed by municipalities within a county must be submitted to the county, which is required to ensure that they are consistent with each other and that they constitute “an integrated and comprehensive plan for the entire area of the county” consistent with overall state goals. Id. § 197.190. But see § 197.656 (allowing the LCDC, through a “collaborative regional problem-solving process, . . . to acknowledge amendments” to municipal land use plans and “new regulations, that do not fully comply with the rules implementing the statewide planning goals”).
262 Id. § 197.320.
263 See Henry Richmond, From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma, 13 PACE L. REV. 327, 340–43 (1993). The LCDC also could take a number of additional enforcement measures, including suspending a municipality’s authority to issue building permits or approve subdivisions in rural areas, and ordering it to issue permits or approve subdivisions in growth areas. Liberty, supra note 94, at 10,371 n.41.
264 See GERRIT KNAAP & ARTHUR C. NELSON, THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON 80 (1992); Liberty, supra note 94, at 10,370 n.32.
ing proposed plan amendments. With regard to the latter, it generally exercises its enforcement authority by taking an appeal to an administrative body, the Land Use Board of Appeals (LUBA), and subsequently, to the state’s intermediate appellate tribunal, the Oregon Court of Appeals.

Planning Goal 14 requires that each of Oregon’s cities protect development over a twenty-year period and establish urban growth boundaries designed to accommodate areas best suited for compact patterns of habitation. Goal 10 requires municipalities to create housing plans that inventory buildable land within the urban growth boundary, project future needs, and plan for and zone enough land to meet those needs. The housing plan must address a variety of housing types, and “encourage the availability of adequate numbers of needed housing units [including multifamily units and manufactured homes] at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households.” When a plan is amended, its urban growth boundaries must encompass enough buildable land to meet the estimated need for all types of housing, including affordable housing, for the twenty-year horizon.

The LCDC and the Oregon Legislature have made it clear that they consider the Goal 10 program, as incorporated in Goal 14’s mandate for urban growth boundaries, to embody the essence of Mount Laurel. Echoes of the New Jersey doctrine can be discerned


266 The Land Use Board of Appeals (LUBA) was created in 1979 to deal with the large caseload of the Land Conservation and Development Commission (LCDC) and the Oregon trial courts. See Span, supra note 16, at 76.

267 Liberty, supra note 255, at 10,374. It retains more direct enforcement powers, however, to address poor municipal performance immediately following plan approval. Id. at 10,372 n.63.


269 See OR. REV. STAT. § 197.296; OR. ADMIN. R. 660-015-0000(10).


271 See OR. REV. STAT. § 197.296(2); Liberty, supra note 94, at 10,378 (explaining that “needed housing” includes multifamily and manufactured housing).

272 OR. REV. STAT. § 197.296(2); see MANDELKER, supra note 18, § 7.30.


274 The LCDC so found in Seaman v. City of Durham, 1 LCDC 283, 290 (1978), and later informally extended this interpretation as unofficial policy. MANDELKER, supra note 18, § 7.30. The Legislature subsequently codified the requirement: “When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing . . . shall be permitted in one or more zoning districts . . . of sufficient buildable land to satisfy that need.” OR. REV. STAT. § 197.307(3)(a).
in the statutory requirement that affordable housing proposals be reviewed only pursuant to “clear and objective approval standards,” and in the requirement that the need for such housing be met within urban growth areas. Evidence suggests that the combined application of these two goals has promoted higher-density residential development. The result has been relatively inexpensive housing that counteracts the effects of sprawl.

This last claim has been subject to controversy. Some have argued that strictly enforced urban growth boundaries merely raise the price of housing and eliminate the added affordability that clustering can provide. Recent data, however, cast doubt on these assertions. Moreover, these critics miss a larger point: in Oregon, concerns about housing costs have replaced concerns about exclusionary zoning. Although this might appear to be simply a variation upon a theme, the Massachusetts and New Jersey experiences suggest that, if the local polity does not accept the premise that affordable housing is needed in a diverse range of communities, a long and expensive struggle will

275 OR. REV. STAT. § 197.307(3)(a)–(b). The need must be assessed on a regional basis. See Residents of Rosemount v. Metro, 21 P.3d 1108, 1113 (Or. Ct. App. 2001) (rejecting the proposition that housing need could be established solely by reference to areas in close proximity to preselected site of urban growth boundary expansion); Seaman, 1 LCDC at 289–90. This can mean that a local area without immediate need must provide housing if the surrounding region requires it, or that a local area with such need may not have to do anything if it is being met elsewhere in the region. See Span, supra note 16, at 75 n.329.

276 E.g., Span, supra note 16, at 79 n.342 (noting that from 1978 to 1982, the maximum number of permissible units in Portland area increased nearly 150%, even though only 10% more land had been zoned residential).

277 Liberty, supra note 94, at 10,379 nn.173–77; see Anthony Downs, Regulatory Barriers to Affordable Housing, 1992 Am. PLAN. Ass’n J. 419, 420 (stating that by eliminating unnecessary dimensional minima, housing costs could be decreased by half).


ensue merely to site a relatively small number of relatively non-controversial examples of it.280

Oregon has gone beyond Massachusetts and New Jersey. The State long ago decided it wants low- and moderate-income housing and that it should be sited in growth clusters. It is now merely working out the details—where affordable housing units should go, and who should live there. The details are important, but the steps taken already by Oregon have advanced the debate markedly.

From an environmental perspective, the contrast is even sharper. Oregon is one of the few states—perhaps the only one—that has implemented a broadly effective growth management and sprawl-control program.281 True, the program is a point on a continuum,282 and it certainly has its critics, but the Oregon approach offers three features that commend it. First, as noted, it contains a strong top-down element. Second, justification arises from concern about the environment and land use, not housing.283 Finally, it is enforced directly by a specialized government agency.284

In contrast, Massachusetts and New Jersey focus on the legal (and moral) responsibility of each municipality for its portion of affordable housing, termed "fair share," "regional share," or "proportionate share." To succeed in these states, action must begin at the grassroots, though often it does not. The Massachusetts and New Jersey programs are sequestered in the local in another way: achievement of their policy objectives depends on the presence of builders seeking to pursue specific projects. Those projects are driven by short-term economics, not by environmental protection or thoughtful, long-term planning.

280 See Euchner & Frieze, supra note 25, at 41 ("Chapter 40B . . . has sucked the oxygen out of the housing debate."). By early 2003, more than sixty bills had been introduced in the Massachusetts Legislature to amend or repeal the State's affordable housing law. See Flint, Romney, supra note 98, at 1A.

281 See Liberty, supra note 94, at 10,379.

282 Jerry Weitz & Terry Moore, Development Inside Urban Growth Boundaries: Oregon's Empirical Evidence of Contiguous Urban Form, 1998 AM. PLAN. ASS'N J. 424, 436 (noting that Oregon's growth policies are being achieved, yet "there is significant room for improvement").

283 See generally 19 Goals, supra note 259 (listing and providing links to pdf files for each of the nineteen goals).

284 See Liberty, supra note 94, at 10,368-69 (noting that "land use planning in Oregon is not advisory, but an integrated hierarchy of legally binding Goals, plans, and regulations"); Knaap & Nelson, supra note 264, at 81 (LCDC forcefully implemented high-density, fair-share housing policy that local governments would not have chosen on their own).
The Oregon way has other advantages, including the benefit of long-term planning. Further, with only 241 major local political jurisdictions, it is considerably less Balkanized than its eastern counterparts. Eighty percent of Oregon's population lives in the 100-mile long Willamette Valley, and, thus, is highly concentrated. Unlike New England and the Atlantic states, it has a weaker home rule tradition. The Willamette Valley also is Oregon's premier agricultural region; thus, the community contains a relatively strong counterweight to development interests.

Perhaps the question should not be whether other states can emulate Oregon's model. Instead, it should be whether elements of the model can survive elsewhere, complementing existing structures. If so, what is the optimal organizational transplant?

CONCLUSION

In pressing for an RCA provision in the New Jersey Fair Housing Act, then-Governor Thomas Kean said that his objective was to inspire communities to engage in planning. Based on the experiences of Massachusetts and Oregon, the converse might have been the better strategy: planning, under the right circumstances, can establish an appropriate incentive to create affordable housing.

Despite their controversial histories, the Massachusetts and New Jersey programs have met at least some benchmarks of success. Each,

285 Before the 1973 Oregon Land Use Act was passed, planning was not performed at a regional or statewide level. Rather, like Massachusetts and New Jersey, Oregon authorized each municipality to plan and zone on its own. See Rothrock, supra note 265, at 456-57.


287 Approximately 43% of the state's population lives in the Portland metropolitan area. Span, supra note 16, at 75 n.330.

288 Richmond, supra note 263, at 338, 342.

289 See Cynthia Cumfer, Original Intent v. Modern Judicial Philosophy: Oregon's Home Rule Case Frames Dilemma for State Constitutionalism, 76 OR. L. REV. 909, 913-18 (1997). With a legal tradition that made municipal mergers difficult, but deconsolidation relatively easy, New Jersey has been called "the most municipally fragmented state in the nation." Kirp et al., supra note 79, at 23.

290 The Willamette Valley encompasses 83% of the Oregon's best farmland and produces 48% of its agricultural goods. Its 2.2 million acres also are home to about 2.8 million people, slightly larger than Delaware, but with nearly 3.5 times the population. Knaap & Nelson, supra note 264, at 130-31; Population Research Ctr., Portland State Univ., Certified Estimates for Oregon; Its Counties and Cities, July 1, 2002, at www.upa.pdx.edu/CPRC/certified%20estimates%202002.PDF (release date Dec. 16, 2002).

291 Kirp et al., supra note 79, at 123.
for example, has produced approximately 20,000 units of affordable housing. These numbers are small, but not insignificant. Whether the programs have come close to meeting other goals, however, is another matter, and the extent to which those goals justify the investment is an open question.

From an environmental standpoint, the Massachusetts and New Jersey initiatives suffer from an obvious defect—they are not coordinated with other policy objectives. As a result, they tend to be shaped by existing patterns of sprawl.

This lack of coordination is reinforced by the structure of the two programs. Both are founded on the concept that each community is responsible for a "personal" share of a larger region's housing needs, which may play into much-criticized notions of home rule and local autonomy. Additionally, states that follow the Massachusetts or New Jersey approach may inadvertently mischaracterize the nature of the racial and class discrimination that affordable housing programs are presumably designed to ameliorate. Indeed, this personalistic approach has been received as an accusation and resisted. This can increase program costs unnecessarily. In addition, where a town-by-town affordable housing obligation is the default position, its successful pursuit will tend to promote sprawl. Yet, no obvious way exists to balance this environmental impact against potential equity considerations.

Both the Massachusetts and New Jersey approaches require municipalities to allow more development than they otherwise might allow on their own. Massachusetts sets a clear numerical threshold, whereas New Jersey has a more complex process that, nevertheless, arrives at a similar result.

Both states rely on market-based approaches, such as the zoning waiver or the builder's remedy, to provide a regulatory subsidy to developers. At a time of rapidly diminishing public housing funds, the

292 See Krefetz, supra note 120, at 392; Payne, The Mount Laurel Matrix, supra note 225, at 368.

293 For example, it might be disappointing if thirty years of effort had been spent just so local police officers could live in the town where they work.


295 See KIRP ET AL., supra note 79, at 81.

296 Conversely, in theory, the absence of a municipality-based, fair-share principle could result in the further concentration of housing in urbanized areas. But neither the economics of development, nor history, bears this out.
builder's remedy cross-subsidizes affordable units through sale of market-rate units.

Economics and existing practices favor housing that promotes sprawl. First, the required percentage of low-cost units is small,297 and builders have little, if any, incentive to offer more. Second, the cross-subsidy favors building more profitable single-family homes. Because some of the potential profits are lost on the affordable units, developers have an even stronger reason to build the most profitable housing possible. Third, these economic signals tend to promote construction in locations that, although not necessarily the most environmentally sensitive open spaces, are nonetheless unconnected to other development or to public transit. Developers will seek such areas because they accommodate the kinds of housing that the cross-subsidy promotes and because land and development costs are likely to be lower in these locations. Collectively, these factors translate into sprawl.298

Both states have established institutions that ostensibly examine the environmental impacts of affordable housing with great care. There is some evidence that this strategy is working, particularly in Massachusetts, but it is also clear that, in a showdown between affordable housing and the environment, housing has the edge. Low-cost units will likely be approved unless local environmental rules,299 specifically prohibit them. Although the Massachusetts Housing Appeals Committee has done a particularly noteworthy job of evaluating a wide spectrum of environmental risks, it simply does not have the mandate to ensure that this will continue. Even the laws themselves—Chapter 40B in Massachusetts and New Jersey's Mount Laurel regime—require that close cases be decided in housing's favor.

Oregon offers an alternative. Affordable housing in sufficient quantity to meet local needs could arise from a system of mandatory statewide planning. Whether effective statewide planning can arise from a localized housing mandate, however, remains to be seen.

Right now, both Massachusetts and New Jersey have weak statewide planning, and, with few exceptions, neither State performs any

297 In Massachusetts, the requirement is 25%; in New Jersey, it generally is 20%, but may be lower.

298 Although one could argue that this also may mean more affordable housing, that question has not been closely examined. Furthermore, better planning could provide for an equivalent amount of profit-driven development, but with lower impact on the environment.

299 State or federal statutes or regulations controlling development are, of course, not waived.
regional planning. This makes for a poor fit because affordable housing goals in both states are expressed on a regional basis. But there is reason for optimism. New Jersey, at least, does have a plan, and COAH is attempting to enforce it. While that effort has not been entirely successful, it does provide the structure and some authority for denying the builder's remedy at sites where development will promote sprawl. Massachusetts effectively does no statewide planning, but HAC has articulated incentives for localized planning on a case-by-case basis. Communities with plans that provide for affordable housing have the authority to deny a comprehensive permit where a builder has violated the objectives of the plan. 300

Although the opportunity to implement centrally enforced planning around urban growth boundaries may never arise in the northeast,301 other approaches are available, even in Massachusetts. First, significant improvement could be achieved if individual cities and towns would plan for affordable housing, along with more efficient growth patterns.302 Second, a revivified local process could generate consensus planning principles, albeit few and basic, that recommend themselves for adoption at the regional or state level. Third, even a bottom-up effort might accumulate sufficient momentum to spark legislative action, provided the action is narrowly focused. One attractive target in Massachusetts is its generous doctrine of vested rights. Right now, open space advocates contend that builders can take advantage of existing sprawl-friendly zoning for extensive periods merely by making a cursory gesture of their intent to develop.303 Finally, de-

300 Current precedent centers on efforts to site housing in areas accorded special protection, like historic districts. But nothing appears to bar the extension of these decisions to towns seeking to steer affordable housing to specified areas for sound planning reasons, including proximity to shopping, employment, recreation, or transit.

301 Span, supra note 16, at 72–73. Span suggests that a confluence of factors particular to Oregon produced its unique system. These include the presence of a powerful, focused statewide advocacy group (1000 Friends of Oregon); a well-staffed state agency dedicated to land use planning (LCDC); and a supportive and streamlined administrative enforcement process (LUBA). See id. This is not much help to a state, with entrenched and embattled interests, that lacks most of the foregoing factors.

302 There seems to be no lack of professional planners. A recent tally in Massachusetts suggests that more than half of its municipalities have at least one planning professional on staff, and some that do not are served by outside planners. E-mail from Bob Mitchell, AICP, Planning Director, Town of Amherst, to Rusty Russell (Jan. 14, 2003, 15:04 EST) (on file with author); E-mail from Juliet T. Hansel Walker, Planner, John H. Chafee Blackstone River Valley National Heritage Corridor Commission, to Rusty Russell (Jan. 14, 2003, 14:47:46 EST) (on file with author).

303 Russell, supra note 168; see The Zoning Act, Mass. Gen. Laws ch. 40A, § 6 (2000) (authorizing a freeze on existing zoning for eight years if a preliminary subdivision plan is
spite shortcomings, it is not clear that the planning vacuum in Massachusetts effectively stymies local attempts to coordinate growth and integrate housing, economic, and environmental goals. Even imperfect efforts could channel existing animus in a more positive way.

In New Jersey, where planning is somewhat more advanced, it may be possible to broaden the mandate of the State Development and Redevelopment Plan, or at least to incorporate its principles into additional agency rules and judicial decisions.\textsuperscript{304} Also, the state might take inspiration from Oregon and adopt the "growth share" approach, which would link housing policy and environmental protection together more tightly.\textsuperscript{305}

These would be small steps, but they could build on what now exists, rather than allow Oregon's widely remarked perfection to become the enemy of good-faith improvements elsewhere. Finally, it is important to maintain perspective, because affordable units, when all is said and done, account for but a small percentage of all housing starts.\textsuperscript{306} The main burden of sprawl just might be coming from other quarters.\textsuperscript{307}

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\textsuperscript{304} Payne, \textit{General Welfare and Regional Planning}, supra note 200, at 378–79.

\textsuperscript{305} See discussion supra Part II.

\textsuperscript{306} Toll Bros. v. Township of W. Windsor, 803 A.2d 53, 93 (N.J. 2001) (Stein, J., concurring in part and dissenting in part) (pointing out that in the twenty years since \textit{Mount Laurel II}, only 5.4% of all residential dwelling units built in New Jersey were affordable, and that, during that same period, 60 million square feet of office and retail space was constructed).

\textsuperscript{307} Id. at 118 (Stein, J., concurring in part and dissenting in part). "[I]f overdevelopment has occurred, the source of that overdevelopment is market-priced housing and commercial construction, not affordable housing." \textit{Id.} (Stein, J., concurring in part and dissenting in part); see, e.g., Kate Spinner, \textit{Tiny Turtles Push Back Development Effort}, \textit{DAILY News} (Newburyport, Mass.), April 18, 2003, at 1 (describing conflict between industrial development and wetlands and species protection).