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WILSON AND COLLURA: A SETBACK FOR REGIONALISM

Ann I. Killilea

I. INTRODUCTION

Metropolitan expansion and the concomitant increase in demand for housing and other services are placing heavy pressures on suburban quietude. Motivated by a desire to retain a "small town" atmosphere or to avoid the heavy tax burdens which accompany large-scale residential development, many suburban communities have responded to such pressures with an attitude of isolationism. Ordered and planned development of metropolitan areas is barred by the obstacle of suburban "no-growth" policies exhibited in a variety of creative land-use control mechanisms. Voters in areas anticipating or experiencing rapid growth are imposing minimum large-lot zoning ordinances, moratoria on building construction, and "phased-growth" plans to halt or suspend growth.

Two recent cases, Wilson v. Sherborn1 and Collura v. Arlington,2 are indicative of the judicial response in Massachusetts to the practice of suburbs to zone and plan exclusively for the residents within their borders. The Massachusetts Appeals Court in Wilson upheld a minimum two-acre lot ordinance in a metropolitan Boston community zoned primarily for large lots. In Collura, the Massachusetts Supreme Judicial Court upheld the validity of a two year moratorium on apartment construction in a suburban community during the formulation of a comprehensive plan. When contrasted with zoning decisions in other states,3 the Wilson and Collura cases repre
sent judicial reluctance in Massachusetts to upset the traditional local prerogative in zoning and planning matters.

In analyzing Wilson and Collura, this article will first briefly examine the traditional concepts of zoning law which have empowered communities to plan exclusively for residents within their boundaries. These concepts will be compared with the developing trend toward a more active judicial role in zoning matters producing a more regional approach toward community growth. Examination of this trend will provide a context in which to view the most recent position of the Massachusetts judiciary regarding zoning and regional planning, as articulated in the Wilson and Collura cases. More specifically, the analysis will focus upon two elements of the

denied standing. The original plaintiffs in Warth included three low- and moderate-income residents of a town located adjacent to the challenged community; five taxpayers of the adjacent town, four of whom were also residents of that community; and Metro-Act, Inc., a not-for-profit corporation whose purpose was to promote the construction of housing in order to alleviate the general housing shortage for low- and moderate-income persons. The low- and moderate-income residents of the adjacent town were members of ethnic or racial minority groups. Two additional associations attempted to intervene in the suit: a Home Builders Association whose members consisted of residential construction firms in the metropolitan area, and a not-for-profit corporation comprised of several organizations interested in housing problems. The plaintiffs were denied standing generally because they failed to allege (1) that they were personally injured by the challenged zoning practices and (2) that their inability to locate or construct suitable housing in the challenged community directly resulted from the challenged zoning ordinance. See James v. Valtierra, 402 U.S. 137 (1974) (upheld a state constitutional provision requiring approval by a majority of community vote prior to the time when a state public body may develop, construct, or acquire a low-rent housing project); Belle Terre v. Boraas, 416 U.S. 1 (1974) (upheld validity of ordinance restricting lots to one-family dwellings not allowing more than two unrelated persons to live together as a single housekeeping unit); Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (upheld large-lot ordinance which provided for a minimum of one dwelling unit per minimum lot size of one acre); Constr. Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 44 U.S.L.W. 3467 (U.S. Feb. 24, 1976), note 106, infra. See also City of Eastlake v. Forest City Enterprises, 96 S. Ct. 768 (1976) (upheld city charter provision requiring proposed land use changes to be ratified by fifty-five percent of voters who participate in referendum).

As indicated in Warth, commentators believe that federal courts in nonstatutory review cases have and will refuse to grant standing to plaintiffs challenging local ordinances and consequently will refuse to remedy the problem of exclusionary zoning practices in the regional metropolitan context. Comment, Standing To Challenge Exclusionary Zoning In The Federal Courts, 17 B.C. IND. & COM. L. REV. 347 (1976). Plaintiffs will have more difficulty challenging a town with allegedly exclusionary zoning practices in federal court rather than in state court. Lewis, New Jersey Gives, High Court Takes Away, 41 PLANNING 4 (Sept. 1975); cf. Hills v. Gautreaux, 96 S. Ct. 1538 (1976). (The Court found that the Department of Housing and Urban Development (HUD) violated the Fifth Amendment and the Civil Rights Act of 1964 by assisting the Chicago Public Housing Authority in selecting family public housing sites located exclusively within Chicago's city limits. The Court held that because HUD committed constitutional and statutory violations, a metropolitan area remedy was permissible to rectify discriminatory public housing site selection.)
cases common to zoning matters: (1) the traditional presumption of validity given the ordinance and the consequent burden of proof upon the landowner, and (2) the exclusionary aspects of the large-lot ordinance and of the moratorium on apartment construction. Analysis will show that these cases reaffirm the right of the suburban community in Massachusetts to determine its rate of growth and to plan for the needs of its residents, independent of metropolitan pressures.

II. BACKGROUND: THE NATURE AND SCOPE OF ZONING POWER

A. The Local Concept

Zoning and other land-use controls have traditionally been the product of local legislation and direction. The enactment of zoning laws, long regarded as a valid exercise of the state police power, rests upon the proposition that an owner of land must yield some property rights for the greater good of the entire community. This power is not unlimited, however. It may not be exercised unless such exercise bears a substantial relation to the public health, safety, morals, or general welfare. The concept of the "general welfare" is the most flexible and expansive of these requirements, allowing courts to modify local zoning powers to meet the changing needs of a metropolitan area.

Municipalities and courts have adopted a parochial approach when determining whose "general welfare" must be considered in

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1 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), established the traditional tools of zoning analysis. According to the Court, the zoning ordinance must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," before it can be declared unconstitutional. Id. at 395. On the other hand, "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Id. at 388.

2 Police power requires: first, that the ends sought by the government be reasonably necessary for the public health, safety, morals, or general welfare; second, that the means employed be reasonably calculated to carry out the desired objectives; and third, that the individual not be asked to make inordinate sacrifices. Violation of any of these police power requirements constitutes a taking of property without due process. Feiler, Zoning: A Guide to Judicial Review, 47 URBAN L. 319 (1969) [hereinafter cited as FEILER]. See also R. ANDERSON, AMERICAN LAW OF ZONING § 2.06 (1968).


The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual . . . as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. Id. at 33.
the enactment of a zoning ordinance, generally limiting that concept to the needs of those residents within the geographical boundaries of a municipality. The result of this approach has been the furtherance of local, as opposed to regional or state, interests. Furthermore, because zoning and land-use planning have long been considered to be legislative functions, courts have relied upon a strong presumption of validity favoring the local zoning ordinance.

B. The Concept of a Regional-State "General Welfare"

The urban exodus has created a tension between interests of "would-be" suburban dwellers and the protectionist policies of suburban residents. This conflict has led some state courts to pierce the presumption of validity concerning local ordinances and to re-examine the traditional concept of the general welfare. As a result, the authority vested in the municipality to regulate its domain is being delimited in some jurisdictions by concern for the regional effects of those "local" regulations. Some state courts are scrutinizing local ordinances and taking an increasingly critical view of community efforts to preserve the suburban status quo. The result

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1 County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967) (upholding a 5-acre minimum lot size); Honack v. County of Cook, 12 Ill. 2d 257, 146 N.E.2d 35 (1957) (upholding a 5-acre minimum lot size); State ex rel. Grant v. Kiefaber, 114 Ohio App. 279, 181 N.E.2d 905 (1960) (upholding 2-acre minimum lot size in a district in which there were a substantial number of country homes).

2 Vickers v. Township Comm'n, 37 N.J. 232, 181 A.2d 129 (1962), app. dism'd and cert. denied, 371 U.S. 26 (1954). Justice Douglas, writing for the Court, observed: subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-neigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . Id. at 32.

3 McGowan v. Maryland, 366 U.S. 420 (1961). In the area of regulation of private property, the Court will usually find a legislative enactment valid "if any state of facts reasonably may be conceived to justify it." Id. at 426.

4 Village of Euclid v. Ambler Realty Co. established some limit to the local prerogative in zoning when it recognized the " . . . possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." 272 U.S. 365, 390 (1926).

has been expansion of the "general welfare" concept to encompass regional, as well as local, considerations.

1. The Pennsylvania Experience

The Pennsylvania Supreme Court in National Land and Investment Co. v. Easttown Township Board of Adjustment,\(^4\) established that a four-acre minimum lot requirement, "designed to be exclusive and exclusionary," is not justifiable as an attempt to further the health, safety, or general welfare of the community.\(^5\) Confronting the issue of "whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live,"\(^6\) the court stated that because the township was located "in the path of a population expansion,"\(^7\) it had a responsibility to a society outside its geographical boundaries.\(^8\)

While recognizing that the population expansion would put pressure upon the township to provide additional municipal facilities, the court stated that an ordinance which prevented growth, when the installation of additional facilities was in fact feasible, could not be sanctioned as promoting the health and safety of the municipality.\(^9\) Such a zoning ordinance, by allowing a community to escape the economic burdens of providing essential facilities and services for newcomers, furthers a private rather than a public interest and is an invalid exercise of the zoning power.\(^10\) Moreover, the

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\(^4\) 419 Pa. 504, 215 A.2d 597 (1965) [hereinafter cited as National Land].

\(^5\) Id. at 533, 215 A.2d at 612.

\(^6\) Id. at 532, 215 A.2d at 612.

\(^7\) Id. at 519, 215 A.2d at 605.

\(^8\) Id. at 532, 215 A.2d at 612.

\(^9\) The court noted that alternative methods were available for dealing with nearly all the problems that attend growth in population, including sewerage problems. Because the town could utilize different means to prevent potential health problems, the four-acre minimum was "neither a necessary nor a reasonable method." The Second Class Township Code established sanitary regulations which were enforceable regardless of zoning ordinances. Also, the zoning officer could require lots larger than the minimum if a larger area was needed for proper drainage and disposal of sewage. Id. at 526, 215 A.2d at 609.

\(^10\) Id. at 533 & n.30, 215 A.2d at 612 & n.30. The court further stated: "A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future
town's goals of preserving land in its natural state, protecting the "setting" of historic homes, and preserving open space did not "rise to the level of the public welfare" in the context of large-lot zoning.21

By stating that zoning regulations may not be enacted purely to effectuate the interests of community residents,22 the court evidenced an awareness of regional housing needs pressing upon the locality from without. Thus, in Pennsylvania a community within an undefined regional area has a responsibility not to impede its natural growth patterns with "unnecessary" land-use restrictions.23 The community may utilize its zoning powers to "plan for the future," but not "as a means to deny the future."24

A subsequent Pennsylvania case has more clearly articulated the rights of outsiders desirous of moving into a certain community, and the attendant responsibility of the community not to impede future population growth. In In re Concord Township25 the Pennsylvania Supreme Court required that a large-lot ordinance having an exclusionary purpose or effect be kept "within the limits of necessity"26 in order to be validated. The court there concluded that potential sewerage problems were not within those limits and could not justify an exclusionary zoning ordinance. It directed the community to assume direct financial responsibility for the services and facilities necessary to support an inevitable population growth.

The Concord court broadened the mandate of National Land. While National Land had simply required that a community not interrupt its natural growth with restrictive ordinances,27 the Concord court enlarged this responsibility, stating:

burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid." Id. at 532, 215 A.2d at 612. The court will not uphold "fiscal zoning," which is the process by which a municipality seeks to exclude from a jurisdiction any proposed development that creates a financial burden and to encourage development which promises a net financial gain. Fiscal zoners try to strike a balance so that the tax revenue which new development contributes to local coffers will at least pay for the public services which that development will entail. U.S. NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY at 19 (1969).

21 Id. at 531, 215 A.2d at 611.
22 The court stated that "[t]here is no doubt that many of the residents of this area are highly desirous of keeping it the way it is . . . . This is purely a matter of private desire which zoning regulations may not be employed to effectuate," Id. at 530-31, 215 A.2d at 611.
23 Id. at 528, 215 A.2d at 610. The court noted that "[z]oning provisions may not be used to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring." Id.
24 Id.
26 Id. at 473, 268 A.2d at 768.
27 The court stated that "[t]he implication of our decision in National Land is that
Although *National Land* . . . is postured as involving the constitutional due process rights of the landowner whose property has been zoned adversely to his best interests, it cannot realistically be detached from the rights of other people desirous of moving into the area. . . .

Thus, the court required the community, when adopting a zoning ordinance, to consider the needs of the "entire area," including the rights of "outsiders" who may someday wish to move into the community. It recognized that an ordinance which unnaturally limits population growth places an additional burden on adjoining communities to accommodate those excluded. Such an imposition upon other communities is not a decision that a town "should alone be able to make." A suburb, therefore, may not promote its own welfare by controlling the use of land while simultaneously ignoring the welfare of the "area." The court, however, refrained from defining the "area" that must be considered when a community enacts a zoning ordinance.

In sum, the Pennsylvania court refused to allow a suburban community to insulate itself from the inevitable growth and expansion of a metropolitan area. Although the regional "general welfare" approach has been recognized in Pennsylvania, the contours of the doctrine there are not yet definitive.

2. The New Jersey Experience

The New Jersey Supreme Court in *So. Burlington County N.A.A.C.P. v. Township of Mount Laurel* also enlarged the community responsibilities to the region. The court expanded the negative duty of not interfering with the natural growth of the region, articulated in *National Land* and *Concord*, into the affirmative duty of assuming a fair proportion of the regional housing need and ensuring a balanced community.


29 439 Pa. at 474-75, 268 A.2d at 768-69.

30 *Id.* at 475, 268 A.2d at 769.

31 67 N.J. 151, 336 A.2d 713 (1975) [hereinafter cited as *Mount Laurel*].
metropolitan area. The general ordinance of the town provided for four residential zones, permitting only single-family, detached dwelling, one house per lot development.  

32 A realistic interpretation of the minimum zoning ordinance requirements for dwellings precluded single-family housing for even moderate-income families.  

33 Attached town houses, apartments, and mobile homes were not allowed in the town under the general ordinance, although a Planned Unit Development (PUD) was utilized to vary the conventional development.  

34 This attempt to achieve diversity was ineffective, however, because conditional approvals for PUD developments were burdened with restrictive limitations on the number of bedrooms and the number of school-age children allowed per unit.  

35 The New Jersey Supreme Court declared the ordinance to be exclusionary and therefore an improper exercise of the zoning power. The court imposed a definite responsibility upon Mount Laurel to adopt a zoning ordinance that "affirmatively affords" an opportunity for low- and moderate-income housing to be built within the region.  

36 The applicability of the decision was not limited, however, to low- and moderate-income households. Rather, the court found that Mount Laurel's zoning ordinance prevented "various categories of persons from living in the township because of the limited extent of their income and resources."  

37 These categories

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67 N.J. at 164, 336 A.2d at 719.

33 Id. at 183, 336 A.2d at 729.

34 2 WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER §§ 47.01 .. 47.05 (1974), cited in 67 N.J. at 166, 336 A.2d at 720. The PUD development is permitted by a cluster zoning provision:

Under the usual cluster-zoning provisions, both the size and the width of individual residential lots in a large (or medium-sized) development may be reduced provided (usually) that the overall density of the entire tract remains constant—provided, that is, that an area equivalent to the total of the areas thus "saved" from each individual lot is pooled and retained as common open space. The most obvious advantages include a better use of many sites, and relief from the monotony of continuous development.

Id. at § 47.01.

35 The approvals required that the developer must provide in its leases that no school-age children shall be permitted to occupy any one-bedroom apartment and that no more than two such children shall reside in any two-bedroom unit. The developer was also required to record a covenant providing that in the event more than .3 school children per multi-family unit shall attend the township school system in any one year, the developer will pay the cost of tuition and other school expenses of all such excess number of children. 67 N.J. at _____ , 336 A.2d at 721-22.

36 Id. at 174, 336 A.2d at 724.

37 Id. at 159, 336 A.2d at 717.

Plaintiffs included (1) present residents of the township residing in dilapidated or sub-standard housing; (2) former residents who were forced to move elsewhere because no suitable
included "young and elderly couples, single persons and large, growing families not in the poverty" economic level. In New Jersey, then, a municipality has a responsibility to "make realistically possible," through its land-use regulations, "the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there. . . ." 39

The Mount Laurel court prescribed specific requirements which, if adhered to, would adequately fulfill this affirmative obligation. A valid ordinance, for instance, "must" permit multi-family housing, allow small dwellings on very small lots, and permit high density zoning. It may not impose bedroom or similar restrictions on multi-family housing, or "artificial and unjustifiable" minimum requirements as to lot or building size. These specifications for suburban zoning ordinances were derived from a broad interpretation of the "general welfare." The court noted that previous New Jersey zoning decisions considered only the interests of the enacting municipality. Necessitated by reason of the dire need for housing, however, especially but not limited to the low- and moderate-income population, the court recognized that other interests were at stake. The "general welfare" which developing municipalities must now consider extends "beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality." 41

Indicating just how far beyond the municipal boundaries the community must look in order to fulfill its affirmative obligation, the court in Mount Laurel specifically stated that a valid zoning ordinance must attempt to meet the "present and prospective regional need" for low- and moderate-cost housing. While the court stated that the developing municipality "must bear its fair share of the regional burden," it refrained from defining its standard of "re-

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38 Id.
39 Id. at 174, 336 A.2d at 724 (emphasis added).
40 Id. at 187, 336 A.2d at 731 (emphasis added).
41 Id. at 179, 336 A.2d at 728.
42 Id. at 189, 336 A.2d at 733. For an up-to-date summary of New Jersey lower court decisions interpreting the Mount Laurel mandate, see Rose, The Trickle Before the Deluge from Mount Laurel, 5 REAL ESTATE L.J. 69 (1976).
Some commentators suggest that the term "region" lacks specificity, being equally as undefined as the nebulous "entire area" terminology of the Concord court. They are concerned that a town attempting to abide by the mandate of Mount Laurel may have difficulty measuring the territory for which it is responsible. The court has provided a more definitive standard than did the Concord court, however, in that most states are organizationally divided into various functional "regions." By making reference to these, a local legislative body may more easily be able to determine which regional entity is the basis for calculating each community's regional need.

The Pennsylvania and New Jersey courts, in sum, have expanded the "general welfare" concept to include a regional-state constituency, rather than a local one. Consequently, these courts refuse to allow the suburban municipality to isolate itself from the complex metropolitan structure of which it is an integral part. They impose upon a suburb the responsibility to anticipate the eventualities of population growth.

III. Massachusetts: Judicial Deference to a "Local" General Welfare

A. The Cases

The controversy leading to Wilson v. Sherborn took place in Sherborn, Massachusetts, a small rural town located approximately 20 miles southwest of Boston. The town is almost entirely residential and agricultural in character with a large area of undeveloped land. It has no public water supply or sewerage system so that each house must provide a separate well for water and an individual septic system for sewage disposal. The suitability of the soil to sustain septic systems and water supply installations varies throughout the town. The amount of land necessary to support both a septic

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"See note 110, infra.


system and water supply on a particular parcel of land may vary from a half-acre to as much as eight acres depending upon the particular soil conditions. 50

The petitioner, owner of approximately eighty acres of land located in the two-acre zoning district, 51 brought suit in Land Court 52 to determine the validity of Sherborn's by-law provision requiring minimum lots of two acres. The Land Court found, and the Appeals Court agreed, that because the town was not equipped with a public water supply or municipal sewerage system, and since extra land was required for eventual repair, relocation, and expansion of the sewerage facilities, large lots were "not unreasonable." 53 The two-acre minimum lot ordinance, therefore, was held to be a valid exercise of the zoning powers. The Wilson decision indicates a judicial deference to local no-growth policies including local zoning ordinances with possible exclusionary effects.

The Massachusetts Supreme Judicial Court decided similar zoning policy issues, though obscured by procedural complications, in Collura v. Arlington. 54 There the Town of Arlington adopted a two-year moratorium on the construction of apartment buildings applicable to certain areas of the town. 55 An owner of land located in the moratorium district filed a bill for declaratory relief in Superior Court concerning the validity and effect of the moratorium by-law as applied to his land tract. 56 The landowner argued that the town

52 Pursuant to MASS. GEN. LAWS ch. 240, § 14A (1959) and MASS. GEN. LAWS ch. 185, § 1 (j1/2) (1975).
55 The Moratorium By-Law reads as follows:

Section 9 A. Restrictions in Moratorium District #1. In Moratorium District #1, no new building or part thereof shall be constructed for use as an apartment house or for apartments or for any use in an Industrial District in Moratorium District #1 for a period of two years from the date of approval of this section by the Massachusetts Attorney General's office, or September 1, 1975, whichever date is the longer period of time. Whereas the Town of Arlington is in the process of updating its Comprehensive Plan, it is desired to protect certain parts of the Town from ill-advised development pending the final adoption of a revised Comprehensive Plan and a moratorium on the issuance of building permits for the construction of apartment houses in a Moratorium District in excess of two families is hereby in effect for period of time described above.

Id. at 1755, 329 N.E.2d at 735.
56 Basing its decision on timing and procedural considerations, the Superior Court ruled
lacked the authority to enact a by-law temporarily suspending an existing ordinance for two years.\textsuperscript{57} The Supreme Judicial Court rejected this argument holding that the two-year moratorium on the construction of apartment buildings was valid and within the scope of the Zoning Enabling Act.\textsuperscript{58}

\textit{B. Rejection of the Regional Approach in Massachusetts}

Municipal zoning ordinances are frequently made invulnerable to challenge through two commonly self-imposed restraints on judicial interference. First, the burden of proof generally falls upon the challenger, who has the difficult task of proving the ordinance to be unreasonable, capricious, and arbitrary. Second, the zoning ordinance is presumed to be valid by the courts when the disagreement existing over the question presented is such that it would be resolved more properly by the legislative process.\textsuperscript{59}

The Massachusetts Appeals Court in \textit{Wilson}, while upholding the two-acre minimum lot ordinance, utilized the traditional presumption of validity with a single variation. The court effected a shift in the burden of proof from the challenger of the ordinance to the municipality where the ordinance requires a minimum lot of more than one acre.\textsuperscript{60} With ordinances requiring lots of one acre or less,

in favor of the plaintiff-landowner. A building permit to construct a forty-unit, six-story apartment building was issued to the landowner prior to the enactment of the moratorium by-law, but after notice of a public hearing to consider the by-law. The landowner contended that the moratorium must operate prospectively and, therefore, did not affect his permit issued prior to the moratorium. The Superior Court ruled in favor of the plaintiff-landowner on the grounds that the ordinance operated prospectively. The Supreme Judicial Court reversed the lower court ruling concerning retroactive application of the by-law by declaring the moratorium to be an "amendment" under the Zoning Enabling Act. This finding allowed the court to apply the ordinance retroactively to the plaintiff-landowner pursuant to statutory authorization. \textit{1975 Mass. Adv. Sh.} at 1756-58, 329 N.E.2d at 735-36.


\textsuperscript{58} 1975 Mass. Adv. Sh. at 1763, 329 N.E.2d at 738. Zoning ordinances are enacted by municipalities in accordance with specific state enabling statutes, which limit the use of the state police powers. \textit{R. ANDERSON, AMERICAN LAW OF ZONING} \S 3.09 (1968). Land-use regulations enacted pursuant to such state enabling acts have been recognized as valid since \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365 (1926). The source of a municipality's zoning power in Massachusetts is \textit{MASS. GEN. LAWS} ch. 40A, \S 2 (1968), which "is a broad delegation of authority to cities and towns phrased in general language." \textit{Collura v. Arlington}, 1975 Mass. Adv. Sh. 1753, 1758, 329 N.E.2d 733, 736. The Massachusetts Zoning Enabling Act has as its purpose to promote "the health, safety, convenience, morals or welfare . . . ." \textit{MASS. GEN. LAWS} ch. 40A, \S 2 (1968).

\textsuperscript{59} \textit{FEILER, supra} note 5, at 321.

the traditional presumption still would apply, and the burden of proof would remain with the challenger. 61

In making a distinction between the one-acre ordinance and the ordinance requiring more than one acre, the court adopted the standard and rationale of a prior Massachusetts decision, Aronson v. Town of Sharon. 62 Shifting the burden of proof to the municipality, the Supreme Judicial Court in Aronson reasoned that while an increase in lot size can procure certain desired advantages, 63 "the law of diminishing returns will set in at some point." 64 That point is deemed to be reached when the minimum lot ordinance requires more than one acre.

The potential effect of this burden shifting on the validity of ordinances requiring more than one acre lots is clear. A town, defending a large-lot ordinance, could no longer rest upon the strength of the presumption of validity that attaches to a zoning by-law. The Appeals Court, like the Pennsylvania Supreme Court in National Land, has attempted to make the challenger's burden less onerous.

Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964). Other courts have shifted the burden of proof to the municipality once the ordinance is suspect as exclusionary. National Land and Investment Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965) warned that: "[t]he burden of proof imposed upon one who challenges the validity of a zoning regulation must never be made so onerous as to foreclose, for all practical purposes, a landowner's avenue of redress . . . ." See text at notes 14-24, supra.


"as a practical matter, the question of who has the burden of proof is not really very important. The Justices seem to look at the record presented and form their opinions without substantial reference to methods or standards of proof. If they find the zoning unreasonable, they say that the city has failed to show that the ordinance restriction bears any substantial relation to the public health, safety, and welfare. If they reach the opposite conclusion, they maintain that the person attacking an ordinance has the burden of proof and that the ordinance is presumed to be reasonable.

CRAWFORD, MICHIGAN ZONING AND PLANNING §§ 7.01 et seq. (1963).

62 346 Mass. 598, 195 N.E.2d 341 (1964) [hereinafter cited as Aronson].

63 The Aronson court recognized certain advantages as laid out in Simon v. Needham, 311 Mass. 560, 42 N.E.2d 516 (1942). There the court approved of certain "amenities" that could reasonably "flow" from one-acre lot zoning:

More freedom from noise and traffic might result. The danger from fire from outside sources might be reduced. A better opportunity for rest and relaxation might be afforded. Greater facilities for children to play on the premises and not in the streets would be available. There may perhaps be more inducement for one to attempt something in the way of the cultivation of flowers, shrubs and vegetables.

311 Mass. at 563, 42 N.E.2d at 518.

The actual effect of the burden shifting in Wilson, however, was negligible. Sherborn, by purporting to use its zoning powers in order to prevent a public hazard, added a tinge of urgency and necessity to the municipality’s act. By so characterizing the ordinance as a health protection measure enacted for the purpose of shielding its inhabitants from a “potential,” not even existing, sewerage problem, the town easily satisfied its burden.65 This result occurred despite the fact that the expert evidence which had been presented in the Land Court was sharply divided as to whether a substantial sewerage problem could occur in the future. Moreover, the Land Court itself had expressed grave reservations as to whether zoning was the ultimate cure for “potential” sewerage problems.66 In contrast to the Appeals Court, the Pennsylvania court in National Land recognized that the four-acre restriction there in question was “based upon possible future conditions.”67 That court determined the reasonableness of the ordinance only as it applied to conditions presently existent,68 refusing to allow the town to sustain its burden by merely speculating as to future hazards.

The Wilson court has manifested apparent predisposition to allow communities practically unlimited latitude in determining their future growth rates independent of regional considerations. The lack of a judicial mandate to consider regional needs in the enactment of zoning ordinances greatly aided the town in satisfying the shifted burden. If the court had acknowledged the obvious no-growth implications underlying the large-lot ordinance,69 it could have applied a balancing approach, recognizing and weighing regional needs for added suburban growth against the local need for the two-acre re-

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68 See note 65, supra.

69 The large-lot ordinance permits a community to refrain from expanding its public facilities and services. The Town of Sherborn largely because of large-lot zoning does not have a public water system nor any plans for studying or constructing such a system. Camp, Dresser, & McKee, Inc., Projected Needs and Current Proposals for Water and Sewer Facilities 224 (1969). Additionally, Sherborn does not have a public sewerage system and does not anticipate constructing a facility until the year 1990. The report states that “[c]onsidering future residential development and large-lot zoning, subsurface disposal of sewage would adequately serve the town until the . . . year of 1990.” Camp, Dresser & McKee, Inc., Alternative Regional Sewerage System for the Boston Metropolitan Area, VII-43 (1972).
striction. Using the regional-local balancing approach, the court could still have upheld the validity of the ordinance, but with the added imperative for the town to begin planning for future regional needs.

By not suggesting that the town commence plans for facility improvements, the court allowed Sherborn's lack of a public sewer and water system to bar inevitable metropolitan expansion. Since the town has no impetus to install or expand its facilities, it has effectively restricted future population growth. The court, therefore, has implicitly sanctioned a form of fiscal zoning, in relieving Sherborn from expending public funds to improve and expand its facilities. In contrast, the New Jersey Supreme Court in *Mount Laurel* did not view the lack of sewer and water facilities as a major deterrent preventing the community from assuming its regional obligations. Rather, the court stated: "[w]e understand that sewer and water utilities have not generally been installed, but, of course, they can be."

While large-lot zoning in *Wilson* triggered an ineffective shift in the burden of proof, the Supreme Judicial Court in *Collura* utilized the traditional presumption and burden to uphold a two-year moratorium on the construction of apartment buildings. A moratorium, an example of "interim zoning," is a land-use device used by municipalities to prevent land development during the formulation of a comprehensive plan or other planning policies. This device is usually enacted, as in the Town of Arlington, "to protect certain parts of the Town from ill-advised development pending the final adoption of a revised Comprehensive Plan. . . ."

In scrutinizing the town's moratorium, the *Collura* court reasoned that the only difference between an interim ordinance and a permanent ordinance is that the interim ordinance is in effect for a limited period of time. The court found that the town could exclude apartments from certain districts permanently, and therefore, it could do

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70 See note 20, supra.
so temporarily. Banning the construction of apartment buildings in certain areas for two years, therefore, was a valid use of the zoning power.

Thus, Collura differs factually from Wilson in that the two-year moratorium on apartment construction is not of indefinite length. Sherborn’s two-acre ordinance is in reality a permanent moratorium, since there is no indication that the town will construct municipal facilities and repeal its large-lot ordinance in the foreseeable future. The purpose of the Arlington moratorium, on the other hand, was to better plan the town’s “probable future development” by temporarily halting unwanted development during its planning process. Since the purpose was neither suspect nor questioned, the burden of proof was immovable and remained with the challenger of the ordinance.

C. Exclusionary Zoning

1. Chapter 774: The Legislative Response to Snob Zoning

Before discussing the exclusionary aspects of the Wilson decision, Chapter 774 of the Massachusetts General Laws, popularly known as the Massachusetts “Anti-Snob Zoning Law” should be examined. The court in Wilson summarily treated the allegations of exclusionary effect primarily because of the existence of this statute.

The intent of Chapter 774 is to allow for the construction of housing for low- and moderate-income households in suburbs where restrictive zoning practices preclude such development. The legislative report that became the initial impetus for the enactment of Chapter 774 recognized that restrictive zoning ordinances, although the byproduct of local decision-making, involve underlying economic and social ramifications, including aggravation of housing problems that are regional in scope. Chapter 774 exemplifies the

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74 Id. at 1764, 329 N.E.2d at 738.
75 See note 69, supra.
77 MASS. GEN. LAWS ch. 40B, §§ 20-23, (Supp. 1975), as added by St. 1969 ch. 774 [hereinafter referred to as Chapter 774].
78 METROPOLITAN AREA PLANNING COUNCIL, CHAPTER 774: FOUR YEARS LATER — AN INTERPRETIVE ANALYSIS OF THE LAW AND A REVIEW OF ACTIVITIES, 21, MAPC, 44 School Street, Boston, Massachusetts, 02108 (1974) [hereinafter cited as MAPC].
belief that local land-use decisions should be scrutinized by a governmental body representing a constituency broader than that of the local community.

The statute provides two primary means by which a qualified applicant can construct low- and moderate-income housing in a community that zones against such development by such techniques as large-lot zoning or minimum floor area requirements. First, it simplifies the process by which a qualified developer can obtain the requisite permits.60 Second, it provides a means of bypassing local regulation which would otherwise prohibit construction of low- and moderate-income housing.

The authority to override local zoning by-laws is conferred upon a five-member state Housing Appeals Committee. When an application is denied at the local level or is approved with conditions making the development of subsidized housing economically unfeasible, the developer may appeal to the Housing Appeals Committee for review and possible reversal of the local decision. In deciding a case, the Housing Appeals Committee makes one fundamental determination: whether the local denial of the permit is "consistent with local needs," which according to the law includes regional needs.61 The statute contains guidelines prescribing the minimum amount of subsidized housing which must be available in a town before it can conclusively deny a comprehensive permit.62 If the

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60 Traditionally a developer has had to apply for separate approvals and permits from separate local boards responsible for administering zoning, subdivision control, building, housing, plumbing, electrical, and fire prevention ordinances. Under Chapter 774 the local board of appeals is authorized to issue a "comprehensive permit" which covers all codes. The traditional procedures are streamlined into one application, one hearing, and one comprehensive permit. MAPC, supra note 78, at 12-13.


62 MAPC, supra note 78, at 4-5. Both a maximum guideline and an annual guideline are provided. The maximum guideline indicates that a proposed development is eligible for consideration if the total number of subsidized low- and moderate-income housing units does not exceed 10 percent of the existing housing stock in the community as reported in the latest federal census or if the total amount of land area occupied by subsidized housing does not comprise 1.5 percent or more of the land area zoned for residential, commercial, and industrial use excluding publicly-owned land.

The annual guideline indicates that a development is eligible for consideration if the aggregate area of housing sites proposed for development for low- and moderate-income housing during any one calendar year does not exceed 0.3 percent of the land area zoned for residential, commercial, and industrial use excluding publicly-owned land, or 10 acres, whichever is larger.

According to the Chapter 774 guidelines, the Town of Sherborn has a current housing deficit of 89 low- and moderate-income housing units and the Town of Arlington has a current housing deficit of 1,208 low- and moderate-income housing units. Arlington had 584 subsidized housing units as of the 1970 census data, while Sherborn has none.
Committee determines that the local denial was consistent with the guidelines and other planning objectives, the local decision will stand undisturbed. If, on the other hand, the Committee decides that the local denial is inconsistent with Chapter 774 guidelines, it is empowered to override the local decision and to direct the local board of appeals to issue a comprehensive permit for construction.

2. *The Boomerang Effect of Chapter 774*

The New Jersey and Pennsylvania courts have determined the validity of local ordinances by examining the regional need for housing coupled with the possible exclusionary effects of the challenged by-law. The Massachusetts court in *Wilson*, on the other hand, refused to consider the possible exclusionary effects of the two-acre zoning ordinance deferring to what it considered to be the legislative remedy for exclusionary zoning, Chapter 774, though the statute makes no reference to the exclusiveness of its remedy.

The *Wilson* court narrowly defined exclusionary zoning as any ordinance that primarily affects “the poor” — a collection of land use devices designed to keep out low- and moderate-income groups from suburban areas. In so stating, the court implied that because the Massachusetts legislature had provided a method of dealing with low- and moderate-income housing needs, it should not depart from its traditional position of deference to local legislative judgments on zoning matters. Concluding that any possible exclusionary effect of two-acre zoning “is at least minimized by the anti-snob zoning law,” the court summarily dismissed the impact of the ordinance on low- and moderate-income groups. This unwillingness to interfere with possible exclusionary zoning ordinances, because of the existence of Chapter 774, may be an unforeseen result contrary to the intent of the proponents of Chapter 774.

3. *Effect of Judicial Reliance on Chapter 774*

By precluding consideration of exclusionary zoning issues, the *Wilson* court implied that Chapter 774 is a panacea for exclusionary zoning practices. The statute, however, contains inherent limi-
tions and consequently may not justify a restricted judicial examination of exclusionary zoning issues. First, the statute explicitly applies only to the construction of housing for low- and moderate-income households. By not considering the exclusionary effect of the two-acre ordinance because of the existence of Chapter 774, the Wilson court failed to consider the exclusionary effect of the ordinance on other income groups. Young and elderly couples, single persons, and large families who wish to live within the community but who do not wish to invest in a single-family house, may be prevented from so doing if the town remains zoned exclusively for large lots. In contrast to this confined interpretation of exclusionary zoning, the New Jersey Supreme Court in Mount Laurel recognized the broad implications of large-lot zoning, and demanded that provisions for adequate housing be made for "all categories of people," not simply low- and moderate-income groups.

The second limitation of the statute is that only public agencies, nonprofit corporations, and limited dividend corporations involved in building publicly subsidized housing have recourse to the provisions of the law. The private profit-motivated developer cannot apply for relief under Chapter 774. The law creates a method by which only some developers may seek relief from restrictive provisions in local ordinances.

By enacting Chapter 774, therefore, the legislature did not provide total relief from the exclusionary effects of large-lot zoning. The statute was not intended as an exclusive solution to exclusionary zoning patterns in Massachusetts, but rather as a remedial first step toward lessening their impact upon the low- and moderate-income population. The existence of Chapter 774 does not preempt an active judicial role in seeking a more effective and comprehensive

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90 In order to qualify as a limited dividend entity, the corporation must be organized exclusively for the purpose of providing housing. The shareholders of a limited dividend corporation may not receive annual cash distributions in excess of 6% of their initial equity investment in the housing development as determined by the appropriate government agency. After the corporation has paid its operation and maintenance fees and its overall expenses, the balance may be used to renovate and improve the property. Although a shareholder is limited to a 6% return on his investment, his financial benefits are derived primarily from the tax shelter aspects of the transaction. See Chapter 121A: A Mechanism To Provide Low and Moderate Income Housing, Working Paper No. 8, Office For Housing Development, Metropolitan Area Planning Council, 44 School Street, Boston, Mass. 02108.
92 MAPC, supra note 78, at 12-13.
resolution to exclusionary zoning. Furthermore, although the law incorporates the regional low- and moderate-income housing need into a determination of the local need, the court did not regard Chapter 774 as a legislative expression favoring a local-regional partnership in planning for housing needs. Rather, the court impliedly dismissed both legislative and judicial trends that look suspiciously upon large-lot ordinances. Unless the challenge to a large-lot ordinance is brought by a qualified developer under the auspices of Chapter 774, the Appeals Court is unwilling to delve into possible exclusionary effects.

4. The Exclusionary Effect of the Collura Moratorium

Although the Supreme Judicial Court did not specifically confront an exclusionary zoning ordinance in Collura, underlying notions in the decision may have ramifications for exclusionary zoning. The court in Collura emphasized that the Arlington moratorium did not prohibit all use of land but was "primarily directed at the construction of apartment buildings," and that such prohibition was an "allowable restriction" under the purposes of the Zoning Enabling Act. In a prior decision, Moss v. Winchester, the same court had declined to decide whether a town may constitutionally exclude apartments altogether, but did express disfavor for the Pennsylvania position that a town must provide for apartments somewhere within its boundaries. The court in Collura, however, did address the issue, accepting the proposition that Arlington could have legally restricted apartment construction in the moratorium district permanently, rather than temporarily, if it had decided to do so.

The Collura court noted approvingly that the Arlington moratorium was a "good faith" attempt to better plan for the town's future development. The court implied that a temporary reprieve from

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* Id.
* See text at note 74, supra.
* Statistical evidence demonstrated a proliferation of apartment construction in Arlington during the last decade. Almost sixty-eight percent of all dwelling units constructed in Arlington were apartment units, as compared with seventeen percent in the previous decade. 1975 Mass. Adv. Sh. at 1762, 329 N.E.2d at 737-38.
the onslaught of apartment construction was inextricably related to the process of reviewing the town’s comprehensive plan, “a matter of genuine planning significance.”

The court further stated that the ordinance, limited to a two-year period of applicability, did not encompass “an unreasonable length of time for the town to undertake and complete a thorough review of its comprehensive plan.” Since the court did not specify a time limit which it would consider “unreasonable,” the allowable duration of an interim ordinance is uncertain.

Thus, a Massachusetts community may effectively forestall natural development and exclude potential newcomers through enactment of a lengthy building moratorium. The potential effects of such unlimited license are clear. For example, In Matter of Golden v. Planning Board of Town of Ramapo, the defendant town developed a comprehensive master plan, which included an 18-year capital improvement program and a phased-growth zoning amendment effectively slowing expected population growth. The purpose of the ordinance was to coordinate residential development with the town’s ability to provide needed municipal facilities and services. The New York Court of Appeals held in Ramapo that the phased-growth plan was not exclusionary and, therefore, constituted a con-

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100 Id. at 1762, 329 N.E.2d at 738.
101 Id. at 1763, 329 N.E.2d at 738.
104 The ordinance required a developer to obtain a special permit from the Town Board before receiving a building permit, subdivision approval, or site plan approval from the Planning Board. When considering the eligibility of each residential development, the Board considers the relative availability of five municipal services to each proposed housing development. The distance and accessibility of each public facility to the proposed development is rated on a sliding point scale: the more immediate the availability of the facility to the development the greater the number of points allocated. No permit may be issued unless the developer obtains a minimum of fifteen points. As part of its comprehensive planning, the township developed an 18-year schedule for sewerage and drainage facilities, parks and recreation areas, school sites, roads, and fire houses. The developer may either wait for the town to “qualify” his property for the special permit according to the schedule for the public improvements or he may provide the public services at his own expense and qualify immediately. 30 N.Y.2d 359, 368-69, 285 N.E.2d 291, 295, 334 N.Y.S.2d 138, 143-44 (1972).
105 The court accepted the town’s purpose for enacting the ordinance when it stated: What we will not countenance... under any guise, is community efforts at immunization or exclusion. But, far from being exclusionary, the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient utilization of land. Id. at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.
stitutional exercise of the police powers. Like the Collura court, it considered the phased-growth plan as a temporary not a permanent restriction upon land-use. Though the 18-year time limit in the ordinance is a lengthy restriction, it is not absolute. The Ramapo court determined that the property would be put to a desired use at an appreciated value within a "reasonable time." The majority stated approvingly that the effect of the plan was to provide an overall program of orderly growth coincident with the availability and capacity of public facilities.

On the other hand, interim ordinances with such latitude can be used to exclude multi-family housing or small lot single-family housing from a community for a prolonged period of time. Their use also permits the community to unilaterally determine its rate of growth with the consequent potential for isolation from the needs of the surrounding metropolitan area. On the other hand, since moratoria are judicially accepted in Massachusetts in spite of their inherent exclusionary aspects, they may constitute a useful attempt to protect the planning process and thereby promote orderly growth and development. Commentators have, in fact, encouraged the use of such "interim development controls" in order to promote a flexible system of planning that demands continuous updating and examination. Furthermore, the use of the interim control or morato-

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164 See also Construction Indus. Ass'n v. City of Petaluma, 357 F. Supp. 574 (N.D. Cal. 1974) and Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 44 U.S.L.W. 3473 (1976). Petaluma, California, adopted a plan to limit the city's demographic housing growth. The Plan officially included two main restrictions on growth: (1) a numerical limit in new housing units to be permitted within a 5-year period (2500 units over 5 years), and (2) an "urban extension line" beyond which the city would not expand for 15 years. Unofficially, Petaluma limited its growth by a third means: contracting for water and expanding sewerage services at rates suitable for limited growth under the Plan. These rates were not sufficient for the needs of anticipated growth. In a widely-noted opinion, the federal district court concluded that the efforts of Petaluma to limit its growth to 500 units a year was an indirect violation of the federal constitutional "right to travel." 375 F. Supp. 576. The Court of Appeals reversed the decision, relying on the traditional presumption of validity: "[a] federal court is without authority to weigh and reappraise factors considered or ignored by the legislative body in passing the challenged zoning regulation." 522 F.2d 897, 906 (1975). The Petaluma court concluded that since the regulations "served a legitimate governmental interest" falling within the concept of the public welfare, the preservation of quiet neighborhoods and the preservation of a rural environment, their effect on the overall housing market did not invalidate the ordinance." For an in-depth analysis of Petaluma and Ramapo, see Kellner, Judicial Responses To Comprehensively Planned No-Growth Provisions: Ramapo, Petaluma and Beyond, 4 ENV. AFF. 759 (1975).


168 See authorities cited at note 72, supra. See also Note, A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development, 47 N.Y.U.L. Rev.
rium may prevent a town from hastily adopting permanent controls to ward off nonconforming uses and structures. If instituted for a definite and limited period of time, the interim ordinance may assure that the effectiveness of the planning process will not be destroyed before the plan can be implemented.

IV. Conclusion

When compared with other state court zoning decisions, the Massachusetts judiciary has shown in Wilson and Collura a high degree of judicial deference to local decision-making. Furthermore, it interprets the existence of Chapter 774 as precluding the consideration of the possible exclusionary effects of local ordinances. The major flaw in this approach is that Chapter 774 does not provide a panacea to exclusionary zoning, but only a partial remedy.

In New Jersey and Pennsylvania where the legislature has not acted upon exclusionary zoning practices, the courts have assumed a more active role in local zoning matters. The large-lot ordinance becomes inherently suspect and subject to a strict judicial scrutiny. These courts effect a substantial shift in the burden of proof, requiring the municipality to prove that the ordinance not only is reasonable but also is necessary to promote the general welfare.

Because the possibilities of exclusionary zoning do not trigger a stricter judicial scrutiny in Massachusetts, the large-lot ordinance and building moratorium are presumptively valid, subject at this point only to ineffectual challenge. The courts, in effect, have sanctioned large-lot ordinances and moratoria as methods to forestall local as well as regional growth.

The court decisions in Wilson and Collura may find support, however, in that they reflect a recognition of the limits of town resources. Local government is constrained by its structure to consider the needs of its residents only. As a result, local efforts to incorporate regional needs into town zoning plans may produce haphazard and incongruent results for the region. This situation has led advocates of regional planning to suggest that local zoning decisions be transferred from the smaller to the larger units of government to ensure a unified regional approach. One attempt at such a shift

723 (1972); Contra, Bosselman, Can The Town of Ramapo Pass A Law To Bind The Rights Of The Whole World?, 1 FLA. ST. U.L. REV. 236 (1973).

104 Brown, State Land Use Laws and Regional Institutions, 4 ENV. AFF. 393 (1975) for proposals to strengthen the powers of regional planning agencies and to redistribute local land-use functions.
in decision-making has been the establishment of the Massachusetts Regional Planning Agencies. Their statutory powers, however, are largely advisory, lacking the enforcement "clout" necessary to implement a regional land-use plan.

Until state or regional planning agencies acquire enforcement powers necessary to direct local decision-making, the Massachusetts courts may continue to reaffirm the community's right to zone for its own residents. Such a limited approach to complex social and economic problems bodes ill for future development of the community, the region, and the state.

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110 Id. at 401. There are twelve Regional Planning agencies in Massachusetts, ranging in size from Franklin County with 60,000 people to the Metropolitan Area Planning Council (MAPC) which contains 101 communities and over 2 million people. The statutory powers for the RPA's are advisory. They are empowered to make "studies of the resources, problems, possibilities and needs" of their districts, and are to prepare "a comprehensive plan of development." Mass. Gen. Laws ch. 40B, § 5 (Supp. 1975).

111 Brown, supra note 109, at 401.