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# THE DEVELOPMENT OF ROADWAY AIR RIGHTS: BOSTON'S FUTURE, A SLAVE TO ITS PAST

ANDREW SCHULTE\*

**Abstract:** The City of Boston and the Commonwealth of Massachusetts have attempted to develop air rights over the Boston Extension of the Massachusetts Turnpike ever since its construction during the 1960s. There is widespread agreement among politicians, developers and residents that such development would solve myriad existing problems—from aesthetics to safety, to a dire shortage of groundwater. Nevertheless, very little has been built and the turnpike remains an open scar, dividing the urban landscape and undermining important civic objectives. This Note attempts to explain the historical and legal obstacles that have prevented the development of air rights: namely, a misunderstanding of city planning, a weak and belated home rule amendment, and the lingering effects of an Irish-Yankee rivalry.

## INTRODUCTION

The Boston extension of the Massachusetts Turnpike was built in the 1960s, shortly after the completion of the turnpike proper, to provide access to downtown Boston and revitalize a depressed economy.<sup>1</sup> To that end, the turnpike has more than served its purpose.<sup>2</sup> By the 1990s, the average income levels and employment rates in Boston, which were lagging in the 1960s, far exceeded the national norms.<sup>3</sup> Throughout Boston neighborhoods, vibrant streets and busy shops re-

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<sup>1</sup> YANNI K. TSIPIS, BUILDING THE MASS PIKE 9–10, 47–48 (2002). The legal definition of the “Boston extension” is “that portion of interstate highway route 90 beginning at and including the interchange of interstate highway route 90 and state highway route 128 in the town of Weston and ending in the city of Boston at the interchange of interstate highway route 90 and interstate highway route 93 . . .” MASS. GEN. LAWS ch. 81A, § 3 (2005). The term “turnpike proper” is used to refer to interstate highway route 90 beginning at the Massachusetts/New York border and extending easterly to route 128 in Weston. *See* TSIPIS, *supra*, at 47. This stretch of highway was built before the Boston extension due to financial considerations. *See id.*

<sup>2</sup> BOSTON REDEV. AUTH., A CIVIC VISION FOR TURNPIKE AIR RIGHTS IN BOSTON 4 (2000) [hereinafter CIVIC VISION].

<sup>3</sup> *Id.*

placed empty store fronts.<sup>4</sup> The price of convenience and economic growth, however, has been steep.<sup>5</sup> A filthy, noisy, and wide swath of interstate highway snakes through the center of once interconnected and pedestrian-friendly neighborhoods.<sup>6</sup> In addition, the turnpike has accelerated the depletion of groundwater to the point that wood pilings beneath buildings in the surrounding neighborhoods are rotting away.<sup>7</sup>

From the beginning, policy makers in Massachusetts have been well aware of the proper remedy to the turnpike's unwanted aftermath: the development of air rights.<sup>8</sup> When turnpike construction forced the demolition of a Star Market in Newtonville, the Massachusetts Turnpike Authority (MTA) allowed the supermarket to rebuild over the highway.<sup>9</sup> Additionally, the Prudential Insurance Company undertook a massive air rights development that coincided with the construction of the Boston extension as it cut through the Back Bay in the 1960s.<sup>10</sup> Other than these early examples, legislative hurdles and political rivalries have consistently thwarted the development of air rights, leaving Boston's ugly scar largely open and untreated for nearly fifty years.<sup>11</sup>

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 1 (describing the turnpike as a "physical, social and economic breach"); see Thomas C. Palmer, Jr., *Building on the Pike*, BOSTON GLOBE, Mar. 19, 2006, at E1 (discussing the neighborhood divide created by the turnpike).

<sup>6</sup> CIVIC VISION, *supra* note 2, at 1, 3, 4; Susannah Patton, *Seeking a Clear Vision for Air Rights*, BOSTON HERALD, Feb. 14, 2000, at 23 ("It's an asphalt gash through the heart of Boston, spreading a trail of fumes and noise from Back Bay to Brighton.").

<sup>7</sup> Thomas C. Palmer, Jr., *Columbus Center Will Make an Impact on Boston's Skyline. And Under Ground*, BOSTON GLOBE, Feb. 21, 2005, at D1. Currently, rainwater falls on the turnpike and is swept into the harbor unused—a major problem because buildings in the Back Bay and the South End are built on wood pilings that require moisture to retain their strength. *Id.* A ground level deck, however, will catch the rainfall and allow it to soak into the earth, helping to avert an engineering nightmare and billions of dollars in damage. See *id.*

<sup>8</sup> See CIVIC VISION, *supra* note 2, at 13 ("Efforts to deck over the Turnpike began almost as soon as the extension was completed."); Palmer, *supra* note 5, at E1 (quoting Alex Krieger, an urban planner and chief executive of Chan Krieger & Associates: "Since '62, we've assumed there would be a substantial covering [of the turnpike]"). Air rights have been defined as "the right to occupy the space above a specified plane over, on, or beneath a designated tract of land." Comment, *Conveyance and Taxation of Air Rights*, 64 COLUM. L. REV. 338, 338 (1964).

<sup>9</sup> TSIPIS, *supra* note 1, at 14; see also *Lease of Premises in Newtonville, Massachusetts, Between Massachusetts Turnpike Authority and Star Properties of Newton, Inc.* (July 1, 1963).

<sup>10</sup> TSIPIS, *supra* note 1, at 47–48, 88–89.

<sup>11</sup> See *infra* Part III. Copley Place, completed in 1984, involved the use of air rights but also included a large parcel of terra firma owned by the MTA. Interview with Paul McCann, Executive Assistant to Director, Boston Redevelopment Authority, in Boston, Mass. (Dec. 12, 2007). The twenty-three parcels designated for development by the MTA in the early 1990s—made up almost exclusively of air rights—have proved much more difficult to develop. See Palmer, *supra* note 5, at E5; McCann, *supra*.

The hurdles and rivalries that hinder air rights development also have an insidious effect on Boston's growth in general.<sup>12</sup> Therefore, although this Note focuses on the development of air rights over the Boston Extension of the Massachusetts Turnpike, there is more at stake than this stretch of interstate highway.<sup>13</sup> This Note explains how a historical misunderstanding of the principles of planning, a weak and belated home rule amendment, and an Irish-Yankee rivalry have restricted the City of Boston's ability to control its own growth and have hindered the much-needed development of air rights.

Part I of this Note describes the historical context of Massachusetts' planning and home rule legislation. This historical context explains why Massachusetts legislation operates as it does and how it could have been different. Part II describes the City of Boston's historical development and Irish heritage and the significant role these factors have played in the state legislature's unique treatment of the city with regard to land use law. Part III explains how the historical factors introduced in Parts I and II affect the current development of air rights over the Massachusetts Turnpike, using WinnDevelopment's high profile "Columbus Center" project as a case study. Part IV suggests that the Massachusetts state legislature must break away from past misunderstandings and biases in order to allow for the responsible and efficient development of turnpike air rights and the city as a whole.

## I. MUNICIPALITIES IN MASSACHUSETTS: PLANLESS AND POWERLESS

### A. *Lack of Planning*

Today's land use laws are commonly understood as a binary system of two separate powers: planning and zoning.<sup>14</sup> Planning sets forth long-term growth objectives according to the particular needs of a municipality, such as transportation, affordable housing, and infrastructure.<sup>15</sup> Zoning implements these objectives by specifying where different structures and uses may be built.<sup>16</sup> In their finest form, planning and zoning create a comprehensive and proactive system that prevents disputes before they arise and provides for necessities such as parks,

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<sup>12</sup> See *infra*, Part II (discussing Boston's unique land use laws and the city's resulting lack of control over its own development).

<sup>13</sup> See *infra*, Part II.

<sup>14</sup> See DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 25–27 (6th ed. 2005).

<sup>15</sup> *Id.* at 26–28.

<sup>16</sup> *Id.* at 209.

schools, and affordable housing before they become deficiencies.<sup>17</sup> Some states have come closer to this ideal than others, and Massachusetts is one of the latter.<sup>18</sup>

Massachusetts's land use laws are lacking because planning—one half of the land use law binary system—has been misunderstood and underappreciated for generations.<sup>19</sup> To comprehend the deficiency of planning in Massachusetts, one must study the evolution of land use law from the beginning.<sup>20</sup>

## 1. The National Planning and Zoning Movement

Land use law evolved from nuisance law, which is neither comprehensive nor proactive, but piecemeal and reactive.<sup>21</sup> During the nineteenth century, the inefficiency of nuisance law led many communities to adopt fire and health regulations, such as prohibiting noxious industries from locating in residential areas or limiting the height of wooden buildings.<sup>22</sup> These regulations were more comprehensive than nuisance law, but they only applied to certain industries or particular types of construction.<sup>23</sup> In general, private property rights remained supreme and were only restricted in the most extreme cases.<sup>24</sup>

Eventually, the concept of zoning took root in New York City when the city's Board of Estimate and Apportionment promulgated the first city-wide zoning regulation in 1916.<sup>25</sup> Unlike previous laws, the New York zoning regulations applied to all landowners regardless

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<sup>17</sup> See AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK 7-6 to -7 (Stuart Meck ed., 2002) (listing the advantages of local planning) [hereinafter GROWING SMART]; cf. Joel S. Russell, *Massachusetts Land-Use Laws—Time for a Change*, LAND USE LAW & ZONING DIG., Jan. 2002, at 3, 6 (explaining the inefficiency of zoning without planning).

<sup>18</sup> Russell, *supra* note 17, at 3.

<sup>19</sup> See *infra* Part I.A.2.

<sup>20</sup> See MANDELKER ET AL., *supra* note 14, at 26 (describing the current influence of model acts passed in the 1920s).

<sup>21</sup> See 1 MICHAEL S. GIAIMO, MASSACHUSETTS ZONING MANUAL § 1.2 (Martin R. Healy ed., 4th ed. 2007); MANDELKER ET AL., *supra* note 14, at 52–58. Nuisance claims, like all torts, require past or ongoing conduct by the defendant and substantial harm to the plaintiff, thereby restricting the use of nuisance law to individual cases in the past or present. 1 GIAIMO, *supra*, § 1.2; MANDELKER ET AL., *supra* note 14, at 52.

<sup>22</sup> 1 GIAIMO, *supra* note 21, § 1.2; see, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 414 (1915) (upholding an ordinance prohibiting brick manufacturing in a residential area); *Welch v. Swasey*, 214 U.S. 91, 107–08 (1909) (upholding height restrictions in a residential area of Boston).

<sup>23</sup> 1 GIAIMO, *supra* note 21, § 1.2; see *Hadacheck*, 239 U.S. at 410; *Welch*, 214 U.S. at 107–08.

<sup>24</sup> 1 GIAIMO, *supra* note 21, § 1.2.

<sup>25</sup> *Id.* § 1.2.1; MANDELKER ET AL., *supra* note 14, at 209.

of their business or construction methods.<sup>26</sup> Under the New York model, the entire city was divided into residential, commercial, and unrestricted zones, with each progressive zone allowing for more uses and less restrictive structural regulations.<sup>27</sup>

The validity of zoning regulations, such as the one promulgated in New York City, was challenged in *Village of Euclid v. Ambler Realty Co.*<sup>28</sup> The plaintiff claimed that the zoning ordinance was an unconstitutional deprivation of his liberty and property in violation of equal protection and the due process of law.<sup>29</sup> In a pivotal decision, the Supreme Court held that zoning is a means of protecting the health, safety, and welfare of the public and is therefore a valid exercise of police power.<sup>30</sup> In coming to his conclusion, Justice George Sutherland drew from the common law nuisance theory, *sic utere tuo ut alienum non laedas* (“use your property so as not to damage another’s”).<sup>31</sup> Therefore, so long as zoning is rationally related to preventing harm, it falls under constitutional police powers.<sup>32</sup>

Meanwhile, Herbert Hoover, the Secretary of Commerce under Warren G. Harding, was gaining an appreciation for zoning as a tool to improve the quality of life and promote commerce throughout America.<sup>33</sup> To encourage and control widespread zoning initiatives, Hoover formed the Advisory Committee on City Planning and Zoning (ACCPZ) in 1921 in order to draft a Standard Zoning Enabling Act (SZE) and a Standard City Planning Enabling Act (SCPEA).<sup>34</sup>

The SZE and SCPEA encouraged and aided states nationwide to adopt progressive land use laws.<sup>35</sup> Tragically, the ACCPZ failed to convey the importance of planning and establish it as a prerequisite to zoning.<sup>36</sup> Their failure was both substantive and procedural.<sup>37</sup> In substance, the SZE states that zoning “shall be made in accordance with a

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<sup>26</sup> 1 GIAIMO, *supra* note 21, § 1.2.1; MANDELKER ET AL., *supra* note 14, at 209.

<sup>27</sup> MANDELKER ET AL., *supra* note 14, at 209.

<sup>28</sup> 272 U.S. 365, 384 (1926).

<sup>29</sup> *Id.* Section 1 of the Fourteenth Amendment of the U.S. Constitution states in part, “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

<sup>30</sup> See *Euclid*, 272 U.S. at 389–90.

<sup>31</sup> *Id.* at 387–88; BLACK’S LAW DICTIONARY 1757 (8th ed. 2004).

<sup>32</sup> *Euclid*, 272 U.S. at 389–91.

<sup>33</sup> Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, LAND USE LAW, Feb. 1996, at 3, 3.

<sup>34</sup> *Id.* at 3–6.

<sup>35</sup> See *id.* at 8.

<sup>36</sup> See MANDELKER ET AL., *supra* note 14, at 26; Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157 (1955).

<sup>37</sup> See MANDELKER ET AL., *supra* note 14, at 26; Haar, *supra* note 36, at 1157.

comprehensive plan,” but fails to define what a “comprehensive plan” entails.<sup>38</sup> Even the SCPEA contains contradictory statements and confusing explanations of how the plan should relate to zoning.<sup>39</sup> Procedurally, the ACCPZ published the SZEPA two years before the SCPEA, thereby facilitating zoning without planning.<sup>40</sup>

## 2. Planning and Zoning in Massachusetts

Massachusetts is one of the states that fell through the crack created by the ACCPZ’s failure to properly associate planning and zoning.<sup>41</sup> The General Court of Massachusetts adopted the Commonwealth’s original zoning enabling act in 1920 and recodified it in 1933 after the release of the SZEPA.<sup>42</sup> The planning enabling act, however, was not passed until 1947, thus giving zoning in Massachusetts a twenty-seven year head start on planning.<sup>43</sup>

On its face, the planning enabling act, found in chapter 41, section 81D of the Massachusetts General Laws, appears to require local planning.<sup>44</sup> In reality, the requirement has no teeth because the statute does not give the government any enforcement powers.<sup>45</sup> Moreover, comprehensive plans adopted by local governments are next to meaningless because the statute does not require zoning to be in accordance with the plan.<sup>46</sup> This is not the case in states such as California, Oregon, Rhode Island, Delaware, Florida, and others where a comprehensive plan is required before zoning can take place and continued compliance with the plan is mandatory.<sup>47</sup>

The purpose of a prerequisite, mandatory plan is to prevent haphazard zoning that forfeits long-term goals.<sup>48</sup> Unfortunately, the empty planning legislation in Massachusetts allows for unpredictable zoning

<sup>38</sup> U.S. DEPT. OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 3 (1926); Haar, *supra* note 36, at 1157.

<sup>39</sup> T.J. KENT, JR., THE URBAN GENERAL PLAN 35, 38 (1990); see U.S. DEPT. OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT § 6 (1928).

<sup>40</sup> MANDELKER ET AL., *supra* note 14, at 26.

<sup>41</sup> See Russell, *supra* note 17, at 3–4.

<sup>42</sup> I GIAIMO, *supra* note 21, § 1.3.2 to .3; see MASS. GEN. LAWS ch. 40, § 25 (1933) (current version at MASS. GEN. LAWS ch. 40A (2004)).

<sup>43</sup> See ch. 40A, § 4; MASS. GEN. LAWS ch. 41, § 81D (2004).

<sup>44</sup> MASS. GEN. LAWS ch. 41, §§ 81A, 81D (2004); Russell, *supra* note 17, at 4.

<sup>45</sup> Russell, *supra* note 17, at 4; see ch. 41, §§ 81A, 81D.

<sup>46</sup> Russell, *supra* note 17, at 4; see ch. 41, § 81D (mandating only that the plan shall be internally consistent).

<sup>47</sup> GROWING SMART, *supra* note 17, at 7-65; Russell, *supra* note 17, at 4 n.2.

<sup>48</sup> See Haar, *supra* note 36, at 1157–58.

decisions that create complex legal battles between municipalities and developers.<sup>49</sup>

### B. Weak Home Rule

The authority of municipalities to plan and zone is derived from the police power, which enables governments to pass legislation that provides for the “public health, safety, morals, and welfare.”<sup>50</sup> Some states follow “Dillon’s Rule,” under which police power resides exclusively with the state and may only flow to the municipalities through specific delegation.<sup>51</sup> In other states—“home rule” states—police power over local matters resides with the municipalities and is only limited by specific exemptions or preemptions enacted by the state.<sup>52</sup> Although Massachusetts is technically a home rule state, Boston’s power over local affairs is significantly constricted due to a host of exemptions and preemptions.<sup>53</sup>

#### 1. The National Home Rule Movement

Before the home rule movement, federal and state constitutions gave no rights to local governments.<sup>54</sup> The state specifically defined and delegated every instance of local power.<sup>55</sup> Moreover, most state courts subscribed to Dillon’s Rule which stated that, when in question, grants of power should be narrowly construed.<sup>56</sup>

Today, however, the home rule system has replaced Dillon’s Rule in the majority of states.<sup>57</sup> The home rule revolution came in two waves.<sup>58</sup> The first occurred at the end of the nineteenth century and was more robust—treating cities as independent states within states.<sup>59</sup> Under this model, cities and towns possess unrestricted power over

<sup>49</sup> See Russell, *supra* note 17, at 6.

<sup>50</sup> 1 HEALY ET AL., MASSACHUSETTS ZONING MANUAL § 2.2.1 (Martin R. Healy ed., 4th ed. 2007); see MASS. CONST. pt. 2, ch. 1, § 1, art. IV.

<sup>51</sup> 1 HEALY ET AL., *supra* note 50, § 2.2.1; MANDELKER ET AL., *supra* note 14, at 211–12.

<sup>52</sup> 1 HEALY ET AL., *supra* note 50, § 2.2.1; MANDELKER ET AL., *supra* note 14, at 211–12.

<sup>53</sup> See *infra* Part I.B.2.

<sup>54</sup> 1 HEALY ET AL., *supra* note 50, § 2.2.1; MANDELKER ET AL., *supra* note 14, at 211–12.

<sup>55</sup> 1 HEALY ET AL., *supra* note 50, § 2.2.1; MANDELKER ET AL., *supra* note 14, at 211–12; see *Stetson v. Kempton*, 13 Mass. 271, 281 (1816) (establishing that, in Massachusetts, “the powers of towns, as well as parishes, are either entirely derived from some legislative act, or defined and limited by the general statutes prescribing the powers and duties of both classes of corporations”).

<sup>56</sup> MANDELKER ET AL., *supra* note 14, at 212.

<sup>57</sup> Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10–11 (1990).

<sup>58</sup> *Id.* at 10.

<sup>59</sup> *Id.*

municipal affairs.<sup>60</sup> The second—and more restrained—wave of the home rule revolution followed World War II.<sup>61</sup> Although municipalities still had general police powers over local issues, they could be limited by specific state exemptions.<sup>62</sup> Defined restrictions helped the courts determine what qualifies as “municipal affairs” and what issues are outside the power of local governments.<sup>63</sup>

## 2. Home Rule in Massachusetts

Massachusetts finally adopted a restrained home rule amendment in 1966.<sup>64</sup> Article 89 of the Massachusetts State Constitution, better known as the Home Rule Amendment, empowers municipalities to adopt their own charters, act independently of state-delegated power, and petition the General Court for special legislation.<sup>65</sup> However, the amendment also contains significant limits on these powers.<sup>66</sup>

Most of the municipalities in the Greater Boston area, including Boston itself, have declined their power to adopt their own charters.<sup>67</sup> This is due to the confusing and rigid procedure for adopting charters that is set forth in the Home Rule Amendment.<sup>68</sup> Moreover, by the time the amendment was adopted in 1966, cities in Massachusetts had developed for so long without a home rule charter that adopting one would be immensely complicated.<sup>69</sup> It is easier for Boston and other cities in Massachusetts to petition the General Court for specific changes to the charter rather than adopt an entirely new one.<sup>70</sup> Therefore, one of the most central characteristics of home rule power has gone largely unused in Massachusetts.<sup>71</sup>

Similar to the charter provision, the general powers granted by the Home Rule Amendment are not quite what they seem.<sup>72</sup> Standing

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See Briffault, *supra* note 57, at 10.

<sup>64</sup> DAVID J. BARRON ET AL., *DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON 1* (2004); GERALD E. FRUG & DAVID J. BARRON, *BOSTON BOUND: A COMPARISON OF BOSTON'S LEGAL POWERS WITH THOSE OF SIX OTHER MAJOR AMERICAN CITIES 17* (2007); see MASS. CONST. amend. art. LXXXIX.

<sup>65</sup> MASS. CONST. amend. art. LXXXIX; see BARRON ET AL., *supra* note 64, at 1.

<sup>66</sup> FRUG & BARRON, *supra* note 64, at 17.

<sup>67</sup> BARRON ET AL., *supra* note 64, at 3–4; FRUG & BARRON, *supra* note 64, at 18.

<sup>68</sup> BARRON ET AL., *supra* note 64, at 4–5; FRUG & BARRON, *supra* note 64, at 18; see MASS. CONST. amend. art. LXXXIX, §§ 2–4.

<sup>69</sup> FRUG & BARRON, *supra* note 64, at 17, 18.

<sup>70</sup> BARRON ET AL., *supra* note 64, at 5–6; FRUG & BARRON, *supra* note 64, at 18.

<sup>71</sup> BARRON ET AL., *supra* note 64, at 4; FRUG & BARRON, *supra* note 64, at 18.

<sup>72</sup> FRUG & BARRON, *supra* note 64, at 19.

alone, the declaration that “[a]ny city or town may . . . exercise any power or function which the general court has power to confer upon it” appears expansive.<sup>73</sup> However, large areas of this power have been carved out through exceptions and preemption.<sup>74</sup> Massachusetts Constitutional Amendment, article 89, section 7 lists six areas in which municipalities have no power to act: regulating elections, levying taxes, borrowing money, disposing of park land, enacting private or civil law governing civil relationships, and punishing felonies.<sup>75</sup> These exemptions are very limiting compared to those found in other home rule states.<sup>76</sup>

While the ban on taxing and borrowing may have the most direct effect on local initiatives, the private and civil affairs exception has been defined expansively.<sup>77</sup> For example, in *Marshal House, Inc. v. Rent Review & Grievance Board*, the Supreme Judicial Court of Massachusetts struck down a rent control statute in Boston because it interfered with the “civil relationship” between landlords and tenants.<sup>78</sup>

In addition to expanding written exemptions, the Supreme Judicial Court inferred an additional “intermunicipal” exception in *Beard v. Town of Salisbury*.<sup>79</sup> In that case, the court placed the burden on the town, stating, “nothing in . . . the Home Rule Amendment can be construed to allow a municipality . . . to regulate or prohibit intermunicipal traffic.”<sup>80</sup> According to the Home Rule Amendment, however, the burden should be on the State to prove the amendment specifically *disallows* the action.<sup>81</sup>

Specific exemptions are just one layer of limitation on the Home Rule Amendment; the other is the amorphous preemption clause.<sup>82</sup> Several actions that are not enumerated as exempt are nonetheless outside the power of cities and towns because they are “inconsistent with

<sup>73</sup> MASS. CONST. amend. art. LXXXIX, § 6.

<sup>74</sup> *Id.* §§ 6–7.

<sup>75</sup> *Id.* § 7.

<sup>76</sup> FRUG & BARRON, *supra* note 64, at 20–21 (comparing home rule in Massachusetts to home rule in Colorado, Illinois, California, New York, Washington, and Georgia); *see also* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2263 (2003) (contending that no home rule amendment establishes actual local legal autonomy).

<sup>77</sup> *See* FRUG & BARRON, *supra* note 64, at 20.

<sup>78</sup> 260 N.E.2d 200, 205 (Mass. 1970) (stating “[t]he term ‘private or civil law governing civil relationships’ is broad enough to include law controlling ordinary and usual relationships between landlords and tenants [and] is not so confined as clearly to apply only to general legislation”).

<sup>79</sup> 392 N.E.2d 832, 836 (Mass. 1979).

<sup>80</sup> *Id.*

<sup>81</sup> *See* MASS. CONST. amend. art. LXXXIX, §§ 1, 6 (stating that the power of cities and towns shall only be denied by express or clearly implicated limitations).

<sup>82</sup> *Id.* §§ 6–7.

the constitution or laws enacted by the general court.”<sup>83</sup> The phrase “inconsistent with” allows courts ample discretion when determining which local ordinances to uphold and which to strike down as ultra vires.<sup>84</sup> In *Bloom v. City of Worcester*, the Supreme Judicial Court applied an expansive interpretation of the phrase, stating “[l]egislation which deals with a subject comprehensively, describing (perhaps among other things) what municipalities can and cannot do, may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be frustrated.”<sup>85</sup> Since state legislation deals with a multitude of subjects, the limits to local power are numerous and ever-growing.<sup>86</sup>

## II. BOSTON TAKES THE BRUNT

Boston’s lack of local power is exaggerated by its role as the state’s largest and most densely populated city, as well as a prolonged political rivalry between the Yankees and the Irish.<sup>87</sup> Boston’s position as the most populated city in the Commonwealth creates concerns not present in smaller cities and attracts increased attention from the General Court.<sup>88</sup> Moreover, the historical feud between Boston’s Irish politicians and the Commonwealth’s English-bred politicians led to additional limitations on Boston’s autonomy.<sup>89</sup> Nowhere are these unique concerns and limitations more apparent than in the city’s land use laws.<sup>90</sup>

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<sup>83</sup> *Id.* § 6.

<sup>84</sup> See, e.g., *Anderson v. City of Boston*, 380 N.E.2d 628, 633 (Mass. 1978) (finding that state law regulating election financing barred the City of Boston from spending money on an election information campaign); *Bloom v. City of Worcester*, 293 N.E.2d 268, 280 (Mass. 1973).

<sup>85</sup> 293 N.E.2d at 280.

<sup>86</sup> FRUG & BARRON, *supra* note 64, at 22.

<sup>87</sup> See FRUG & BARRON, *supra* note 64, at 11–17 (describing the long history of state intervention into Boston’s affairs and the reasons for it); David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261, 267 (2005) [hereinafter *Defensive Localism*] (arguing that large cities have a unique need for local autonomy).

<sup>88</sup> See DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES 55 (2003); *Defensive Localism*, *supra* note 87, at 267.

<sup>89</sup> FRUG & BARRON, *supra* note 64, at 14.

<sup>90</sup> See 1960 Mass. Acts 562 (creating a special redevelopment authority for the city of Boston); 1956 Mass. Acts 610–17 (setting forth Boston’s unique zoning laws).

### A. Boston's Unique Characteristics

#### 1. The Flagship City

By their nature, large cities face different issues and more complicated problems than do suburban and rural municipalities.<sup>91</sup> Densely populated cities must address traffic, sanitation, and safety concerns not present in the suburbs.<sup>92</sup> Moreover, cities are a “complex microcosm of the state or nation” in that they include significant economic, residential, and cultural components and are home to the full spectrum of class and race.<sup>93</sup> Smaller towns and suburbs, on the other hand, are often homogeneous and primarily residential.<sup>94</sup>

In the campaign for greater autonomy, the city's “microcosm” designation can be a blessing or a curse.<sup>95</sup> Although home rule is more practical in large and diverse settings, flagship cities demand more attention from state governments because their fate affects the welfare of the entire state.<sup>96</sup> Boston's designation as a “microcosm” has not led to the autonomy enjoyed by several other large cities.<sup>97</sup> Indeed, Boston's unique, big-city issues have led to more state interference, not less.<sup>98</sup>

#### 2. Curse of the Irish

Cultural differences between the residents of a flagship city and the state as a whole often generate distrust between the state and city governments, which leads to increased attention and undue interference.<sup>99</sup> This was certainly the case in Boston, where tens of thousands of Irish immigrants disrupted the traditionally English-bred city during the potato famine of the 1840s.<sup>100</sup> Not only did the Irish arrive in overwhelming numbers, they arrived poor, sick, and for the most part

<sup>91</sup> *Defensive Localism*, *supra* note 87, at 267.

<sup>92</sup> See BERMAN, *supra* note 88, at 55.

<sup>93</sup> Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 347 (1990).

<sup>94</sup> *Id.*

<sup>95</sup> See BERMAN, *supra* note 88, at 55; Briffault, *supra* note 93, at 347.

<sup>96</sup> See BERMAN, *supra* note 88, at 55; Briffault, *supra* note 93, at 347.

<sup>97</sup> FRUG & BARRON, *supra* note 64, at v.

<sup>98</sup> See *id.*

<sup>99</sup> BERMAN, *supra* note 88, at 55–61 (“Behind the condemnation of large cities, one found anti-immigrant, anti-Catholic, and anti-alcohol sentiments, particularly on the part of people in rural areas and state legislators from those areas.”). In addition to Boston, cities such as Chicago, New York, St. Paul, and St. Louis were involved in political/cultural rivalries with their respective state legislatures during the mid-nineteenth century. *Id.* at 55, 58.

<sup>100</sup> THOMAS H. O'CONNOR, *THE BOSTON IRISH: A POLITICAL HISTORY* 1–2, 59–61 (1995).

uneducated.<sup>101</sup> The strain on the economy was undeniable, with large numbers of “aged, blind, paralytic, and lunatic immigrants” becoming “charges on [Boston’s] public charities.”<sup>102</sup> As a result, tax rates increased and property values dwindled.<sup>103</sup>

The cultural impact was even more disturbing than the economic impact for many Protestant, native-born “Yankees.”<sup>104</sup> Poverty and lack of education spawned alcoholism, crime, and violence within the Irish community.<sup>105</sup> The Yankee establishment viewed the Irish as “idle, thriftless, poor, intemperate, and barbarian.”<sup>106</sup> In addition to the cultural divide, the Yankees and Irish had different views of religion, slavery, immigration, and political management.<sup>107</sup> All of these factors led to mutual distrust and political antagonism.<sup>108</sup>

Over time the condition of the Boston Irish improved.<sup>109</sup> When Irish-born Hugh O’Brien won the mayoral election of 1884, it marked their triumphant ascendance from listless immigrants to powerful political leaders.<sup>110</sup> As the Irish took control of City Hall, the Yankees reinforced their power from the State House.<sup>111</sup> From their position in the State House—and without the restrictions of home rule—the Yankees were able to amend Boston’s charter and retool the structure of its government without any input from the Irish.<sup>112</sup> From 1885 to 1909, the State reduced the power of the city council, abolished the board of aldermen, and established commissions to oversee city accounts, budgets, and mayoral appointees.<sup>113</sup>

The State did not always interfere with Boston’s local government unilaterally.<sup>114</sup> During the financial crisis of the 1950s and 1960s, Boston voluntarily handed over control to the State to relieve itself of costs and acquire badly needed funding.<sup>115</sup> For example, in 1956, Bos-

<sup>101</sup> *Id.* at 59–64.

<sup>102</sup> *Id.* at 63 (quoting Mayor John Prescott Bigelow).

<sup>103</sup> *Id.* at 69.

<sup>104</sup> *Id.* at 69–70.

<sup>105</sup> *Id.* at 63–64.

<sup>106</sup> O’CONNOR, *supra* note 100, at 64 (quoting Reverend Theodore Parker).

<sup>107</sup> *Id.* at 81–86, 123–124 (discussing the presidential election of 1860 in the first part and the divergent philosophies of government in the second).

<sup>108</sup> See BERMAN, *supra* note 88, at 55–56; FRUG & BARRON, *supra* note 64, at 11–17.

<sup>109</sup> O’CONNOR, *supra* note 100, at xi, 128.

<sup>110</sup> *Id.*

<sup>111</sup> FRUG & BARRON, *supra* note 64, at 14.

<sup>112</sup> *Id.* at 11–14.

<sup>113</sup> *Id.* at 11–13.

<sup>114</sup> *Id.* at 14–15.

<sup>115</sup> *Id.* Boston’s population dropped by over 100,000 in the 1950s and continued to drop through the 1960s and 1970s due to “structural shifts in the economy, and . . . notoriously high property taxes.” *Id.*

ton's Irish-American mayor, John B. Hynes ceded control of the city's ports, the Tobin Bridge, and Logan Airport to the newly created state agency, the Massachusetts Port Authority.<sup>116</sup> Additionally, Boston gladly allowed the Massachusetts Turnpike Authority—a state entity—to assume the responsibility and costs of building the Boston extension of the turnpike during the 1960s.<sup>117</sup>

The passage of the Home Rule Amendment in 1966 finally restrained the State's ability to interfere with Boston's local government by prohibiting the General Court from passing city-specific laws.<sup>118</sup> The amendment, however, failed to make the prohibition retroactive.<sup>119</sup> Therefore, fallout from the Yankee-Irish rivalry and the post-World War II financial crisis continues to play a central role in Boston politics.<sup>120</sup>

### B. Boston's Unique Land Use Laws

One of the most prominent examples of Boston's special treatment is the fact that the city has its own zoning enabling act and a specially tailored planning and redevelopment authority, with different provisions than those governing the rest of the state.<sup>121</sup>

Boston's zoning enabling act, set forth in chapter 665 of the 1956 Massachusetts Acts, differs from chapter 40A of the Massachusetts General Laws in many significant respects.<sup>122</sup> Chief among these differences is the distribution of power.<sup>123</sup> Whereas the power to pass zoning ordinances is granted to the democratically elected city councilors under chapter 40A, Boston has a separate Zoning Commission.<sup>124</sup> Moreover, members of the Zoning Commission are not elected; instead, five members are nominated by interest groups that represent architects, builders, labor unions, and residential neighborhoods and six are appointed by the mayor according to special criteria.<sup>125</sup>

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<sup>116</sup> FRUG & BARRON, *supra* note 64, at 16.

<sup>117</sup> *Id.*

<sup>118</sup> MASS. CONST. amend. art. LXXXIX, § 8.

<sup>119</sup> *Id.* § 9.

<sup>120</sup> *See id.*

<sup>121</sup> 2 CYNTHIA M. BARR, MASSACHUSETTS ZONING MANUAL § 16.2.1 (Martin R. Healy ed., 4th ed. 2007). *See generally* MASS. GEN. LAWS ch. 40A (2004) (setting forth the zoning laws that govern every city and town in Massachusetts other than Boston); 1956 Mass. Acts 610–17 (setting forth the zoning laws that govern Boston).

<sup>122</sup> FRUG & BARRON, *supra* note 64, at 65–68; BARR, *supra* note 121, at § 16.2. *See generally* MASS. GEN. LAWS ch. 40A (2004); 1956 Mass. Acts 610–17.

<sup>123</sup> *See* FRUG & BARRON, *supra* note 64, at 65.

<sup>124</sup> *Id.*; *see* ch. 40A, § 5; 1956 Mass. Acts 612.

<sup>125</sup> 1993 Mass. Acts 1373 (original version at 1956 Mass. Acts 611).

Much like its zoning enabling act, Boston's redevelopment authority is the result of special legislation.<sup>126</sup> The Boston Redevelopment Authority (BRA) is a semi-public corporation charged with drafting a comprehensive plan, encouraging economic growth, and making recommendations to the Zoning Commission.<sup>127</sup> Other redevelopment authorities in Massachusetts are under the control of the City Commission, but BRA board members are appointed by the mayor (four appointees) and the governor (one appointee).<sup>128</sup> Additionally, every other municipality in Massachusetts has a planning board *and* a redevelopment authority, thereby separating the two functions.<sup>129</sup> In Boston, both powers are held by the BRA.<sup>130</sup> The unique concentration of power held by the BRA has been highly controversial.<sup>131</sup> Opponents argue that an entity charged with economic development and planning has an unavoidable conflict of interest because they are responsible for both long-term goal setting and short-term economic return.<sup>132</sup>

The BRA is similar to other redevelopment authorities throughout the Commonwealth in one significant respect: adherence to the comprehensive plan is not mandatory.<sup>133</sup> As explained in Part I, the Massachusetts General Laws do not mandate adherence to comprehensive plans and, for the purpose of interpreting the BRA's planning powers, chapter 652, section 12 of the 1960 Massachusetts Acts states that the BRA is subject to Massachusetts General Laws.<sup>134</sup>

The relatively small role played by the city's elected officials and the conflicting goals of the BRA illustrate Massachusetts' misunderstanding and under-appreciation of planning.<sup>135</sup> The Standard City Planning Enabling Act encourages the adoption of an independent

<sup>126</sup> 1960 Mass. Acts 562.

<sup>127</sup> See FRUG & BARRON, *supra* note 64, at 68–71; BARR, *supra* note 121, at § 16.4.4.

<sup>128</sup> FRUG & BARRON, *supra* note 64, at 68–69; BARR, *supra* note 121, at § 16.4.4.

<sup>129</sup> MASS. GEN. LAWS ch. 41, § 81A (2004) (stating that every city, *except Boston*, with a population over ten thousand shall establish a planning board); MASS. GEN. LAWS ch. 121B, § 4 (2003) (establishing redevelopment authority for every city and town in Massachusetts).

<sup>130</sup> 1960 Mass. Acts 562 (abolishing Boston's planning board and transferring its powers to the BRA).

<sup>131</sup> See FRUG & BARRON, *supra* note 64, at 69–70; *see, e.g.*, Shirley Kressel, *BRA Lacks a Vision for Boston*, BOSTON GLOBE, June 8, 1998, at A15.

<sup>132</sup> Kressel, *supra* note 131, at A15.

<sup>133</sup> See MASS. GEN. LAWS ch. 41, § 81D (2004); 1960 Mass. Acts 562.

<sup>134</sup> See ch. 41, § 81D; 1960 Mass. Acts 562.

<sup>135</sup> See U.S. DEPT. OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT § 2 n.10 (1928) (noting that the purpose of a planning board is to foil city councilmen who may want to move too quickly); FRUG & BARRON, *supra* note 64, at 68–71 (observing that the BRA often moves "too quickly to remake the city's physical landscape without sufficient consultation with those who will be affected").

planning commission for good reason—to avoid the “pressures of purely current problems.”<sup>136</sup> In Boston, this mandate has been lost.<sup>137</sup>

### III. HISTORY’S EFFECT ON THE DEVELOPMENT OF AIR RIGHTS

The lack of appreciation for planning, the belated and weak Home Rule Amendment, and the state versus city rivalry have all played a part in the struggle to get air rights projects off the ground.<sup>138</sup> All of these factors converged in the passing of the Massachusetts Turnpike Authority’s (MTA) zoning exemption for the development of air rights over the Boston extension of the turnpike.<sup>139</sup>

Chapter 81A, section 15 of the Massachusetts General Laws subjects the use of air rights over the turnpike to the state building code and to “such other requirements as the [MTA] deems necessary or advisable to promote the public health, convenience, and safety of persons and property.”<sup>140</sup> The section, however, exempts the development of air rights from “any other building, fire, garage, health or zoning law or any building, fire, garage, health or zoning ordinance, rule or regulation applicable in the city of Boston.”<sup>141</sup> This exemption is limited, however, because the development of air rights requires terra firma upon which to dig footings, attach the deck, and connect utilities.<sup>142</sup> Unlike air rights, terra firma must comport with Boston’s zoning code according to chapter 81A, section 16 of the Massachusetts General Laws.<sup>143</sup> With the BRA in control of the terra firma on either side of the turnpike, and the MTA holding on to its zoning exemption, a thirty-four year standoff ensued, during which little was built.<sup>144</sup>

Eventually, the Central Artery/Tunnel Project (CA/T project), better known as the Big Dig, forced the two sides to the negotiation table.<sup>145</sup> With the cost of the CA/T project escalating by the billions, in-

<sup>136</sup> U.S. DEPT. OF COMMERCE, *supra* note 135, § 2 n.10.

<sup>137</sup> See Kressel, *supra* note 131, at A15.

<sup>138</sup> See *infra* Parts III.A–C.

<sup>139</sup> See *infra* Parts III.A–C.

<sup>140</sup> MASS. GEN. LAWS ch. 81A, § 15 (2005).

<sup>141</sup> *Id.*

<sup>142</sup> McCann, *supra* note 11.

<sup>143</sup> MASS. GEN. LAWS ch. 81A, § 16.

<sup>144</sup> See Anthony Flint, *Big Dig’s Real Estate an Untapped Gold Mine*, BOSTON GLOBE, Feb. 17, 2000, at B1 (describing the prolonged rivalry between the MTA and the City of Boston); Patton, *supra* note 6, at 23 (discussing the long interim between the construction of the turnpike and the drafting of the CIVIC VISION); McCann, *supra* note 11.

<sup>145</sup> See Flint, *supra* note 144, at B1 (discussing the MTA’s desire to use revenue from air rights development to offset the mounting cost of the CA/T project); McCann, *supra* note 11. The CA/T project was a massive undertaking that involved replacing 7.3 miles of highway with an extensive tunnel system beneath the heart of downtown Boston. See MASS. TURNPIKE

come from the development of air rights became increasingly necessary.<sup>146</sup> To this end, the MTA and the BRA broke their stalemate and drafted several mechanisms to bridge the void created by the zoning exemption.<sup>147</sup> These mechanisms, while providing guidelines similar to those found in a zoning ordinance, are marred by the very shortcomings that created the exemption in the first place: unenforceable comprehensive plans, weak home rule, and the legacy of the Irish-Yankee feud.<sup>148</sup>

#### A. *The Effects of Weak Planning Legislation on Air Rights Development*

The 1963 enactment of the air rights zoning exemption illustrated the Commonwealth's lack of appreciation for comprehensive local planning.<sup>149</sup> Air rights parcels in Boston comprise forty-four acres of potential real estate valued at more than \$500 million.<sup>150</sup> With no control over such a large and crucial swath of land, the BRA's ability to carry out its duty as the city's planning board has been severely limited.<sup>151</sup>

Even after the CA/T project led to a compromise, the effects of Massachusetts' weak planning legislation persisted.<sup>152</sup> The document that purports to be a comprehensive plan for air rights development—*A Civic Vision for Turnpike Air Rights in Boston (Civic Vision)*—is limited by chapter 41, section 81D of the Massachusetts General Laws, which fails to make adherence to comprehensive plans mandatory.<sup>153</sup> Indeed, the first successful air rights development proposal since the compromise strays significantly from the *Civic Vision*, setting a dangerous, yet all-too-familiar precedent.<sup>154</sup>

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AUTH., COST/SCHEDULE UPDATE OF THE CENTRAL ARTERY/TUNNEL PROJECT 3 (2007), available at [http://www.massturnpike.com/pdf/finances/costschedule\\_0507.pdf](http://www.massturnpike.com/pdf/finances/costschedule_0507.pdf). The project cost \$14.8 billion and required the cooperation of the city, state, and federal governments. *See id.* at 8–9.

<sup>146</sup> See Flint, *supra* note 144, at B1; Patton, *supra* note 6, at 23.

<sup>147</sup> CIVIC VISION, *supra* note 2, at 13–14; Patton, *supra* note 6, at 23.

<sup>148</sup> See *infra* Parts III.A–C.

<sup>149</sup> See MASS. GEN. LAWS ch. 81A, § 15 (2005).

<sup>150</sup> FRUG & BARRON, *supra* note 64, at 77.

<sup>151</sup> See *supra* Part II.B; cf. Memorandum from the Conservation Law Found. to Robert Durand, Executive Office of Env'tl. Affairs and Randi Lathrop, Boston Redev. Auth. 1 (Feb. 8, 2002) [hereinafter CLF Memorandum] (expressing the breadth of air rights development and the importance of city control over such development).

<sup>152</sup> See, e.g., CLF Memorandum, *supra* note 151, at 4–6 (illustrating the lack of adherence to the CIVIC VISION—the purported comprehensive plan for turnpike air rights).

<sup>153</sup> See MASS. GEN. LAWS ch. 41, § 81D (2004); CIVIC VISION, *supra* note 2, at 1.

<sup>154</sup> See CLF Memorandum, *supra* note 151, at 4–6.

## 1. Origins of the *Civic Vision*

As the CA/T project got underway in 1993, the MTA issued the *Air Rights Study* in order to inform public discussion about “[w]hat kind of development should be encouraged, how much development could be accommodated, and where along the corridor should development be located[.]”<sup>155</sup> With the BRA maintaining control over the terra firma, the MTA’s study was merely exploratory.<sup>156</sup> Nevertheless, the issues, opportunities, and development scenarios it introduced facilitated discussion about the future development of air rights.<sup>157</sup>

In 1997, with the cost of the CA/T project mounting, the state legislature instructed the MTA and the BRA to sign a memorandum of understanding (MOU) regarding the development of air rights over the turnpike.<sup>158</sup> The MOU is based on article 80 of the Boston Zoning Code—an article that empowers the BRA to make a scoping review and adequacy determination of all development projects in Boston that result in the addition of at least 20,000 square feet.<sup>159</sup> For the most part, the MOU mirrors the procedure set forth in article 80, section B-5, with the notable additions of MTA oversight and an arbitration clause.<sup>160</sup>

In 1988 Boston Mayor Thomas M. Menino created a Strategic Development Study Committee (SDSC) to set standards of review for

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<sup>155</sup> MASS. TURNPIKE AUTH., AIR RIGHTS STUDY 1 (1993).

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

<sup>158</sup> 1997 Mass. Acts 34; Memorandum of Understanding between Mass. Turnpike Auth. and the City of Boston para. 1 (June 1, 1997) [hereinafter Memorandum of Understanding]. The MOU has created such a unique partnership between the state and the city that one commentator labeled the unified support for air rights projects as “the rarest of political evolutions.” Cosmo Macero, Jr., *Why Columbus Center Matters*, BOSTON HERALD, Feb. 27, 2006, at 24.

<sup>159</sup> BOSTON, MASS., ZONING CODE art. 80, §§ B-2, E-2 (2008) (setting forth the applicability of article 80 review). Compare ZONING CODE art. 80, § B-5 (setting forth the procedure for large project review), with Memorandum of Understanding, *supra* note 158, art. 3 (setting forth the procedure for air rights project review).

<sup>160</sup> Compare ZONING CODE art. 80, § B-5, with Memorandum of Understanding, *supra* note 158, art. 3, § 2. Both article 80 and the MOU require the proponent to subject its plans to public comments and a “scoping determination” by the BRA. ZONING CODE art. 80, § B-5.3; Memorandum of Understanding, *supra* note 158, art. 3, § 2(a)–(c). The BRA may then require the proponent to modify its plans. ZONING CODE art. 80, § B-5.4; Memorandum of Understanding, *supra* note 158, art. 3, § 2(d). After reviewing the modified plans, the BRA must issue a project determination in which the proposed project shall be certified as filed, subjected to reasonable conditions, or denied altogether. ZONING CODE art. 80, § B-5.4; Memorandum of Understanding, *supra* note 158, art. 3, § 2(d). The MOU differs from article 80 in that the “scoping determination” is subject to MTA approval and the proponent may exercise an arbitration clause if certification is “unreasonably withheld, conditioned or delayed.” Memorandum of Understanding, *supra* note 158, art. 3, § 2(c), 2(f) (3).

MOU projects.<sup>161</sup> Through collaboration with city and state agencies, developers, and community members, the SDSC established general development objectives such as increasing public transportation, enriching the unique characteristics of surrounding neighborhoods, creating affordable housing and jobs, and improving the public realm.<sup>162</sup> Additionally, the SDSC applied these general objectives to the specific needs of each affected neighborhood.<sup>163</sup> Together, the MOU and the *Civic Vision* provide guidelines that would normally be found in a zoning ordinance.<sup>164</sup>

## 2. Limits of the *Civic Vision*

While the MOU is a binding legal document, the *Civic Vision* cannot be enforced in and of itself.<sup>165</sup> The lack of enforceability comports with Massachusetts's standard approach to planning—as an activity that is encouraged, but is neither mandatory nor enforceable.<sup>166</sup> The *Civic Vision*, like all other Massachusetts comprehensive plans, may be ignored without consequence.<sup>167</sup> Indeed, “Columbus Center”—the first air rights proposal to gain BRA approval since the 1997 MOU—varies significantly from the *Civic Vision*'s guidelines.<sup>168</sup>

Columbus Center is a planned multiuse development spanning Boston's Back Bay, South End, and Bay Village neighborhoods.<sup>169</sup> The project, as proposed by WinnDevelopment, involves over one million square feet of livable space, including approximately 199 hotel rooms, 493 residential units, a health club, a daycare, retail stores, and restaurants.<sup>170</sup> If completed, the project will include thirty-five story, fourteen story, and seven story buildings on three adjacent air rights parcels.<sup>171</sup>

The Conservation Law Foundation (CLF), New England's largest nonprofit environmental advocate, noted the significant discrepancies between the *Civic Vision* and WinnDevelopment's proposal in a memorandum of concern addressed to the BRA during the MOU-styled re-

<sup>161</sup> CIVIC VISION, *supra* note 2, at 1.

<sup>162</sup> *Id.* at 1, 55–57.

<sup>163</sup> *Id.* at 59–83.

<sup>164</sup> *See id.* at 13–14.

<sup>165</sup> *Id.* at 1 (“This *civic vision*, while not a zoning code, provides a framework for the future Citizens Advisory Committees and the City of Boston to review air rights proposals.”).

<sup>166</sup> *See supra* Part I.A.2.

<sup>167</sup> *See supra* Part I.A.2.

<sup>168</sup> *See* CLF Memorandum, *supra* note 151, at 4–6.

<sup>169</sup> BOSTON REDEV. AUTH., DEVELOPMENT PLAN FOR PLANNED DEVELOPMENT AREA NO. 62, at 1–3 (2003) [hereinafter COLUMBUS CENTER PDA].

<sup>170</sup> *Id.* at 1, 3–4.

<sup>171</sup> *Id.* at 3–6.

view process.<sup>172</sup> CLF's memorandum observes that—among other substantial deviations—the Columbus Center proposal involves taller buildings, significantly less green space, far more parking spaces, and less public access than called for by the *Civic Vision*.<sup>173</sup> The BRA, however, chose to approve WinnDevelopment's proposal despite these inconsistencies.<sup>174</sup> Unfortunately for the CLF and its clients, there is no legal recourse for enforcing the *Civic Vision* due to Massachusetts's weak planning enabling statute.<sup>175</sup>

### B. *The Effects of Weak Home Rule on Air Rights Development*

In powerful home rule states, the MTA's influence over the BRA's ability to guide development in Boston would be impermissible.<sup>176</sup> Amendments adopted pursuant to the first, more robust wave of the home rule revolution grant local governments unrestricted jurisdiction over all "municipal affairs."<sup>177</sup> Planning and zoning (along with public education) are two of the most fundamental and widely recognized municipal affairs.<sup>178</sup> In Massachusetts, however, the State may explicitly or implicitly preempt any local power—including those as fundamental as planning and zoning.<sup>179</sup> The MTA's zoning exemption under chapter 81A, section 15 of the Massachusetts General Laws is an example of explicit preemption under the Commonwealth's Home Rule Amendment.<sup>180</sup>

The extent of the preemption and its relationship with the MOU is the subject of an ongoing controversy.<sup>181</sup> While chapter 81A, section 15 authorizes the MTA to lease *air rights* and *exempts* such leases from zoning, section 16 authorizes the MTA to lease *land* but expressly *subjects* these leases to zoning.<sup>182</sup> As explained above, the city's ability to

<sup>172</sup> CLF Memorandum, *supra* note 151, at 4–6.

<sup>173</sup> *Id.*

<sup>174</sup> See Memorandum from Susan Hartnett, Dir. of Econ. Dev., Boston Redev. Auth., et al., to Mark Maloney, Dir., Boston Redev. Auth. 4–5 (Oct. 23, 2003) [hereinafter BRA Memorandum].

<sup>175</sup> See *supra* Part I.A.2.

<sup>176</sup> See Briffault, *supra* note 57, at 10 (discussing the immunity from state interference enjoyed under powerful home rule amendments).

<sup>177</sup> *Id.*

<sup>178</sup> MANDELKER ET AL., *supra* note 14, at 211.

<sup>179</sup> See MASS. CONST. amend. art. LXXXIX, § 6; *supra* Part I.B.2.

<sup>180</sup> See MASS. CONST. amend. art. LXXXIX, § 6; MASS. GEN. LAWS ch. 81A, § 15 (2005).

<sup>181</sup> Cosmo Macero, Jr., *Conflict Towers over Plan; Zoning, Building Height Snags for Pike Project*, BOSTON HERALD, July 2, 1999, at 25; CLF Memorandum, *supra* note 151, at 13–14.

<sup>182</sup> MASS. GEN. LAWS ch. 81A, §§ 15–16 (2005).

control the terra firma was instrumental in preventing the development of air rights before the 1997 MOU.<sup>183</sup>

Ironically, the clear-cut division of control between air rights and terra firma—the very situation that made the MOU necessary—was distorted by language within the MOU.<sup>184</sup> The MTA claims that the MOU acknowledges a statutory zoning exemption for both air rights *and* land.<sup>185</sup> CLF and other groups claim that the provisions of chapter 81A, section 16 prevail no matter what the MOU may suggest, and therefore, projects involving terra firma are subject to the article 80 review process.<sup>186</sup> Thus far, the issue has not been litigated.<sup>187</sup> If the conflict does go to court, however, Massachusetts’s Home Rule Amendment could play a major role.<sup>188</sup> The Home Rule Amendment prohibits any local law that is “inconsistent with the constitution or laws enacted by the general court.”<sup>189</sup> The flexibility of the phrase “inconsistent with” may be enough to prevent article 80 review over projects involving both air rights and terra firma.<sup>190</sup>

### C. *The Effects of the Irish-Yankee Feud on Air Rights Development*

#### 1. The Feud’s Influence on the Zoning Exemption

The MTA’s zoning exemption does not apply anywhere but the city of Boston—an anomaly that would violate the Home Rule Amendment if it were passed today.<sup>191</sup> The exemption, however, was passed in 1963, three years before Massachusetts enacted the amendment, and therefore remains good law.<sup>192</sup> Although Boston was in need of funding for a turnpike in the 1960s and welcomed state aid, the special zoning exemption and continued state control of the Boston extension is an unwanted descendant of the old Irish-Yankee rivalry.<sup>193</sup>

On the other hand, the State views the zoning exemption as fair consideration for construction of the Turnpike and security on their

<sup>183</sup> See *supra* notes 138–142 and accompanying text.

<sup>184</sup> See Memorandum of Understanding, *supra* note 158, para. 3.

<sup>185</sup> Macero, *supra* note 181, at 25.

<sup>186</sup> FRUG & BARRON, *supra* note 64, at 78; Macero, *supra* note 181, at 25; CLF Memorandum, *supra* note 151, at 13–14.

<sup>187</sup> FRUG & BARRON, *supra* note 64, at 78.

<sup>188</sup> See MASS. CONST. amend. art. LXXXIX, § 6.

<sup>189</sup> See MASS. CONST. amend. art. LXXXIX, § 6; *supra* Part I.B.2.

<sup>190</sup> See MASS. CONST. amend. art. LXXXIX, § 6; *supra* Part I.B.2.

<sup>191</sup> MASS. CONST. amend. art. LXXXIX, § 8; MASS. GEN. LAWS ch. 81A, § 15 (2005).

<sup>192</sup> MASS. CONST. amend. art. LXXXIX, § 9; 1963 Mass. Acts 377 (codified at MASS. GEN. LAWS ch. 81A, § 15).

<sup>193</sup> McCann, *supra* note 11.

investment.<sup>194</sup> Subjecting plans to the BRA's review process, however, does not nullify the economic benefits of air rights development.<sup>195</sup> Indeed, the MOU and the *Civic Vision* allow for city review and economically beneficial development.<sup>196</sup> Therefore, economic factors alone cannot explain the MTA's zoning exemption and the ensuing thirty-four year standoff.<sup>197</sup> This is because the exemption was more personal than financial; it was a product of the Irish-Yankee political saga.<sup>198</sup>

Even with the signing of the MOU and the publication of the *Civic Vision*, the exemption still looms large.<sup>199</sup> While Boston's zoning code is vast and flexible, the MOU is narrow in scope and void of alternatives.<sup>200</sup> For example, under the Boston Zoning Code, the BRA/Zoning Commission may designate "special purpose overlay districts" with distinct regulations and review procedures.<sup>201</sup> One such overlay district is called a "Planned Development Area" (PDA).<sup>202</sup> PDAs can be established for large projects through a contract signed by the BRA and the developer.<sup>203</sup> The contract grants the BRA increased control over the developer's project in return for streamlined approval.<sup>204</sup>

The MOU does not provide for the flexibility of overlay districts.<sup>205</sup> Nevertheless, the BRA was able to circumvent the limits of the MOU by signing a PDA agreement with WinnDevelopment, which places Columbus Center in an overlay district with all the authority of a normal

<sup>194</sup> *Id.*; see TSIPIS, *supra* note 1, at 48 (noting that the cost of the Boston extension was \$180 million).

<sup>195</sup> See CIVIC VISION, *supra* note 2, at 29 ("Consideration of economic feasibility is very important in crafting an achievable *civic vision* and Guidelines."); Memorandum of Understanding, *supra* note 158, art. 3, §§ 2(c), 2(f)(1) (providing the MTA with oversight of the review process in section 2(c) and prohibiting the BRA from unreasonably withholding approval in section 2(f)(1)).

<sup>196</sup> See CIVIC VISION, *supra* note 2, at 29; Memorandum of Understanding, *supra* note 158, art. 3, § 2(c), 2(f)(1).

<sup>197</sup> See CIVIC VISION, *supra* note 2, at 29; Memorandum of Understanding, *supra* note 158, art. 3, § 2(c), 2(f)(1).

<sup>198</sup> See *supra* Part II.A.2.

<sup>199</sup> See *infra* notes 206–208 and accompanying text.

<sup>200</sup> Compare BOSTON, MASS., ZONING CODE art. 3, § 1A (2008) (establishing flexible overlay districts), and ZONING CODE art. 80, § C (setting forth the procedure for establishing custom-designed planned development areas), with Memorandum of Understanding, *supra* note 158, art. 3, § 2 (setting forth a procedure void of alternatives).

<sup>201</sup> ZONING CODE art. 3, § 1A.

<sup>202</sup> *Id.* art. 3, § 1A(a).

<sup>203</sup> See *id.* art. 80, § C; see, e.g., COLUMBUS CENTER PDA, *supra* note 169.

<sup>204</sup> Compare ZONING CODE art. 80, § C-5, with ZONING CODE art. 80, § B-5.

<sup>205</sup> See Memorandum of Understanding, *supra* note 158, art. 3, § 2.

zoning code.<sup>206</sup> Due to the MTA's zoning exception and according to the procedure set forth by the MOU, however, the plan signed by the BRA and WinnDevelopment is voluntary.<sup>207</sup>

Although the agreement and resulting PDA is enforceable against WinnDevelopment due to its signature, it may not be enforceable if another developer were to take over the project.<sup>208</sup> The voluntariness of the PDA may come into play because of Columbus Center's current financial problems and the common practice of transferring development rights from one proponent to another.<sup>209</sup> If such a takeover were to occur with Columbus Center, the regulations set forth by the PDA could very well be null and void.<sup>210</sup>

## 2. Boston's Peculiar Planning Board

Another instance of Irish-Yankee influenced legislation—the peculiar organization of the BRA—also continues to effect the development of air rights.<sup>211</sup> As explained in Part II, every other municipality in Massachusetts has a planning board *and* a redevelopment authority, while in Boston, both powers are held by the BRA.<sup>212</sup> According to many, this represents an irreconcilable conflict of interest.<sup>213</sup> The consequences of this conflict have been on display throughout Columbus Center's highly publicized review process.<sup>214</sup> In fact, CLF's memorandum of concern addressed to the BRA illustrates that the long-term

<sup>206</sup> COLUMBUS CENTER PDA, *supra* note 169, at 1; *see* ZONING CODE art. 3, § 1A(a); ZONING CODE art. 80, § C.

<sup>207</sup> *See* MASS. GEN. LAWS ch. 81A, § 15 (2005); Memorandum of Understanding, *supra* note 158, art. 3, § 2. *See generally* COLUMBUS CENTER PDA, *supra* note 169.

<sup>208</sup> *See* ch. 81A, § 15; COLUMBUS CENTER PDA, *supra* note 169, at 1.

<sup>209</sup> *See* Andrea Estes & Thomas C. Palmer, Jr., *Turnpike May Halt Columbus Center Job: \$800m Project Loses Its Biggest Lender*, BOSTON GLOBE, Dec. 13, 2007, at A1 (reporting that Columbus Center's largest lender backed out of the project and that the MTA threatened to halt construction); Casey Ross, *Columbus Center May Get a Lifeline; Two Developers to Scour Project's Finances*, BOSTON GLOBE, Sept. 4, 2008, at A1 (reporting that two separate developers, Related Properties and the Beal Companies, have been hired as consultants for Columbus Center and may invest in the venture); Scott Van Voorhis, *Pike Tower Plan Stalls: Builder Seeks 18-Month Delay*, BOSTON HERALD, Mar. 28, 2008, at 18 (reporting that financial trouble forced Columbus Center developers to ask for a delay and that some lawmakers are pushing to rebid the project).

<sup>210</sup> *See* ch. 81A, § 15; Memorandum of Understanding, *supra* note 158, art. 3, § 2. *See generally* COLUMBUS CENTER PDA, *supra* note 169.

<sup>211</sup> *See, e.g.*, CLF Memorandum, *supra* note 151, at 4–6, 9–12 (noting that elements of the CIVIC VISION were sacrificed for economic reasons).

<sup>212</sup> *See supra* Part II.B.

<sup>213</sup> *See* FRUG & BARRON, *supra* note 64, at 69–70; Kressel, *supra* note 131, at A15.

<sup>214</sup> *See* CLF Memorandum, *supra* note 151, at 4–6, 9–12.

goals of the *Civic Vision* have already been sacrificed for the sake of economic growth.<sup>215</sup>

CLF argued that the *Civic Vision* and the MOU should augment—not replace—article 80’s scoping determination and citizen review requirements.<sup>216</sup> Additionally, CLF urged the *Civic Vision* to be utilized as a mandatory plan rather than a mere proposal.<sup>217</sup> Neither of these demands was heard during the Columbus Center negotiations, and therefore, the project avoided several article 80 provisions and varies markedly from the plan outlined by the *Civic Vision*.<sup>218</sup>

Moreover, CLF pointed to clear language in the *Civic Vision* stating that the goals therein should not be sacrificed for economic reasons alone: “[t]he SDSC believes inappropriate air rights development—projects that generate too much traffic or require buildings that diminish the character of their surroundings—should not be built. . . . These Guidelines should not be compromised in response to weak real estate conditions.”<sup>219</sup> Despite this strong language, proponents for Columbus Center have indicated that variation from the *Civic Vision* was necessary for the sake of economic feasibility.<sup>220</sup> It is hardly surprising that the BRA is willing to compromise a comprehensive plan for the sake of economic growth; after all, the BRA’s charter legislation charges it with responsibility for Boston’s economic vitality.<sup>221</sup>

#### IV. MEANINGFUL PLANNING, NO EXCEPTIONS: THE PATH TO RESPONSIBLE AND EFFICIENT DEVELOPMENT OF AIR RIGHTS

For reasons explained in Part III, the MOU and the *Civic Vision* are insufficient solutions to weak planning legislation and an unjustifiable zoning exemption—they are mere stopgaps, hastily prepared and narrowly tailored to offset the costs of the CA/T project.<sup>222</sup> Beneath this thin veneer lie impractical laws born of bias and outdated

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 3.

<sup>217</sup> *Id.* at 7.

<sup>218</sup> Compare CIVIC VISION, *supra* note 2, at 74–78 (suggesting moderate height and extensive public parks), with COLUMBUS CENTER PDA, *supra* note 169, at 3–5 (approving a thirty-five story tower along with substantial build-out on all parcels).

<sup>219</sup> CLF Memorandum, *supra* note 151, at 9 (quoting CIVIC VISION, *supra* note 2, at 29).

<sup>220</sup> See Steve Bailey, *Winn’s Folly*, BOSTON GLOBE, July 25, 2007, at D1; Patton, *supra* note 6, at 23 (quoting Arthur Winn: “Everyone is aware of the cost of platforms and the need for height to make it feasible”).

<sup>221</sup> See FRUG & BARRON, *supra* note 64, at 69–70.

<sup>222</sup> See *supra* Part III.

legal philosophies.<sup>223</sup> As long as comprehensive plans can be ignored without consequence and wholesale zoning exemptions remain on the books, the development of air rights (if not the city itself) will continue to be an arduous process with disappointing results.<sup>224</sup>

Building a massive deck over six lanes of interstate highway and a commuter rail system is complicated and costly under any circumstances.<sup>225</sup> Add the uncertainty of an unenforceable comprehensive plan plus a zoning exemption and the prospect of developing air rights becomes almost unthinkable.<sup>226</sup> Developers require the predictability of zoning laws to draft their plans and attract investors.<sup>227</sup> When the plans involve an engineering-intensive deck that costs upwards of \$160 million, predictability is all the more crucial.<sup>228</sup> Therefore, the uncertainty surrounding the *Civic Vision* and MOU is a major deterrent to the development of air rights.<sup>229</sup>

Even if a developer survives the gauntlet of engineering, financing, governmental review, and public scrutiny, the *Civic Vision* and the MOU do not guarantee a satisfactory product.<sup>230</sup> As discussed in Part III, the CLF memorandum cited a host of environmental, aesthetic, and cultural shortcomings in the Columbus Center plans.<sup>231</sup> Despite these shortcomings, Columbus Center has been fully approved.<sup>232</sup> CLF's memorandum to the BRA articulates the significance of such approval:

Both because of the importance of the Columbus Center project and because of the precedent that will be set for subsequent air rights proposals from Chinatown to Allston, it is essential that the scoping documents issued by both the BRA

<sup>223</sup> See *supra* Part III.

<sup>224</sup> See, e.g., Palmer, *supra* note 5, at E5 (noting that the “[l]egal complexities alone were bewildering” for the proponents of Columbus Center); CLF Memorandum, *supra* note 151, at 4–6 (citing the many ways in which Columbus Center falls short of CIVIC VISION's mandates).

<sup>225</sup> See Bailey, *supra* note 220, at D1 (citing the escalating costs of construction); Interview with Arthur Winn, Chairman, WinnCompanies, in Boston, Mass. (Nov. 14, 2007); Scott Van Voorhis, *Owners to be Liable for New Pike Tunnel*, BOSTON HERALD, July 12, 2007, at 24 (illustrating the complications, such as ventilation and safety concerns, created by constructing a lengthy new tunnel over the turnpike).

<sup>226</sup> See Russell, *supra* note 17, at 4, 6; cf. GROWING SMART, *supra* note 17, at 7-7 (explaining the security afforded to developers in localities with reliable planning laws).

<sup>227</sup> See GROWING SMART, *supra* note 17, at 7-7.

<sup>228</sup> See *id.*; Bailey, *supra* note 220, at D1.

<sup>229</sup> See Palmer, *supra* note 5, at E5 (quoting Matthew J. Kiefer, a director at the law firm Goulston & Storrs PC, who has worked on Columbus Center since 1997: “This is five-dimensional chess for us”).

<sup>230</sup> See CLF Memorandum, *supra* note 151, at 4–6.

<sup>231</sup> *Id.*

<sup>232</sup> See BRA Memorandum, *supra* note 174, at 4–5.

and Massachusetts Environmental Policy Act (MEPA) office clearly define the appropriate process and substance for review of Columbus Center and future air rights developments.<sup>233</sup>

There are still an additional nineteen air rights parcels designated for development by the MTA, and the precedent set by Columbus Center suggests air rights projects will continue to fall short of the *Civic Vision*'s guidelines.<sup>234</sup>

To obtain a measure of predictability and facilitate truly responsible development, the Massachusetts General Court cannot hide outmoded legislation with makeshift solutions—it must exorcize past demons, revise the state's planning enabling act, and repeal blanket zoning exemptions.<sup>235</sup> These changes will enable developers to create practical proposals that address the long-term needs set forth in the *Civic Vision* and empower the City of Boston to control its own future.<sup>236</sup>

#### A. *Bucking the Past*

As discussed in Parts II and III, the zoning exemption was created in 1963 due to a cultural rivalry, the absence of home rule, and the State's desire for a return on its investment in the turnpike.<sup>237</sup> When the *Civic Vision* was released in the summer of 2000, both the Governor of Massachusetts and the Mayor of Boston were Italian-Americans, the Commonwealth had been a home rule state for over thirty years, and very little money had been made from the development of turnpike air rights.<sup>238</sup> Clearly, the environment into which the exemption was born has long since evaporated; and yet, this relic remains.<sup>239</sup>

The United States has gone through several momentous social transformations since tens of thousands of Irish immigrants arrived on the shores of Boston during the 1840s, including the abolition of

<sup>233</sup> See CLF Memorandum, *supra* note 151, at 4–6.

<sup>234</sup> See CIVIC VISION, *supra* note 2, at 55–73, 79–83 (setting forth guidelines for the development of the remaining nineteen parcels); CLF Memorandum, *supra* note 151, at 4–6. As of December, 2008, the MTA was considering four proposals for the development of parcels eleven through fifteen. Casey Ross, *Turnpike Fields Construction Plans; Housing, Offices, Retail Suggested for Back Bay, Fenway*, BOSTON GLOBE, Dec. 6, 2008, at B9 (providing an overview of the proposals without mentioning their relationship with the CIVIC VISION).

<sup>235</sup> See *infra* Parts IV.A–C.

<sup>236</sup> See *infra* Parts IV.A–C.

<sup>237</sup> See *supra* Parts II, III.

<sup>238</sup> See MASS. CONST. amend. art. LXXXIX, § 1; Flint, *supra* note 144, at B1; Mayor—City of Boston, <http://www.cityofboston.gov/mayor/bio.asp> (last visited Mar. 10, 2009); Argeo Paul Cellucci (born 1948), <http://www.mass.gov/> (search “Argeo Paul Celluci,” follow link to “Argeo Paul Cellucci (born 1948)”) (last visited Mar. 10, 2009).

<sup>239</sup> See MASS. GEN. LAWS ch. 81A, § 15 (2005).

slavery, the granting of women's suffrage, and the Civil Rights Movement. As cultural barriers throughout the nation have dissolved, so too has the divide between Irish-Catholics and Yankee-Protestants.<sup>240</sup> The Boston Irish have come a long way from the "idle, thriftless, poor, intemperate, and barbarian" immigrants they were characterized as in the nineteenth century.<sup>241</sup> They are now, as one historian describes them, "statesmen and diplomats, physicians and lawyers, businessmen and bankers, artists and musicians, priests and poets."<sup>242</sup>

In addition to an enlightened society, Massachusetts has an evolved legal structure for local government.<sup>243</sup> As discussed in Part I, municipal control over local affairs has been widely accepted throughout the United States.<sup>244</sup> In 1966, Massachusetts joined the home rule movement by passing a constitutional amendment with the stated intent "to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters."<sup>245</sup> The state legislature, therefore, has recognized that laws such as the MTA's zoning exemption—which only applies to Boston—go against the "customary and traditional liberties of the people."<sup>246</sup> Nevertheless, the State continues to allow laws born of cultural biases and outmoded legal philosophies to dictate development in its largest city.<sup>247</sup> It is time to break free of past mistakes and embrace an integrated and independent Boston.

### B. Meaningful Planning

Whereas home rule has been accepted in Massachusetts—if not always reflected in the law—mandatory and enforceable planning is essentially unheard of.<sup>248</sup> Meanwhile, there is a growing consensus

<sup>240</sup> O'CONNOR, *supra* note 100, at 303.

<sup>241</sup> *Id.* at 64, 303.

<sup>242</sup> *Id.* at 303.

<sup>243</sup> See MASS. CONST. amend. art. LXXXIX, § 1.

<sup>244</sup> MANDELKER ET AL., *supra* note 14, at 211 ("In virtually all states, the legislature is required to act with respect to municipalities by 'general laws' whenever possible, a reform which limits the possibility of specific meddling in the affairs of individual municipalities."); Briffault, *supra* note 57, at 10–11 ("Today, forty-one states provide some form of home rule to at least some of their local governments.").

<sup>245</sup> MASS. CONST. amend. art. LXXXIX, § 1.

<sup>246</sup> See *id.* §§ 1, 8; Joanna Blum Jerison, *Home Rule in Massachusetts*, 67 MASS. L. REV. 51, 59 (1982) (discussing the principle that "localities can more nearly satisfy their citizens' specific wants than can the Legislature").

<sup>247</sup> See *supra* Part III.

<sup>248</sup> See MASS. CONST. amend. art. LXXXIX, § 1; MASS. GEN. LAWS ch. 41, § 81D (2004); Russell, *supra* note 17, at 4.

among legal scholars, professional city planners, and politicians that effective planning is necessary for the proper enactment of zoning regulations.<sup>249</sup> Unfortunately, reversing the early influences of the SZEA and the SCPEA, which led many states to enable zoning before planning, is a difficult task.<sup>250</sup> After all, zoning is more flexible and immediately gratifying if it does not have to comport with a comprehensive plan.<sup>251</sup> Immediate results are often attractive to city councilors who “must deal with a dynamic political environment and must engage in political bargaining.”<sup>252</sup> Under this model, however, there is no accounting for long-term goals such as affordable housing or environmental sustainability.<sup>253</sup>

In Massachusetts, where the zoning enabling act predates the planning enabling act by twenty-seven years, municipalities have grown accustomed to immediate gratification through flexible zoning policies.<sup>254</sup> Sadly, these flexible policies are taking their toll on long-term goals and many communities are already paying the price.<sup>255</sup> Columbus Center’s inconsistency with the *Civic Vision* is just one more example in a long pattern of sacrificing long-term needs for short-term benefits.<sup>256</sup>

Oregon was the first state that enforced comprehensive local plans as mandatory and authoritative.<sup>257</sup> Oregon’s landmark legislation, passed in 1973, “affords all Oregonians predictability and sustainability to the development process by allocating land for industrial, commercial and housing development, as well as transportation and agriculture.”<sup>258</sup> Today, nearly half of the states throughout the country have followed Oregon’s lead and passed legislation that mandates local planning.<sup>259</sup> In these states, comprehensive plans prevent zoning from

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<sup>249</sup> See GROWING SMART, *supra* note 17, at 7-65; Daniel R. Mandelker, *Planning and the Law*, 20 VT. L. REV. 657, 657 (1996) (“Most land use professionals support statutes and court decisions that mandate planning and require zoning to be consistent with a plan.”).

<sup>250</sup> See MANDELKER ET AL., *supra* note 14, at 26.

<sup>251</sup> See Mandelker, *supra* note 249, at 657-58.

<sup>252</sup> See *id.*

<sup>253</sup> See Russell, *supra* note 17, at 6.

<sup>254</sup> See MASS. GEN. LAWS ch. 40A (2004); MASS. GEN. LAWS ch. 41, § 81D (2004); Russell, *supra* note 17, at 4.

<sup>255</sup> See, e.g., Benjamin Krass, *Combating Urban Sprawl in Massachusetts: Reforming the Zoning Act Through Legal Challenges*, 30 B.C. ENVTL. AFF. L. REV. 605, 607 (2003) (discussing the lack of comprehensive plans in Massachusetts and the resulting problems associated with urban sprawl).

<sup>256</sup> CLF Memorandum, *supra* note 151, at 4-6.

<sup>257</sup> See Mandelker, *supra* note 249, at 657.

<sup>258</sup> Oregon Department of Land Conservation and Development, About Us, [http://www.lcd.state.or.us/LCD/about\\_us.shtml](http://www.lcd.state.or.us/LCD/about_us.shtml) (last visited Mar. 10, 2009).

<sup>259</sup> GROWING SMART, *supra* note 17, at 7-65.

becoming arbitrary while maintaining the focus on long-term, complex objectives.<sup>260</sup> As one expert puts it:

We simply cannot satisfy all these conflicting demands on our physical resources at the same time without making tough and mutually exclusive choices. . . . It should be clear that the most reasonable way to moderate these conflicts is to sort them out before decisions have to be made about the use of land resources.<sup>261</sup>

In order to improve upon the arduous process of development and its oft-disappointing results, Massachusetts must join the growing contingency of states that have recognized the vital importance of mandatory planning.

### C. *No Exceptions*

Mandating local planning and enforcing compliance would be a major step towards responsible development that addresses the complex, long-term needs of municipalities in Massachusetts.<sup>262</sup> Even if this step were taken, however, it would not apply to turnpike air rights in Boston as long as the MTA retains its zoning exemption.<sup>263</sup> Therefore, in order to obtain desirable air-rights development, the zoning exemption cannot stand.

The exemption's impracticality was painfully realized during the thirty-four year interim between its enactment and the signing of the MOU.<sup>264</sup> Not only did the MTA face a need for city-controlled terra firma, it was up against a politically active community that demanded a voice in the development process.<sup>265</sup> While the MOU appears to solve these problems, it does *not* establish zoning.<sup>266</sup> The lack of zoning creates uncertainty for developers and casts doubt on important agreements such as PDAs.<sup>267</sup>

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<sup>260</sup> See Daniel R. Mandelker, *Should State Government Mandate Local Planning? . . . Yes*, 44 PLAN., July 1978, at 14, 14.

<sup>261</sup> *Id.*

<sup>262</sup> See *supra* Part IV.B.

<sup>263</sup> See MASS. GEN. LAWS ch. 81A, § 15 (2005).

<sup>264</sup> See Flint, *supra* note 144, at B1; Patton, *supra* note 6, at 23; McCann, *supra* note 11.

<sup>265</sup> See Patton, *supra* note 6, at 23 (quoting Boston Mayor Thomas Menino: "Don't forget, the Turnpike Authority represents the people of Boston. Those air rights belong to us and nobody else"); McCann, *supra* note 11.

<sup>266</sup> See *supra* Part III.C.1.

<sup>267</sup> See *supra* Part III.C.1.

Such uncertainty would be avoided if the State repealed MTA's exemption and established actual zoning.<sup>268</sup> The Commonwealth has little to lose and much to gain by doing so.<sup>269</sup> The power retained by the MTA through the MOU—the right of review and an arbitration clause—are not worth the memorandum's critical shortcomings.<sup>270</sup> To wit, the MTA's right of review depends on a showing of the BRA's unreasonableness.<sup>271</sup> Since the BRA has vast experience and wide discretion in issuing scoping determinations, a challenge from the MTA would almost certainly fail, barring egregious demands from the BRA.<sup>272</sup> Demands on the developer are unlikely to reach the extent called for in the *Civic Vision*, let alone rise to the level of egregiousness.<sup>273</sup>

Similar to the right of review, the arbitration clause is only exercisable in the event that “the BRA has unreasonably withheld, conditioned or delayed its certification.”<sup>274</sup> Moreover, the proponent—not the MTA—holds the power to exercise the clause.<sup>275</sup> Therefore, the clause provides deference to the BRA and is unlikely to be exercised by proponents who depend repeatedly on the BRA and are concerned about creating goodwill.<sup>276</sup> In fact, WinnDevelopment's familiarity with the BRA and desire for goodwill surely played a role in its decision to sign a PDA, which further marginalized the MTA's power.<sup>277</sup> In the end, this largely nominal and marginalized power is not much to sacrifice for the sake of much-needed predictability.<sup>278</sup>

<sup>268</sup> See *supra* Part III.C.1.

<sup>269</sup> See Memorandum of Understanding, *supra* note 158, art. 3, § 2(c), 2(f)(3); compare *supra* Part III.C.1 (discussing the limits and uncertain applicability of the MOU), with *infra* notes 270–278 and accompanying text (discussing the minimal power afforded to the MTA through the MOU).

<sup>270</sup> See Memorandum of Understanding, *supra* note 158, art. 3, § 2(c), 2(f)(3); *supra* Part III.C.1.

<sup>271</sup> See Memorandum of Understanding, *supra* note 158, art. 3, § 2(c).

<sup>272</sup> *Id.*

<sup>273</sup> Compare CIVIC VISION, *supra* note 2, at 74–78, with COLUMBUS CENTER PDA, *supra* note 169, at 3–5.

<sup>274</sup> Memorandum of Understanding, *supra* note 158, art. 3, § 2(f)(3).

<sup>275</sup> *Id.*

<sup>276</sup> See, e.g., Michael Rosenwald, *Signatures on the City's Skyline*, BOSTON GLOBE, Dec. 23, 2001, at G1 (discussing the Columbus Center proponents' long-standing relationship with the BRA); Memorandum of Understanding, *supra* note 158, art. 3, § 2(f)(3).

<sup>277</sup> See COLUMBUS CENTER PDA, *supra* note 169; Rosenwald, *supra* note 276, at G1 (noting that one of the Columbus Center proponents, Roger Cassin, has been known to “bend over . . . backward in an attempt to accommodate both the BRA and the community's needs”).

<sup>278</sup> See *supra* notes 223–227 and accompanying text (discussing the importance of predictability).

## CONCLUSION

There is little argument in Boston over whether or not the development of air rights over the Massachusetts Turnpike is important. Such development attracts business, creates jobs, and increases the amenities and appeal of the city. In addition to these benefits, the development of air rights solves myriad existing problems, including a dire shortage of groundwater, air and noise pollution, dangerously unlit and uninhabited overpasses, socially divided neighborhoods, and a lack of green space.

The distinct opportunity presented by the development of air rights has already resulted in rarely seen cooperation between city and state officials. Hopefully, it will also provide occasion to rid Boston of restrictive and outmoded land use laws created through misunderstanding and bias. These quirks of history have hindered Boston's future for far too long. It is time to update Massachusetts planning legislation and allow Boston to determine its own future with zoning ordinances that apply to all land owners, no matter what their identity. Only then will Boston be able to develop air rights—and the city as a whole—in an efficient and responsible manner.