Combating Urban Sprawl in Massachusetts: Reforming the Zoning Act Through Legal Challenges

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Abstract: Urban sprawl is one of today's most pressing environmental challenges, especially in Massachusetts. The desire to live in rural areas, while demanding urban services, threatens to make Massachusetts a checkerboard of development, with long-lasting ecological, aesthetic, and social effects. Ironically, although Massachusetts is seen as a national leader in various environmental policy areas, the Commonwealth lags far behind other states in progressive land use planning. This anomaly is perpetuated by the Zoning Act, which gives broad zoning-freeze protection to vacant land, thereby unduly constraining a locality's ability to plan for growth. Without comprehensive reform of the Zoning Act, localities cannot adequately manage growth and will continue to be overburdened in providing the level of basic services necessitated by unplanned growth. With no legislative solution ahead, those portions of the Zoning Act that severely restrict a locality's ability to plan for growth should be challenged in the courts.

Land use is the forgotten agenda of the environmental movement.1

INTRODUCTION

The resonating environmental events of the late 1960s and 1970s include the burning of the Cuyahoga River in Cleveland, Ohio,2 Love Canal in western New York,3 and the Allied Chemical Kepone disaster

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2 See, e.g., Roger Meiners & Bruce Yandle, Common Law and the Conceil of Modern Environmental Policy, 7 GEO. MASON L. REV. 923, 924 (1999).

3 Id. at 924, 951–52.
in Hopewell, Virginia. In response, Congress passed statutes such as the Clean Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Responsibility, Compensation, and Liability Act to restore environmental integrity. The passage of time brings new environmental challenges, even as society continues to work toward achievement of the goals set out in response to environmental problems of years past. Urban sprawl is foremost among these new environmental challenges. While urban sprawl has been on the radar screen since at least the early 1990s, it has not generated the same response as the environmental catastrophes of the late 1960s and 1970s. In this regard, John Turner and Jason Rylander describe current land use patterns, and the consequential urban sprawl, as the “forgotten agenda.” In order to illustrate the magnitude of the problem, Turner and Rylander invite people to journey across America without ever leaving their hometown:

Take a look across America. From Boston to Baton Rouge, massive changes have taken place on the landscape and in our society. A seasoned traveler, dropped onto a commercial street anywhere in America, could scarcely tell the location from the immediate vista. A jungle of “big box” retailers, discount stores, fast-food joints, and gaudy signs separated by congested roadways offers no clues to location. Every place seems like no place in particular.

Hop in an airplane and look at the land use patterns below. Cul-de-sac subdivisions accessible only by car—separated from schools, churches, and shopping—spread out from decaying cities like strands of a giant spider web. Office parks and factories isolated by tremendous parking lots dot the countryside. Giant malls and business centers straddle the exit ramps of wide interstates where cars are lined up bumper to bumper. The line between city and country is

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8 Meiners & Fand, supra note 2, at 924–25.
9 Turner & Rylander, supra note 1, at 60–61.
10 See id.
11 Id. at 61.
blurred. Green spaces are fragmented. Only a remnant of natural spaces remains intact.12

As this Comment will detail, current Massachusetts law acts as a barrier to local communities that desire a future different from that described by Turner and Rylander.

Although urban sprawl is widely recognized as a problem in Massachusetts, the legislature has not yet amended the statutes that inhibit the ability of localities to plan comprehensively in order to accommodate growth.13 Briefly stated, urban sprawl is the demand of an increasingly affluent population to live in the spacious countryside, and yet enjoy the same level of services as would be available in a city.14 It is the result of a faulty balancing of the "public's competing demands for open space, wildlife, recreation, environmental quality, economic development, jobs, transportation, and housing."15 Massachusetts has focused on economic development at the expense of these other demands by refusing to amend archaic zoning and subdivision-control statutes, and, as a result, has hampered the efforts of localities to control sprawl.16 In fact, the American Planning Association, in Planning for Smart Growth: 2002 State of the States, reported that new legislative policies in Massachusetts encouraging smart growth would be ineffective without significant changes to the already-existing zoning statutes.17

The Commonwealth's apparent failure to confront this problem18 is particularly striking because Massachusetts has historically

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12 Id. at 60.
15 Turner & Rylander, supra note 1, at 61.
17 Id.
been considered one of the most environmentally progressive states.\textsuperscript{19} It is not surprising that the Commonwealth has progressive environmental policies, given its demographic characteristics.\textsuperscript{20} Massachusetts is a wealthy state with a well-educated citizenry.\textsuperscript{21} It has the "third highest per capita income" and the largest proportion of people in the United States with at least a college degree.\textsuperscript{22} In addition, economic sectors that are important to Massachusetts, such as recreation and tourism, are based on a well-protected environment.\textsuperscript{23} Significantly, Massachusetts has actually translated its progressive policies\textsuperscript{24} into truly progressive substantive environmental statutes.\textsuperscript{25}

Urban sprawl remains a largely unsolved problem in Massachusetts\textsuperscript{26} despite the State's success in these other environmental realms.\textsuperscript{27} The preference for living in the suburbs and the increase in the number of second homes have caused the amount of land used for housing to increase over ten times as fast as the rate of population growth.\textsuperscript{28} Under this measurement, Massachusetts is one of the fastest-sprawling areas in the United States.\textsuperscript{29} Among the data indicating that sprawl is an increasing problem in the Commonwealth,\textsuperscript{30} one fact stands out—between 1972 and 1996, the amount of developed land increased approximately fifty-nine percent, while the Commonwealth's population only increased roughly six percent.\textsuperscript{31} According to Robert Durand, former Secretary of Environmental Affairs,\textsuperscript{32} the last twenty years have produced a thirty-eight percent increase in the

\textsuperscript{19} See infra Part II. This is notwithstanding recent reports indicating that its oversight of industry compliance may be comparably lax. See David Arnold, Pollution Checking Said to Lag in Mass., \textit{Boston Globe}, Jan. 21, 2003, at B1.


\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Id. at 529.

\textsuperscript{24} See id. at 528-29.

\textsuperscript{25} See discussion infra Part II.


\textsuperscript{27} See discussion infra Part II.

\textsuperscript{28} Payne, supra note 20, at 528.


\textsuperscript{30} See generally Steel, supra note 18 (reporting and analyzing relevant statistics).

\textsuperscript{31} Id. at 1.

\textsuperscript{32} The Secretary of Environmental Affairs heads the Executive Office of Environmental Affairs in Massachusetts. See Frates, supra note 26, at B1.
amount of developed land in Massachusetts; every day, the State loses forty-four acres to development. 33

This Comment will focus on the Zoning Act34 and the lack of growth management legislation in Massachusetts. 35 Part I provides a working definition of urban sprawl, and Part II documents the largely progressive environmental agenda of Massachusetts. Part III examines section 6 of the Zoning Act, one of the statutory provisions impacting the ability to manage growth, and its effect on pre-existing nonconforming structures, vacant land, and “approval not required” (ANR) plans. Part III reviews approaches taken by localities within the existing statutory scheme. In Part IV, Massachusetts’s statutory scheme is compared with that of Oregon, a state that is generally recognized for its progressive land use planning statutes. Part V explores whether urban sprawl can be managed using existing regulatory tools under the Zoning Act, concludes that it cannot, and suggests legal challenges to the Zoning Act.

I. Urban Sprawl: Definitions and Effects

Because “urban sprawl” is a term with varied connotations, the three following definitions describe the term as used in this Comment. Urban sprawl can be considered “the desire for a rural lifestyle—more spacious housing, lavish kitchens, master baths, and ‘great rooms’—coupled with large lot ‘ranchettes,’ but ironically with a demand for urban services, and access to urban income . . . .”36 This definition focuses on the demands of an increasingly affluent population that desires space in the countryside along with a level of services commensurate with that found in a city.37

A slightly more refined definition describes sprawl as “low-density development on the edges of cities and towns that is poorly planned, land-consumptive, automobile-dependent [and] designed without regard to its surroundings.”38 Finally, in a recent report on patterns of

33 Id.
35 See AM. PLANNING ASS’N, supra note 16, at 71. At the same time, effectively controlling sprawl in Massachusetts will not be possible without reforming the Massachusetts Low and Middle Income Housing Act, 1969 Mass. Acts 712 (codified as amended at MASS. GEN. LAWS ch. 40B, §§ 20–23 (2000)). Witten, supra note 13, at 8.
36 FREILICH, supra note 14, at 2.
37 See id.
38 Id. at 16 (providing the definition of sprawl given by Richard Moe, President of the National Trust for Historic Preservation).
development and open space, the Massachusetts Audubon Society defined sprawl as "[d]evelopment that is relatively low density; has separate residential and commercial components, and is, therefore, largely automobile-dependent; and is poorly integrated with existing infrastructure and the environment." These definitions link sprawl to planning and put the burden on government to figure out how to accommodate the desires for a rural lifestyle and urban services while protecting health and safety in general, and the environment in particular.

While still governor of New Jersey in 1998, current Environmental Protection Agency Administrator Christine Todd Whitman noted, "Sprawl eats up our open space. It creates traffic jams that boggle the mind and pollute the air. Sprawl can make one feel downright claustrophobic about our future." It is not just an abstract planning concern, but a problem that has direct impacts on daily life. At its core, "containing sprawl is creating a sustainable environment." Although this Comment avoids a protracted policy discussion about sprawl, understanding its effects on communities and the environment provides context for the legal issues.

One expert, Robert Freilich, identified six adverse effects of sprawl: (1) "deterioration of existing built-up areas (cities and first- and second-ring suburbs);" (2) "environmental degradation—loss of wetlands and sensitive lands, poor air and water quality;" (3) "overconsumption of gasoline energy;" (4) "fiscal insolvency, transportation congestion, infrastructure deficiencies, and taxpayer revolts;" (5) "ag-
Combating Urban Sprawl 611

However, its effects are both economic and environmental,\(^{47}\) sprawl’s detrimental impacts on the environment, in particular, have received a lot of attention.\(^{48}\) Sprawl creates additional environmental problems when large tracts of land are cleared for homes because both the individual large-lot homes and their supportive public services, such as sewers and septic systems and roads, can severely alter existing ecosystems.\(^{49}\)

The damaging aesthetic effects of urban sprawl should not be discounted either.\(^{50}\) For example, in rapidly expanding areas, poorly planned strip commercial development is often glaringly located immediately along the roadside, rather than in enclaves, partially shielded from view of passing motorists.\(^{51}\) By magnifying the visibility of this type of development, such poor planning exacerbates the aesthetic unpleasantness of sprawl.\(^{52}\)

Massachusetts cannot afford to ignore the problem of sprawl because the consequences of doing so are potentially severe. Nonetheless, whereas Massachusetts can be criticized for moving slowly to confront sprawl, it is largely immune from such criticism with regards to its other environmental policies.

II. Massachusetts Environmental Policy

A. Wetlands

Massachusetts is one of the most forward-thinking states on environmental policy in general.\(^{53}\) In the area of wetlands protection, for example, Massachusetts has been historically progressive and continues to be so today.\(^{54}\) In 1963, Massachusetts enacted the first statute in

\(^{46}\) Id. at 16.
\(^{47}\) See id.
\(^{48}\) See, e.g., James H. Wickersham, Note, The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes, 18 HARV. ENVTL. L. REV. 489, 495 (1994) ("Low-density suburban development patterns can radically affect the environment.").
\(^{49}\) Id.
\(^{50}\) See id.
\(^{51}\) See id.
\(^{52}\) See id.
\(^{53}\) See James P. Lester, A New Federalism? Environmental Policy in the States, in ENVIRONMENTAL POLICY IN THE 1990s, at 63 (Norman J. Vig & Michael E. Kraft eds., 2d ed. 1994) (labeling Massachusetts environmental programs “progressive” due to the Commonwealth’s high commitment to environmental protection and strong institutional capabilities for implementation).
\(^{54}\) See Payne, supra note 20, at 520, 534.
the United States to control draining and development in coastal wetlands,55 followed two years later by the first freshwater wetlands law.56 Remarkably, in the midst of the movement to federalize environmental laws in the early 1970s, in response to lax state regulation, Massachusetts affirmed its commitment to environmental regulation.57 The Massachusetts legislature combined its two existing wetland laws, expanded their jurisdiction, and installed municipal conservation commissions as the primary permitting authorities.58

In addition to historically protecting wetlands to a greater extent than other states,59 Massachusetts arguably has enjoyed quantitative success as well.60 The Massachusetts Wetlands Protection Act (WPA)61 appears to have been quite successful in significantly slowing the rate of wetlands loss since its passage.62 Although it is difficult to measure rates of wetlands loss with absolute accuracy, one study indicates that the reduction was dramatic, with a net loss of wetlands in Massachusetts of 163,700 acres in 1979 alone, compared with only 9275 acres lost over the entire period from 1986 to 1991.63

It should also be noted that the WPA was passed at a time of increasing real estate development, when wetlands loss would otherwise be expected to increase.64 That the wetlands-loss rate remained steady, and might even have decreased, attests to the WPA’s success.65 Cymie Payne, an attorney with the United States Department of the Interior, analyzed the WPA and concluded that it “has successfully reduced the wetlands loss rate . . . despite the dense and growing population of the Commonwealth and the intense development pressure of the last twenty years.”66 The Commonwealth’s wetlands program success has been mirrored in other fields as well.

55 Id. at 534.
56 Id.
57 Id.
58 Id.
59 Id.
60 Payne, supra note 20, at 524.
62 Payne, supra note 20, at 524.
63 Id. at 527 (citing MASS. DEP’T OF ENVT’L PROT., AN ASSESSMENT OF NON-COMPLIANCE WITH THE WETLANDS PROTECTION PROGRAM: A FINAL REPORT FOR THE 104(b) (3) EPA STATE WETLANDS PROGRAM DEVELOPMENT GRANT CD001633-01, at fig.3 (1994)).
64 Id.
65 Id.
66 Id. at 567–68.
B. Hazardous Waste

Massachusetts has also been a leading innovator in the field of hazardous waste clean-up.\textsuperscript{67} Massachusetts's version of the federal Comprehensive Environmental Response, Compensation, and Liability Act\textsuperscript{68} is the Massachusetts Oil and Hazardous Material Release Prevention Act (Act).\textsuperscript{69} The Massachusetts Contingency Plan (MCP),\textsuperscript{70} similar to the federal National Contingency Plan (NCP),\textsuperscript{71} has been considered a national model for its privatization of hazardous waste site clean-ups.\textsuperscript{72} The Council of State Governments awarded the MCP an Innovations Award in 1995.\textsuperscript{73} The authors of a guide on brownfields redevelopment noted that due to the state programs under the MCP, and "the increased level of experience of the players involved, the tools available for the redevelopment of brownfields properties in Massachusetts are increasing in number and effectiveness."\textsuperscript{74}

Unlike some states, Massachusetts has a provision for the assessment and recovery of natural resources damages under the Act.\textsuperscript{75} The natural resources damage program began in 1983 and had recovered a total of $23.6 million through 1998.\textsuperscript{76} A report by the Environmental Law Institute puts this success into perspective. As of 1998, thirty-two states claimed to have independent state authority to recover for natural resources damages, but only ten states had actually done so, and eleven more states had claims pending.\textsuperscript{77}

\begin{thebibliography}{9}

\bibitem{67} Ned Abelson et al., \textit{Massachusetts, in Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property} 456 (Todd S. Davis & Kevin D. Margolis eds., 1997).


\bibitem{70} Id. § 3.

\bibitem{71} 42 U.S.C. § 9605.

\bibitem{72} Abelson, \textit{supra} note 67, at 456.

\bibitem{73} Id.

\bibitem{74} Id.


\bibitem{76} Id. at 148.

\bibitem{77} Id. at 4.
\end{thebibliography}
C. Biodiversity

A third environmental policy area in which Massachusetts is progressive is in its efforts to map statewide biodiversity. Massachusetts officials claim that, so far, no other state has created such a checklist of all visible organisms. The effort to create a statewide map of existing species appears to be the nation’s most ambitious. In addition, Massachusetts seems to be the first state to set state conservation goals based on such a list. Jessica Wilkinson, director of the state biodiversity program for the Environmental Law Institute, called the State’s approach to biodiversity: “visionary in land use.”

The 2001 Biodiversity Days, a three-day effort to assemble data on biodiversity, involved almost 35,000 people in approximately 270 of the State’s 351 towns and cities. The participants gathered information on plant and animal species. The baseline information was fed into a state master list and will be used to determine the continuing viability of these species in the future. Robert Durand, then-State Secretary of Environmental Affairs, indicated that the information would be used in making environmental policy decisions and as an educational tool. According to Bill McComb, head of the Department of Natural Resource Conservation at the University of Massachusetts at Amherst, this statewide mapping effort is vital because the State’s biodiversity has increased as meadows have evolved into forests and water quality has improved. The project will also help to map invasive species, which the State seeks to control.

Against this backdrop of environmental policy successes, this Comment contrasts a principal Massachusetts land use statute, the Zoning Act, and its relationship to sprawl.

80 Id.
82 Id.
83 Frates, supra note 26, at B1.
84 Daley, supra note 79, at A12.
85 Frates, supra note 26, at B1.
86 Daley, supra note 79, at A12.
87 Id.
III. THE CURRENT MASSACHUSETTS ZONING ACT ENCOURAGES SPRAWL

Although several Massachusetts land use statutes encourage sprawl,88 this Comment will only focus on the principal land use statute, the Zoning Act, the present day version of which was first passed in 1975.89 Section 6 of the Zoning Act is particularly relevant because of its impact on local efforts to manage growth. Its provisions unnecessarily restrict local authorities’ ability to combat sprawl by granting broad vested-rights protections.90 Section 6 addresses pre-existing nonconforming uses, structures and lots, as well as the impacts of zoning changes on vacant land.91 The legislature has yet to enact substantive changes to section 6 to deal with its impediments to managing sprawl; the section largely exists as it was first enacted in 1975.92

Such constraints on the power of local bodies to regulate land use are especially puzzling given how political power is apportioned by the Massachusetts Constitution.93 Land use decisions are generally made by relying on the police power, which inherently resides in state governments.94 Thus, a town or municipality derives its power to make land use decisions from the state.95 There must be a specific grant of legislative authority from the state to towns and municipalities to exercise this police power.96

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88 See Russell, supra note 13, at 12. For example, any comprehensive reform must include revisions to the Massachusetts Low and Middle Income Housing Act, Mass. Gen. Laws ch. 40B, §§ 20–23 (2000).
90 See id. § 6.
91 Id.
92 See Mass. Gen. Laws Ann. ch. 40A, § 1 (West 1994). It is unclear why the Massachusetts legislature has refused to amend the Zoning Act. The American Planning Association reported that efforts to reform the State’s comprehensive planning laws have been unsuccessful despite an attempt by planning advocates to pass laws requiring communities to develop comprehensive plans and then link those plans to local zoning ordinances. Am. Planning Ass’n, supra note 16, at 71.
94 See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); Freilich, supra note 14, at 58.
95 See Freilich, supra note 14, at 58.
96 Id.
In 1966, Massachusetts voters adopted the so-called "Home Rule Amendment."\(^{97}\) As a result, Massachusetts became a state in which power is decentralized and granted to local communities according to the Massachusetts Constitution and subsequent legislation.\(^{98}\) Before 1966, municipalities could not impose zoning controls without an express delegation from the state.\(^{99}\) Now, municipalities may pass zoning ordinances or bylaws without express state authorization.\(^{100}\) Local authority is still limited, of course, where its laws would conflict with or are preempted by, state or federal law.\(^{101}\) Therefore, although towns and municipalities can pass ordinances and zoning bylaws through their police powers under the Home Rule Amendment, these regulations cannot frustrate the "purpose or implementation of a general or special law enacted by the Legislature in accordance with [the Home Rule Amendment's] provisions."\(^{102}\) Thus, the current state zoning act is entitled the "Zoning Act" and not the "Zoning Enabling Act."\(^{103}\)

**A. Section 6 of the Zoning Act and Its Impact on Smart Growth Policies**

Within the Zoning Act, section 6 in particular has direct ramifications for attempts to control urban sprawl because it governs the protections given to both pre-existing nonconforming uses and structures, and to vacant land.\(^{104}\) Although the vacant land protections of section 6 are the most detrimental to local growth management efforts, it is helpful to use the protections given to pre-existing nonconforming uses and structures as a baseline for comparison.

Pre-existing nonconforming structures are created by almost any change in zoning laws.\(^{105}\) These zoning changes diminish the usefulness of the resulting pre-existing nonconforming structures.\(^{106}\) This is because additions or alterations to such structures are governed by a

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\(^{97}\) Teresa Rohwedder, Note, Regulation of Zoning Nonconformities in Massachusetts: The "Difficult and Infelicitous" Language of Section 6, Chapter 40A, Massachusetts Zoning Act, 28 NEW ENG. L. REV. 1123, 1128 (1994).


\(^{99}\) Rohwedder, supra note 97, at 1128.

\(^{100}\) Id.

\(^{101}\) Id.


\(^{103}\) Rohwedder, supra note 97, at 1128–29.

\(^{104}\) See The Zoning Act, MASS. GEN. LAWS ch. 40A, § 6 (2000).

\(^{105}\) See id.

standard different from those governing structures meeting current zoning laws.\textsuperscript{107}

The Zoning Act generally makes it more difficult to build an addition onto a pre-existing nonconforming structure than to modify a structure that meets current zoning law requirements.\textsuperscript{108} As a result, pre-existing nonconforming structures are often sold or left underutilized while new structures are built, encouraging new development instead of encouraging the reuse of existing buildings.\textsuperscript{109} At the same time, zoning-freeze protections provided to vacant land handicap the ability of localities to plan for this new development.\textsuperscript{110}

An analogy might be made to the concept of brownfields and greenfields. Brownfields are sites that are either lightly contaminated or perceived to be contaminated.\textsuperscript{111} Numerous regulations governing the clean up of brownfield sites might provide an economic disincentive for a developer to redevelop a brownfield site.\textsuperscript{112} In that situation, a developer might pick a greenfield instead—an undeveloped site, usually in the suburbs or rural areas—which is presumed to be uncontaminated.\textsuperscript{113} In much the same way that stigmatization of brownfield sites has encouraged sprawl,\textsuperscript{114} the scarce zoning-freeze protection given to pre-existing nonconforming structures and uses also encourages new development and sprawl.\textsuperscript{115}

Nonetheless, there are legitimate reasons to limit modifications to pre-existing nonconforming structures.\textsuperscript{116} Indeed, a locality presumably passes new zoning laws to protect the health, safety, or welfare of the community, and thus the newly regulated "harms" should not be easily allowed to expand.\textsuperscript{117} However, comparing this lack of

\textsuperscript{107} MA\textsc{ss. Gen. Laws} ch. 40A, § 6.
\textsuperscript{108} Forsten, \textit{supra} note 106, at 7 (noting the paradox that older properties often need to be modified to conform with modern business practices, and retain their utility, yet it is nearly impossible to modify an older property and meet current zoning requirements).
\textsuperscript{109} \textit{Id.} at 7, 25–26 (noting that existing, nonconforming properties are not recycled because it is far easier, and encouraged under the law, for newer businesses to improve undeveloped land rather than improve a pre-existing nonconforming property).
\textsuperscript{110} Russell, \textit{supra} note 13, at 3.
\textsuperscript{112} \textit{Id.} at 8.
\textsuperscript{113} \textit{Id.} at 5.
\textsuperscript{114} \textit{Id.} at 12.
\textsuperscript{115} Forsten, \textit{supra} note 106, at 26.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{See} Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (upholding zoning as a legitimate exercise of the police power); Forsten, \textit{supra} note 106, at 7.
zoning-freeze protection for non-conformities to the zoning-freeze protections given to vacant land, it becomes clear that the Zoning Act strongly contributes to sprawl.\textsuperscript{118}

B. Zoning Changes and Pre-existing Nonconforming Structures

The paragraph of section 6 dealing with zoning changes and pre-existing nonconforming structures provides:

Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the non-conforming nature of said structure.\textsuperscript{119}

Given its complexity and incoherence, it is not surprising that volumes of litigation have arisen from this "sentence," although it is unclear whether a direct facial challenge has ever been brought.\textsuperscript{120} As the Massachusetts Appeals Court discerned, the first "except" clause ("[e]xcept as hereinafter provided") applies to zoning changes and the alteration of a pre-existing nonconforming structure.\textsuperscript{121} The second "except" clause ("except where alteration") deals with zoning

\textsuperscript{118} See The Zoning Act, MASS. GEN. LAWS ch. 40A, § 6 (2000).
\textsuperscript{119} Id.
\textsuperscript{120} See Powers v. Bldg. Inspector, 296 N.E.2d 491, 494 (Mass. 1973); Willard v. Bd. of Appeals, 514 N.E.2d 369, 372 (Mass. App. Ct. 1987) ("The first paragraph of [chapter 40A, section] 6 . . . contains an obscurity of the type which has come to be recognized as one of the hallmarks of the chapter."); Fitzsimonds v. Bd. of Appeals, 484 N.E.2d 113, 115 (Mass. App. Ct. 1985) (noting that the provisions of section 6 of the Zoning Act "are as difficult and infelicitous as other language of the act recently reviewed"). Clearly, this sentence needs to be rewritten merely to make grammatical sense.
\textsuperscript{121} Willard, 514 N.E.2d at 372.
changes and certain modifications to a single- or two-family residential structure when the modification does not increase the nonconforming nature of the structure.\textsuperscript{122}

Without distinguishing between residential or non-residential structures, it appears that three situations are governed by section 6: (1) extension or structural change of a nonconforming structure; (2) reconstruction of a nonconforming structure; and (3) alteration of a nonconforming structure, to provide for its use for a substantially different purpose, manner, or extent.\textsuperscript{123} Comparing a property owner's protection from zoning changes in these three circumstances to the protection of vacant land, it is clear that vacant land protections are considerably more generous. This is because Massachusetts General Laws chapter 40A, section 6 gives a municipality much less control over the development of vacant land than it does over pre-existing nonconforming structures.\textsuperscript{124} Although there are valid reasons to restrict modifications to pre-existing nonconforming structures, it is unreasonable to provide such broad protection to vacant land.\textsuperscript{125}

C. Zoning Changes and Vacant Land

The fifth paragraph of section 6 addresses the application of zoning changes to definitive plans for currently vacant land.\textsuperscript{126} The pertinent text provides:

If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted to a planning board for approval under the subdivision control law, and written notice of such submission has been given to the city or town clerk before the effective date of ordinance or by-law, the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law, if any, in effect at the time of the first such submission while such plan or plans are being processed under the subdivision control law, and, if such definitive plan or an amendment thereof is finally approved, for eight years from the date of the endorsement of such approval . . . . \textsuperscript{127}

\begin{enumerate}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} See \textsc{Mass. Gen. Laws} ch. 40A, § 6; Rohwedder, \textit{supra} note 97, at 1150–51.
\item \textsuperscript{124} See discussion \textit{infra} Part III.C.
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textsc{Mass. Gen. Laws} ch. 40A, § 6.
\item \textsuperscript{127} \textit{Id.}
\end{enumerate}
This zoning-freeze protection applies to the land and not to the preliminary or definitive subdivision plan.\textsuperscript{128} Therefore, a town or municipality cannot apply new zoning controls to vacant land protected by an approved definitive plan until eight years after the endorsement of the definitive plan’s approval.\textsuperscript{129}

It is difficult for a locality to manage growth and control sprawl when vacant land is exempt from changes in zoning law for eight years.\textsuperscript{130} This is because growth patterns often change rapidly and cannot be accurately predicted.\textsuperscript{131} A locality will have a hard time reacting to growth in a comprehensive manner because different parcels of vacant land may be governed by different laws enacted during any given eight-year period.\textsuperscript{132} A locality is forced to plan for growth eight years from the time it passes a law, with no recourse if conditions rapidly change during that eight-year period.\textsuperscript{133}

The Massachusetts Supreme Judicial Court has recognized that section 6 affords “broad protection to developers.”\textsuperscript{134} According to the court, the section’s purpose is to protect landowners from “‘the practice in some communities of adopting onerous amendments to the zoning by-law after submission of a preliminary plan which is opposed by segments within the community.’”\textsuperscript{135} The statute provides landowners with protection from zoning law amendments that would “unpredictably and unfairly burden the development of their land.”\textsuperscript{136} While recognizing the hardships that this might work on a progressive town planning board, the court was clear that a board could not interfere with a vested property right created by the legislature.\textsuperscript{137} It also noted that the zoning-freeze period has been an overriding concern of the legislature.\textsuperscript{138} The zoning-freeze period was initially three years.


\textsuperscript{129} Id.

\textsuperscript{130} Russell, supra note 13, at 3.

\textsuperscript{131} See, e.g., id. at 3–4 (noting that once word of proposed zoning change leaks out, landowners hurry to file development applications; the development resulting from this knee-jerk filing is difficult for a locality to predict).

\textsuperscript{132} Id. at 6.

\textsuperscript{133} See Mass. Broken Stone, 723 N.E.2d at 9 (recognizing the absolute protection of the zoning freeze on the land covered by a subdivision plan).

\textsuperscript{134} See Heritage Park Dev. Corp. v. Town of Southbridge, 674 N.E.2d 233, 236 (Mass. 1997).

\textsuperscript{135} Id. (quoting MASS. DEP’T OF CMTY. AFFAIRS, REPORT OF THE DEPARTMENT OF COMMUNITY AFFAIRS RELATIVE TO PROPOSED CHANGES AND ADDITIONS TO THE ZONING ENABLING ACT, H.R. Doc. No. 5009, at 38 (1972)).

\textsuperscript{136} Id.

\textsuperscript{137} Id.

\textsuperscript{138} Id.
but has subsequently been extended to five, seven, and then to eight years.\footnote{Id. The zoning-freeze period was extended to eight years in 1982. Act of June 28, 1982, ch. 185, 1982 Mass. Acts (codified at Mass. Gen. Laws ch. 40A, \$ 6 (2000)).} In another indication of the broadness of this protection, lower Massachusetts courts have held that developers are entitled to a zoning freeze with inconsistent subdivision filings or by filing plans with the sole intent of invoking the freeze.\footnote{Heritage Park, 674 N.E.2d at 236.}

A more in-depth review of a classic Massachusetts case noting this broadness is helpful. In \textit{Heritage Park Development Corp. v. Town of Southbridge}, the Heritage Park Development Corp. (Heritage) had a conditionally approved definitive subdivision plan from the planning board of Southbridge.\footnote{Id. at 234.} Heritage and the planning board entered into a covenant that provided that the board’s approval of the plan would be automatically rescinded if Heritage did not complete certain groundwork required to service each subdivision lot on or before a set date.\footnote{Id.} Heritage did not complete the work on time and the plan’s approval was automatically rescinded.\footnote{Id.} Twenty-two months after the date of the automatic rescission, Heritage asked the board to extend the covenant’s construction deadline, but this request was denied.\footnote{Id.}

The plaintiff then asked to re-file a subdivision plan that would only need to comply with the zoning bylaws in effect when the board conditionally approved the definitive plan.\footnote{Id.} The board required any re-submitted plan to comply with the current zoning bylaws.\footnote{Heritage Park, 674 N.E.2d at 234.} Heritage then filed a complaint requesting a declaratory judgment stating that the property was subject to the zoning laws in effect when the subdivision plan had first been submitted.\footnote{Id. at 235 n.4.}

The board argued that the eight-year zoning freeze had terminated when the approval of the subdivision plan was automatically rescinded.\footnote{Id.} The court disagreed, holding that Heritage was entitled to an eight-year statutory zoning freeze, and that the automatic rescission had not deprived the plaintiff of that “vested zoning protec-
The town had conditioned the initial approval in order to ensure that the groundwork necessary to serve each lot was completed before the lot being built upon or conveyed. In a sweeping statement, the court intoned, "Once a definitive subdivision plan is 'finally approved' . . . the eight-year zoning freeze is secure." The court noted that nothing in the Zoning Act suggested that the continued existence of the zoning freeze was linked to subdivision approval. In a final insult to the planning board, the court extended the zoning freeze "for a period equal to the duration of [the] action."

Courts have, however, vigilantly enforced the requirement that a definitive plan must be approved within seven months after the submission of the preliminary plan. In Arenstam v. Planning Board, for example, the plaintiff filed a preliminary plan with the planning board and then filed a definitive plan exactly seven months later. The planning board disapproved of the definitive plan because it did not comply with the rules and regulations of the board, and because it did not comply with the zoning bylaws. The plaintiff then resubmitted the plan with amendments, and the plan was again disapproved by the board. The plaintiff argued that he was entitled to the grandparent protection of chapter 40A, section 6, even though the amended definitive plan was resubmitted after more than seven months. The court rejected this argument and explained that this zoning-freeze protection only applied to amended definitive plans submitted within seven months after a preliminary plan. The court noted that an amended definitive plan resubmitted after the seven-month period would be treated as a new plan; thus, the eight-year protection would begin at that point. Therefore, although the legislature was generous in affording protection to approved definitive plans, the court was

149 Id.
150 Heritage wanted to subdivide the property into 143 single- and two-family dwelling lots. Id. at 234.
151 Id.
152 Heritage Park, 674 N.E.2d at 235.
153 Id.
154 Id. at 237.
156 Id. at 143.
157 Id.
158 Id. at 143–44.
159 Id. at 144.
160 Id. at 144–45.
161 Arenstam, 560 N.E.2d at 145.
not willing to extend that protection any further than required by the statute.\textsuperscript{162}

Comparing the two paragraphs of section 6 reveals that, unlike vacant lots, pre-existing nonconforming structures receive relatively little protection from zoning changes.\textsuperscript{163} This statutory scheme encourages sprawl by severely constraining the use of existing structures, and thereby encouraging new construction. This scheme also makes it difficult for localities to control future sprawl because vacant lots remain subject to the old zoning laws for eight years.\textsuperscript{164}

It does not appear that any facial or as-applied challenges have been brought against the eight-year protection. A locality might argue that it violates substantive due process under the Fourteenth Amendment; the likelihood of success is discussed below.\textsuperscript{165}

\section*{D. Zoning Changes and "Approval Not Required" Plans}

The sixth paragraph in chapter 40A, section 6, addressing zoning changes and "approval not required" (ANR) plans, also unduly constrains a locality's ability to manage growth.\textsuperscript{166} The statute provides:

When [an ANR plan] has been submitted to a planning board and written notice of such submission has been given to the city or town clerk, the use of the land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of such plan . . . and for a period of three years from the date of endorsement by the planning board . . . .\textsuperscript{167}

Consistent with the plain meaning of this language, courts have found that endorsed plans that do not require approval under the subdivision control law enjoy a zoning-freeze period of three years.\textsuperscript{168} The zoning-freeze period is meant to protect a developer during the planning stage of a building project.\textsuperscript{169} In addition, the protection afforded by this paragraph extends to both uses as of right and uses subject to a special permit under the zoning laws in effect at the time of

\begin{footnotesize}
\begin{enumerate}
  \item See id.
  \item Id.
  \item See discussion infra Part V.B.
  \item Id.
\end{enumerate}
\end{footnotesize}
the approval.\textsuperscript{170} Although not as egregious as the eight-year zoning freeze protection for vacant land governed by a definitive plan, the three-year period might still make it difficult for a locality to manage growth and control sprawl.\textsuperscript{171} The provision still forces a locality to plan and correctly anticipate sprawl three years from the date it passes a law, with no recourse if conditions change rapidly during that three-year period and present new growth challenges not covered by existing law.\textsuperscript{172}

The Massachusetts Appeals Court, in \textit{Falcone v. Zoning Board of Appeals}, confronted a dispute about the three-year protection period.\textsuperscript{173} In that case, the plaintiff applied for a building permit the day before the three-year zoning-freeze period was set to expire.\textsuperscript{174} The Brockton Zoning Board of Appeals denied the application after the expiration of the three-year period on the basis that the section 6 protection had expired by the time that the permit was denied.\textsuperscript{175} The plaintiff contended that he was only required to apply for a building permit within the three-year period to ensure that his application would be governed by the zoning laws in effect at the time his plans were submitted.\textsuperscript{176} The court disagreed, stating that the mere filing of a permit application did not toll the running of the zoning-freeze period.\textsuperscript{177}

In \textit{Long v. Board of Appeals}, the plaintiff abutters challenged a zoning freeze as applied to one of the defendants’ property because of the submission of an ANR plan.\textsuperscript{178} The defendant, Albert Price, applied to the Falmouth Board of Appeals for a special permit to use part of his property for a dental office.\textsuperscript{179} At the time of this special permit application, Falmouth bylaws would have allowed the defendant’s residentially zoned property to be used as a dental office, subject to certain restrictions imposed by special permit.\textsuperscript{180} While the Price’s special permit application was pending, Falmouth published notice that it was considering an amendment to the bylaws that would

\textsuperscript{171} See Russell, supra note 13, at 3.
\textsuperscript{172} See id. at 3–4, 6.
\textsuperscript{173} 389 N.E.2d at 1033.
\textsuperscript{174} Id. at 1032.
\textsuperscript{175} Id. at 1033.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 1034.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
make Price’s property ineligible for a special permit. 181 On October 20, 1988, Price submitted a plan seeking an ANR endorsement solely for the purpose of obtaining a zoning freeze for the property. 182 On November 2, 1988, the town voted to adopt the special permit zoning changes, and on November 8, 1988, the board gave Price’s plan an ANR endorsement. 183 The Board of Appeals ultimately granted the special permit on November 16, 1988. 184 This is important, for as the Massachusetts Appeals Court noted, the reference to “use” in the language of chapter 40A, section 6, paragraph 6 includes use by special permit as well as use by right. 185

The abutters claimed that the endorsement of the ANR plan was invalid because Price had no intention of recording the plan. 186 The court rejected this argument, noting that nothing in chapter 40A, section 6, paragraph 6 required the recording of a plan as a prerequisite for a zoning freeze. 187 The abutters also argued that the zoning-freeze provision did not apply to developed land. 188 The court again rebuffed them, proclaiming that the protection afforded by the zoning-freeze provision is “broad, certain, and unambiguous.” 189 The court deemed that the presence of a structure on the property at the time of the ANR application was irrelevant. 190 Although ruling against the abutters, the court seemed to sympathize with their situation, realizing that the statute provided an easy way for a developer to gain a zoning freeze for three years, whether or not he or she ever actually intended to develop the property. 191 The court commiserated:

We recognize, however, that, in general, the right to obtain a three-year zoning freeze by submitting a plan for ANR endorsement is very broad. As we interpret the statute, it has the potential for permitting a developer, or at least a sophisticated one, to frustrate municipal legislative intent by submitting a plan not for any purpose related to subdivision control and not as a preliminary to a conveyance or record-

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181 Id.
182 Id.
183 Id.
184 Long, 588 N.E.2d at 693.
185 Id.
186 Id. at 694.
187 Id.
188 Id.
189 Id.
190 Long, 588 N.E.2d at 695.
191 See id. at 695 n.7.
ing, but solely for the purpose of obtaining a freeze. Any overbreadth in the protection afforded by the statute, however, will have to be cured by the Legislature.192

A locality is often powerless to impose new zoning regulations on vacant land to control sprawl. At the same time, the Zoning Act has made it difficult to alter pre-existing nonconforming structures.193 As will be explained infra, other states have taken a different, more progressive approach.194

E. Approaches Taken by Localities Within the Existing Statutory Scheme

Given the difficulties of changing the existing statutory scheme,195 localities have attempted to accomplish their smart growth priorities in spite of the statutory constraints on controlling sprawl. One strategy used to control the rate of development was to limit the number of building permits issued for residential construction.196 The town of Chilmark enacted such a bylaw, allowing only ten percent of the number of building permits to be issued per year for subdivisions with a total land area sufficient to provide more than ten dwellings at the maximum permitted density.197 In Sturges v. Town of Chilmark, the plaintiffs brought a facial challenge, alleging that the bylaw violated substantive due process, and that the town had acted ultra vires.198 As will be discussed,199 the Massachusetts Supreme Judicial Court upheld the constitutionality of the law, and also found that the town had the requisite statutory authority to adopt it.200

In attempting to control development, the court has been clear that the extensive powers granted to localities under chapter 40A are not to be narrowly interpreted.201 In Collura v. Town of Arlington, the town enacted a two-year moratorium on apartment building construc-

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192 Id. The legislature neglected to take up the court's suggestion to amend the statute.
194 Russell, supra note 13, at 3 (noting that states as varied as South Carolina, Washington, Maine, and Utah have enacted land use legislation that allows localities to plan for and manage growth); see discussion infra Part IV.
195 Russell, supra note 13, at 1 (noting that the "power of special interest lobbies and the very incomprehensibility of the subject matter to most state legislators have posed monumental barriers to reform in the past").
197 Id. at 1349 n.6.
198 Id. at 1349.
199 See discussion infra Part V.A.1.
200 Sturges, 402 N.E.2d at 1350.
tion in certain areas of Arlington.202 The Massachusetts Supreme Judicial Court upheld the bylaw, because it allowed for full public debate while protecting the area from "unwise exploitation."203 As another example of a locality's extensive zoning powers, even under the current statute, the court upheld a three-acre minimum lot requirement.204

Consistent with such local strategies to manage growth, at least one commentator has suggested that the Massachusetts Environmental Policy Act (MEPA) can be used as a tool to manage growth, even without a change in the current statutory scheme.205 MEPA forces state actors to weigh the environmental impacts of their projects or projects they sanction through permits.206 This commentator's viewpoint will be discussed further infra.207

IV. LAND USE STATUTES IN OREGON: PROGRESSIVE PLANNING FOR GROWTH208

Other states that have taken a different, more progressive approach, have obviated the need for localities to apply band-aid approaches to underlying statutory problems. In order to understand the evolution of so-called growth management statutes, it is helpful to explain the historical foundation of zoning. The dominant model of land use regulation in the United States is Euclidean, or local zoning.209 Almost every state and major city with the exception of Houston, Texas continues to base its land use controls on Euclidean zoning.210 Under this model, zoning ordinances divide a municipality into zones in order to regulate the type and density of land use.211 The present utility of this zoning model, developed during the early twentieth century, has been questioned, however, because of the change

202 Id. at 734.
203 Id. at 737; see discussion infra Part V.A.1.
207 See discussion infra Part V.A.2.
208 Oregon was selected as representative of the many states that have enacted growth management statutes. Although there are differences among these statutes, the emphasis here is on the contrast between states with and states without growth management statutes—not on the exact provisions of any particular statute.
209 Wickersham, supra note 48, at 492.
210 Id. at 493.
211 Id.
from a largely urban demographic to one that is predominantly suburban.\textsuperscript{212} The pre-World War II pattern of development, which consisted of a downtown commercial core surrounded by urban and suburban residential housing, no longer exists.\textsuperscript{213} Suburban zoning encourages low population densities, which contributes to the problem of sprawl.\textsuperscript{214} Euclidean zoning was developed on the premise of regulating small-scale development, rather than regulating large-scale projects such as residential subdivisions, industrial parks, or shopping malls.\textsuperscript{215}

Nine states enacted statutes that reasserted state control over land development policies beginning in the early 1970s and continuing through the 1980s.\textsuperscript{216} The list included states as diverse as Florida, Georgia, Maine, Maryland, New Jersey, Oregon, Rhode Island, Vermont, and Washington.\textsuperscript{217} Notably, Massachusetts was not among this group.\textsuperscript{218} These growth management statutes are intended to achieve higher density developments, a greater mixture of uses, and a more abrupt transformation from urban areas to the surrounding greenbelts.\textsuperscript{219}

In 1973, Oregon passed a growth management statute that shifted regulatory power from the local level to the regional or state level.\textsuperscript{220} The Legislative Assembly declared that the uncoordinated use of lands within the state threatened "the orderly development, the environment of [the] state and the health, safety, order, convenience, prosperity and welfare of the people of [Oregon]."\textsuperscript{221} To counter this threat, the legislature created a statewide planning agency to formulate planning goals that are to be applied by localities.\textsuperscript{222} The Oregon planning structure relies on the use of comprehensive plans drawn up by cities and towns to implement these goals.\textsuperscript{223} The legislature identified the implementation and enforcement of these plans to be of

\textsuperscript{212} See id. at 494. Although the historical trend of suburbanization began in the nineteenth century, it accelerated rapidly in the second half of the twentieth century. Id.

\textsuperscript{213} Id.

\textsuperscript{214} Id. at 495.

\textsuperscript{215} Wickersham, supra note 48, at 496.

\textsuperscript{216} Id. at 489.

\textsuperscript{217} Id. at 489 n.2.

\textsuperscript{218} Id.

\textsuperscript{219} Id. at 507.

\textsuperscript{220} Id. at 512.

\textsuperscript{221} 1973 OR. LAWS 80 (codified as amended at OR. REV. STAT. §§ 197.005--.860 (2001)).

\textsuperscript{222} OR. REV. STAT. § 197.005.

\textsuperscript{223} Id. § 197.010.
statewide concern. The scheme relies on state oversight of local zoning, rather than direct state or regional regulation of major projects or areas of critical environmental concern.

The statute created a seven-member Land Conservation and Development Commission (LCDC) and authorized it to adopt statewide planning goals. The LCDC, which administers and enforces land use planning, may adopt, by rule, any statewide land use policy needed to implement the growth management statute. The LCDC principally adopts land use planning goals, collects information on land use, prepares statewide planning guidelines, reviews comprehensive plans for consistency with articulated goals, and ensures public participation in the process.

The statute also created the Department of Land Conservation and Development (Department), which includes a director, subordinate employees, and the LCDC. The Department Director may seek review of land use decisions involving the goals, acknowledged comprehensive plan, or land use regulations promulgated under the statute.

The statutory authority of the LCDC to establish statewide land use planning goals was challenged by the intervenors in Meyer v. Lord, who alleged that such broad delegation of legislative power violated the Oregon Constitution. The court found this allegation without merit. Upholding the power of a state agency to establish

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224 Id. § 197.013.
225 Wickersham, supra note 48, at 522–23. This is contrasted with the model used in Vermont, for example. Vermont also passed a growth management statute in the early 1970s in which regional or state level approval was required for major development projects. Id. at 512. Under Vermont’s program the proponent of a major development project must obtain a project permit from one of the nine regional Environmental District Commissions (EDCs). Id. at 513. The threshold for coming under the regulatory reach of this statute is quite low; the statute covers all public and private construction “involving” ten or more acres, and residential construction projects with ten or more units. Id. at 513–14. An EDC may decline to grant a permit if it finds that the project will be “detrimental to the public health, safety or general welfare.” Id. at 514. Statewide planning was meant to accompany the statute but the statewide plan was never adopted. Id. at 522.
226 OR. REV. STAT. §§ 197.030(1), 197.040(1) (c) (A); Wickersham, supra note 48, at 523.
227 Id. § 197.040(2).
228 Id. § 197.075.
229 Id. § 197.090(2) (a).
230 Id. § 197.090(2) (a).
232 Id.
233 Id. at 371.
statewide land use planning goals, the court noted that there are standards for the agency to apply and also safeguards for those whose interest may be affected, including provisions for judicial review. 234

The power of the LCDC appears to be quite broad. 235 In Alexander v. Board of Commissioners, the court considered whether statewide planning goals promulgated by the LCDC applied to the partition of a twenty-five-acre tract of land in Polk County, Oregon, even though the county did not have an "acknowledged" comprehensive plan. 236 The narrow issue was whether the county should decide if the partition could go forward based on a county ordinance, or based upon the statewide planning goals. 237 The court held that the statute directed that LCDC's statewide planning goals, not local ordinances, were controlling in that case. 238

This brief look at Oregon's growth management statute illustrates how differently Massachusetts and Oregon have approached the problem of sprawl. Whereas Oregon deals with such statewide or regional growth problems on a statewide or regional basis, Massachusetts, lacking a growth management program, deals with the same problems almost exclusively at the local level. 239 Yet, the power of the local authorities in Massachusetts to manage growth is severely constrained by the eight-year statutory zoning freeze for vacant land. 240

V. Analysis

A. Can Urban Sprawl Be Managed Under the Current Massachusetts Zoning Act?

Given the existing Massachusetts statutory scheme, 241 is it possible for localities to enact smart growth policies that are not defeated by the long-term protection given to vacant land under chapter 40A, section 6? Although some regulatory tools are available to soften the impacts of development, there does not appear to be any way to defeat
the eight-year protection given to endorsed definitive plans, and to plan for growth before it occurs. Therefore, the best possible approach is a two-track strategy of using these regulatory tools to their fullest extent, while at the same time seeking statutory solutions through passage of a growth management statute and reforming chapter 40A, section 6.

1. The Use of Temporary Development Bans

One way localities may attempt to implement smart growth policies and mitigate the eight-year protection problem is by imposing either temporary bans or temporary limitations on development. This may be accomplished through a short-term moratorium on subdivision plan approvals, or by agreeing to approve only a specified number of subdivision plans per year until the locality can enact a comprehensive plan utilizing smart growth policies. The boundaries of a locality's power to ban development temporarily are not entirely clear under the current Zoning Act and the United States Constitution; it would appear to be an area that proceeds on a case-by-case basis, and is not yet amenable to general rules.

In Sturges v. Town of Chilmark, the town enacted a zoning bylaw that slowed the rate of development by limiting the number of building permits issued for residential construction. The restrictions were quite severe—for subdivisions with a total land area sufficient to provide more than ten dwellings at the maximum permitted density, only ten percent of the building permits would be issued each year for ten years. If these lots were sold before they were developed, then

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242 A report on sprawl by the Massachusetts Audubon Society advocates passing a growth management plan that is enforceable for every municipality in the Commonwealth. Steel, supra note 18, at 16.
244 The issue of whether a temporary moratorium on land development, imposed in order to create a comprehensive land use plan, constitutes a per se taking of property requiring compensation under the Takings Clause was recently decided by the United States Supreme Court. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306 (2002). Rejecting a categorical rule of a per se taking in that situation, Justice Stevens explained, "In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never': the answer depends upon the particular circumstances of the case." Id. at 321. The proper application of Tahoe to a locality's attempt to enact a temporary development ban in Massachusetts is unclear, although it would appear that it is possible to structure such a temporary development ban so that it passes constitutional muster.
245 402 N.E.2d at 1349.
246 Id. at 1349 n.6.
this restriction would be incorporated into the deed for that property.247

In bringing a facial challenge, the plaintiffs alleged that the law violated substantive due process and that the town had exceeded its statutory authority.248 The Massachusetts Supreme Judicial Court upheld the constitutionality of the law and also found that the town had the requisite statutory authority to adopt it.249 In so holding, the court stated that a municipality could impose "reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies."250 The court noted that the purpose of the Zoning Act—to allow towns and municipalities to resolve a variety of land use issues including the adequate provision of infrastructure, an important concern with unmanaged growth—supported the limitation enacted.251 The court continued, "From the wide scope of the purposes of The Zoning Act, it is apparent that the Legislature intended to permit cities and towns to adopt any and all zoning provisions which are constitutionally permissible, subject, however, to limitations expressly stated in that act or in other controlling legislation."252

In another case, the court held that the extensive powers granted to cities and towns under the Zoning Act were not to be narrowly interpreted.253 The court found that the interim zoning at issue, a two-year moratorium on the construction of apartment buildings in certain areas of Arlington, allowed for full public debate while protecting the area from "unwise exploitation" before reaching an agreement on potentially more restrictive zoning bylaws.254 The broad language employed by the courts in Sturges and in Collura v. Town of Arlington is instructive for towns that are considering temporary development moratoriums while they enact laws to manage future development.255

247 Id.
248 Id. at 1349.
249 Id. at 1350.
250 Id.
251 Sturges, 402 N.E.2d at 1350–51.
252 Id. at 1351. Admittedly, this statement by the court begs the question whether a temporary ban on endorsing subdivision plans would be constitutionally or statutorily permissible. Id.
254 Id. at 734, 737.
255 See Sturges, 402 N.E.2d at 1350–51; Collura, 329 N.E.2d at 737.
Importantly, both the *Sturges* and *Collum* courts also used limiting language.\(^{256}\) Although it upheld the bylaw as constitutional, the *Sturges* court also suggested that the particular circumstances of the municipality would have some bearing on the constitutional result.\(^{257}\) Significantly, in *Sturges*, the Town of Chilmark made a prima facie showing of rationality by providing specific, tangible concerns to which time limitations on development were a reasonable response.\(^{258}\) The court allowed Chilmark the opportunity to test the usefulness of the bylaw, although it was unclear for how long the court would allow such development restrictions to continue.\(^{259}\)

Presenting a potentially difficult hurdle for localities to overcome, the court appeared to tailor the holding to the specific facts of the case.\(^{260}\) It noted that Chilmark was a Martha’s Vineyard town with a year-round population of 400 people, an annual budget of $350,000, a land area of 10,500 acres, and five paved public ways.\(^{261}\) In addition, the restriction generally applied to the construction of second or vacation homes, rather than primary dwellings.\(^{262}\) Finally, Chilmark already had studies underway on how to confront the sprawl problem for which it needed the time to develop controls.\(^{263}\) Under these circumstances the court thought it reasonable that the town wanted time to decide whether sprawl was becoming a problem, and to remedy problems that it may find.\(^{264}\) This suggests that it would be more difficult to sustain a stopgap measure such as the one proposed in a locality in which growth was rampant and there was a high demand for additional primary housing.\(^{265}\) Ironically, this is exactly the type of situation in which a locality might need to seek a temporary moratorium on growth in order to have time to devise a solution.

\(^{256}\) *Sturges*, 402 N.E.2d at 1353; *Collum*, 329 N.E.2d at 737–38.

\(^{257}\) 402 N.E.2d at 1353.

\(^{258}\) Id. at 1354.

\(^{259}\) Id. at 1354, 1355 n.16.

\(^{260}\) See id. at 1354.

\(^{261}\) Id.

\(^{262}\) Id.

\(^{263}\) *Sturges*, 402 N.E.2d at 1355 n.16.

\(^{264}\) Id. Similar considerations were important to the court’s decision to uphold a two-year moratorium on apartment buildings in *Collum v. Town of Arlington*, 329 N.E.2d 733, 738 (Mass. 1975).

\(^{265}\) See *Sturges*, 402 N.E.2d at 1352. The court in *Johnson v. Town of Edgartown*, 680 N.E.2d 37, 39 (Mass. 1997), was similarly concerned about the effect of a zoning bylaw meant to control development on available primary housing stock. The court in that case upheld a three-acre minimum area requirement for residential lots, partly because it did not impact the availability of primary housing stock. See id. at 40, 42.
In Sturges, it is significant that the town was on Martha’s Vineyard, and that the legislature had expressed a public interest in the preservation of the qualities of Martha’s Vineyard.\textsuperscript{266} A court might need to be convinced that there is similar region-wide interest in combating sprawl to uphold a temporary development limitation elsewhere.\textsuperscript{267} Therefore, localities wishing to take advantage of the Sturges ruling would need to emphasize those characteristics that make it similar to Chilmark or distinguish dissimilar characteristics.\textsuperscript{268}

A locality attempting to set aside time to develop smart growth laws might want to prohibit the endorsement of definitive or preliminary plans temporarily, rather than control the rate at which building permits were issued, as Chilmark did.\textsuperscript{269} It is unclear from Sturges whether a locality could do so,\textsuperscript{270} but arguably the rationale behind both approaches is similar, so both actions could be constitutionally permissible.

The use of temporary development bans is not a long-term solution to the problem of unmanaged growth because it does not soften the impact of the eight-year zoning freeze. A locality will still be forced to speculate about which measures it must pass to manage future growth adequately. Furthermore, the time frame for a permissible development ban would probably be relatively short,\textsuperscript{271} and coupled with the scarce resources available to many localities,\textsuperscript{272} trying to plan for growth during a short-term ban might present a Herculean task.

2. The Massachusetts Environmental Policy Act as a Regulatory Tool to Combat Sprawl

Some of sprawl’s impacts, but not sprawl itself, might be manageable under the current statutory scheme by using already-existing laws

\textsuperscript{266} Sturges, 402 N.E.2d at 1354; accord Johnson, 680 N.E.2d at 39. The Johnson court stressed the expressed statewide interest in preserving Martha’s Vineyard, stating, “Those interests justify the making of conservative assumptions about the consequences of land uses, even if standing alone protection of those interests might not support the imposition of three-acre zoning.” Johnson, 680 N.E.2d at 42.
\textsuperscript{267} See id.
\textsuperscript{268} See 402 N.E.2d at 1353.
\textsuperscript{269} Id. at 1349.
\textsuperscript{270} See id. at 1350.
\textsuperscript{271} See id. at 1354.
\textsuperscript{272} See Russell, supra note 13, at 6.
such as the Massachusetts Environmental Policy Act (MEPA).\textsuperscript{273} At its heart, MEPA forces state actors\textsuperscript{274} to weigh the environmental impacts of their projects, or projects they sanction through the issuance of permits.\textsuperscript{275} Because of this, MEPA applies to both private and public development projects.\textsuperscript{276} Provided that a project will have environmental impacts,\textsuperscript{277} there is a statutory mandate to articulate and consider any alternatives to such projects, or to impose mitigation measures to lessen the environmental impacts of the project.\textsuperscript{278}

Unlike NEPA, its federal counterpart, MEPA is substantive in that it requires government to "use all practicable means and measures to minimize and prevent damage to the environment."\textsuperscript{279} MEPA also mandates that statutes be "interpreted and administered so as to minimize damage to the environment."\textsuperscript{280} Thus, once a project falls under MEPA jurisdiction, substantive environmental benefits can be achieved.\textsuperscript{281} MEPA can be substantively enforceable when mitigation measures agreed to during MEPA review are adopted through legally binding findings.\textsuperscript{282} Once there is MEPA jurisdiction over a project and the project is found to have negative environmental impacts, the State may require the proponent to undertake all feasible actions to avoid damage to the environment.\textsuperscript{283} If damage cannot be avoided, then the State may require the applicant to implement all feasible measures to minimize the environmental impacts of the project, or to fulfill mitigation measures designed to lessen the environmental effects "to the maximum extent practicable."\textsuperscript{284}

It must be stressed that MEPA does not apply to private projects not requiring any state action,\textsuperscript{285} nor to projects that do not exceed a certain review threshold.\textsuperscript{286} As a consequence, many projects escape

\begin{footnotesize}
\textsuperscript{274} As described by the statute, these actors are "agencies, departments, boards, commissions and authorities of the commonwealth." \textit{Id.}
\textsuperscript{275} \textit{Id.} § 62.
\textsuperscript{276} \textit{Id.}
\textsuperscript{277} The statute does not reach environmental impacts that cause "insignificant damage to or impairment of [listed] resources." \textit{Id.} § 61.
\textsuperscript{278} \textit{Id.}
\textsuperscript{280} Mass. Gen. Laws ch. 30, § 61; Payne, \textit{supra} note 20, at 539.
\textsuperscript{281} Mass. Gen. Laws ch. 30, § 61.
\textsuperscript{282} Wickersham, \textit{supra} note 205, at 8.
\textsuperscript{284} \textit{Id.}
\textsuperscript{286} Mass. Regs. Code tit. 301, § 11.03.
\end{footnotesize}
MEPA review.\textsuperscript{287} Furthermore, any potential environmental review of a private project under MEPA usually occurs when the entity undertaking the project is required to obtain a state permit.\textsuperscript{288} When a developer files a preliminary or definitive plan to gain the Zoning Act's eight-year protection, there is no state action; thus, MEPA is not yet applicable to the project, if it ever will be.\textsuperscript{289} The environmental effects of endorsing the location of a subdivision in the first place cannot be reviewed under MEPA. In this sense, MEPA does not directly address unplanned growth. Under the current Zoning Act, MEPA will be inapplicable to the various subdivisions already grandfathered under the old zoning laws for a period of eight years.\textsuperscript{290}

It has been suggested that MEPA can be used to manage growth, even without a change in the current statutory scheme.\textsuperscript{291} Although this is true to a limited extent, it appears more accurate to say that sprawl's impacts can be softened by MEPA review, but the statute's utility is seriously limited because only private projects involving state action may be subject to MEPA jurisdiction.\textsuperscript{292} MEPA can only soften the impacts of the already-existing development rights, without reviewing whether those development rights should have been granted in the first place.

Under this limited tool, the MEPA Office within the Executive Office of Environmental Affairs reviews approximately 300 projects a year at the initial stage of an Environmental Notification Form (ENF).\textsuperscript{293} Presumably, these 300 projects are large in scale, and although this number might represent a small percentage of all such projects undertaken on a yearly basis, reviewing these projects might have a significant effect on reducing sprawl.\textsuperscript{294} At the same time, it should be reemphasized that sprawl is problematic because it often places development in locations lacking the infrastructure to accommodate new growth. MEPA's utility in this respect is to ensure that this additional infrastructure is provided in an environmentally sensitive manner.

\textsuperscript{287} Id.
\textsuperscript{288} MASS. GEN. LAWS ch. 30, § 61.
\textsuperscript{289} Id. § 62.
\textsuperscript{290} The Zoning Act, MASS. GEN. LAWS ch. 40A, § 6 (2000).
\textsuperscript{291} Wickersham, supra note 205, at 8 (noting that the “1998 revisions to the MEPA Regulations . . . modified the review thresholds” to allow for increased consideration of projects that might contribute to sprawl).
\textsuperscript{292} MASS. GEN. LAWS ch. 30, § 62.
\textsuperscript{293} Wickersham, supra note 205, at 7.
\textsuperscript{294} See id.
Given the severe constraints placed upon localities to manage sprawl in their communities under the current statutory scheme, and the limited regulatory tools that might be able to mitigate the weaknesses of that statutory structure, another avenue for relief would be to challenge the legality of the current Zoning Act.

B. Potential Legal Challenges to the Zoning Act

There are numerous legal challenges, with varying possibilities for success, that could be brought to strike down the eight-year zoning-freeze protection afforded to endorsed subdivision plans under chapter 40A, section 6. These possible challenges are summarily listed here as a way to stimulate a more serious debate about the relative merits of each. The resulting publicity from these legal challenges may bring political pressure on the legislature to amend the eight-year zoning-freeze provision of the Zoning Act or even to enact comprehensive reform.

1. A Facial Challenge to Chapter 40A, Section 6

A facial challenge could be brought against the Zoning Act, chapter 40A, section 6, alleging a substantive due process violation of the Fourteenth Amendment. A locality could challenge the eight-year zoning-freeze protection, arguing that it violates substantive due process under the Fourteenth Amendment because it is arbitrary. This challenge, however, would be difficult because state statutes enjoy a strong presumption of legislative validity.

The constitutional test in substantive due process challenges such as this one is whether the statute is rationally related to the protection of health, safety, or welfare. A locality could argue that even if the eight-year protection was rational at the time it was passed in 1982, circumstances have changed so substantially in the ensuing twenty years that the provision is now arbitrary and irrational.

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296 The Fourteenth Amendment to the United States Constitution provides in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.
297 See, e.g., Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").
298 Id. at 391.
2. An As-Applied Challenge to Chapter 40A, Section 6

There might be a greater chance of success under an as-applied challenge compared with a facial challenge. A locality could claim that chapter 40A, section 6 violates substantive due process under the Fourteenth Amendment as applied to its particular circumstances. For example, a locality whose population is exploding faster than its ability to provide public services could argue that it is irrational to prohibit it from being able to regulate vacant land for eight years. With such fast-paced development, the eight-year protection is irrational because the locality could never adequately plan for the growth, and its infrastructure would be overwhelmed. This argument might be strongest for those localities that are under substantial development pressure and have large ecologically sensitive areas, conditions similar to those found on Cape Cod.

3. The Eight-Year Protection Provision Violates the Home Rule Amendment

A locality could bring a claim that the eight-year protection provision violates the Home Rule Amendment under the Massachusetts Constitution. Although the legislature has the power in general to pass a statute affording vacant land protection from zoning changes, the eight-year period that it has provided is such an imposition on local control, which is so highly valued under the Home Rule Amendment, that it cannot stand. This argument is substantially diminished by the fact that a locality's authority is explicitly limited by Massachusetts's preemptory use of that same power. Thus, this would seem to be an area in which Massachusetts has merely decided to assert its authority to legislate under the police power.

4. The Eight-Year Zoning Freeze Violates the Public Trust Doctrine

One of the underpinnings of the Public Trust doctrine is that a state may not substantially impair a public resource over which it exercises control. There are various untested theories through which the Public Trust doctrine might be used to defeat the legality of the

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300 Euclid, 272 U.S. at 395-96.
302 Rohwedder, supra note 97, at 1128.
303 See id.
eight-year zoning freeze. It could be argued that by enacting the eight-year zoning freeze, Massachusetts has so broadly abdicated its ability to regulate under the police power that its action is inherently inconsistent with its trustee duty to safeguard public trust resources. For example, if streams and rivers in Massachusetts are considered Public Trust resources, then a state statute that substantially impairs those resources might violate the Public Trust doctrine. In an as-applied challenge, a plaintiff would need to show that the eight-year zoning freeze so severely restricted a locality’s ability to manage growth along a public waterbody or watercourse—causing impairment of the waterbody or watercourse through increased siltation, pollution runoff, etc.—that the State’s action was inconsistent with its duty to protect those resources for the public. As the Supreme Court said in Illinois Central Railroad Co. v. Illinois, “The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”

**Conclusion**

As Turner and Rylander stated, “Growth is inevitable, but ugliness and environmental degradation are not.” Given this realization, the eight-year zoning freeze in the Zoning Act must be amended so that localities may manage growth in order to minimize ugliness and environmental degradation. Unfortunately, the prospects for reform of the biases of the Zoning Act against a locality’s ability to plan for and manage growth seem unlikely. Given the limited regulatory tools available to localities under the current Zoning Act to enact smart growth policies, it seems inevitable that more legal disputes will erupt as localities attempt to control unmanaged development. Whether political momentum or the courts will solve Massachusetts’s sprawl problem is difficult to predict. What is certain is that unless the zoning-freeze period is at least reduced, Massachusetts will continue to lag behind other states while its localities struggle to navigate the current misguided legal framework to manage uncontrolled growth.

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305 *Id.* at 453.