

# WHAT REGIONAL AGENDA?: RECONCILING MASSACHUSETTS'S AFFORDABLE HOUSING LAW AND ENVIRONMENTAL PROTECTION

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## I. INTRODUCTION

*Amesbury, Massachusetts, May 2003<sup>1</sup>*

Leading away from Amesbury's business district toward the hamlet of South Hampton, New Hampshire, Whitehall Road is hardly a scenic country lane. Although Lake Gardner sits within view off to the east, and one can catch glimpses of Woodsom Farm's open pastures to the west through stands of oak and maple trees, nearly every half-acre of frontage to the New Hampshire border has been developed.<sup>2</sup> Mostly, the homes along Whitehall Road are single-family ranches and the Cape Cods once typical to families of the classic suburban "middle-middle": relatively unglamorous structures, most with fewer than two thousand square feet of living space, rickety swingsets, and above-ground pools dotting the yards.

Some of the driveways lead not to only one house but to many units. Built twenty or more years ago, apartment complexes with names like "British Colonial Apartments" are now in a slow process of decay. Once "affordable" for moderate-income or working-class families, most of these apartments are now condos—two and three bedrooms now *begin* at \$149,000 at Whitehall Lake Condominiums. Moreover, no public transportation is within walking distance of the complexes; families need at least one car to live here.

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<sup>1</sup> For the accounts of Amesbury, I am deeply indebted to Joseph Fahey, Amesbury's director of community and economic development, who granted me several chances during the spring of 2003 to discuss the situation on Whitehall Road and the Millyard Project described in this Article's conclusion.

<sup>2</sup> Amesbury is a small town of about 16,000 residents on the New Hampshire border, with significant but declining socio-economic diversity and an overwhelmingly Caucasian population. See U.S. Census Bureau, Fact Sheet for Amesbury, Massachusetts (2000), at [http://factfinder.census.gov/servlet/SAFFFacts?\\_event=ChangeGeoContext&geo\\_id=06000US2500901185&\\_geoContext=01000US%7C86000US01913&\\_street=&\\_county=&\\_cityTown=Amesbury&\\_state=04000US25&\\_zip=01913&\\_lang=en&\\_sse=on](http://factfinder.census.gov/servlet/SAFFFacts?_event=ChangeGeoContext&geo_id=06000US2500901185&_geoContext=01000US%7C86000US01913&_street=&_county=&_cityTown=Amesbury&_state=04000US25&_zip=01913&_lang=en&_sse=on) (last visited Oct. 2, 2003) (on file with the Harvard Environmental Law Review). Now largely a bedroom community for commuters to Boston and firms along Boston's outer-circumferential highway (I-495), Amesbury faces a future of gentrification and further price inflation of its housing market because natural beauty and open spaces are two of its selling points with local realtors.

There are also cookie-cutter subdivisions of relatively new single-families. One of these subdivisions, "Woodsom Meadows," is just beginning to rise from a large lot of cleared land abutting Woodsom Farm. The billboard reads: "Breathtaking views of beautiful Woodsom Farm and acres of open space—custom homes starting at \$499,900." Not exactly affordable, even to the "middle-middle."

Some undeveloped frontage lies across the road from the stone post demarcating the New Hampshire state line and a vineyard's rows of grape arbors and open land. The land here is low and densely wooded. The soil is moist underfoot in the spring, if one could find a trail to navigate through the hundreds of thin trees.

The local man who owns this swampy property also owns the adjacent upland lot, and he is building a basic Cape Cod single-family on the parcel. Now that spring has finally arrived after an unusually long New England winter, the contractors are busy with drywall installation, roof work, and weather-sealing the new structure. After subdividing his land with the Town, the owner wanted to build a second house in the Federalist style on the undeveloped frontage. This endeavor, however, will require a variance from the Amesbury Zoning Board of Appeals (ZBA), since his plan to avoid encroaching on the parcel's wetlands involved insufficient setback from Whitehall Road. If he could build the second house on his property, he planned to donate the rest of his adjoining land—many acres of open space, some within a flood plain and others along a wooded upland ridge—to the Town for permanent conservation. But the Zoning Board of Appeals denied his application, finding no hardship justifying the variance.

Left with many acres of land undevelopable under the Town's conventional zoning, the man approached the Town with a new plan for his undeveloped property: a twenty-eight unit condominium complex on the upland portion he had planned to donate to the Town, with a long access road slicing through the property's wetlands and opening onto Whitehall Road. Seven of these units would be "affordable" condos, and the rest would sell for market prices of at least \$200,000. The man claimed that the number of units was necessary to finance the expensive wetlands mitigation and grading associated with the access road and to generate a profit. This new plan would violate the Town's single-family zoning for the area, as well as undermine the Town's designation of portions of the parcel as within a "water resource protection district."<sup>3</sup>

Undeterred by the local regulations, the man will bypass the normal permitting process, applying directly to the ZBA for a comprehensive permit under Chapter 40B of the Massachusetts General Laws. Chapter 40B was enacted in 1969 to open exclusive suburban areas to housing for

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<sup>3</sup> See Amesbury, Mass., Amesbury Zoning Bylaw and Map (2003), available at [http://www.ci.amesbury.ma.us/NF1\\_114.pdf](http://www.ci.amesbury.ma.us/NF1_114.pdf) (last visited Oct. 2, 2003).

people of low and moderate incomes. If the ZBA denies the permit, as it did his variance application, the man may appeal the decision to a state board, which has the power under the statute to override the ZBA's denial and permit the plan to go forward.

With the recently booming housing market,<sup>4</sup> the vast majority of Massachusetts municipalities now face Chapter 40B applications from private developers who seek comprehensive permits to build housing not contemplated by local zoning, which accommodates mostly single-family residential development on large lots with significant setbacks. Perhaps even more acutely than in 1969, Amesbury is confronting an affordable housing crisis on several levels: only 6.77% of Amesbury's housing units are classified as affordable;<sup>5</sup> apartment buildings are continually being converted into unaffordable condominiums; rents have gone up dramatically; and many long-time residents are moving elsewhere, in part due to the significant property taxes levied on properties purchased many years ago for ten or twenty percent of their current market values. The affordable housing crisis is not unique to Amesbury or to Massachusetts, and is ongoing in many parts of the United States.<sup>6</sup>

Chapter 40B's solution to the affordable housing crisis involves a striking assertion of state power over local land use; the law has been fuel for a political firestorm, intensified in recent years by the new availability of private funding for Chapter 40B projects.<sup>7</sup> The governor of Massachusetts, Mitt Romney, has recently received the report of his task force of housing, environmental, legislative, and municipal leaders, which generated recommendations to reform Chapter 40B.<sup>8</sup> Meanwhile, the 2003 legislative session burst with more than sixty bills to revise, weaken, or repeal the law.<sup>9</sup> Owing to nationwide interest in Massachusetts's thirty years of experience with this statutory program, commentators have ex-

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<sup>4</sup> For an up-to-date account of the Boston housing market as well as a general introduction to the issues raised in this Article, see Anthony Flint, *Real Estate Roulette: Why the State's Red-Hot Housing Market Could End Up Hurting the Economy, Harming the Environment, and Landing the Suburbs in Court*, BOSTON GLOBE MAG., Mar. 9, 2003, at 10.

<sup>5</sup> Mass. Dept. of Hous. and Cmty. Dev., Subsidized Housing Inventory (Apr. 24, 2002), at <http://www.state.ma.us/dhcd/components/hac/HsInvRev.pdf> (last visited Oct. 2, 2003) (on file with the Harvard Environmental Law Review).

<sup>6</sup> See generally Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 B.C. ENVTL. AFF. L. REV. 437, 448-51 (2003) (examining causes of affordable housing crisis nationwide).

<sup>7</sup> See *infra* note 17.

<sup>8</sup> See Press Release, Office of the Governor, Romney Unveils Housing Task Force Recommendations (June 12, 2003), available at [http://www.mass.gov/portal/govPR.jsp?gov\\_pr=gov\\_pr\\_030612\\_40B\\_Housing\\_habitat.xml](http://www.mass.gov/portal/govPR.jsp?gov_pr=gov_pr_030612_40B_Housing_habitat.xml) (last visited Oct. 2, 2003) (on file with the Harvard Environmental Law Review). See generally CHAPTER 40B TASK FORCE: FINDINGS AND RECOMMENDATIONS REPORT TO GOVERNOR MITT ROMNEY (May 30, 2003), available at <http://www.state.ma.us/dhcd/Ch40Btf/report/rpt1.htm> (last visited Oct. 2, 2003) (on file with the Harvard Environmental Law Review).

<sup>9</sup> Anthony Flint, *Zoning at Issue in Affordable Housing*, BOSTON GLOBE, Mar. 31, 2003, at B2.

tensively examined the statute's success in achieving its various ends: enhanced production of affordable units around the state,<sup>10</sup> relief for cities saddled with the burden of concentrated poverty, an end to the socioeconomic and racial exclusion of suburban zoning practices, and racial integration throughout Massachusetts.<sup>11</sup> Little scholarship, however, has critically evaluated Chapter 40B's treatment of environmental impacts and the statute's interactions with environmental law.<sup>12</sup>

Is developing some of the last Whitehall Road frontage and building on acres of would-be conservation land intelligent land use policy? Or do the desperate need for affordable housing and the value of socioeconomic and racial inclusion justify the construction of this condominium complex? Are these inquiries independent at all? Chapter 40B answers them separately, but this Article argues that its approach poorly serves the causes of both housing equity and environmental stewardship by setting these interdependent policies against each other. Moreover, Chapter 40B has divided urban housing advocates and suburban communities into a vitriol-soaked debate that resorts to a counter-productive rhetoric of "us versus them." The law, and even the recent efforts at its reform, fails to recognize that both environmental stewardship and social justice should be but two elements of the responsibility shared by all levels of govern-

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<sup>10</sup> See Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 548 (1992); Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 415-17 (2001).

<sup>11</sup> See Bonnie L. Koneski-White, *Increasing Affordable Housing and Regional Housing Opportunity in New England: Perspectives on the Occasion of the Thirtieth Anniversary of the Massachusetts Comprehensive Permit Law: A Selected Bibliography*, 22 W. NEW ENG. L. REV. 431 (2001).

<sup>12</sup> A recent symposium at Boston College Law School on housing equity issues generated a number of insightful articles debating the merits of Chapter 40B, particularly as the statute relates to environmental issues. See generally *Boston College Law School Mount Laurel Symposium Consensus Observations and Principles*, 30 B.C. ENVTL. AFF. L. REV. 433 (2003). A number of the commentators stressed the compatibility of housing equity and environmental stewardship. See generally Russell, *supra* note 6 (comparing the approaches of Massachusetts, New Jersey, and Oregon to affordable housing, and describing the virtues of a focus on proactive planning for affordable housing and environmental protection simultaneously to prevent sprawl); Mark Bobrowski, *Affordable Housing v. Open Space: A Proposal for Reconciliation*, 30 B.C. ENVTL. AFF. L. REV. 487 (2003) (offering a sketch of legislative reforms that could defuse the Chapter 40B debate in Massachusetts); Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509 (2003) (criticizing Chapter 40B as dysfunctional and rendering local planning impossible); Robert L. Liberty, *Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates*, 30 B.C. ENVTL. AFF. L. REV. 581 (2003) (suggesting that exclusionary zoning practices should be the enemy of both anti-sprawl environmentalists and advocates for housing equity). Nevertheless, while touching on the intersections of environmental law and Chapter 40B, these articles do not (nor were intended to) evaluate fully the environmental law context and environmental provisions of the statute. None squarely confronts the inconsistent legal frames advanced by Massachusetts environmental law as applied to Chapter 40B projects. See *infra* Part III.

ment—to care for an inclusive public commons that nurtures both human and environmental diversity.

Part Two of this Article lays out Chapter 40B's statutory framework for state overrides of local land use decisions denying developers the opportunity to site affordable housing. It also explores how the statute fits within the broader context of state environmental law and how the statute and its regulations handle environmental questions. Describing the current on-the-ground implementation of the statute, Part Three illustrates how Chapter 40B in its current form pits regional housing needs as interpreted by the state against localities' perceptions of their autonomy, by denominating affordable housing a regional issue and environmental impact a local matter. Part Four evaluates from an environmental perspective some of the reform alternatives recently proposed to address the statute's shortcomings. Part Five proposes that both Chapter 40B and the present debate over the law contribute to a flawed conceptual framing of the issues of environmental protection and regional housing equity. It concludes that these policy goals should be treated as interlocking parts of an agenda that embraces social justice *and* sustainability.

## II. THE COMPREHENSIVE PERMIT LAW; WHY IS THIS AN ENVIRONMENTAL STATUTE?

As a statute that provides an avenue for housing development, Chapter 40B interacts with the full machinery of Massachusetts environmental law. This Part surveys the operation of 40B itself and its points of connection with other state environmental statutes, finding ultimately that the complete matrix reflects ongoing confusion about the proper roles of state and local governments and powers in protecting the environment.

### A. Statutory Framework: The Local Override

In 1969, years before *Mount Laurel*,<sup>13</sup> the Massachusetts legislature responded to the twin challenges of the scarcity of affordable housing and the exclusionary zoning practices of Boston's suburbs by enacting Chapter 40B,<sup>14</sup> then dubbed the "Anti-Snob Zoning Law." Although the law eschews any mention of race, the bill arose from the racially charged political atmosphere of the late 1960s.<sup>15</sup> Explicitly targeted at encourag-

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<sup>13</sup> S. Burlington County NAACP v. Mount Laurel Township (*Mt. Laurel I*), 336 A.2d 713 (N.J. 1975) (holding a New Jersey town's exclusionary zoning ordinances requiring minimum lot and home sizes to be unconstitutional socio-economic discrimination under the New Jersey state constitution).

<sup>14</sup> Massachusetts Low and Middle Income Housing Act, MASS. GEN. LAWS ch. 40B, §§ 20–23 (2002).

<sup>15</sup> See Stockman, *supra* note 10, at 547–50 (providing a concise and well-referenced account of the bill's contentious passage); see also Richard G. Huber et al., *Low- and Moderate-Income Housing: The Anti-Snob Zoning Act, Linkage, Inclusionary Zoning and*

ing affordable housing production in places with available land outside the decaying central cities, Chapter 40B establishes an administrative pathway for developers to circumvent restrictive zoning requirements when helping to fulfill the regional need for affordable housing.<sup>16</sup>

The law created a consolidated local approval process before local ZBAs for any subsidized housing development when at least twenty-five percent of its units were to be sold or leased to people of low-to-moderate incomes with long-term affordability restrictions.<sup>17</sup> Developers, who must be governmental, nonprofit, or limited dividend entities, first secure proof that their proposed projects will enjoy some kind of subsidy and subsequently file single applications to local ZBAs. After consulting with other town agencies (such as the Planning Board in § 20, Conservation Commission, Board of Health, and the water and sewer authorities) a ZBA may take any of the following actions: approve the developers' application outright and issue a "Comprehensive Permit" for the development; approve the application and add conditions to the permit, such as local infrastructure improvements or design restrictions; or deny the application.<sup>18</sup> Developers may appeal local denials and unfavorable conditions of Comprehensive Permits to the Housing Appeals Committee ("HAC"), administered by the state Department of Housing and Community Development ("DHCD").<sup>19</sup> In towns with less than ten percent of their total housing stock classified as affordable under the statute,<sup>20</sup> HAC presumes that the "local need" for affordable housing outweighs any other local needs relied upon by ZBAs in denying the application or in

*Incentive Zoning*, in MASSACHUSETTS ZONING MANUAL § 5.2 (Mass. CLE 2002), (outlining legislative history of Anti-Snob Zoning Law through 2001).

<sup>16</sup> See Stockman, *supra* note 10, at 548 n.93.

<sup>17</sup> See MASS. GEN. LAWS ch. 40B, § 21 (2002). The generality of this requirement, which is typical to qualify for government subsidy programs (like those run by Mass Housing and the Massachusetts Housing Partnership), derives from a Housing Appeals Committee decision that made a pool of private bank financing eligible to fund Chapter 40B projects. *Stuborn Ltd. P'ship v. Barnstable Bd. of Appeals*, No. 98-101, at 7 (Mass. Hous. Appeals Comm., Mar. 5, 1999) (decision on jurisdiction) (finding financing from the New England Fund of the Federal Home Loan Bank Board of Boston to qualify as a subsidy when the project makes available more than twenty-five percent of units to those with less than eighty percent of regional median income, and has long-term affordability restrictions and limits on developer return).

<sup>18</sup> MASS. GEN. LAWS ch. 40B, §§ 20–22 (2002).

<sup>19</sup> MASS. GEN. LAWS ch. 40B, § 22 (2002).

<sup>20</sup> DHCD counts "subsidized" affordable housing with long-term affordability restrictions and entering resident income limits as affordable "low and moderate income housing." MASS. GEN. LAWS ch. 40B, § 20 (2002). The counting is the subject of significant controversy; many communities have large numbers of unsubsidized and unrestricted but nonetheless affordable units—such as mobile homes, inexpensive market-rate rentals, and units whose current residents have a mobile Section 8 voucher. See Chapter 40B Taskforce, Apr. 14, 2003, Final Meeting Minutes 5–6, 12–14 (on file with the Harvard Environmental Law Review) (testimony of state representatives Frank Hynes of Marshfield and Garrett Bradley of Hingham, town planner Lynn Duncan of Wilmington, and town employee Robert Crossley of Merrimac).

adding project-killing “uneconomic” conditions.<sup>21</sup> Effectively, the statute encourages affordable housing production in suburbs where zoning makes it otherwise impossible, overriding local land-use regulation when localities deny permit applications and cannot prove extraordinary local conditions<sup>22</sup> that justify the denials.

### *B. Other Massachusetts Statutes’ Interaction with Chapter 40B*

The following analysis includes four Massachusetts environmental laws—the Massachusetts Environmental Policy Act (“MEPA”), the Wetlands Protection Act, the Historic Districts Act, and Title 5 of the State Environmental Code. The analysis reveals that even independent of Chapter 40B, state law provides for a confused matrix of state and local authority in assessing a housing development’s impacts on the environment, and an equally confused separation of administrative procedures that may undermine the “comprehensiveness” of 40B permits.

#### *1. MEPA*

As articulated in the HAC’s regulations, all challenged projects that reach the HAC are subject to MEPA, Massachusetts’s “mini-NEPA.”<sup>23</sup> Without demanding any particular result, MEPA mandates that state actions that may impact the environment face public scrutiny. Whether the risk is of septic system failure or the degradation of wildlife habitat, if an aspect of the development may cause “damage to the environment,” MEPA requires the developer to file a brief statement of a project’s environmental impacts, known as a Environmental Notification Form (“ENF”), with the state Executive Office of Environmental Affairs (“EOEA”).<sup>24</sup> If the project exceeds certain regulatory impact thresholds, the developer must subsequently prepare the state version of the federal Environmental Impact Statement, the elaborate Environmental Impact Report (“EIR”).<sup>25</sup>

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<sup>21</sup> MASS. GEN. LAWS ch. 40B, §§ 20, 23 (2002); *Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 294 N.E.2d 393, 413 (1973); MASS. REGS. CODE tit. 760, § 31.07(1)(e) (2003). Under intense pressure from localities, DHCD issued new regulations that provide an additional pathway for municipalities to avoid this presumption short of reaching ten percent—making a decent annual rate of affordable housing progress (three-quarters of one percent per annum within a DHCD-approved “affordable housing plan”). MASS. REGS. CODE tit. 760, § 31.07(1)(i) (2003).

<sup>22</sup> The statute’s regulations allow denials to stand when a ZBA can prove that “the installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly.” MASS. REGS. CODE tit. 760, § 31.06(8) (2003).

<sup>23</sup> MASS. REGS. CODE tit. 760, § 31.06 (2003). See generally Massachusetts Environmental Policy Act, MASS. GEN. LAWS ch. 30, §§ 61–62H (2002). “NEPA” stands for the National Environmental Policy Act, 42 U.S.C. §§ 4321–4375 (2003).

<sup>24</sup> MASS. GEN. LAWS ch. 30, § 62A (2002).

<sup>25</sup> MASS. REGS. CODE tit. 301, § 11.03 (2003) (delineating review thresholds based on

The process involves an opportunity for public comment on the developer's ENF, and those public comments may assist EOE in determining whether to require an EIR. Major Chapter 40B projects generally require the filing of an ENF and an EIR, while an ENF alone is generally sufficient for projects with a small number of units. MEPA requirements may add delay to finalizing Chapter 40B permits, as Chapter 40B regulations demand that the developer see the MEPA process through to its conclusion, without any provision for expediting or consolidating the review.<sup>26</sup> Furthermore, the HAC has the power to reverse or modify its decisions based on any new environmental impact information unearthed in MEPA filings.<sup>27</sup> Although the prospect of project delay associated with MEPA may reduce the financial feasibility of Chapter 40B projects and undermine the comprehensiveness of comprehensive permits,<sup>28</sup> MEPA review has the potential to inform the 40B process with concrete information on a broad range of environmental impacts. However, HAC and ZBA reviews of comprehensive permit applications have not managed to incorporate MEPA-generated information in a systematic or consistent fashion.

## 2. *The Wetlands Protection Act*

Under Massachusetts's stringent Wetlands Protection Act,<sup>29</sup> projects situated near wetlands require permits from local Conservation Commissions, to which the statute delegates broad enforcement authority. As wetlands are broadly defined in the statute,<sup>30</sup> many 40B projects are subject to the Commissions' imposition of mitigation and other wetlands-related conditions, known as "Orders of Conditions."<sup>31</sup> These conditions are separate and distinct from ZBA-imposed comprehensive permit con-

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acreage of land to be altered, additional expected storm water runoff and wastewater, and the impact on rare species, wetlands, waterways, tidelands, transportation and other utility infrastructures, historic and archeological resources, water supplies, and air emissions).

<sup>26</sup> See MASS. REGS. CODE tit. 760, § 31.08(3) (2002).

<sup>27</sup> *Id.* § 31.08(3)(c).

<sup>28</sup> See Stockman, *supra* note 10, at 572 n.236 (noting that MEPA review adds delay and complication to the comprehensive permitting process).

<sup>29</sup> MASS. GEN. LAWS ch. 131, § 40 (2002).

<sup>30</sup> The act requires filings and a hearing before a local Conservation Commission before a developer or property owner "alter[s] . . . any bank, riverfront area, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding . . ." *Id.* The Commission's jurisdiction includes a one-hundred foot buffer zone around these wetland features, when proposed activity may affect the wetland. MASS. REGS. CODE tit. 310, § 10.02(2)(b) (2003).

<sup>31</sup> MASS. GEN. LAWS ch. 131, § 40 (2002). Because the Conservation Commission is directly implementing a state statute, wetlands orders are not a part of the consolidated Chapter 40B process before the ZBA. See *Bd. of Appeals of Maynard v. Hous. Appeals Comm.*, 345 N.E.2d 382, 385 (1976) (finding that comprehensive permit does not override wetlands protection scheme mandated by the Wetlands Protection Act).



ditions; unlike ZBA-imposed conditions, they may legitimately render the project "uneconomic." Still, such conditions must arise from the specific statutory framework of the Wetlands Protection Act. Developers can appeal Conservation Commission orders to the Department of Environmental Protection ("DEP") for an adjudicatory hearing and final decision. The Supreme Judicial Court of Massachusetts has stated that this local process remains in force despite Chapter 40B because the protection of wetlands is a "statewide" requirement.<sup>32</sup> By devolving authority to local elected commissions, the statute at least gives localities a chance to veto developments sited near wetlands, providing an opportunity to influence the development outside of the Chapter 40B ZBA process.<sup>33</sup> While safeguarding wetlands from alteration and imposing locally proposed but state-mandated mitigation measures, the Wetland Protection Act kills, sidetracks, or delays many 40B projects by rendering much suburban land difficult and expensive to develop.<sup>34</sup> For example, the 40B proposal for Whitehall Road will face the initial challenge of obtaining an order of conditions from the Amesbury Conservation Commission, which would permit construction of the access road through the swampy area, and any other wetlands impacts.

### 3. *The Historic Districts Act*

Some projects raise another set of resource concerns when proposed within a local historic district. Massachusetts recognizes the necessity of cultural preservation in both MEPA and the Historic Districts Act.<sup>35</sup> The protection of historic structures and neighborhoods may not seem inherently environmental, but the Massachusetts program responds to a project's impact on the area's historic coherence and character in much the same way that other environmental statutes address impacts to natural resources. Designed to preserve the exterior character of structures in areas of historic significance, the Historic District Act requires a local board to review the exterior design of many developments, particularly those sited in the state's historic village and town centers. If a proposed development or renovation lies within a locally designated Historic Dis-

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<sup>32</sup> See *Dennis Hous. Corp. v. Bd. of Appeals of Dennis*, 785 N.E.2d 682, 689 (2003) (citing *Bd. of Appeals of Maynard*, 345 N.E.2d at 385); see also Huber, *supra* note 15, § 5.4.4.

<sup>33</sup> For evidence of this strategy, see Gregor I. McGregor, *Role of the Conservation Commission in Affordable Housing "Comprehensive Permits,"* MASS. ASSOC. OF CONSERVATION COMM'NS NEWSLETTER (Nov.-Dec. 2001), available at [http://www.maccweb.org/affordable\\_housing.html](http://www.maccweb.org/affordable_housing.html) (last visited Oct. 2, 2003) (on file with the Harvard Environmental Law Review).

<sup>34</sup> See Sharon Perlman Krefetz, *Low- and Moderate-Income Housing in the Suburbs: The Massachusetts "Anti-Snob Zoning" Law Experience*, 8 POL'Y STUD. J. 288, 292-94 (1979) (citing evidence of delay and project attrition as a result of Wetlands Protection Act procedures and orders); see also Stockman, *supra* note 10, at 572 n.236.

<sup>35</sup> MASS. GEN. LAWS ch. 40C, §§ 1-17 (2002).

trict, typically the construction cannot go forward without a certificate from the local historical commission. Under Chapter 40B, however, the ZBA consolidates historic review within the comprehensive permitting process, just as with the work of the Planning Board, the Board of Health, and other “local” boards.<sup>36</sup> Unlike the Wetlands Protection Act, which is a “state” program administered locally, Massachusetts’s highest court has recently deemed the Historic Districts Act affirmatively of “local” and not “statewide” benefit. Thus the local standards created under the statute are subject to usurpation and possible override by the ZBA.<sup>37</sup> The court also noted that to give historic commissions power over affordable housing developments would undermine Chapter 40B’s ability to counteract local exclusionary practices and regulations.<sup>38</sup>

#### 4. Title 5 of the State Environmental Code

As with all residential development, Chapter 40B projects that have no access to municipal sewer systems must install, or (in the case of many properties to be renovated under a comprehensive permit) rebuild on-site wastewater disposal facilities (or “septic systems”), which are regulated by the DEP.<sup>39</sup> The scale of many of these 40B projects requires large sewage capacities and technologically sophisticated septic systems, potentially posing risks to ground water, nearby wetlands, and water bodies. While a detailed analysis of this state regulatory regime is beyond the scope of this Article, it is sufficient to note that the regulations require projects to demonstrate the systems’ compliance with various technology, flow, and environmental standards.<sup>40</sup> Local Boards of Health issue permits to developers for Title 5 purposes;<sup>41</sup> if system flow exceeds 10,000 gallons per day, the DEP embarks on a mandatory review after the

<sup>36</sup> *Id.* ch. 40C, § 6; ch. 40B, §§ 20, 21; *Dennis Hous. Corp.*, 785 N.E.2d at 685–90.

<sup>37</sup> *See Dennis Hous. Corp.*, 785 N.E.2d at 689–91.

<sup>38</sup> *Id.* at 690–91.

<sup>39</sup> MASS. REGS. CODE tit. 310, § 15.000 (1995) (“Title 5 of the State Environmental Code” or simply “Title 5”); MASS. GEN. LAWS ch. 21A, § 13 (2002). Title 5 regulates on-site septic systems, including those that serve single-family and multi-family residences. Compliance with Title 5 is necessary to effectuate a property transfer, and the revised 1995 regulations outlawed much of the septic technology in the ground at the time. For these reasons, the regulations have been sharply criticized as regressive and unfair to low-income, moderate-income, and middle-class homeowners, who frequently must pay tens of thousands of dollars to overhaul their systems before reselling their property. For a discussion of the impact of Title 5 on housing, see Charles C. Euchner & Elizabeth G. Frieze, *Getting Home: Barriers in Housing in Greater Boston* (Pioneer Institute for Public Policy Research & Harvard University Kennedy School of Government Rappaport Institute for Greater Boston, Boston, Mass.), Jan. 2003, at 25–27, available at <http://www.pioneerinstitute.org/pdf/wp21.pdf> (last visited Oct. 2, 2003) (on file with the Harvard Environmental Law Review).

<sup>40</sup> *See* Mass. Dept. of Env’tl. Prot., *About Septic Systems/Title 5*, at <http://www.state.ma.us/dep/brp/wwm/t5about.htm> (last visited Oct. 4, 2003) (on file with the Harvard Environmental Law Review).

<sup>41</sup> MASS. REGS. CODE tit. 310, § 15.003(2) (2003); *see* Huber, *supra* note 15, § 5.4.4.

local board issues a permit.<sup>42</sup> Local boards can also issue variances from Title 5 requirements, but the terms of the variance are subject to automatic DEP review.<sup>43</sup> Permit or variance denials can be appealed to a superior court.<sup>44</sup> Municipalities may impose more stringent requirements than Title 5,<sup>45</sup> but under Chapter 40B these local regulations, like zoning or historic district bylaws, will not bind applicants whose septic system plans comply with Title 5.<sup>46</sup>

### C. Chapter 40B's Environmental Provisions

Chapter 40B and its implementing regulations designate environmental concerns related to a proposed affordable housing development as "local" impacts that must be balanced against the urgent "regional" need for affordable housing, which subsumes almost all local concerns and becomes nearly the only state-recognized need in communities that have not done their "fair share."<sup>47</sup> The statute itself does not use the word "environmental," but its definition of "consistent with local needs" identifies environmentally related needs "to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, and to preserve open spaces" as local concerns to be "considered with" the "regional need for low and moderate income housing" before ZBAs and the HAC.<sup>48</sup>

Chapter 40B regulations set out a balancing test for the HAC to perform if a ZBA denies a developer's application for a comprehensive permit and attempts to rebut the presumption that the development is "consistent with local needs," setting the "weight of the housing need" against the "weight of local concerns."<sup>49</sup> Under the regulations, local concerns are delineated as

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<sup>42</sup> MASS. REGS. CODE tit. 310, § 15.020(1) (2003). See also Euchner & Frieze, *supra* note 39, at 26 (charting out the Title 5 construction permitting process).

<sup>43</sup> See MASS. REGS. CODE tit. 310, § 15.410–15.415 (2003).

<sup>44</sup> *Id.* §§ 15.421, 15.422.

<sup>45</sup> *Id.* § 15.003(3). 125 communities have enacted stricter standards. See Euchner & Frieze, *supra* note 39, at 27.

<sup>46</sup> See *KSM Trust v. Pembroke Zoning Bd. of Appeals*, No. 91-02, at 18–21 (Mass. Hous. Appeals Comm., Nov. 18, 1991) (finding proposed septic system in vicinity of wetlands and a tidal river adequate to protect the environment when in compliance with Title 5 and Department of Environmental Management protective order, but not with local septic regulation using drinking water standards, and granting comprehensive permit) (on file with the Harvard Environmental Law Review).

<sup>47</sup> Although neither the statute nor the regulations use "fair share" language to describe each municipality's obligation to provide a given amount of the regional need for affordable housing within its borders, the idea of "fair share" obviously animates Chapter 40B and explicitly forms the basis for the New Jersey Supreme Court's decision in *Mt. Laurel I.* See 336 A.2d at 724.

<sup>48</sup> MASS. GEN. LAWS ch. 40B, § 20 (2002).

<sup>49</sup> MASS. REGS. CODE tit. 760, § 31.07(2) (2003).

the degree to which the health and safety of occupants or town residents is imperiled, the degree to which the natural environment is endangered, the degree to which the design of the site and the proposed housing is seriously deficient, the degree to which additional open spaces are critically needed in the city or town, and the degree to which the local requirements and regulations bear a direct and substantial relationship to the protection of such local concerns . . . .<sup>50</sup>

To assess a project's danger to the natural environment, "critical" local open space needs, or the degree to which local regulations would halt the development, the HAC can admit evidence provided by the developer and by the locality to settle factual disputes on alleged impacts.<sup>51</sup> The regulations also command the HAC to compare the development's relationship with the details of any municipal planning efforts, such as the implementation of a comprehensive or master plan.<sup>52</sup> Although the HAC is explicitly "balancing," the regulation's burden of proof establishes a Herculean task for ZBAs. For an appealing locality to succeed in sustaining a permit denial before the HAC, it must prove "first, that there is a valid health, safety, environmental, design, open space, or other local concern which supports such denial, and then, that such concern outweighs the regional housing need."<sup>53</sup>

In the abstract, projects that genuinely and significantly "endanger the environment" or pose other grave threats to the town will not pass muster before the HAC, and the HAC will override only denials that are not grounded in some well-substantiated and recognized "local concern." In practice, however, the HAC rarely engages in qualitative balancing, frequently relying instead on the near-ironclad presumption that the affordable housing development is "consistent with local needs" due to the

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<sup>50</sup> *Id.* § 31.07(2)(b).

<sup>51</sup> MASS. REGS. CODE tit. 760, § 31.07(3)(a)-(c) (2002).

<sup>52</sup> MASS. REGS. CODE tit. 760, § 31.07(3)(d) (2002). *See* *Stuborn Ltd. P'ship*, No. 98-01, at 7-15 (Mass. Hous. Appeals Comm., Sept. 18, 2002) (refusing to override a ZBA's denial on the basis of the development's incompatibility with the local master plan and finding local interest in preserving the maritime business zoning of the development's parcel to trump the regional need for housing) (on file with the Harvard Environmental Law Review); *KSM Trust*, No. 91-02, at 6 (Mass. Hous. Appeals Comm., Nov. 18, 1991) (setting out criteria to evaluate local master plans but attaching relatively little weight to eighteen year-old comprehensive plan, which had an unclear effect on rejected project) (on file with the Harvard Environmental Law Review); *Harbor Glen Assoc.*, No. 80-06, at 6-15 (Mass. Hous. Appeals Comm., Aug. 20, 1982) (upholding local denial of comprehensive permit when project would have precluded the siting of an office park in the area in keeping with town's master plan) (on file with the Harvard Environmental Law Review). Localities may avoid the presumption that the development is consistent with local needs altogether by reaching the ten percent statutory minimum or by making significant progress toward the ten percent. *See supra* note 21.

<sup>53</sup> MASS. REGS. CODE tit. 760, § 31.06(6) (2002).

region's pressing need for affordable housing.<sup>54</sup> When the HAC does embark on the balancing test, it tends to focus on the denying locality's pattern of environmental enforcement in non-subsidized contexts. For example, the HAC has been suspicious of communities that subject Chapter 40B projects to local environmental bylaws concerning cumulative environmental impacts, since those communities generally have not subjected past and present non-subsidized developments to the same scrutiny.<sup>55</sup> This pattern of holding municipalities accountable for their past environmental laxity reflects the command of the statute itself<sup>56</sup> but does not reveal that the HAC directly confronts the question of developments' environmental context with any regularity. Instead, the HAC examines projects through the lens of a town's past practices, making environmental inquiries more retrospective than prospective. However, the HAC does give the subjects of septic system and drainage adequacy significant substantive consideration, and these impacts often play a role in the validity of a comprehensive permit's locally imposed conditions.<sup>57</sup>

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<sup>54</sup> Huber, *supra* note 15, § 5.4.1(j); Witten, *supra* note 12, at 536–40. In contrast, Werner Lohe, the HAC's longtime chair, has recently insisted that its decisions are consistent with an ethic of environmental protection:

[E]nvironmental diversity is not addressed explicitly in the statute. In fact, if anything, affordable housing is set in opposition to environmental issues. That is, the statute explicitly permits the weighing of local environmental concerns against the need for affordable housing, permitting some environmental degradation. Historically, however, the Housing Appeals Committee has not done that. A review of its cases, at least during the past ten years, shows that the proposals submitted have been such that the Committee has not had to issue decisions in which it accepts degradation of the environment.

Werner Lohe, *Command and Control to Local Control: The Environmental Agenda and the Comprehensive Permit Law*, 22 W. NEW ENG. L. REV. 355, 360–61 (2001). HAC critics counter that it rarely upholds ZBA denials, and thus fails to pursue the meaningful environmental review Lohe insists is happening. *See, e.g.*, Witten, *supra* note 12, at 540 (citing Krefetz, *supra* note 10, at 398).

<sup>55</sup> Woodland Heights, No. 91-06, at 11–13 (Mass. Hous. Appeals Comm., June 14, 1993) (overriding a ZBA denial on grounds that ZBA's basis for denial, cumulative nitrogen loading, was unevenly applied at the local level: "Because of their great importance and public visibility, environmental issues lend themselves to use, and unfortunately too often are actually used, as stalking-horses.") (on file with the Harvard Environmental Law Review); G.P. Affordable Homes Corp., No. 89-24, at 35 (Mass. Hous. Appeals Comm., Nov. 12, 1991) (finding Town's attempts to stem septic nitrogen loading by other area developments inadequate to show equal treatment of subsidized and non-subsidized development, and granting developer comprehensive permit) (on file with the Harvard Environmental Law Review). *See also* CMA, Inc., No. 89-25, 39 (Mass. Hous. Appeals Comm., June 25, 1992) (deciding that inadequate streets cannot be grounds for denial of comprehensive permit when it is technically and financially feasible for town to improve them) (on file with the Harvard Environmental Law Review).

<sup>56</sup> MASS. GEN. LAWS ch. 40B, § 20 (2003) (requiring consideration of whether local "requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing").

<sup>57</sup> *See* Ipswich Hous. Auth., No. 91-01, at 5, 9–10 (Mass. Hous. Appeals Comm., June 14, 1993) (upholding on-site septic permit condition instead of graywater sewer arrangement and requiring monitoring wells for environmental reasons) (on file with the Harvard

Even while HAC is very unwilling to uphold permit denials based on environmental impacts, HAC accepts municipal master and comprehensive plans in a way that may stymie 40B projects. Insofar as communities exercise their planning discretion to embrace, encourage, and create subsidized affordable housing, they may manage to avoid the Chapter 40B override threat when developers propose projects contrary to specific master plan provisions.<sup>58</sup> Amesbury and other communities like it have not engaged in such planning until recently, and the Amesbury Master Plan that will address affordable housing may not be in place until 2004.<sup>59</sup> Without a plan, Amesbury can thus not justify a ZBA denial by citing a proactive record.

To summarize, the overall result of 40B's environmental provisions and the other state statutes that influence its implementation is an odd and incoherent amalgam of (1) broad environmental reviews of some but not most projects by the state, (2) wetlands standards of "statewide" significance implemented by local specialized boards, (3) local historic district protections that are subject to 40B override as "local" concerns, (4) stringent state septic system requirements overlaid with some even more stringent local regulation, the latter but not the former avoidable by 40B developers, and (5) Chapter 40B's demand that "regional housing needs" override local environmental concerns, unless the locality can conclusively prove the validity of those concerns, or has built a local record of equal-opportunity environmental scrutiny of developments or proactive affordable housing planning.

### III. THE 40B CONFRONTATION TODAY

In the suburbs, the comprehensive permitting process is as contentious as the statutory framework is convoluted. With even more vitriol than in the years following the passage of Chapter 40B, municipalities and local residents who embrace the "NIMBY" (Not In My Backyard) creed oppose the siting of developments within their town borders, often pointing to environmental reasons for the impropriety of 40B projects. Affordable housing advocates, often with urban backgrounds, fault these communities for their reluctance to show local initiative in building affordable housing and cite the tens of thousands of new affordable units

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Environmental Law Review); Oxford Hous. Auth., No. 90-12, at 9, 13 (Mass. Hous. Appeals Comm., Nov. 18, 1991) (requiring monitoring wells in septic system design and improvement of storm water drainage) (on file with the Harvard Environmental Law Review).

<sup>58</sup> See *supra* note 52 and accompanying text; see also Russell, *supra* note 6, at 484. But see Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 512-13 (2003) (arguing that Chapter 40B is fundamentally incompatible with planning).

<sup>59</sup> See Amesbury Master Plan: Housing, available at <http://www.ci.amesbury.ma.us/home.nfs?a=amesbury&s=1066625889:8299&group=301> (last visited Oct. 2, 2003) (on file with the Harvard Environmental Law Review).

produced in the statute's history. These advocates perceive as clearly as the legislators who passed Chapter 40B that "local concerns" are almost always pretextual, a way to justify exclusionary or even racist motives. The resultant debate is hardly a civil dialogue, and the camps have, by one account, "sucked the oxygen" out of the state's housing policy discussion.<sup>60</sup> Nevertheless, it is essential to understand each perspective before evaluating the reform alternatives because the divisive debate stirred by Chapter 40B's implementation brings the preceding blurry portrait of the statutory environmental framework into clearer focus.

#### A. *Local Outrage, Suburban Environmentalism, and Identity*

Local opponents to Chapter 40B developments see the statute as an unjust intrusion on their local autonomy by state government and powerful private developers<sup>61</sup> and as a threat to their cherished suburban "quality of life."

In many Massachusetts communities, local autonomy is the rallying call for 40B detractors mobilizing to defeat a comprehensive permit application, with all the rhetorical appeal of self-determination.<sup>62</sup> These detractors view Chapter 40B as an attack on local government's sovereignty to regulate land use, and as an unjust limit on local government power to impose more stringent environmental standards than are required by state authorities. For example, a suburban critic of Chapter 40B, State Representative Frank Hynes, argued before Governor Romney's task force that 40B destroys planning and "trumps" zoning to the detriment of local concerns such as groundwater and wetland protection.<sup>63</sup> He cited the unique environmental concern of his district—sandy soil and its fast leaching of chlorine and other chemicals from septic systems—as the basis for Marshfield's stringent wetlands and groundwater standards, which exceed the requirements of state law.<sup>64</sup> A leading environmental attorney for municipalities reinforces Hynes's assertion when advising communities how to confront comprehensive permit applications, suggesting that

[40B] is the tactic of choice for marginal developers to ram down the throats of municipalities poorly-planned residential projects which cannot otherwise meet (and often do not even

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<sup>60</sup> Euchner & Frieze, *supra* note 39, at 41.

<sup>61</sup> A full discussion of the legal flaws underlying this perception is beyond the scope of this Article, but for an introductory selection of materials on the subject of local power, see generally GERALD E. FRUG, ET AL. *LOCAL GOVERNMENT LAW* (3d ed. 2001).

<sup>62</sup> See David A. Mittel, *Commentary: Towns Are Being Victimized By Anti-Snob Zoning*, PATRIOT LEDGER, Aug. 3, 2002.

<sup>63</sup> Minutes, *supra* note 20, at 5.

<sup>64</sup> *Id.* at 5–6.

come close to meeting) *your reasonable local bylaws and regulations . . . .* Some builders, however, use the law to get around the law . . . . Don't be cowed by applicants who, instead of trying to meet what local requirements they can for affordable housing, speak as if on a "broken record" that "your town has no power here and no choice."<sup>65</sup> (emphasis added)

This rhetoric is only persuasive insofar as local environmental regulation is "reasonable" or necessary and is the proper domain of local government. Following this vein of reasoning, a commentator opposing 40B contends that

[i]n practice, the Act requires municipalities to grant a waiver from any and all locally-based regulations in favor of the development of "affordable housing," regardless of the regulation's purpose or intent . . . . This requirement, however, conflicts with the readily definable carrying capacity of the region's water resources for nitrogen and phosphorus. Yet, under the Act, an application for affordable housing development that would result in the generation of nutrient levels beyond the carrying capacity of the water resource would nevertheless be entitled to approval. The need for affordable housing has trumped environmental protection, even though there has been no analysis of the impact this sweeping initiative will have upon the state's environmental resources . . . . Ultimately, local residents will lose their voices to their futures when they are lulled with false promises of home rule and self-determination, which are largely irrelevant if local plans and visions are not taken into account.<sup>66</sup>

At the heart of this critique is confusion about the proper arbiters of "regional," "local," and "statewide" concerns,<sup>67</sup> much like the confusion described in reference to 40B's statutory framework. Which level of government should have the legal power to enforce the "carrying capacity" of the *region's* resources? The locality? The state? By conflating regional and local environmental concerns under the "local concerns" label, 40B

<sup>65</sup> McGregor, *supra* note 33. See also HORSLEY & WITTEN, INC., MEMORANDUM: HOW TO EVALUATE PROJECT UNDER G.L. CHAPTER 40B, available at <http://www.marshfieldaction.com/Horsley/Memorandum.htm> (last visited Oct. 2, 2003) (on file with the Harvard Environmental Law Review).

<sup>66</sup> Jonathan Douglas Witten, *Carrying Capacity and the Comprehensive Plan: Establishing and Defending Limits to Growth*, 28 B.C. ENVTL. AFF. L. REV. 583, 598-99 (2001) (arguing for robust local comprehensive plans incorporating idea of environmental carrying capacity and that 40B fundamentally disregards locally driven prospective planning).

<sup>67</sup> See Russell, *supra* note 6, at 1 ("Environmental impacts big and small spill with abandon across political boundaries of all dimensions, yet, in the end, their effects are felt locally.").



itself invites the local opponents' argument that environmental protection is within a sacred domain of local autonomy.

The perception of local regulatory autonomy extends to the generalized local animus against private outside developers' use of Chapter 40B, at least since 1999, when the HAC blessed the New England Fund's private financing pool as a subsidy for use in 40B projects.<sup>68</sup> Although much local self-righteousness over autonomy stems from the normative power of environmental stewardship,<sup>69</sup> the rhetoric often shifts to complaints about the impact of dense multi-family developments on "community character" and "quality of life," the interests upheld by the Supreme Court as valid objects of local protection in *Village of Belle Terre v. Boraas*.<sup>70</sup> Local residents, in other words, wish to keep the suburbs "the suburbs" and free of undesirable urban density and problems they associate with urban areas. Critics complain that Chapter 40B is fundamentally "a bludgeon" used by irresponsible, greedy developers,<sup>71</sup> forcing communities to accept substandard or illegitimate projects that produce substantial private profit<sup>72</sup> and leave behind undesirable burdens: the cost of educating the children to be housed in the development, traffic woes, police and fire protection, and less open space. While private developers may use Chapter 40B to circumvent local zoning to build affordable housing for families, these critics point to the fact that seventy-five percent<sup>73</sup> of

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<sup>68</sup> See *supra* note 17. State Representative Hynes has proposed many 40B reforms, one of which would preclude the use of private financing pools like the New England Fund as a "subsidy" under the statute. See Minutes, *supra* note 20, at 5.

<sup>69</sup> When environmentalists opposing a permit are also town residents or abutters to be affected by the proposed development, it is fair to question the real basis for their opposition. See, e.g., Brian W. Blaesser et al., *Advocating Affordable Housing in New Hampshire: The Amicus Curiae Brief of the American Planning Association in Wayne Britton v. Town of Chester*, 40 WASH. U. J. URB. & CONTEMP. L. 3, 14 (1991) (noting that "the desire to preserve the environment is often cited as a reason for imposing severe restrictions on land development," and that "ecological concerns may mask exclusionary motives").

<sup>70</sup> 416 U.S. 1, 9 (1974) ("A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. . . . It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clear air make the area a sanctuary for people.")

<sup>71</sup> See Horsley & Witten, Inc., *supra* note 65; McGregor, *supra* note 33; Euchner & Frieze, *supra* note 39, at 41; Minutes, *supra* note 20, at 7 (testimony of state senator Robert Hedlund of Weymouth that many communities perceive 40B as a "sledge hammer"). The Web sites of local anti-40B citizens' groups also characterize the statute this way. See, e.g., Marshfield Action, at <http://www.marshfieldaction.com/> (last visited May 3, 2003) (on file with the Harvard Environmental Law Review); 40B.org, at <http://www.40b.org/> (last visited May 3, 2003) (on file with the Harvard Environmental Law Review). See also Paul Restuccia, *Chapter 40B Changes on Way*, BOSTON HERALD, Sept. 28, 2001, at 49 (quoting state representative Harriet Stanley: "These towns are being bombed by 40B.").

<sup>72</sup> The HAC has stated that a ten to twenty percent return on projects developed by limited-dividend entities is reasonable and economic under the statute. See *Hastings Village, Inc. v. Wellesley Board of Appeals*, No. 95-05, at 15 (Mass. Hous. App. Comm., Jan. 8, 1998) (on file with the Harvard Environmental Law Review); *Stuborn Limited Partnership I*, *supra* note 17, at 17.

<sup>73</sup> See *Stuborn Limited Partnership I*, *supra* note 17, at 10.

the housing built by a New England Fund Chapter 40B project is sold at exorbitant market rates. Ultimately, local outrage feeds on the strident NIMBY rhetoric of the “us vs. them” entrenchment of town borders that lacks broader commitment to regional or statewide problems—“we” have tough local regulations to protect “our community” and “our way of life”—and “they” are coming into “our town” to profit off of “us,” to despoil “our environment,” and raise “our” taxes to provide services for “them.”<sup>74</sup>

### B. Desperate Housing Advocates

In this dire time for public financing of affordable housing production programs in Massachusetts,<sup>75</sup> housing advocates see Chapter 40B as a resilient, albeit limited tool that has been the only effective means of bringing affordable units to suburban communities. Housing advocacy groups like the Citizen’s Housing and Planning Association (“CHAPA”) and the Massachusetts Association of Community Development Corporations, as well as urban legislators whose districts have the overwhelming majority of subsidized housing in the state, thus defend the statute, applauding its success in producing affordable units in the suburbs over the past thirty years.<sup>76</sup> The complete failure of most localities to meet the ten percent subsidized standard in thirty years leaves housing advocates

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<sup>74</sup> A commentator could not ask for a more perfect statement of this attitude than these words on Marshfield Action’s Web page:

What is wrong with this 40b picture? Why is the Chapter 40b law always used as a threat to the people when it was put in place to help people? Why do Developers always file a 40b application on substandard land that is deemed buildable? Why does the State let builders destroy our ecosystem, pollute our wells and endanger children in the name of 40b? Why does the State of Massachusetts let 40b developers, HAC and CHAPA (all one in the same, builders & bankers) control the quality of life of the people who have lived in these towns for generations? Massachusetts isn’t Communist Russia!! DID WE FORGET WHAT TYPE OF GOVERNMENT WE LIVE IN? IS IT WE THE PEOPLE OR STATE RULE? Don’t just sit there and be hijacked by greedy builders. Join the good fight at the state level where we the people will put the brakes on this outrageous destructive law! JOIN US TO SAVE OUR TOWNS!

Marshfield Action, *supra* note 71.

<sup>75</sup> See Anthony Flint, *Affordable Housing Advocates Decry Cuts*, BOSTON GLOBE, Feb. 4, 2003, at B2.

<sup>76</sup> Although only two cities in Massachusetts had more than ten percent of its housing stock in subsidized affordable units when 40B was enacted, the number of cities at or near ten percent is now close to fifty, one-seventh of the Commonwealth’s 351 municipalities. See CITIZEN’S HOUSING AND PLANNING ASSOCIATION, CHAPTER 40B FACT SHEET, at [http://www.chapa.org/40b\\_fact.html](http://www.chapa.org/40b_fact.html) (last modified Mar. 2003) (finding that, since 1970, Chapter 40B has led to the production of 30,000 new housing units, 18,000 of which are reserved for households with 80% or less of median income). See also Krefetz, *supra* note 10, at 415; Stockman, *supra* note 10, at 576–77 (citing significant progress in affordable housing production under Chapter 40B, particularly noteworthy for its locus in suburban areas).

mostly unsympathetic to the local vitriol chronicled *supra*. Aaron Gornstein, executive director of CHAPA, has expressed his frustration, pointing to the towns which have not reached ten percent: "Many . . . communities don't want to do their fair share. . . . They want to skirt their obligations."<sup>77</sup> Speaking from their singular policy focus, these activists present Chapter 40B as a necessary tool to address the discrete problems of exclusionary zoning and housing affordability in the suburbs. Through this lens, "40B is necessary as long as suburbs continue to exclude the needy,"<sup>78</sup> and even the middle class.<sup>79</sup> As housing advocates understand the "suburban obligation" to build affordable housing, they perceive a moral imperative in the statewide and "regional need" for housing equity. It is therefore no surprise that one of the most prominent Chapter 40B proponents cited by housing advocates (before his disgraceful public departure) was Cardinal Bernard Law of the Boston Archdiocese of the Roman Catholic Church.<sup>80</sup> Yet the sphere of such advocacy rarely spreads beyond housing, ignoring even the mention of any "regional" environmental impacts of Chapter 40B, deriding them as pretextual "local concerns" and yet another aspect of local obstruction of affordable housing production.<sup>81</sup> Indeed, the focus of this housing policy advocacy is most

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<sup>77</sup> Restuccia, *supra* note 71, at 49. The exchange between state representative Hynes and state senator Dianne Wilkerson of Boston at the recent meeting of Governor Romney's 40B task force vividly reflects 40B defenders' frustrations with suburban inaction. See Minutes, *supra* note 20, at 5.

<sup>78</sup> Thomas Grillo, *Affordable Housing: The Debate Goes On*, BOSTON GLOBE, Jan. 20, 2002, at H1 (noting opinion of Thomas Callahan, President of the Massachusetts Affordable Housing Alliance).

<sup>79</sup> In 2003, families of four with household incomes of \$62,650 (80% of median income) or less are eligible to apply for units produced under Chapter 40B. CHAPA, *supra* note 76. See Restuccia, *supra* note 71, at 49 (quoting Marc Draisen of MACDC):

We ask some of these suburbs, how are you meeting *your* own local needs for affordable housing, places for residents of the town who are police officers, firefighters, teachers, widows, divorced or disabled people . . . . *They* are not even providing housing for people who need it within *their* own borders. (emphasis added).

See generally CITIZENS HOUSING AND PLANNING ASSOCIATION, THE FACES OF 40B (2003), available at <http://www.chapa.org/Facesof40B.pdf> (last visited Oct. 5, 2003) (on file with the Harvard Environmental Law Review) (providing narratives showing the socio-economic range of families who have benefited from Chapter 40B "affordable" housing units). See generally CITIZENS HOUSING AND PLANNING ASSOCIATION, THE RECORD ON 40B: THE EFFECTIVENESS OF THE MASSACHUSETTS AFFORDABLE HOUSING ZONING LAW (2003), available at <http://www.chapa.org/TheRecordon40B.pdf> (last visited Oct. 5, 2003) (on file with the Harvard Environmental Law Review).

<sup>80</sup> Marie Szaniszlo, *Law: Affordable Housing Crucial to Economy*, BOSTON HERALD, Feb. 28, 2001, at 4.

<sup>81</sup> See, e.g., Aaron Gornstein, *Argument: A Plan for Solving the Housing Crisis*, COMMONWEALTH MAG., Summer 2000, available at <http://www.massinc.org/handler.cfm?type=1&target=2000-3/argument.html> (last visited Oct. 5, 2003) (on file with the Harvard Environmental Law Review) (finding that "A long Massachusetts tradition of home rule and local rights has worked to exclude low-income families from many suburban communities. [S]ome communities . . . thwart affordable housing development through

frequently the State House. Leveraging suburban action on housing issues remains difficult for housing advocates precisely because they subscribe to the “us vs. them” rhetoric embraced by suburban NIMBYs.

#### IV. EVALUATING THE ALTERNATIVES TO 40B

With this Article’s portrait of Chapter 40B now in view, it is important to note that the portrait’s composition is in a state of flux. Governor Romney’s task force has recently issued its recommendations on 40B reforms, and comprehensive legislation to reflect its proposals has been filed. In this context and with the existing statutory framework and the contours of the 40B debate in mind, the following Sections present an evaluation of selected reform alternatives.

##### A. *State Senator Dianne Wilkerson and State Representative Brian Golden’s CHAPA-Endorsed Bill*

Hesitant to tamper too much with the law that has stimulated substantial affordable housing production in the past thirty years and prevented localities from completely excluding multi-family developments, State Senator Dianne Wilkerson and State Representative Brian Golden, both of Boston and both CHAPA allies, have proposed only slight alterations in the basic 40B framework. These alterations are intended to enhance 40B’s effectiveness and increase unit production, and to codify a number of the recent regulatory changes promulgated by DHCD.<sup>82</sup> Most significantly, their bill would codify the requirement that the HAC consider local master planning efforts and their implementation, as well as the local affordable housing plan when reviewing permit denial appeals. It would also impose some caps on an application’s number of units commensurate with each locality’s size. Prodding municipalities to exercise their discretion to craft affordable housing plans and master plans that welcome, encourage, and produce affordable housing, the bill reflects an acknowledgement of the legitimacy of local planning autonomy, without conceding an inch of the moral imperative for municipalities to begin to address housing equity. These reforms represent adjustments that would bolster housing advocates’ insistence that Chapter 40B is fair and that individual communities must take the initiative to meet their “fair share” affordable housing obligation to the state.

From an environmental perspective, this bill offers little to change Chapter 40B’s skewed framing of affordable housing as a “regional need” and environmental concerns as “local.” Instead, through the local planning incentives, these 40B adjustments decentralize affordable housing

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‘no growth’ regulations and overly restrictive zoning practices”).

<sup>82</sup> S. 741, 183d Gen. Ct. (Mass. 2003); H.R. 2607, 183d Gen. Ct. (Mass. 2003)

policy much as the Clean Air Act delegates responsibility to the states to craft State Implementation Plans while maintaining centralized approval authority over the Plans.<sup>83</sup> If the Clean Air Act analogy is any guide, local compliance with housing production goals may not be spectacular.<sup>84</sup>

### B. *The Community Preservation Act*

Passed into law in 2000, the Community Preservation Act ("CPA")<sup>85</sup> is not a direct alternative to Chapter 40B. It instead represents a fundamentally different effort to empower municipalities to raise funds specifically for the purposes of financing, ideally in concert, a range of conservation, preservation, and affordable housing measures. Spearheaded by former Secretary of Environmental Affairs Robert Durand and supported by environmental groups, affordable housing advocates, and historic preservation organizations, this statute allows localities to increase real estate taxes by up to three percent, by referendum, for the purposes of creating a local fund for (1) acquisition and preservation of open space, (2) creation and support of affordable housing, and (3) acquisition and preservation of historic buildings and landscapes.<sup>86</sup> The state will match local tax contributions to the fund with a state contribution of up to 100% of the local taxes collected.<sup>87</sup> Local community preservation committees have discretion as to the use of seventy percent of the fund, which may also go to finance recreational programs, but communities must allocate thirty percent of the fund to the three "core" purposes above.<sup>88</sup>

According to the Web page for the coalition which fought for passage and is now fighting for implementation of the CPA, the statute embraces by its very provisions the conception that these issues are fundamentally "local":

This legislation strengthens and empowers Massachusetts communities: All decisions are local. Local people must vote by ballot to adopt the Act. Local legislatures must appoint a committee of local people to draw up plans for use of the funds. These plans are subject to local comment and approval. If resi-

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<sup>83</sup> See Clean Air Act § 110, 42 U.S.C. § 7410 (2000); see generally STEVEN FERREY, ENVIRONMENTAL LAW 157-60 (EXAMPLES AND EXPLANATIONS 2d ed. 2001).

<sup>84</sup> See FERREY, *supra* note 83, at 160 (noting that the 1970 amendments to the Clean Air Act mandated compliance with national air quality standards nationwide by 1977 and that "many areas of the nation still are not in compliance, more than twenty years later.>").

<sup>85</sup> MASS. GEN. LAWS ch. 44B, §§ 1-17.

<sup>86</sup> MASS. GEN. LAWS ch. 44B, §§ 3(a), 3(b), 5(b)(2).

<sup>87</sup> MASS. GEN. LAWS ch. 44B, § 9-10.

<sup>88</sup> MASS. GEN. LAWS ch. 44B, § 6.

dents don't feel the CPA is working as they expected, they can repeal it.<sup>89</sup>

Sixty-one of Massachusetts's 351 localities have adopted the CPA, increasing their local tax rates anywhere from half of one percent to the full three percent authorized under the statute.<sup>90</sup>

Despite their endorsement of the law's spirit of local autonomy, housing advocates have been sharply critical of the local implementation of the CPA so far, which has generally involved the use of the fund to finance purchases of open space or conservation easements on undeveloped land.<sup>91</sup> Frequently, community preservation committees have voted to fund existing housing programs, not new affordable units, with the affordable housing ten percent allocation.<sup>92</sup> A few towns have bucked this trend, including Amherst, Bedford, Cambridge, and Newton.<sup>93</sup>

Bedford's example in particular suggests the untapped potential of the CPA to interact positively with Chapter 40B, strengthening the locality's bargaining power vis-à-vis landowners eager to develop their properties using comprehensive permits, but without empowering the town to say no to the new housing. At a recent town meeting, Bedford voted to approve a community preservation budget providing for the construction of ten one-bedroom apartments in a building within a historic district, close to the town center and public transportation.<sup>94</sup> The landowner of the in-town parcel originally came forward with a proposal for eighteen units, and officials promised they would push for CPA funding for the

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<sup>89</sup> COMMUNITY PRESERVATION COALITION, MASSACHUSETTS COMMUNITY PRESERVATION ACT, at <http://www.communitypreservation.org> (last visited May 3, 2003) (on file with the Harvard Environmental Law Review).

<sup>90</sup> Trust for Public Land, Status of Local CPA Votes, at [http://www.tpl.org/content\\_document/CPA\\_votes\\_as\\_of\\_4-24-03.xls](http://www.tpl.org/content_document/CPA_votes_as_of_4-24-03.xls) (Apr. 24, 2003) (on file with the Harvard Environmental Law Review).

<sup>91</sup> Anthony Flint, *Open Space, Not Housing, Is Priority*, BOSTON GLOBE, Feb. 16, 2003, at B1; EUCNER & FRIEZE, *supra* note 39, at 41–42 (noting also that open space preservation removes land with potential for housing development from consideration); Bobrowski, *supra* note 12, at 498–99, 506–07 (“Of all funds committed to date, affordable housing is getting short shrift.”).

<sup>92</sup> EUCNER & FRIEZE, *supra* note 39, at 41–42:

Even the 10 percent of funds used for housing are often directed toward existing housing programs rather than development of new residential units. In Chilmark, for instance, where the CPA passed in April 2001 and where there are currently no housing units that qualify as affordable, 71 percent of the affordable housing budget for FY 2003 will be used for projects that help people pay their rent and mortgages. The remaining 29 percent of the affordable housing money will help fund a study regarding the feasibility of turning 20 acres of town-owned land into an affordable housing development.

<sup>93</sup> *Id.* at 41.

<sup>94</sup> Denise Dube, *Historic Vote for Housing at Town Meeting*, BOSTON GLOBE, Apr. 3, 2003, at Globe Northwest 6.

project in exchange for reducing the development's size to ten units.<sup>95</sup> The bargaining and the town meeting's deliberation was squarely in the shadow of 40B, which would have allowed the landowner to build the eighteen units, of which only four would have been affordable.<sup>96</sup> A replication of these negotiations elsewhere would serve to allow local communities to exert more influence over housing developments and promote the cross-pollination of frequently distinct CPA purposes, without releasing the suburbs from doing their affordable housing "fair share."

A rare example of recent legislation that expands the public fisc in support of housing production, the CPA nevertheless promotes the locally autonomous approach to affordable housing obligations without abridging the stick of Chapter 40B, like Senator Wilkerson's bill. As a replacement for 40B, the CPA would lose its housing effectiveness, with even more communities opting to use their CPA authority to lock away open space from development.

Environmentally, the statute treats the preservation of open space and historic landscapes as important local goals, also designating affordable housing as a local need. The statute's telling choice of words to describe low- and moderate-income housing—"community housing"<sup>97</sup>—raises the question of just who belongs to the "community," as surely as local environmental bylaws raise the question of just what and whom they are protecting. Secretary Durand's vision consistently embraced the vitality and necessity of the local,<sup>98</sup> and his CPA certainly has the potential to expand the conventional and exclusionary spheres of local autonomy to include housing equity alongside land stewardship, especially when practiced within a framework of regional and state obligations.<sup>99</sup>

### C. Making Inclusionary Zoning or Density Bonuses Mandatory

A bona fide wholesale alternative to Chapter 40B would be to require all (or some, depending on the program details) private developers of multi-unit developments—including residential subdivisions, apartment buildings, and condominium complexes—to make some percentage of the units affordable, a land use policy known as "inclusionary zoning."<sup>100</sup> The much-heralded example of this approach is Montgomery

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> MASS. GEN. LAWS ch. 44B, § 6. See MASS. GEN. LAWS ch. 44B, § 2 (defining "community housing" as "low and moderate-income housing").

<sup>98</sup> See Michael Jonas, *The Sprawl Doctor*, COMMONWEALTH MAG., Spring 2003.

<sup>99</sup> *But see* Bobrowski, *supra* note 12, at 497 (suggesting that the CPA pits housing and open space advocates against each other in the fight for CPA resources).

<sup>100</sup> "Linkage" requires large commercial developments to build affordable housing or pay into an affordable trust fund, and is a variant of inclusionary zoning and a key source of funds for affordable housing production in Boston and San Francisco. See EUCHNER & FRIEZE, *supra* note 39, at 38; Jane E. Schukoske, *Housing Linkage: Regulating Develop-*

County, Maryland,<sup>101</sup> although a few Massachusetts municipalities, including Boston, Newton, Cambridge, Somerville, Duxbury, and the regional Cape Cod Commission, have also passed inclusionary ordinances under the implicit authority of Chapter 40A, Massachusetts's zoning enabling act.<sup>102</sup> Despite the enactment of ordinances, these local inclusionary initiatives have mostly failed to deliver on their promise of affordable unit production.<sup>103</sup> Some legislators and local officials believe that making statutory authorization explicit would encourage more local governments to adopt their own versions of inclusionary zoning ordinances, which could expand their effectiveness.<sup>104</sup> No one involved in the Massachusetts debate, it seems, has proposed the kind of inclusionary zoning mandate that might serve as a complete alternative to Chapter 40B.<sup>105</sup>

From a housing equity perspective, mandatory inclusionary zoning on a statewide basis has abundant advantages—for example, the promise of significantly enhanced affordable unit production and the uniformity of its application. Although it deprives developers of the same rate of return they have enjoyed in the past from multi-unit projects, all prospective zoning regulation that alters the status quo may have this effect. Furthermore, the state could mandate a range of density bonuses,<sup>106</sup> such as those in Montgomery County, that could compensate developers by permitting the construction of more units more economically than under present local zoning. Such density bonuses might explicitly reward tradi-

*ment Impact on Housing Costs*, 76 IOWA L. REV. 1011, 1027, 1033 (1991).

<sup>101</sup> See, e.g., Jennifer M. Morgan, *Zoning for All: Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 379 (1995).

<sup>102</sup> EUCHNER & FRIEZE, *supra* note 39, at 39; Huber, *supra* note 17, § 5.9; Minutes, *supra* note 20, at 11–12.

<sup>103</sup> Philip B. Herr, *Zoning for Affordability in Massachusetts: An Overview*, NHC AFFORDABLE HOUSING POLICY REVIEW, Jan. 2002, at 4–5, available at <http://www.nhc.org/nhcimages/massiz.pdf> (last visited Oct. 5, 2003) (on file with the Harvard Environmental Law Review).

<sup>104</sup> See EUCHNER & FRIEZE, *supra* note 39, at 39.

<sup>105</sup> See Witten, *supra* note 12, at 549 (proposing allowing communities to enact inclusionary zoning but requiring affordable housing plans). State Representative Hynes's bill, H. 3658, 183d Leg. (Mass. 2003), proposes that the local adoption of inclusionary zoning should exempt municipalities from the threat of HAC override of a comprehensive permit denial. With the right set of circumstances and widespread local adoption, such a reform would have a similar effect to a state mandate, forcing developers to factor affordable housing production into their profitable suburban-subdivision business model.

<sup>106</sup> While linkage or inclusionary zoning without compensation, given the right fact pattern, could violate the takings clause of the U.S. Constitution, density bonuses or other assurances of developer profitability are widely thought to render inclusionary zoning schemes constitutional. See Morgan, *supra* note 101, at 380–81; Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539, 603 (1995); see also Timothy J. Choppin, Note, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L. J. 2039, 2063 (1994); *Holmdel Builders Ass'n v. Township of Holmdel*, 583 A.2d 277 (N.J. 1990) (holding that municipalities can constitutionally impose fees on commercial and typical residential developments to fund the creation of affordable housing).



tional neighborhood design, in-town or in-village housing development, proximity to public transportation, and compatibility with local master plans.<sup>107</sup>

Another advantage of mandated inclusionary zoning statewide would be its replacement of the local autonomy language in 40B and the CPA—the conception of absolute and appropriate municipal rights of self-determination within local borders—with the language of uniform private obligation to statewide or regional housing equity. One can see, in the Wilkerson/CHAPA bill and in the CPA, the full blossoming of what Professor Sam Stonefield has called Chapter 40B’s “fundamental flaw”—its creation of private rights, either for developers or for suburbs, in place of the imposition of public obligation.<sup>108</sup> Indeed, a model of public obligation is the model of many environmental law regimes, including state wetlands protection and Title 5. In short, though the idea is still in its political infancy, mandated inclusionary zoning with density bonuses, with rewards for infill development, coordination with mass transit hubs, and green design, could replace Chapter 40B and be better public policy.

#### D. Regional Contribution Agreements

Would Massachusetts be well-served by proposals to model New Jersey’s Fair Housing Act of 1985, passed as a result of that state supreme court’s *Mount Laurel* decisions and authorizing Regional Contribution Agreements (“RCAs”)?<sup>109</sup> RCAs have allowed New Jersey suburbs to buy their way out of their “fair share” obligations, effectuating a transfer of wealth to lower-income communities who use the money to make in-place investments in new or rehabilitated housing. Under the law, 6700 affordable units of obligation have been transferred to urban areas, and

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<sup>107</sup> See Bob Burchell & Kathleen Galley, *Inclusionary Zoning: Pros and Cons*, NEW CENTURY HOUSING, Oct. 2000, at 7, available at <http://www.nhc.org/nhcimages/chpinczon.pdf> (last visited Oct. 5, 2003) (on file with the Harvard Environmental Law Review).

<sup>108</sup> Sam Stonefield, *Symposium: Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323, 330 (2001).

Framing the legal issue solely as a private right has ignored the important public interests at stake and has unduly narrowed legal and policy discussions, as well as program development. Instead of imposing a duty and responsibility on state government and local towns to increase the supply of suburban affordable housing, the statutes have permitted these entities to meet their statutory obligation simply by reacting to particular development proposals.

*Id.*

<sup>109</sup> N.J. Stat. §§ 52:27D-301–52:27D-329. RCAs may transfer up to fifty percent of a community’s obligation to another; RCAs between municipalities require the approval of the state affordable housing council or a court. See *Hills Dev. Co. v. Bernards Township*, 510 A.2d 621, 640-41 (N.J. 1986).

the wealth transfer has amounted to \$130 million.<sup>110</sup> The New Jersey Supreme Court has avoided the issue of this statutory provision's state constitutionality, implicitly blessing RCAs as a valid legislative compromise under the *Mount Laurel* decisions. Commentators have noted the pragmatism of RCAs, finding fiscally starved urban areas happy to receive suburban contributions and take on suburban fair share obligations. At the same time, they note that RCAs contravene the anti-segregation motives of the *Mount Laurel* court and prevent de-concentration of urban poverty.<sup>111</sup>

The adoption of such a market in Massachusetts has been suggested by Massachusetts Audubon's Director of Advocacy Jack Clarke,<sup>112</sup> but the New Jersey experience suggests that Massachusetts should reject such an approach. The suburban-to-urban pattern of wealth transfer has some initial appeal from an environmental perspective, as it channels affordable housing resources into the inner-city and inner-ring suburbs, slowing exurban housing unit growth. This idea, however, ultimately undermines both environmental stewardship and housing equity by privatizing the attainment of these policy goals and monetizing any conception of public obligation to either. The RCA model both decouples the goal of sustainability from the planning standards and practices that would lead to sound resource stewardship, and effectively precludes the siting of affordable housing anywhere but within central cities and aging inner-ring communities. Arguments for local autonomy transform into assertions of individualistic rights under RCA-like instruments. Although a regional affordable housing credit market may seem pragmatic, it perpetuates, as a matter of interlocal "private law," the flawed 40B premise that affordable housing is solely a "regional need" with no relation to life within suburban towns' borders.

### E. *The Romney-Foy Smart Growth Agenda*

By hiring Douglas Foy, the president of the Conservation Law Foundation, one of the region's leading environmental advocacy groups, to head a new Executive Office of Commonwealth Development, Governor Romney made abundantly clear that "smart growth"<sup>113</sup> would be one of

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<sup>110</sup> New Jersey Dept. of Community Affairs, Council on Affordable Housing, About COAH, at <http://www.state.nj.us/dca/coah/about.shtml> (last visited May 3, 2003) (on file with the Harvard Environmental Law Review).

<sup>111</sup> See, e.g., Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 67-70 (2001); Russell, *supra* note 6, at 475-76, n.248.

<sup>112</sup> Jack Clarke, A Regional Approach to Affordable Housing (Mar. 21, 2003), at [http://www.massaudubon.org/News\\_&\\_Action/news\\_ra\\_affordhousing.html](http://www.massaudubon.org/News_&_Action/news_ra_affordhousing.html) (last visited Oct. 5, 2003) (on file with the Harvard Environmental Law Review). Mr. Clarke was a member of Governor Romney's Chapter 40B task force.

<sup>113</sup> At its best, advocating for "smart growth" is about embracing a comprehensive agenda of environmental, democratic, and socially just reforms that encourage intelligent, well-

the cardinal initiatives of his administration.<sup>114</sup> Foy is wielding tremendous power in the early days of Romney's term and is pursuing an array of reforms—including agency consolidation, which promises to improve the coordination of the state's various development policies and regulations by integrating the state's housing, transportation, and environmental agencies under one banner.<sup>115</sup> Foy's comments to a meeting of office park developers in March could just as well have been to a group of developers specializing in 40Bs:

We're not going to be able to continue to just sprawl across the landscape . . . . We're not going to be able to just grow anywhere. We're not going to be able to help you go out and buy the cheapest piece of land you can find and then hope that we're going to run highways to it. We're just not going to be able to do it.<sup>116</sup>

One can look to the example of a proposed transit village in Kingston for just the sort of housing and commercial development the administration's smart growth strategy will encourage. Approved as a general idea in Kingston's 1998 master plan, "The Village at Kingston" proposal included more than 800 units of housing with first-floor retail and service spaces, clustered around a commuter rail station offering a direct connection with downtown Boston. Developers were also required to pay to transfer development rights from the land now comprising Kingston's cranberry bogs and other open space to the village.<sup>117</sup> Developments in the suburbs like these are ideal from an environmental perspective, because they create walkable, transit-friendly places to live, while they also "protect basic environmental values like clean air and clean water [and also reduce the infrastructure needed]: you need fewer utility lines, sewer lines, new roads, wires to lay, telephone poles to hoist up, pavement and piping to put down."<sup>118</sup> Unfortunately, because proponents were not able to garner the two-thirds majority necessary to change the area's zoning to mixed-use residential-commercial, the local town meeting has defeated the proposal twice now, at least partially because some local residents

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planned growth. See generally Gerald E. Frug, *Euphemism as a Political Strategy*, 30 *Envtl. L. Rep. (Envtl. L. Inst.)* 11,189 (2000) (arguing that the use of "smart growth," "sustainability," and "livable communities" by smart growth advocates hides the "revolutionary" and contentious discussion that will be necessary for real political change).

<sup>114</sup> See Anthony Flint, *Staunch Environmentalist Is Pick for Development Chief*, *BOSTON GLOBE*, Dec. 20, 2002, at B10.

<sup>115</sup> See Jonas, *supra* note 98; Anthony Flint, *Added Powers Attract Critics to Foy*, *BOSTON GLOBE*, Mar. 7, 2003, at B1.

<sup>116</sup> Jonas, *supra* note 98.

<sup>117</sup> Dorie Clark, *Growth Smarts*, *COMMONWEALTH MAG.* (Winter 2003).

<sup>118</sup> *Id.* (quoting Bennett Heart of the Conservation Law Foundation).

fear that some of the housing would be set aside for low-income families.<sup>119</sup>

Despite municipal hesitations, Foy's influence and Romney's smart growth agenda have played some role in the crafting of reform recommendations by the 40B task force.<sup>120</sup> The task force has even proposed piloting New Jersey's approach to regionalizing fair share obligations under Chapter 40B,<sup>121</sup> which would direct suburban resources to urban infill development of affordable housing near transit while simultaneously protecting open space. Significantly, the recommendations also include imposing a smart growth requirement on 40B developments at the financing stage and incorporating smart growth principles into the recently promulgated planned production regulations.<sup>122</sup> Environmentally, these reforms would be helpful amendments, giving some statewide financing agencies incentives to look at a development's regional impacts. Perhaps these agencies would implement some kind of smart growth "scoring" system to evaluate the sustainable development caliber of projects. Yet, these sorts of new measures would probably not fully disqualify developers who wish to create condominium projects in outlying areas and would likely have the effect of simply grafting onto the existing statutory framework more layers of separate review.

The themes of the recommendations are "consistency and equity," enhancing "local capacity and technical assistance," "improving the process," "technical improvements," and addressing "community impact and community needs."<sup>123</sup> When taken together, these themes reflect the task force's real motivation: to make Chapter 40B less controversial to suburbs by piling a sort of permanent professionalism onto what is a remarkably straightforward statutory mandate. Each theme is an attempt to half-respond to a municipal or developer complaint. Aside from the smart growth recommendations, the rest of the task force report includes, among numerous minor adjustments, recommendations to double-count new homeownership units on the way to ten percent, to create an online 40B resource center at DHCD to assist municipalities reviewing proposals, and to create a "growth aid" fund that would have the state recoup some of the public education and municipal service costs of low and moderate-income families.<sup>124</sup> Amounting to a recognition of municipal

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<sup>119</sup> Anthony Flint, *A 'Transit Village' Is Derailed*, BOSTON GLOBE, Dec. 26, 2001, at B1.

<sup>120</sup> See Jonas, *supra* note 98 ("The Romney administration says the solution is to tackle sprawl and resistance to new housing all in one by reaching some consensus on changes to Chapter 40B . . . ."); Anthony Flint, *State Mulls Regional Affordable Housing*, BOSTON GLOBE, Feb. 27, 2003, at B2.

<sup>121</sup> See CHAPTER 40B TASK FORCE FINDING AND RECOMMENDATIONS, *supra* note 8, at 38–39.

<sup>122</sup> See *id.* at 29–30, 34–37.

<sup>123</sup> *Id.* at 3–9.

<sup>124</sup> *Id.* at 3, 6, 10.

“plight,” the report has revealed that Romney’s task force, crippled by its consensus approach, squarely avoided the socio-economic, racial, and environmental fault lines inherent in the statute. Certainly a few of its recommendations, but probably the least ambitious, will make it to Governor Romney’s desk.

The Romney/Foy smart growth agenda has not yet managed to integrate a clear conception of the roles of state and local power with its laudable environmental and transportation principles. Romney’s overall approach thus far has been to centralize state executive functions, as evidenced by his assignment of two über-secretaries who report directly to him and oversee many individual state agencies.<sup>125</sup> If this pattern of centralization extends to locally administered environmental regulations like the Wetlands Protection Act or to other laws of special local concern,<sup>126</sup> Romney and Foy may face an even more vocal chorus of local protest than currently exists under Chapter 40B.

#### V. RETHINKING “LOCAL” AND “REGIONAL” NEEDS: THE SYNTHESIS OF ENVIRONMENTAL STEWARDSHIP AND SOCIAL JUSTICE POLICY

With the blurry portrait of Chapter 40B’s environmental law framework on the wall, and the reform options laid out on the table, this Article proposes to open a window to surround the discussion with light and air by identifying several guiding principles that should inform efforts to reform 40B sustainably—principles that do not play a significant role in present reform options. Recognizing the compatibility of housing equity and environmental stewardship involves putting aside the statute’s and reformers’ stubborn framing of the two policies as in opposition and as the domain of different levels of government. At last, localities and regions must define and address their common failures as stewards and as neighbors, without cowering behind human-drawn borders and political divides. Taken together, these principles offer a rhetorical escape from the “us vs. them” trap that has paralyzed the housing and environmental debates in Massachusetts and elsewhere.

##### *A. Principle: Almost All “Local Needs” Are Also Regional, and All “Regional Needs” Are Also Local*

This flaw in the statutory framework, which calls for balancing regional housing needs against local concerns, makes it seem as though no communities are secure islands isolated from other communities in the

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<sup>125</sup> Joanna Weiss & Anthony Flint, *Romney Picks 2 as Agencies’ ‘Chiefs,’* BOSTON GLOBE, Dec. 20, 2002, at A1.

<sup>126</sup> See, e.g., Stephanie Ebbert, *In Romney Strategy, Some See Echoes of Bush,* BOSTON GLOBE, Feb. 16, 2003, at B1 (finding the new administration’s management more corporate—or presidential—than gubernatorial).

state and region. Environmental impacts of development are perhaps the best riposte to the island theory of local concerns, even as Chapter 40B commands the rampant state and local perception that they are only local. Watersheds, airsheds, biologically linked wetlands, wildlife, and automobile traffic, all impacted by 40B, know no jurisdictional boundaries. Likewise, regional economies that depend on local public school systems provide telling evidence that even that most cherished province of local autonomy—the school board—acts on at least a regional if not a national stage.

Defining “regional needs” under Chapter 40B also poses problems of borders,<sup>127</sup> which obscure the reality that the regional need for housing equity is also fundamentally local. It is important to recognize three predominantly local values served by the production of affordable housing: (1) enhancing the diversity of localities—socio-economically, racially, and ethnically—by welcoming outsiders, (2) lowering long-standing but locally imposed legal barriers to these outsiders, (3) providing shelter for those who work within the community, grew up in the community, or contribute to the community’s economic health. These values are not precisely “interests” in any fiscal sense, but reflect how much poorer communities will be if they choose to ignore social needs like housing equity as solely “regional.”

*B. Principle: State, Local, and Regional Empowerment Are Not Mutually Exclusive*

The present Chapter 40B framework and the debate that surrounds its implementation involve two contradictory propositions: a local perception of state encroachment on local power and recent state efforts to empower localities to exercise their discretion. Informing the law should instead be a commitment, by both state and local governments, to mutual empowerment through collaboration and coordination. Ideally, the state would create a regional entity, whether a government organization like Oregon’s “Metro” Council or a regional legislature as suggested by Professor Gerald Frug, to provide a democratic forum for this collaboration.<sup>128</sup> Even the new 40B regulations that encourage local planning establish discrete safe harbors for local autonomy, rather than encouraging interlocal and state-local negotiation *about* local plans to provide affordable housing.

Chapter 40B’s approach to environmental conflicts is particularly guilty of allocating (rather than sharing) power between the state and the

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<sup>127</sup> Eric J. Gouvin, *Rural Low-Income Housing and Massachusetts Chapter 40B: A View from the Zoning Board of Appeals*, 23 W. NEW ENG. L. REV. 3, 36–38 (2001).

<sup>128</sup> Gerald E. Frug, *Beyond Regional Government*, 116 HARV. L. REV. 1763, 1777, 1790–92 (2002).

locality, permitting the imposition of variously applicable local regulations while enforcing some but not all standards in state statutes. While a detailed proposal for revising the sharing of these enforcement and regulatory powers is beyond the scope of this Article, it should be enough to note that the present regime lacks coordinated state-local (or state-regional-local) collaboration on environmental standards and monitoring. The Wetlands Protection Act and its provision for authority in local Conservation Commissions provide a possible model for replication, although its framework also tends to exert state power *through* localities, rather than *with* localities.

*C. Principle: Regional and Local Inclusion Is About Racial, Class, and Environmental Diversity*

The oft-cited proposition in the scholarship addressing exclusionary zoning that racial and class integration is an aim of inclusionary remedial efforts does not penetrate the reality of Chapter 40B implementation. Appeals by urban legislators to retain Chapter 40B rarely mention racial diversity, perhaps perceiving racial inclusion as less important today than in 1969.<sup>129</sup> Housing advocates reinforce this pattern by downplaying the importance of diversity as a component of inclusion, instead focusing on the regional housing needs of middle-class wage earners and the local inclusion of a community's children or municipal employees.<sup>130</sup> A renewed commitment to racial and class desegregation must be a crucial element of a robust principle of inclusionary diversity.

Environmental diversity,<sup>131</sup> although it played no role in Chapter 40B's enactment, deserves a role in the inclusion principle. One can define environmental diversity broadly—including the biodiversity of flora and fauna as well as more human aspects of environmental diversity—such as local architectural, exterior design, and land use heterogeneity. Placing environmental alongside racial and class diversity represents a more comprehensive and integrated understanding of what it should mean to live in a publicly inclusive and varied place—access and proximity to heterogeneity of all kinds as well as a common commitment to a broad conception of diversity.

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<sup>129</sup> Gouvin, *supra* note 127, at 57–59 (questioning whether Chapter 40B should have as a goal “mobility relief”).

<sup>130</sup> See *supra* note 78; Stonefield, *supra* note 108, at 330 (“[I]mplementation of the statutes [like 40B] has been indifferent to racial consequences, as expressed in the approval of residence preferences and in the absence of outreach and support efforts for minority families.”).

<sup>131</sup> Perhaps ironically, the chair of the HAC does assert that environmental diversity concerns and smart growth principles manage to play a role in the committee's decisions. He does not describe how local ZBAs should integrate this thinking into their decision-making. See *supra* note 54.

*D. Principle: Caring for the Public Commons, Whether the Provision of Shelter for Neighbors or the Protection of Non-Human Resources, Is a Public Obligation of Individuals, Municipalities, Regions, States, and the Nation*

As Chapter 40B encourages localities to react to its assignment of private developer rights to property within its borders with a correspondingly private reaction, it exacerbates the distance between local residents and the broader world. The unifying concern of housing equity and environmental stewardship should be an ethic of care encompassing but far exceeding the limits of a locality's moral imperative to provide affordable housing.<sup>132</sup> The guiding insight of this Article, then, is the fundamental overlap of the human commons of the public sphere—within which individuals, towns, cities, regions, states, and the nation share an obligation to honor and care for neighbors—and the non-human commons of the natural world, within which those same nested constituents of society share an obligation to protect and conserve resources for their intrinsic value and for the purposes of inter-generational benefit. Upon recognizing these obligations as public and not simply the product of a gamed private rights regime, one can both reconcile simultaneous commitments to environmental stewardship and housing equity, and allow these commitments to inform all levels of public policy.

*Amesbury, Massachusetts—Downtown*

Amesbury was a mill town. Decades ago, the companies left behind the hulking brick structures that dominate the town's central business district; many have been vacant since. Downtown is now a fascinating mix of businesses, particularly when arrayed in a list: Amesbury Industrial Supply, the Lafayette (night club), Hark Nock's Gym, Top o' the Morning Barber Shop, Greenery Designs (flower shop), Attorney von Klittitz, the Provident Bank, Ben's Uniform, W. E. Fuller Men's and Women's Clothing, Fiddlestix (toys), restaurants China Star (\$), Flatbread Pizza Company (\$\$), Scandia (\$\$\$), and Wild Bites (\$\$\$\$), and even an old-fashioned "supermarket" with six aisles and excellent meats. Several churches, including two spacious Catholic parishes (one once Irish, the other once French Canadian) surround the district, but the real presences in town are the vast red mills and the fast-moving Powow River slicing beneath them. The downtown is also compact; one can cross the entire district on foot within ten minutes.

Over the past twenty years, through the use of federal and state grant monies, the town has slowly taken some of the mill buildings off tax foreclosure and begun their renovation. Amesbury has built a recreational

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<sup>132</sup> See *infra* Part III.B.



one-mile pedestrian path and bikeway leading away from the downtown on abandoned railroad tracks; refurbished the streets, the bridges, and the wide-open space between the mill buildings known as the Millyard; and has even created an amphitheater for summer drama and music performances. While the downtown retains some grandfathered housing and the surrounding neighborhoods are unusually dense with the former homes of millworkers, town officials have long envisioned the best use of the mills themselves as a prime place for loft-style affordable housing. The town has requested proposals and is now negotiating with a developer to overhaul several mill buildings into a mixed-use complex. The complex would include a museum celebrating the town's heritage as a carriage-builder, forty-six units of artisan live-work space (between nine and twelve of which will be affordable), and a gallery for showcasing the artisans' work for sale and display. The buildings' rebirth will be the end result of years of toil by municipal planners and of millions of dollars in federal community development grants.

If Chapter 40B persists to see the grand opening of these "Carriage Lofts," Amesbury's subsidized housing tally will rise a few ticks, but the town will still face the prospect of the private development of outlying sites like the last frontage on Whitehall Road. In short, the motives behind "Carriage Lofts" will not turn with Governor Romney's filing of his 40B reforms.

The planners at Town Hall who engineered Amesbury's recovery will continue to go about the business of downtown improvements, applying for the state and federal funds to rehabilitate more buildings and welcoming new people and businesses to town. The story of Amesbury's revitalization is, then, one of inclusion, one of intergovernmental cooperation, and one of smart growth.

Is Amesbury doing enough to attract ethnic and racial minorities? Perhaps not. Is its resentment of the development "threat" on Whitehall Road helpful? Perhaps not. Is it spending enough time working with surrounding communities on housing equity and environmental stewardship? Perhaps not.

But are Amesbury's efforts to rebuild its downtown part of an agenda that understands the compatibility of affordable housing and protecting the environment? Yes—and that modest understanding, particularly if it were to spread, would mark a valuable beginning.

