

THE COST OF DEVELOPING AFFORDABLE HOUSING: AT WHAT PRICE?

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Abstract: It is not disputed that many of the nation's cities, towns, and tribal reservations, and their current or would be residents, are facing an affordable housing crisis. At issue is how municipal governments—the level of government within which housing gets built—can solve this crisis without exacerbating existing problems or creating new ones. This Article recommends the affordable housing problem be solved through a combination of time- and judicially-tested options and burden-sharing arrangements with the private sector, most notably through mandatory inclusionary-zoning requirements and the imposition of impact fees. It presents a critique of the approach taken by the Commonwealth of Massachusetts in its pursuit of affordable housing development. The Article recommends that states considering the Massachusetts “cram-down” methodology avoid the draconian and regressive tactics employed by the Massachusetts affordable housing statute. Rather, they should look to successful affordable housing programs employed by “plan states.”

*Housing is a necessary of life.*¹

*The Due Process Clause was intended to secure an individual from an abuse of power by government officials.*²

*[Due process] claims should, however, be limited to the truly irrational—for example, a zoning board's decision made by flipping a coin, certainly an efficient method of decisionmaking, but one bearing no relationship whatever to the merits of the pending matter.*³

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¹ Block v. Hirsh, 256 U.S. 135, 156 (1920).

² Daniels v. Williams, 474 U.S. 327, 327 (1986).

³ Lemke v. Cass County, 846 F.2d 469, 472 (8th Cir. 1987).

INTRODUCTION

The development of land, the rules governing land development, and the process undertaken in both instances is, and has always been, peppered with hostility, resentment, accusations of wrongdoing, and distrust of individual motives.⁴ This is also the case with the development of affordable housing.⁵

Although opposition to affordable housing developments historically has been associated with racial animus, expressed both overtly⁶

⁴ See JOEL GARREAU, *EDGE CITY* 11 (1991). Garreau poignantly illustrates the tension between preservation and development:

The forces of change whose emblem is the bulldozer, and the forces of preservation whose totem is the tree, are everywhere at war in this country. The raging debate over what we have lost and what we have gained, as we flee the old urban patterns of the nineteenth century for the new ones of the twenty-first, is constant.

Id.

⁵ See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926). The Supreme Court in *Euclid* made reference to certain prejudices common in affordable housing debates:

With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite

Id.; Editorial, *Snob Zoning Alert*, *BOSTON GLOBE*, May 18, 2001, at A22 ("If we went by current zoning and bowed to the neighbors every time, we would have no affordable housing outside major cities." (quoting Aaron Gornstein, Director, Citizens Housing & Planning Association)).

⁶ See, e.g., Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low Income Communities of Color*, 77 *MINN. L. REV.* 739, 773-74 (1993); Stanley P. Stocker-Edwards, *Black Housing 1860-1980: The Development, Perpetuation and Attempts to Eradicate the Dual Housing Market in America*, 5 *HARV. BLACKLETTER L.J.* 50, 58 (1988). Racism was a significant problem in early public housing projects:

[I]n the 1940s in San Diego, the federal Public Housing Authority (PHA) adopted a segregated pattern for its federally managed projects, while many areas of the city were integrated An example of the role that race could play in the politics of location is the city of Chicago in the later 1940s and early 1950s. During this period, the majority of the city's aldermen favored the principle of public housing; however, the aldermen did not want public housing in their own wards. They wanted no low-income neighbors, and no Blacks of any kind.

Stocker-Edwards, *supra*, at 58. Other commentators provide additional examples of the effects of overt racism in housing:

The historic and continuing practices of officially sanctioned zoning and land use discrimination are perhaps most pervasive and well-documented as they

and subtly,⁷ this Article critiques a particular means of developing affordable housing as violative of fundamental due process protections and common sense.⁸

This critique is not directed at the fact that the affordable housing units have been constructed or the fact that the structures are occupied by needy residents. This Article does not contend that affordable housing development has any impact, positive or negative, on abutting or municipal property values.⁹ Thus, this article does not criticize the “end result.”

pertain to African-American communities Nevertheless, other communities of color—in particular, Puerto Rican and Mexican-American communities (hereinafter Hispanics)—have similarly experienced substantial governmental discrimination Public housing site and tenant selection and urban renewal policy have also served to confine hispanics to segregated and inferior housing.

Dubin, *supra*, at 773–74. Overt racism was also substantive part of the marketing employed by one of the nation’s largest housing developers, William Levitt, the designer and builder of Levittown on Long Island, New York. The original Levittown contract read, “No dwelling shall be used or occupied except by members of the Caucasian race, but the employment and maintenance of other than Caucasian domestic servants shall be permitted.” Jay B. Itkowitz, *Levittown at 25: Prototype of Suburban Housing*, at <http://www.itkowitz.com/mam1965text.php?aid=259> (last visited Mar. 16, 2003).

⁷ See RICHARD BABCOCK, *THE ZONING GAME* 31 (1969) (“The resident of suburbia is concerned not with *what* but with *whom*. His overriding motivation is less economic than it is social. His wife spends more at the hairdresser in a month than the proposed apartment house will add to her husband’s tax bill in a year.”).

⁸ Opponents to affordable housing developments are commonly referred to as NIMBYs (not in my backyard). “Most of the mechanisms citizens use to influence land development are local, just as most decisions affecting land development and housing affordability are local. Hence, a particular symbiosis exists between NIMBY sentiments and the institutionalization of NIMBY.” ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., U.S. DEP’T OF HOUS. & URBAN DEV., *NOT IN MY BACK YARD* 1–7 (1991) [hereinafter *ADVISORY COMM’N REPORT*]. But if private property owners do not protect “their backyard” from development projects that were neither foreseeable nor in accordance with the city or town’s long range plan, then who will? The use of the phrase NIMBY seeks to chill otherwise lawful and expected opposition to ill-conceived and threatening developments by casting less than honorable motives upon the objector. One cannot be considered a NIMBY to developments that have an unconstitutional foundation and abuse the public’s trust. Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 78, 79 n.5 (2002) (“This article uses the term ‘local opposition’ instead of NIMBY because NIMBY has become a pejorative term that can undermine efforts to reduce opposition and to build community support by unnecessarily offending reasonable individuals who have sincere concerns and questions.”).

⁹ Many commentators argue that studies used to quantify the impact low- and moderate-income housing has on nearby property values are imprecise. See, e.g., RICHARD K. GREEN, ET AL., UNIV. OF WIS., *LOW INCOME HOUSING TAX CREDIT HOUSING DEVELOPMENTS AND PROPERTY VALUES* 7 (2002) (“The great difficulty in doing such a study well is

Rather, this Article argues that the means of producing affordable housing is as important as the resulting housing itself. To ensure an equitable result—to guarantee that the ends do justify the means—a municipal comprehensive plan and regulations consistent with that plan must guide the development of affordable housing.

A successful affordable housing program is, by definition, one that is consistent with the city or town or regional plan for growth and development.¹⁰ An unsuccessful affordable housing program—best exemplified by that found in Massachusetts—is one that has no foundation in a plan or in planning principles.¹¹ The result is that although the program may facilitate the construction of affordable housing units, its reliance upon an “ends justifies the means” methodology violates due process,¹² ignores so-called “smart growth” principles,¹³ and clouds an otherwise clear and addressable problem—the need for more housing at sub-market prices.¹⁴

in finding otherwise nearly identical units and neighborhoods to compare, that differ more or less only in whether developments exist nearby.”). Other commentators, however, have noted that quantification is useful. *See, e.g.,* Justin D. Cummins, *Housing Matters: Why Our Communities Must Have Affordable Housing*, 28 WM. MITCHELL L. REV. 197, 212 (2001) (“Data collected over the past four decades from across the country, and in the metro area, shows affordable housing has little, if any, negative impact on surrounding property values.”). As discussed throughout this Article, however, the impact of low- and moderate-income housing on surrounding land values is relevant only insofar as it relates to the development of the municipal comprehensive plan.

¹⁰ *See* discussion *infra* Part IV.

¹¹ The Massachusetts approach to affordable housing development fosters an “ends justifies the means” approach. *See* discussion *infra* Part III. The relevant statute and regulations mandate that where a city or town does not have a requisite number of dwelling units defined as subsidized, an applicant proposing to build twenty-five percent of a project’s dwelling units as “affordable” can override all local rules and regulations. *Id.*

¹² *See* discussion *infra* Part III.B; *see also* WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 3, sc. 2 (Wordsworth Editions Ltd. 1994) (1600). In the words of William Shakespeare:

The world is still deceived with ornament./ In law, what plea so tainted and corrupt,
/ But being seasoned with a gracious voice,/ Obscures the show of evil?/
/ In religion, What damned error, but some sober brow/ Will bless it and
/ approve it with a text,/ Hiding the grossness with fair ornament?/ . . . The
/ seeming truth which cunning times put on to entrap the wisest.

Id. act 3, sc. 2, 74–80, 100.

¹³ KAREN FINUCAN ET AL., AM. PLANNING ASS’N, *PLANNING FOR SMART GROWTH: 2002 STATE OF THE STATES 22–23* (2002) (“Provisions in Massachusetts’ current planning statutes would allow plans for new development to circumvent smart growth measures by . . . allowing construction of affordable housing in unsuitable locations through a ‘comprehensive permit’ which effectively bypasses local planning and zoning requirements.”).

¹⁴ *See* discussion *infra* Part III.

This Article analyzes Massachusetts's Comprehensive Permit Statute, chapter 40B (Comprehensive Permit Statute or 40B), the nation's leading "ends justifies the means" statute, and proposes a more progressive, defensible, and likely, more successful process for developing affordable housing not just in Massachusetts, but nationwide.¹⁵ Countless examples exist of statewide solutions to affordable housing development that link the need for affordable housing with other critical municipal concerns. These approaches respect due process guarantees and the logic of comprehensive plans and planning.

I. AFFORDABLE HOUSING AND THE COMPREHENSIVE PLAN: INTEGRATING, NOT ISOLATING, MUNICIPAL PLANNING CONCERNS

It has long been recognized that a plan—a comprehensive plan or a master plan—provides state, regional, and municipal governments with a rational and predictable plan for growth, development, and resource allocation.¹⁶ The plan becomes the blueprint or, in California, the constitution, for land use and land development.¹⁷ In true "plan states," regulatory enactments not in accord with the comprehensive plan are void *ab initio*.¹⁸ Thus, in a plan state, a city or town adopts a comprehensive plan consistent with either a state or regional plan (or both), and then tailors its regulatory program around the

¹⁵ Low and Moderate Income Housing Act, 1969 Mass. Acts. 712 (codified as amended at MASS. GEN. LAWS ch. 40B, §§ 20–23 (2000)).

¹⁶ The recognition that planning and zoning are, or should be, inexorably linked, dates back to the Standard Zoning Enabling Act and the Standard City Planning Enabling Act published by the United States Department of Commerce in 1926 and 1928, respectively. See A STANDARD CITY PLANNING ENABLING ACT (Advisory Comm. on City Planning & Zoning, U.S. Dep't of Commerce 1928); STANDARD ZONING ENABLING ACT (U.S. Dep't of Commerce rev., 1926); see also *Udell v. Haas*, 235 N.E.2d 897, 900–01 (N.Y. 1968) ("[T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.").

¹⁷ See Daniel J. Curtin, Jr., *The Comprehensive Plan as Constitution: General Lessons from Recent California Zoning Initiative Cases*, in 1992 ZONING AND PLANNING LAW HANDBOOK 463 (Kenneth H. Young ed., 1991).

¹⁸ *deBottari v. City Council*, 217 Cal. Rptr. 790, 795 (Ct. App. 1985); see also *Forestview Homeowner's Ass'n. v. Cook County*, 309 N.E.2d 763, 772 (Ill. App. Ct. 1974); *Raabe v. City of Walker*, 174 N.W.2d 789, 796 (Mich. 1970); *Bd. of County Comm'rs v. City of Las Vegas*, 622 P.2d 695, 698 (N.M. 1980).

plan and the principles contained in the plan.¹⁹ The adopted regulations follow, and are consistent with, the plan.²⁰

States that do not require planning consistency or linkage between regulatory enactments and an adopted plan could, for lack of a better term, be labeled "non-plan" states. Non-plan states rely on traditional rational basis presumptions to defend (or arguably excuse) local government actions. Thus, for example, the success of a challenge to a downzoning in a non-plan state is dependant upon the plaintiff demonstrating that the city's or town's action was arbitrary; a difficult hurdle given that there are no benchmarks for guiding the court's adjudication.

Consider the following hypothetical: the City of Jamesville is an incorporated municipality in a state with no comprehensive planning requirements. The state has enabled cities and towns to adopt zoning and traditional police power controls to protect public health, safety, and welfare. Jamesville recently adjusted its zoning ordinance to prohibit multifamily structures and require a minimum lot size of two acres for every single-family residential structure. Jamesville has adopted, many would argue, a zoning ordinance that is both exclusionary and orchestrated to erect "barriers" to moderate-income housing development.

A statewide nonprofit organization files for declaratory judgment claiming that Jamesville's ordinance is exclusionary. The claim is a facial challenge²¹ and includes the argument that the City's actions were ultra vires, arbitrary, and de facto exclusionary. Bowing to tradi-

¹⁹ *deBottari*, 217 Cal. Rptr. at 795; see also *Forestview Homeowner's Ass'n*, 309 N.E.2d at 772; *Raabe*, 174 N.W.2d at 796; *Bd. of County Comm'rs*, 622 P.2d at 698.

²⁰ See *Leshar Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317, 322 (Cal. 1990) ("The Planning and Zoning Law does not contemplate that general plans will be amended to conform to zoning ordinances. The tail does not wag the dog."); see also *Nova Horizon, Inc. v. City Council of Reno*, 769 P.2d 721, 724 (Nev. 1989). The Supreme Court of Nevada reinforced the fact that judicial deference cannot be equated with judicial abdication:

Having determined that master plans are to be accorded substantial compliance under Nevada's statutory scheme, and recognizing anew the general reluctance to judicially intervene in zoning determinations absent clear necessity It is clear on the record that no evidentiary basis exists for the Council's denial of appellants' zone change request.

Nova Horizon, 769 P.2d at 724.

²¹ A facial challenge to a zoning or other land use regulation is a challenge brought to the regulation in the abstract, even though the regulation has not yet been "applied" to the plaintiff's land. An "as applied" challenge attacks the regulation as it relates to the plaintiff's specific property or development proposal.

tional principles of judicial deference to legislative²² and adjudicative²³ actions, the likely outcome of a reviewing court, applying a rational basis standard of review,²⁴ will be for the defendant-City. This outcome will likely occur despite the possibility that the two-acre zoning may *in fact* be exclusionary.

In its review, the court may demand some evidence that a two-acre minimum lot size and a prohibition on multifamily housing are necessary to fulfill the City's police power objectives.²⁵ However, absent a clear indication that the City violated equal protection²⁶ or

²² In reviewing a government's exercise of the police powers, the court's analysis rests upon the presumption that a legislative body—state or local—is in a better position to assess the propriety of the action. *See, e.g.*, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 613–14 (Pa. 1965) (Cohen, J., dissenting). If there is a rational basis for the legislative action, then the judiciary will defer to the legislature and uphold the regulation. *Euclid*, 272 U.S. at 388. When a land use regulation's reasonableness is "fairly debatable," it will be upheld. *Id.*; *see also* *Carty v. City of Ojai*, 143 Cal. Rptr. 506, 508 n.1 (App. Dep't Super. Ct. 1978) ("As applied to the case at hand, the function of this court is to determine whether the record shows a reasonable basis for the action of the zoning authorities, and, if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed." (quoting *Lockard v. City of Los Angeles*, 202 P.2d 38, 43 (Cal. 1949))); *Johnson v. Town of Edgartown*, 680 N.E.2d 37, 40 (Mass. 1997) ("The general rule is that a zoning by-law whose reasonableness is fairly debatable will be sustained . . . [T]he challenger must prove by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals or general welfare.").

²³ *See, e.g.*, *Pendergast v. Bd. of Appeals of Barnstable*, 120 N.E.2d 916, 918 (Mass. 1954).

Zoning has always been treated as a local matter. The creation and modification of zones are matters of municipal legislation. The board of appeals is a local board familiar with local conditions . . . A judge of a State wide court, perhaps spending only a few days or weeks in a particular locality, is hardly a suitable tribunal for such purposes.

Id.

²⁴ *See, e.g.*, *Arneson v. State*, 864 P.2d 1245, 1248 (Mont. 1993).

²⁵ *See* *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977) ("In sum, the evidence does not warrant overturning the concurrent findings of both courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision.").

²⁶ *Id.* The Supreme Court in *Arlington Heights* noted that evidence of a racially discriminatory motivation does not end the inquiry:

Proof that the decision was motivated in part by a racially discriminatory purpose would not necessarily have required the invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.

Id. at 270–71 n.21.

some other state constitutional guarantee,²⁷ the challenge will fail and the ordinance will be upheld.

The fact that Jamesville's rezoning efforts will succeed highlights both the inherent problem lurking within non-plan states as well as the irrationality of forcing non-plan states to succumb to legislative or judicial punishment for the failure of their respective cities and towns to respond properly to legislative mandates. This is land use law's most notorious Catch-22.

By virtue of the fact that the state has not adopted statewide planning or consistency requirements, cities and towns are arguably free to enact any regulation that is not preempted by or inconsistent with state or federal law. This *laissez faire* approach may work, unless and until the state concludes that issues of statewide importance are being overlooked and therefore require remedial action. Thus, in a non-plan state, needs of statewide importance—affordable housing, power plants, telecommunication facilities, and others that transcend traditional municipal boundaries—are difficult to address. There is no effective mechanism to encourage cities and towns to “do the right thing” with respect to accepting their share of undesirable land uses.²⁸ A “cram-down” mechanism, either statutorily or judicially enforced, leads to irrational results.²⁹

In a plan state, however, cities and towns can be “forced” to satisfy statewide concerns in accordance with a logical planning process.³⁰

²⁷ *Cf.* S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 724–25 (N.J. 1975) [*Mount Laurel I*].

²⁸ Undesirable land uses have been referred to as LULUs (locally unwanted land uses). The American Planning Association categorized these uses into three broad headings: (1) “Noncontroversial” uses, such as day-care centers and courthouses; (2) “Sometimes Controversial” uses, such as hospitals and recycling facilities; and (3) “Controversial” uses, such as airports, prisons, and sewage treatment facilities. AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING & THE MANAGEMENT OF CHANGE 5–6 (Stuart Meck ed., 2002) [hereinafter APA GUIDEBOOK].

²⁹ See discussion *infra* Part III.

³⁰ See DIV. OF HOUS., COLO. DEP'T OF LOCAL AFFAIRS, AFFORDABLE HOUSING REGULATORY BARRIERS IMPACT REPORT 16 (2000) [hereinafter COLO. BARRIERS REPORT]. The Colorado Division of Housing discussed the importance and utility of the housing element of a comprehensive plan:

The first step toward removing the regulatory barriers that limit the production of affordable housing is found in a community's long term strategic planning process. A local comprehensive land use plan is a product of this longterm vision The housing element of this Comprehensive Plan can address residential locations, policies regarding subsidies for affordable housing, and general design guidance. It is the adoption of affordable housing

They can be entrusted to develop a schedule and a process—a plan—for how, where, and when the construction or placement of these mandatory facilities or uses is to occur. Plan states respect the logic of ensuring both horizontal consistency among the plan's elements and vertical consistency between the plan itself and the regulations that implement the plan.³¹ As a result, plan states avoid the illogical result of requiring cities and towns to develop consistency between plans and regulations, only to have them voided if and when the state legislature deems it appropriate.

Finally, plan states create a process by which cities and towns develop a comprehensive plan, adopt regulations to enforce and implement the plan, and revise the plan on a regular and predictable basis. This process allows a court, reviewing either a facial or an as-applied attack to a regulation, to ensure first that the regulation was in accordance with the comprehensive plan.³² As noted previously, in some states, if the regulation is not in accordance with the plan, then it is void *ab initio*.³³

The mandatory planning process ensures that cities and towns fulfill statewide, regional, and local concerns in a logical and predictable fashion. The mandatory plan is the most democratic means of ensuring, for example, that City A and Town B both have their fair share of affordable housing, appropriate amounts of open space, adequate commercial and industrially zoned property, and regionally ascertained coverage under the Telecommunications Act.³⁴

policies as an outgrowth of the Comprehensive Plan that prepares a community to increase its affordable housing supply.

Id.

³¹ See APA GUIDEBOOK, *supra* note 28, at 2-12 to -13. Horizontal or internal consistency requires that the mandated elements of the plan be consistent with each other. See, e.g., FLA. STAT. ANN. § 163.3194(3)(b) (West 2002) ("A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities . . . and other aspects of development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan . . .").

³² See Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1156 (1955) ("The legal implications of this theory seem manifest. A city undertaking to exercise the land regulatory powers granted to it by state enabling legislation should be required initially to formulate a master plan, upon which regulatory ordinances, of which the zoning ordinance is but one, would then be based.").

³³ See sources cited *supra* note 18.

³⁴ For example, section 704 of the Telecommunications Act of 1996 contains the requirement that if local regulation of the location of telecommunication facilities is tantamount to an effective prohibition, the local regulation will run afoul of the statute. Telecommunications Act of 1996 § 704, 47 U.S.C. § 332(c)(7)(B)(i)(II) (2000). The Telecommunications Act of 1996 has generated significant amounts of litigation regarding the

If one removes the assurance that a comprehensive planning program provides, then cities and towns are left to fend for themselves with little or no statewide guidance or support. Although municipalities have the benefit of the presumption of validity in their actions, these actions are capable of reversal or suspension at anytime if the state legislature deems one issue more important than any other.³⁵ And while it has always been true that the state legislature can remove any of the powers that it granted cities and towns,³⁶ the fact is that these powers need never be removed in a plan state. Simply put, in a plan state, cities and towns do the state's bidding, but in a predictable and logical fashion.³⁷

For example, assume that the state legislature in a plan state adopts the following two statutes. First, the legislature passes a law stating that cities and towns that fail to have at least twenty percent of their land area protected as open space will lose a set percentage of state aid dollars every year. Second, the legislature passes a law requiring that cities and towns have at least twenty-five percent of their land area zoned for multifamily housing. In a plan state, these mandates can be satisfied by revisions to the local comprehensive plan and supporting land use regulations. In a non-plan state, however, compliance with these new laws is complicated and unguided. Which areas

extent to which the Act preempts local government authority to prohibit or otherwise regulate the placement of telecommunication towers. See, e.g., Timothy J. Tryniecki, *Cellular Tower Siting Jurisprudence Under the Telecommunications Act of 1996—The First Five Years*, 37 REAL PROP. PROB. & TR. J. 271, 272 (2002).

³⁵ See *infra* discussion accompanying notes 48–50.

³⁶ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907). The *Hunter* Court noted:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation In all these respects the state is supreme.

Id.

³⁷ See GOVERNOR'S CTR. FOR LOCAL GOV'T SERVS., DEP'T OF CMTY. AND ECON. DEV., COMMONWEALTH OF PA., PLANNING SERIES NO. 10, REDUCING LAND USE BARRIERS TO AFFORDABLE HOUSING 13 (4th ed. 2001) [hereinafter PENNSYLVANIA PLANNING] ("Except for taxing authority, the most important power that local governments possess is land use regulation. Unfortunately, zoning and subdivision practices can contribute in one or more ways to unnecessarily increase the cost of housing. The best framework for exercising local land use powers is a well-conceived comprehensive plan.")

of the city should be preserved as open space? Which areas are best suited for multifamily development?

Now assume that the state mandate pertaining to open space noted above is revised to require that where the open space mandate has not been met, a State Open Space Appeals Committee will be authorized to hear appeals brought by any resident of the city or town complaining of its failure to comply with the twenty percent requirement. The Committee is empowered to issue an order granting the city or town 120 days to remedy its noncompliance by executing agreements with property owners to purchase, in fee or easement, real property for perpetual protection. If the municipality fails to comply with the Committee's order, the statute empowers the Committee to purchase the land on the municipality's behalf. The cost of the acquisition is thereafter deducted from annual state aid payments due the community.

The above-noted revision would wreak havoc in a non-plan state. What competing municipal concerns would have to be ignored while the Committee's order was being enforced? Where would the community find the money to comply? What about the city or town's desperate need to expend funds on public services such as schools or housing for the elderly?

In this hypothetical, cities and towns in a plan state would fair much better. They could meet as a community to discuss how to revise their comprehensive plan, and then determine how to alter their land use regulations to ensure that all new developments set aside at least twenty percent of the locus as protected open space. They could adjust their zoning codes to raise minimum lot sizes, decrease building and lot coverage, increase setbacks, and tighten subdivision and wetland regulations. They could address the mandate in a comprehensive and logical fashion by addressing all the issues facing them, rather than in an ad hoc, "cram-down" basis.

Almost sixty years ago, in their now famous book *Communitas*,³⁸ Paul and Percival Goodman publicized the illogical and regressive results that occur in states and local governments where plans are ignored or non-existent. With specific reference to the housing crisis then existing in New York City, they criticized the fact that the City was facing numerous competing interests without the vision to tackle

³⁸ PAUL GOODMAN & PERCIVAL GOODMAN, *COMMUNITAS: MEANS OF LIVELIHOOD AND WAYS OF LIFE* (Random House 1960) (1947).

them comprehensively.³⁹ As discussed above, this failure and the attendant consequences best describes non-plan states, such as Massachusetts, today.

II. MUNICIPAL AUTHORITY TO PROTECT PUBLIC HEALTH, SAFETY, AND WELFARE: A BASIS FOR DEVELOPING AFFORDABLE HOUSING

Common state-imposed requirements that pertain to all local governments within a state include school curriculum,⁴⁰ water quality standards,⁴¹ and traffic regulations.⁴² Each requirement is perceived as a traditional function of the state's police powers and local regulation is generally not tolerated.

A legislative mandate captures the essential relationship between the state and its subordinate corporations. This hierarchical relationship highlights the persistent tension between municipalities and their respective state governments and establishes the distinction between "home rule"⁴³ and "Dillon's Rule"⁴⁴ jurisdictions.

In a pure home rule state, a city or town is free to protect the "health, safety, welfare, and morals" of its citizens provided that the local law does not conflict with state law,⁴⁵ or act where the state has

³⁹ *Id.* at 241–42. Goodman and Goodman observe:

Under the circumstances it seems reasonable to ask if the *integration* of all these various functions is not relevant? To give a partial list: housing, slum clearance, location of industries, transportation, adequate schools and teachers, clean streets, traffic control, social work, racial harmony, master planning, recreation Apart from such a unified view, the apparent solution of this or that isolated problem inevitably leads to disruption elsewhere. Slum-clearance as an isolated policy must aggravate class stratification No Master Plan guarantees foolishness like the Lincoln Square project. These consequent evils then produce new evils among them. Isolated planning *cannot* make sense.

Id.

⁴⁰ *See* *Lanza v. Wagner*, 183 N.E.2d 670, 675 (N.Y. 1962).

⁴¹ Section 1421 of the Safe Drinking Water Act of 1974 established drinking water quality standards. Safe Drinking Water Act of 1974 § 1421, 42 U.S.C. § 300h (2000).

⁴² *See, e.g.,* *City of Rio Rancho v. Young*, 889 P.2d 1246, 1249 (N.M. 1995).

⁴³ OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* 108 (2d ed. 2001) ("Home rule has been said to be intended to allow localities to decide for themselves the form of local government that they desire and the scope of its powers.")

⁴⁴ *Id.* at 159 ("Under the majority view, Dillon's Rule is an exclusive enumeration of powers; no others exist.")

⁴⁵ The Massachusetts Home Rule Amendment provides a good example of the broad powers granted and the few powers withheld from local governments: "Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not in-

preempted local governments from acting.⁴⁶ Save these two exceptions, cities and towns are free to act in furtherance of their plans, policies, and locally adopted goals and programs.⁴⁷ An inherent conflict arises, however, where the legislature in a home rule state reduces or rescinds previously granted powers. The courts have resolved this conflict, stating that the sovereign that granted the powers may simply take them away.⁴⁸

Absent imposition of a state mandate or preemptory language, however, the regulation of land uses enjoys the presumption of validity by a reviewing court.⁴⁹ Thus, a city or town that adopts a zoning ordinance requiring 10,000 square feet per dwelling unit, or two acres per dwelling unit, is granted substantial deference by the judiciary if the ordinance is challenged.⁵⁰

consistent with the constitution or laws enacted by the general court" MASS. CONST. amend. LXXXIX, § 6.

⁴⁶ The Massachusetts Home Rule Amendment provides a good example of preemption language as well: "Nothing in this article shall be deemed to grant to any city or town the power to: (1) regulate elections . . . (2) to levy, assess and collect taxes" MASS. CONST. amend. LXXXIX, § 7.

⁴⁷ The powers of local government to protect public health, safety, and welfare have been the subject of numerous federal and state court decisions. In *Hadachek v. Sebastian*, the United States Supreme Court was faced with whether the City of Los Angeles could enforce a prohibition against brick manufacturing on Mr. Hadachek's land—land that he purchased specifically for the manufacturing of brick. 239 U.S. 394, 404–05 (1915). The case is riddled with due process, equal protection, regulatory takings, and estoppel issues. *See id.* at 405–07. The most memorable aspect of the Court's decision, however, is Justice McKenna's sweeping statement regarding the City's police powers to protect public health, safety, and welfare:

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining.

Id. at 410.

⁴⁸ The Massachusetts Supreme Judicial Court (SJC) applied the rule established by the United States Supreme Court in *Hunter v. City of Pittsburgh* in the first and most prominent Massachusetts case that focused on the constitutionality of the Massachusetts Comprehensive Permit Law. *See Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 294 N.E.2d 393, 409–10 (Mass. 1973); discussion *supra* note 36. The SJC concluded that the statute's usurpation of local control over applications under the law is within the power of the legislature and that the statute lawfully supercedes the grant of home rule powers. *See Bd. of Appeals of Hanover*, 294 N.E.2d at 409–10.

⁴⁹ *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–67 (2001).

⁵⁰ *See id.*

The reviewing court applies the rational basis standard.⁵¹ If the court concludes that the ordinance is not “arbitrary or capricious,” and was enacted to fulfill a legitimate governmental purpose, then the ordinance is valid and will stand.⁵² This rational basis standard ensures that courts will not interfere with, substitute their judgment for, or otherwise challenge actions taken by local legislative bodies seeking to protect health, safety, or welfare.⁵³ Although some constraints are in place, courts are reluctant to reverse decisions made at the local level of government.⁵⁴

Judicial deference for legislative acts stems from the constitutional requirement that the powers of the judicial, legislative, and executive branches of government remain separate and independent, precluding one branch from exercising the powers of another.⁵⁵ This deference, in addition to their extensive regulatory powers, offers broad opportunities for local governments to regulate private property in the pursuit of protecting health, safety, and welfare.⁵⁶

But this result is as it must be, given the fact that the federal government has never successfully regulated land at the local level,⁵⁷ and the fact that only a small minority of states have been willing to entertain the idea of regulating private property at a statewide,⁵⁸ or even

⁵¹ See *id.* This is one of three methods of analyzing the validity of regulations adopted by a local government. See DANIEL R. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 18 (5th ed. 2002).

⁵² *State ex. rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 313 N.W.2d 805, 813 (Wis. 1982) The Wisconsin Supreme Court summarized the rational basis test as follows:

While we have recognized the presumption of constitutionality and the rather easily accommodated rational-basis test, we should not blindly rubber stamp legislation enacted under the guise of the city’s police power when careful review has revealed no logical link between the legislation and the objective it was enacted to effect.

Id.

⁵³ See *Nat’l Amusements, Inc. v. City of Boston*, 560 N.E.2d 138, 140 (Mass. App. Ct. 1990).

⁵⁴ *Id.* at 141 (“Despite the heavy momentum in favor of affirmation of local zoning action, the applicable principles are of judicial deference and restraint, not abdication.”).

⁵⁵ U.S. CONST. art. I–III.

⁵⁶ See *supra* note 46 and accompanying text.

⁵⁷ The Coastal Zone Management Act provides a limited exception. Coastal Zone Management Act, 16 U.S.C. §§ 1451–1464 (2000). The Act requires that federal, state, and local government activities within the defined coastal zone be consistent with state coastal zone management plans previously approved by the federal government. 16 U.S.C. § 1456(c)(1)(A)–(C), 1456(d).

⁵⁸ Examples of state regulation of private property are limited. Exceptions include legislation enacted in Florida (areas of critical environmental concern), Massachusetts (on Cape Cod and Martha’s Vineyard via developments of regional impact), California, and

regional, level.⁵⁹ Although federal or statewide regulation of land use *could* lead to more comprehensive and successful management of the nation's natural resources, the fact is that the federal government has shown little interest in this approach, and the majority of states see land use regulation as a "local government issue."

That land use is most effectively managed at the largest scale practicable is a basic tenet of land use planning.⁶⁰ Unfortunately, this principle clashes with the fact that it would be politically risky for a senator from Ohio to vote for land use regulations on land in Sarasota, Florida, or for a state representative from upstate New York to vote for land use controls over land on Long Island.⁶¹

The implications of the fact that land use is managed, perhaps by default, at the local level of government are significant. Local officials, by virtue of their proximity, both physically and politically, to the affected land are deemed to know best the appropriate regulations that should be applied to their respective landscapes.⁶² For example, a member of a city council would understand the need to rezone a portion of the city to a more or less intensive use, given his or her knowledge of the city's economic climate, infrastructure availability, and political support of the abutting neighborhood. Similarly, a member of a local planning board would know the importance of supporting a downzoning effort to protect the zone-of-contribution of the town's only source of drinking water.

North Carolina (developments in the coastal zone). See APA GUIDEBOOK, *supra* note 28, at 5-28.

⁵⁹ Examples of regional agencies with regulatory authority are limited. Exceptions include the Pinelands Commission (New Jersey), the Cape Cod and Martha's Vineyard Commissions (Massachusetts), the Adirondack Park Agency (New York), and the Tahoe Regional Planning Agency (Nevada and California). *Id.* at 6-20 to -21.

⁶⁰ See REYNOLDS, *supra* note 43, at 410-11 (explaining how zoning developed as an improvement over lawsuits in nuisance).

⁶¹ Richard Babcock offers some explanation for why local control has lasted despite its problems:

Local control over use of private land has withstood with incredible resilience the centripetal political forces of the last generation. In an era of concentration of power, each blind man may offer a different explanation for the remarkable continuing strength of local control over land use. I believe this condition is explained in part by the conviction of the local decision-maker that he is more competent to decide these questions than is his professional counterpart in Albany, Columbus or Sacramento.

BABCOCK, *supra* note 7, at 19.

⁶² See REYNOLDS, *supra* note 43, at 465.

These examples highlight why the majority of states grant broad authority to their cities and towns to regulate land use within their respective borders.⁶³ When it comes to development of affordable housing, however, it is precisely because of such deferential treatment that federal,⁶⁴ state, county, and even some local governments, as well as the private and the non-profit sectors, have called for dramatic remedial action.⁶⁵ In some cases, the called-for actions have reversed, or sought to reverse, the presumption of validity afforded cities and towns by the rational basis test.⁶⁶

Perceived as a root cause of the lack of affordable housing, land use regulations, including zoning and subdivision regulations, health codes, building and fire codes, and fee requirements are alleged to represent “barriers” to affordable housing.⁶⁷ Examples of these allegations are numerous. A generalized example is as follows:⁶⁸ Jamesville’s minimum lot size of 20,000 square feet per dwelling unit, coupled with the city’s subdivision regulations, rules governing wastewater disposal, and impact fees, are targeted as contributing to the high costs of new residential construction. But for these regulatory barriers, critics argue, new home construction in Jamesville would be more vigorous and resulting sales prices lower than they are with the barriers in place.

The search for, and rooting out of, “barriers” to affordable housing has taken on an increased frenzy of late.⁶⁹ The United States De-

⁶³ *Id.* at 110 n.14 (“Forty-eight states now provide some form of home rule for municipalities.”).

⁶⁴ ADVISORY COMM’N REPORT, *supra* note 8, at 1 (“Unnecessary regulations at all levels of government stifle the ability of the private housing industry to meet the increasing demand for affordable housing throughout the country.”).

⁶⁵ *See, e.g.*, KAREN DESTOREL BROWN, EXPANDING AFFORDABLE HOUSING THROUGH INCLUSIONARY ZONING 2 (2001) (citing examples of affordable housing ordinances at the regional level).

⁶⁶ *See, e.g.*, CITIZENS’ HOUS. & PLANNING ASS’N, FACT SHEET ON CHAPTER 40B, *at* http://www.chapa.org/40b_fact.html (updated Jan. 2003) [hereinafter 40B FACT SHEET] (describing how Massachusetts’s Chapter 40B Comprehensive Permit Law (Comprehensive Permit Law or 40B) allows zoning boards of appeal to approve affordable housing projects even if they do not strictly meet all local zoning ordinances, in effect removing the presumption of validity).

⁶⁷ *See* ADVISORY COMM’N REPORT, *supra* note 8, at 3.

⁶⁸ *See, e.g., id.*; PENNSYLVANIA PLANNING, *supra* note 37, at 1.

⁶⁹ *See generally* ADVISORY COMM’N REPORT, *supra* note 8 (cataloging the impact of regulatory barriers on the creation of affordable housing). A letter accompanying the Advisory Committee’s Report to President George H.W. Bush from the Secretary of the Department of Housing and Urban Development, Jack Kemp, described the report as a “call to action” for federal, state, and local governments. *Id.*

partment of Housing and Urban Development has organized an extremely sophisticated Web site entitled *Regulatory Barriers Clearinghouse*.⁷⁰ The National Association of Home Builders has published numerous documents on the subject.⁷¹ Several states have conducted “barrier” studies designed to identify and “break down” barriers to affordable housing.⁷²

These efforts are probably well intentioned; affordable housing is a key concern facing the nation’s cities and towns. At issue, however, is how best to address the problem. One approach is to encourage and, if necessary, require cities and towns to develop affordable housing consistent with their respective comprehensive plans. This approach has been successfully used by several states throughout the country and could be readily adopted in all states.⁷³ Another approach, and one that is receiving an increasingly receptive audience, seeks to emasculate local government efforts to manage and control local land use under a theory that local government regulations are “barriers” to affordable housing development.⁷⁴

III. BARRIERS TO AFFORDABLE HOUSING—A CLOSE LOOK AT THE MASSACHUSETTS “ANTI-SNOB ZONING ACT”⁷⁵

Legislative mandates directed toward the provision of affordable housing are common, but are more often expressed as desirable goals

⁷⁰ DEP’T OF HOUS. AND URBAN DEV., REGULATORY BARRIERS CLEARINGHOUSE, at <http://www.huduser.org/rbc/> (last updated Dec. 20, 2002). Note the accompanying commentary on the Web site, under the topic “fees and dedications,” wherein the “[S]tate of Oregon’s comprehensive land use planning coordination” is critiqued due to the fact that “state law requires counties and cities to have plans” and the State of Maine’s “smart growth” plan is criticized due to the proposal that water and sewer extensions be channeled to designated areas only. *Id.*

⁷¹ See generally, e.g., NAT’L ASS’N OF HOME BUILDERS, 2001–2002 LEGISLATIVE AND REGULATORY POLICY (2001).

⁷² See generally, e.g., ARIZ. HOUS. COMM’N, THE STATE OF HOUSING IN ARIZONA 2000 (1999); COLO. BARRIERS REPORT, *supra* note 30; GOVERNOR’S SPECIAL COMM’N ON BARRIERS TO HOUS. DEV., COMMONWEALTH OF MASS., REPORT OF THE GOVERNOR’S SPECIAL COMMISSION ON BARRIERS TO HOUSING DEVELOPMENT (2002); PENNSYLVANIA PLANNING, *supra* note 37; OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., AFFORDABLE HOUSING (2001).

⁷³ See discussion *infra* Part IV.

⁷⁴ See discussion *infra* Part III.

⁷⁵ Chapter 774 of the Acts of 1969 was referred to in the original House Bill (5429) as the “Anti-Snob Zoning Act.” Act of August 23, 1969, ch. 774, 1969 Mass. Acts 712. The phrase and its attendant implications have stuck and remain a weapon of choice among the statute’s supporters. See, e.g., *Snob Zoning Alert*, *supra* note 5, at A22.

than as minimum standards or milestones.⁷⁶ Two distinct exceptions to this generalized rule exist. One exception, in part the focus of this Symposium, is the New Jersey Supreme Court's holdings in the *Mount Laurel* cases.⁷⁷ The second exception lies with the "Anti-Snob Zoning Act,"⁷⁸ adopted by the Commonwealth of Massachusetts in 1969, and

⁷⁶ See, e.g., FLA. STAT. ANN. § 187.201(5)(a) (West 2002); R.I. GEN. LAWS § 45-22.2 to -22.3 (1999); WASH. REV. CODE ANN. § 36.70A.020 (West 2002). Each of these statutes are designed to increase production and ensure availability of low- and moderate-income homes and rental units.

⁷⁷ *S. Burlington Co. NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) [*Mount Laurel II*]; *Mount. Laurel I*, 336 A.2d 713 (N.J. 1975). The *Mount Laurel* holdings espoused several important public policy positions—from the bench—and may be best known for the establishment of the "builder's remedy," a judicially-sanctioned override of local regulations to support the development of affordable housing. Perceived by some as a draconian intervention into the traditional home rule powers of New Jersey's cities and towns, the *Mount Laurel* holdings are tame when compared with the Massachusetts statute and resulting case law. *But see* Jerold S. Kayden, Editorial, *Who Decides Housing Issues*, BOSTON GLOBE, Aug. 11, 2002, at D7 (concluding that the Massachusetts approach is less intrusive than New Jersey's). The following remarks from the New Jersey Supreme Court highlight the differing perceptions of the respective courts:

The lessons of history are clear, even if rarely learned. One of those lessons is that unplanned growth has a price: natural resources are destroyed, open spaces are despoiled, agricultural land is rendered forever unproductive, and people settle without regard to the enormous cost of the public facilities needed to support them. Cities decay; established infrastructures deteriorate for lack of funds; and taxpayers shudder under a financial burden of public expenditures resulting in part from uncontrolled migration to anywhere anyone wants to settle, roads leading to places they should never be More than money is involved, for natural and man-made physical resources are irreversibly damaged. Statewide comprehensive planning is no longer simply desirable, it is a necessity recognized by both federal and state governments.

Mount Laurel II, 456 A.2d at 429. The SJC, bowing in deference to the legislature, have not taken a similar position:

The Legislature's zoning power may be used 'where the interests of the public require such action and where the means employed are reasonably necessary for the accomplishment of the purpose.' Within these broad limits, the General Court is the sole judge as to how and when the power is to be exercised as long as it acts in accordance with the powers reserved to it by s. 8 of the Home Rule Amendment.

Bd. of Appeals of Hanover v. Hous. Appeals Comm., 294 N.E.2d 393, 424 (Mass. 1973) (quoting *Simon v. Town of Needham*, 42 N.E.2d 516, 517 (Mass. 1942)).

⁷⁸ Low and Moderate Income Housing Act, 1969 Mass. Acts 712 (codified as amended at MASS. GEN. LAWS ch. 40B, §§ 20-23 (2000)). Discussed in detail, the statute is "anti-suburban." A well-respected, long-time advocate of affordable housing in Massachusetts, who asked to remain anonymous, told the author that the statute was designed to "break the backs of the suburbs." To that end, the statute has and will always be, very successful. A more refined way of stating the objective is as follows: "Opening up the suburbs to low-income housing is an essential element in a long-term strategy for revitalization of urban

discussed in detail below. Massachusetts's Comprehensive Permit Statute has remained unaltered since its adoption.⁷⁹ The intended goal of 40B remains the same as it was thirty-four years ago: to require that no less than ten percent of the housing stock within every city and town be subsidized with or by a federal or state subsidy.⁸⁰

Remembered as racist, at worst, and arrogant, at best, the nation's most recent experiences with urban renewal and affordable housing development on a grand scale are thought of today as government intervention in urban affairs "gone wrong."⁸¹ Yet, despite the disgraceful efforts of government central planners and the failure of the urban renewal programs, many vestiges of the flawed policies of urban renewal can be found within 40B.

neighborhoods. Moreover, suburban isolation threatens the economic well being of the entire metropolitan region and thus harms suburban as well as urban residents." Note, *State-Sponsored Growth Management As a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1127-28 (1995). Clint Bolick adds:

The problem with this anti-suburban view is that these cities—and they are cities—are not really the bland, faceless, non-communities described in social studies textbooks. People live here. People choose to live here, and they chose not to move out. In fact, suburban residents are less likely to move than their central city counterparts.

Clint Bolick, *Subverting the American Dream: Government Dictated "Smart Growth" is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859, 867 (2000) (citing Sam Staley, *Urban Sprawl: A Grassroots Defense* (Dec. 1997), at <http://www.urbanfutures.org/opedstaley.html>). The above-noted articles are decidedly opposed to governmental regulation of land use and they are cited here with caution. It is suspected, however, that individuals who perceive governmental regulation of land use as "paternalistic" would likewise rebel against the notion that using government as its agent, a speculator can cram-down an unlimited number of dwelling units on any parcel of land unconstrained by some rules.

⁷⁹ MASS. GEN. LAWS ch. 40B, §§ 20-23.

⁸⁰*Id.* The ten percent requirement, however, can hardly be considered a "goal." First, the "goal" is not tied to a plan or statewide process to match housing needs with housing development. Second, the "goal" presumes that every city or town has the same housing needs and thus the same needs for housing production, regardless of where the municipality is located, the historic development patterns of the community, or demands placed upon housing due to economic expansion or contraction. Third, the "goal" exists in a complete vacuum. It is contradictory to articulate a goal that is not linked, in some way, to any one of a variety of issues and concerns that face city and town government on a daily basis.

⁸¹ ROBERT GOODMAN, *AFTER THE PLANNERS* 59 (1971) ("I submit that we have made a botch of urban renewal to date. By and large, people don't understand what we're after—or even what we're talking about. This is fortunate, for if they did, we'd all have to run for cover." (Robinson F. Parker, Address to National 1968 Industrial Conference Board (Jan. 10, 1968) (quoting David A. Wallace, former Director of the Philadelphia Redevelopment Authority)).

For example, urban renewal programs repeatedly relied upon state and federal money to dismantle existing neighborhoods to “make way” for urban redevelopment.⁸² As we know, these programs did not eradicate slums or urban decline. In fact, they accomplished just the opposite. They destroyed the urban core, separated and segregated neighborhoods, and leveled urban history.⁸³

The driving forces behind urban renewal programs were federal and state subsidies: cash and/or cash equivalents.⁸⁴ These gifts rewarded developers with handsome discounts on land, mortgage insurance, grants of easements, abatements on real property taxes, and tax deductions.⁸⁵ To avoid the appearance that developers would reap

⁸² See, e.g., *Knudson v. City of Decorah*, 622 N.W.2d 42, 45 (Iowa 2002); *Brady v. City of Dubuque*, 495 N.W.2d 701, 706 (Iowa 1993); *In re Amendment to Recreation and Open Space Inventory of the City of Plainfield*, 802 A.2d 581, 591 (N.J. Super. Ct. App. Div. 2002).

⁸³ Referring to the nation’s highway program, the literal “vehicle” for the grand urban redevelopment plan, then-Pennsylvania Senator Joseph Clark stated, “It is presently being operated by barbarians. We ought to have some civilized understanding of just what we do to spots of historic interest and great beauty by the building of eight lane highways through the middle of our cities.” TOM LEWIS, *DIVIDED HIGHWAYS* 200 (1997) (citing RICHARD O. BAUMBACH, JR. & WILLIAM E. BORAH, *THE SECOND BATTLE OF NEW ORLEANS* 102 (1981)).

⁸⁴ Wilton Sogg and Warren Wertheimer completed an exhaustive analysis of the urban renewal programs of the day in 1959. Among other observations, the study made clear the direct role federal and state subsidies had on the “success” of the renewal efforts. Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 528–32 (1959) [hereinafter *Urban Renewal*]. The authors noted:

The cost to municipalities of conducting urban-renewal programs is considerable, especially when the local public agency must acquire and clear an entire area In order to encourage urban renewal, the federal government is authorized to pay up to two-thirds of the net project cost if certain requirements are met by the city, including the submission of an acceptable workable program.

Id. at 511.

⁸⁵ See generally ROBERT A. CARO, *THE POWER BROKER* (1974). Caro critiques Robert Moses’s efforts in the New York metropolitan area:

[F]or though the money that built them was supposedly private money, the tax abatement that Moses arranged for them would, when totaled over the years, insure that the public investment in them would dwarf the private, and the powers that Moses utilized to make possible not only their construction but the assemblage of their site—eminent domain, street closings, utility easements—were all public.

Id. at 968; see *Urban Renewal*, *supra* note 84, at 535–36. The authors discussed the relationship between tax credits on the economic viability of building affordable housing:

A project which does not produce a satisfactory cash return on the invested cash equity may nevertheless prove advantageous if the impact of its tax con-

windfall profits, several programs “enforced” caps on the profits allowed the private sector. These so-called “limited dividend” programs are strikingly similar to the limitations “imposed” by the comprehensive permit program. The state and federal dollars used in the now-discredited urban renewal programs were financial or related subsidies that differed little from the subsidies used by 40B.⁸⁶

In one of many ironies discussed in this Article, at least the failed urban renewal programs required the development of an urban renewal plan.⁸⁷ In exchange for selling or renting twenty-five percent of

sequences on the taxpayer’s business as a whole is considered. A project is desirable from an investment standpoint only if the annual “cash throw-off” is such as to return the initial investment within a relatively short-time Since a project which would produce little or no cash throw-off before federal income tax may thus produce a substantial loss for tax purposes in the early years, and since such a loss may be deductible from other income of the taxpayer, the tax savings produced thereby may make the project more desirable from an investment standpoint.

Urban Renewal, *supra* note 84, at 535–36.

⁸⁶ Using federal and state dollars to lure the private sector into destroying the urban core was an undeniable mistake. The error lies, in large part, on ignoring the political, social, and environmental fabric of that portion of the city or town that was being destroyed. No plan guided the government’s actions. Where there was a plan, it was rendered irrelevant. Professor Mandelker wrote of the failure of urban renewal projects to incorporate the general, comprehensive plan into decisions regarding slum clearance and public housing development in 1967:

Since the statute speaks of a “legislative finding,” not of the general plan itself, a court asked to review for conformity to the provision plausibly could refuse to look behind the legislative determination to ascertain whether a general plan actually existed Now planning for individual projects could begin before the general plan was even adopted. By deferring the completion of the general plan until the submission of the final project plan, the federal agency allowed the content of the general plan to be influenced by ad hoc redevelopment decisions.

Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25, 41–43 (1967).

⁸⁷ Daniel Mandelker notes: “While planning has not had much influence on project selection, planning was intended to play a critical role in shaping project redevelopment. Federal legislation requires that the urban renewal project plan be related to the community plan.” Mandelker, *supra* note 86, at 33–34 (citing 42 U.S.C. § 1455(a)(iii) (1964) (omitted and replaced by 42 U.S.C. § 5316 (1976))). It was not until December, 2002, that the Comprehensive Permit Statute’s implementing regulations made any mention of a “comprehensive or master plan.” The regulation states: “The Committee may receive evidence of and shall consider the following matters: a city or town’s comprehensive plan, community development plan, or master plan and the city or town’s effort to implement the housing components of such plans.” MASS. REGS. CODE tit. 760, § 31.07 (2002). It remains to be seen what weight the Housing Appeals Committee (HAC) grants this evidence; whatever weight is granted rests solely with HAC’s discretion. If history is any guide,

the dwelling units in a development project at eighty percent of the median income for the community, 40B permits a developer of raw, under-developed, or previously-developed, land to force the approval of a development density unconstrained by any local rule, regulation, ordinance, or policy.⁸⁸ Put another way, in exchange for offering twenty-five percent of the total number of dwelling units as "affordable," no density restrictions are imposed, subdivision rules and regulations, health regulations, historic district requirements, and any and all other local rules or requirements can be waived by the local board of appeals. As far as the developer is concerned, the sky is literally the limit.

Thus, a parcel of land zoned two dwelling units to the acre can now contain twelve, fourteen, or forty units to the acre. A parcel prohibiting structures greater than forty feet in height can contain structures 100 feet in height. Structures otherwise required to be set back at least twenty feet from a neighboring sideline can now be constructed on the neighboring sideline. In short, the only applicable local regulations are those "negotiated"⁸⁹ between the local review board and the applicant.⁹⁰

however, the HAC will not allow logical plans to interfere with the statutory mandate. *See, e.g., Interfaith Hous. Corp. v. Bd. of Appeals*, No. 72-05, slip. op. at 14 (Mass. Hous. App. Comm. Feb. 13, 1974) ("The legislature, however, has not written into chapter 774 this admittedly existing combination of serious problems as a reason for denial of a comprehensive permit.").

⁸⁸ MASS. GEN. LAWS ch. 40B §§ 20-23 (2000).

⁸⁹ The utility commonly associated with negotiation is outweighed by the unpredictable results and anarchy, when applied in the context of land use regulation. Referring to the connection between planning and zoning, the New York Court of Appeals cautioned that without a comprehensive plan acting as a rational foundation for land use decision-making, zoning decisions "become nothing more than just a Gallup poll." *Udell v. Haas*, 235 N.E.2d 897, 901 (N.Y. 1968).

⁹⁰ The board of appeals is required to hear and rule upon the application on an expedited basis. A public hearing must be commenced within thirty days of receipt of the comprehensive permit application and a decision rendered within forty days of the close of the public hearing. MASS. GEN. LAWS ch. 40B, § 21. Intrepid boards of appeal have learned that because virtually no comprehensive permit applicant ever presents a complete application to the board, they can prolong rendering a final decision by extending the public hearing process. *See, e.g., Pheasant Ridge Assocs. v. Town of Burlington*, 506 N.E.2d 1152, 1160 (Mass. 1987). This strategy is fraught with risk, however, and the HAC has signaled an available remedy: "When the local hearing has been unduly protracted, this Committee will entertain an appeal on the theory that the permit has been constructively denied." *Transformations, Inc. v. Townsend Bd. of Appeals*, No. 02-14, slip op. at 4 n.3 (Mass. Hous. Appeals Comm., September 23, 2002) (emphasis added) (referencing *Pheasant Ridge Assocs.*, 506 N.E.2d at 1160; *Milton Commons Assocs. v. Bd. of Appeals of Milton*, 436 N.E.2d 1236, 1239 (Mass. App. Ct. 1982)).

In yet another ironic aspect of Comprehensive Permit Statute, a board of appeals can waive rules and regulations adopted locally,⁹¹ but regulations promulgated by the State, even if implemented locally, cannot be waived. Thus, the State Building Code,⁹² Wetlands Protection Act,⁹³ Environmental Policy Act,⁹⁴ and wastewater disposal regulations⁹⁵ apply to comprehensive permit and market rate projects alike.

The illogic of this fact is maddening. On one hand, Massachusetts has promulgated minimum standards for the protection of public health and welfare—including ground, surface, and drinking water supplies⁹⁶ and wetland resources.⁹⁷ On the other hand, the Comprehensive Permit Statute demands a “one size fits all” approach for the

⁹¹ For example, the regulations governing subsurface disposal of waste water are “minimum regulations.” MASS. GEN. LAWS ch. 111, § 31 (2000). Therefore, to protect locally specific resources from the impacts of viruses, nitrogen, or phosphorus found in wastewater effluent, a city or town may choose to expand the minimum setback between drinking water supplies and wastewater disposal systems (set by the State at 100 feet). See APA GUIDEBOOK, *supra* note 30, § 7-208, at 7-134 to -141. Notwithstanding the fact that this local regulation has a firm rational basis, the board of appeals can waive the additional setback imposed by the local regulation beyond the state requirement of 100 feet. Similarly, whereas the state Wetlands Protection Act grants review authority to the local conservation commission for activities occurring within 100 feet of a wetland resource, a local ordinance could grant authority within a greater distance (e.g., 150 feet). MASS. GEN. LAWS ch. 131 §§ 40, 40A (2000); see *Tortorella v. Bd. of Health of Bourne*, 655 N.E.2d 633, 636 (Mass. App. Ct. 1995). It is presumed that the board of appeals may waive the difference between the state requirement and the local, more restrictive requirement. Note, however, that section 20 of chapter 40B clearly—arguably intentionally—omits the phrase “conservation commission” from the list of local boards whose regulations can be waived. *Expressio unius est exclusio alterius* (the specific mention of one thing is the specific exclusion of all things not mentioned).

⁹² MASS. GEN. LAWS ch. 143, §§ 93–100 (2000); MASS. REGS. CODE tit. 780, § 101.0–.6 (2002).

⁹³ MASS. GEN. LAWS ch. 131 §§ 40, 40A; MASS. REGS. CODE tit. 310, § 10.01–.60 (2002).

⁹⁴ MASS. GEN. LAWS ch. 30, §§ 61–62H; see MASS. REGS. CODE tit. 301, § 11.01–.13 (2002); see also Mass. Exec. Order No. 385 (1996). Executive Order 385 (EO 385) discourages the use of state financing for projects that will develop previously undeveloped land or encourage land development in areas without adequate infrastructure. Although the phrase “sprawl” is not found within EO 385, it was clearly intended to minimize the use of state funds to encourage sprawl. See, e.g., Jay Wickersham, *Managing Growth Without a Growth Management Statute: The Uses of MEPA*, NEW ENGLAND PLANNING, Apr. 2001, at 1. EO 385 applies to both the admission ticket to the board of appeals and the funding obtained to develop the comprehensive permit project. To date, MassHousing has ignored the requirements of EO 385. As discussed below, these actions are consistent with the agency’s belief that they are immune from state regulations governing the comprehensive permit process.

⁹⁵ See MASS. REGS. CODE tit. 310, § 15.001–.505; tit. 314, §§ 4.01–.06, 5.01–.19, 6.01–.10 (2002).

⁹⁶ See, e.g., MASS. REGS. CODE tit. 314, §§ 2.01–.12, 4.01–.06, 5.01–.19, 6.01–.10.

⁹⁷ See, e.g., MASS. REGS. CODE tit. 310, § 10.01–.60.

State's 351 municipalities. Septic system regulations applicable in communities with geologic deposits of bedrock, for example, cannot be more restrictive than in communities with geologic deposits of sand and gravel.⁹⁸ Wetland regulations in communities with extensive vernal pools and wildlife habitat cannot be more restrictive than in communities with limited and degraded wetland systems.⁹⁹ Massachusetts's cities and towns are treated as homogenous blobs: Falmouth is the same as Lowell; Lenox is the same as Worcester; Rockport is the same as Grafton.

Recognizing that cities and towns would rebel against this usurpation of local control, the Comprehensive Permit Statute created the Housing Appeals Committee (HAC),¹⁰⁰ an administrative agency to which an applicant whose project was denied, or approved with too many conditions, could appeal.¹⁰¹ The HAC, through rules promulgated by the Department of Housing and Community Development,¹⁰² has overseen the appeal process with an unbending commitment to the intent of the statute. The Massachusetts courts have supported this relentless pursuit, deferring to the legislature and arguably demanding that it respond.¹⁰³

⁹⁸ Contaminants behave differently in the subsurface depending upon the geologic environment. Contaminant pathways are predictable in a sand and gravel aquifer, for example on Cape Cod, whereas they are grossly unpredictable in bedrock environments, for example on Boston's north shore or in the Berkshire communities. See, e.g., SANJAY JEER ET AL., *NONPOINT SOURCE POLLUTION: A HANDBOOK FOR LOCAL GOVERNMENTS* 35 (Am. Planning Ass'n, Planning Advisory Service Report No. 476, 1997).

⁹⁹ ALEXANDRA D. DAWSON & SALLY A. ZIELINSKI, *ENVIRONMENTAL HANDBOOK FOR MASSACHUSETTS CONSERVATION COMMISSIONERS* 194-95 (8th ed. 2000) Dawson and Zielinski note the virtues of passing local wetland regulations that are more restrictive than parallel state regulations.

There are several good reasons for increasing protection [beyond the state act]. The Wetlands Protection Act [the state act] is limited to protecting only eight wetland values Communities may wish to regulate work over a broader geographic area including wetlands not linked to water bodies and also including adjacent upland areas, work on which may affect wetlands and floodplains.

Id.

¹⁰⁰ MASS. GEN. LAWS ch. 23B, § 5A (2000).

¹⁰¹ MASS. GEN. LAWS ch. 40B, § 23.

¹⁰² MASS. REGS. CODE tit. 760, §§ 30.00, 31.00 (2000).

¹⁰³ The SJC, however, may be signaling the Legislature that reform is due. In *Zoning Board of Appeals of Wellesley v. Ardmore Apartments Ltd. Partnership*, the SJC ruled that unless otherwise permitted by the city or town, the affordable dwelling units within a comprehensive permit project must remain affordable in perpetuity where the comprehensive permit violates local zoning regulations. 767 N.E.2d 584, 586 (Mass. 2002). The court said:

In decision after decision, the HAC has dismissed local offers of proof or concerns regarding the extent of affordable housing already existing within the city,¹⁰⁴ environmental impacts generated by the new development,¹⁰⁵ traffic congestion and emergency access,¹⁰⁶ storm-water runoff,¹⁰⁷ visual impacts and property devaluation,¹⁰⁸ school overcrowding,¹⁰⁹ inconsistency with a locally adopted plan,¹¹⁰

It may be that a comprehensive permit is essential for the construction of some affordable housing projects because of local zoning restrictions, and it may be that, in those situations, the absence of an affordability restriction expiration operates as an economic disincentive to developers to build affordable housing. The solution to that problem, however, lies with the Legislature.

Id. at 596–97. Furthermore, in *Planning Board of Hingham v. Hingham Campus, L.L.C.*, the SJC ruled that 40B does not grant a municipal planning board standing to appeal the decision of a board of appeals. 780 N.E.2d 902, 908 (Mass. 2003). The SJC concluded that “[i]f the law is to be changed, the change can only be made by the Legislature.” *Id.* (quoting *Commonwealth v. Jones*, 632 N.E.2d 408, 410 (Mass. 1994)).

¹⁰⁴ *Hadley W. Assocs. v. Haverhill Bd. of Appeals*, No. 74-02, slip op. at 8 (Mass. Hous. App. Comm. Sept. 25, 1974) (“Nor does . . . the fact that Haverhill ranks among ‘the top ten cities in the Commonwealth with state and federal housing units in occupancy and progress’ imply that Haverhill has complied with any of the mathematical criteria for ‘consistent with local needs.’”).

¹⁰⁵ *C.S.R. Mgmt., Inc. v. Yarmouth Bd. of Appeals*, No. 95-01, slip op. at 6–10 (Mass. Hous. App. Comm. Sept. 7, 1995).

¹⁰⁶ *Dexter St. L.L.C. v. N. Attleborough Bd. of Appeals*, No. 00-01, slip op. at 10–12 (Mass. Hous. App. Comm. July 12, 2000).

¹⁰⁷ *Spencer Livingstone Assoc. Ltd. P’ship v. Medfield Zoning Bd. of Appeals*, No. 90-01, slip op. at 12–17 (Mass. Hous. App. Comm. June 12, 1991).

¹⁰⁸ *Cedars Holdings, Inc. v. Dartmouth Bd. of Appeals*, No. 98-02, slip op. at 2–3 (Mass. Hous. App. Comm. May 24, 1999).

¹⁰⁹ *Interfaith Hous. Corp. v. Bd. of Appeals of Gardner*, No. 72-05, slip op. at 14 (Mass. Hous. App. Comm. Feb. 13, 1974). Prior to the decision, Gardner High School had lost its accreditation due to overcrowding, and the board based its denial of the comprehensive permit, in part, on the overcrowding of its public schools. The HAC reversed, however:

The unfortunate combination of overcrowded schools, high construction costs to provide more schools, and taxes already at the breaking point, is a sad fact of life that presently besets almost every municipality in the country Apparently, the legislature felt that existing needs for low and moderate income housing were so overriding as to have priority over the admittedly pressing problem of overcrowded schools.

Id.

¹¹⁰ *Planning Office for Urban Affairs v. N. Andover Bd. of Appeals*, No. 74-03, slip op. at 13–15 (Mass. Hous. App. Comm. May 5, 1975). The regulation setting the criteria for decisions of the HAC was revised, effective December 20, 2002, to include the following: “The Committee may receive evidence of and shall consider the following matters: 1. a city or town’s master plan, comprehensive plan, or community development plan, and 2. the results of the city or town’s efforts to implement such plans.” MASS. REGS. CODE tit. 760, § 31.07(3)(d) (2002). Two years prior to that revision, the Chairman of the HAC wrote, “What these cases make clear is that if towns take control of their own planning processes

impact on the municipality's tax base,¹¹¹ and water supply and water pressure limitations.¹¹²

Judicial support for the decisions of the HAC, and 40B in general, is perplexing given the Massachusetts Supreme Judicial Court's (SJC) decision in *Vazza v. Board of Appeals of Brockton*.¹¹³ In *Vazza*, the SJC noted:

Purchasers of real estate are entitled to rely on the applicable zoning ordinances or by-laws in determining the uses which may be made of the parcel they are buying For many persons, particularly those purchasing houses, this is the largest single investment in their lives. It is important that such purchasers be able to determine with reasonable accuracy, before making that investment, just what the appli-

and put affordable housing on their agendas, their local autonomy will be respected under the Comprehensive Permit Law." Werner Lohe, *The Massachusetts Comprehensive Permit Law: Collaboration Between Affordable Housing Advocates and Environmentalists*, LAND USE L. & ZONING DIG., May 2000, at 3. The combination of the regulatory revision and the Chairman's comments should give hope to cities and towns seeking to develop affordable housing in a state with no planning or consistency requirements. The facts, however, prove differently. Since the Chairman's article, the HAC has: (1) overturned a denial by a board of appeals and approved a comprehensive permit in a community where the median sale price of a dwelling unit was less than the sale price of the deed restricted units permitted by the Committee's order; (2) reversed a decision by a board of appeals denying a comprehensive permit to build on a parcel of land noted "Not A Buildable" lot, holding that such a notation could be waived in the pursuit of affordable housing; (3) concluded that the legislature's definition of satisfying the statutory obligation for the total land area that is devoted to affordable housing is measured by the land area in which the building occurs and not the total area of the parcel subject to the development. See generally *Delphic Assocs. v. Middleborough Bd. of Appeals*, No. 02-11 (Mass. Hous. App. Comm. Dec. 23, 2002); *Cloverleaf Apartments, L.L.C. v. Zoning Bd. of Appeals of the Town of Natick*, No. 01-21, slip op. at 2-3 (Mass. Hous. App. Comm. Mar. 4, 2002); *Woodridge Realty Trust v. Ipswich Bd. of Appeals*, No. 00-04 (Mass. Hous. App. Comm. June 28, 2001).

¹¹¹ *Woodcrest Vill. Assocs. v. Bd. of Appeals of the Town of Maynard*, No. 72-13, slip op. at 27 (Mass. Hous. App. Comm. Feb. 13, 1974).

¹¹² *Coop. Alliance of Mass. v. Taunton Bd. of Appeals*, No. 90-05, slip op. at 14-15 (Mass. Hous. App. Comm. Apr. 2, 1992). In *Cooperative Alliance*, HAC reinforced the relative lack of importance of local needs:

But this cannot mean that any condition which insures adequate water supply is automatically consistent with local needs. If this were the case, any town wishing to block affordable housing could simply identify a legitimate local concern and then require that it be remedied in the most expensive way possible. Thus we believe that also implicit within the definition of consistency with local needs is that any condition be reasonable.

Id.

¹¹³ 269 N.E.2d 270 (Mass. 1971).

cable zoning ordinances or by-laws are, and what uses they permit or prohibit.¹¹⁴

Moreover, the court's concern for the due process rights—the ability to predict with some certainty the allowable uses on a parcel of land—is noticeably absent in its support for 40B. The statute provides no “reasonable accuracy,” as was deemed so important in *Vazza* for property owners, neighborhoods, cities, or towns to determine what will happen on the parcel of land next door, down the street, or within the corporate boundaries. The comprehensive permit process is predictable only in its unpredictability. Any and all parcels of land are subject to it, at any time and at any density.

Perhaps injured by the publicity and attendant public outrage accompanying such decisions, the Department of Housing and Community Development has embarked on an aggressive campaign to “soften” the applicable regulations,¹¹⁵ and thereby attempt to check the groundswell seeking to repeal the statute.¹¹⁶ Due to the timidity of the Department's actions to date, it has been ineffective in reigning in the HAC.¹¹⁷

¹¹⁴ *Id.* at 274.

¹¹⁵ Among the most noteworthy revisions are: (1) a limitation on the number of dwelling units that can be developed per application depending upon the size of the community; (2) a twelve-month “cooling off” period between the filing of a market rate development plan and the filing of a comprehensive permit; and (3) an ability of a city or town to prepare a housing plan and thus deny or condition comprehensive permits if the city or town creates qualified housing units that amount to at least three-quarters of one percent of the community's total housing stock per year. MASS. REGS. CODE tit. 760, § 31.07(1)(g)–(i) (2002). Note that in each case, however, the ability to deny or condition a comprehensive permit remains an option for the board of appeals even where the city or town would otherwise be “consistent with local needs.” *Id.* § 31.07(1)(g). Thus, no appeal by the applicant is allowed to the Housing Appeals Committee. The upshot of this permissive language is that the “lawlessness” and unpredictability of the statute remains in full force and effect even where the city or town has met the obligations set forth in the statute.

¹¹⁶ Before this Article went to press, over sixty bills are pending in the Massachusetts General Court pertaining to reform of the comprehensive permit statute. *See, e.g.*, H.B. Nos. 813, 1566, 3391 183rd Gen. Ct. (Mass. 2003); S.B. Nos. 500, 561, 1799, 183rd. Gen. Ct. (Mass. 2003).

¹¹⁷ The HAC recently concluded that a board of appeals could not impose a requirement that the sale of affordable dwellings be subject to resale restrictions that survive bankruptcy or foreclosure by the lender as a condition of approval. *Delphic Assocs., L.L.C. v. Hudson Bd. of Appeals*, No. 02-11, slip op. at 8 (Mass. Hous. App. Comm. Dec. 23, 2002). This conclusion was based on the Committee's belief that

there is no evidence that foreclosure is a common occurrence. Second . . . the town has a right of first refusal that permits it to step in and purchase the unit if no affordable purchaser can be located And, even if the unit is lost, the

A. *The Housing Appeals Committee Process*

Before applying to the city or town, an applicant for a comprehensive permit¹¹⁸ is required to obtain a project eligibility letter¹¹⁹ in

town is compensated, since it receives the windfall generated by the sale, which can [then be] put that to use for other affordable housing purposes.

Id. The consequences of this decision are staggering. Imagine a scenario in which a qualified income buyer purchases a dwelling in a comprehensive permit project that is ten times more dense than the underlying zoning permits. The “social benefit” of ignoring local zoning is complete. Twenty-five percent of the dwelling units are sold to needy purchasers. Later, some of the dwelling units are repossessed by the lending institution, through bankruptcy proceedings and for a variety of possible reasons. According to the HAC, these dwelling units can now be sold free of any affordability restriction. The “social benefit” that trumped local zoning and the historic deference to local police powers has disappeared. Having lost some of the affordable dwellings that count toward its ten percent quota, the community must go through the process over and over again. Is it “snob zoning” to demand that a tradeoff of trumping all local zoning regulations should be the protection of affordable dwelling units in perpetuity? The HAC justified its decision on the statement that “there is no evidence that foreclosure is a common occurrence.” *Id.* Well before the decision was issued, however, the *Boston Business Journal* reported that while the Massachusetts foreclosure rate was far below the rates of the early 1990s, government loan defaults were increasing in Massachusetts and nationwide. Donna L. Goodison, *Residential Foreclosures Creep Up in the Bay State*, BOSTON BUS. J., June 17, 2002, available at <http://boston.bizjournals.com/boston/stories/2002/06/17/story7.html> (last visited Mar. 4, 2003). The *Boston Globe* reports that foreclosures are likely to rise. Thomas Grillo, *Mass. Home Foreclosures Fall in '02 Low Interest Rates Cited; Bankruptcies Down 1.5 Percent*, BOSTON GLOBE, Jan. 18, 2003, at E1 (“Many homeowners are eating up the equity in their house and it won’t be long before the value is gone and they find themselves in deep financial trouble.”). As if the HAC’s justification for allowing a foreclosure to wipe out the affordability restriction is not bad enough, the HAC suggests that if there is a foreclosure, the host city or town will be the beneficiary of a windfall. *Delphic Assocs.*, No. 02-11, slip op. at 8. Surely, local officials must be puzzled by the hypocrisy of the HAC’s decision. Isn’t the point of the statute to develop affordable housing? Does the HAC really believe that the “windfall” will go to affordable housing creation when in fact, the money will be needed to compensate the city or town for the added cost burdens imposed by the destruction of local zoning and whatever plans and programs the city or town has in place?

¹¹⁸ An applicant can be a public agency, a nonprofit agency, or a “limited dividend organization.” MASS. GEN. LAWS ch. 40B, § 20 (2000). A limited dividend organization is anyone who agrees to limit its profit to that set by the subsidizing agency. One of the most popular subsidizing agents is MassHousing. MassHousing has established a profit cap for fee projects at twenty percent, meaning that the total return on a fee development project cannot exceed twenty percent. MASS. HOUS. FIN. AGENCY, HOUSING STARTS PROGRAM OVERVIEW, at http://www.masshousing.com/sf/sf_cstrln.htm (last visited Mar. 4, 2003). Excess profits must be returned to the municipality for affordable housing purposes. This otherwise wise magnanimous gesture is actually a cruel hoax on the community at large. See sources cited *infra* note 144.

¹¹⁹ The validity of the letter has been the subject of much debate since a ruling by the HAC in 1999 that private banks that are members of the Federal Home Loan Bank of Boston can issue project eligibility letters. *Stuborn Ltd. P’ship v. Barnstable Bd. of Appeals*, No. 98-01, slip op. at 2 (Mass. Hous. App. Comm. March 5, 1999).

order to gain admission to the municipal board of appeals.¹²⁰ The presumed purpose of this letter is to ensure that only bona fide applicants will be able to engage the board of appeals, and the board “will not spend time reviewing a proposal that is unlikely to be realized.”¹²¹

This gatekeeper strategy is theoretically a good one. Rogue applicants seeking nothing more than to develop on a parcel of marginal land—land that heretofore had been deemed undevelopable—would be rejected and would not receive the eligibility ticket needed to apply for a comprehensive permit. Thus, the gatekeeper could be con-

¹²⁰ The regulation states, “To be eligible to submit an application for a comprehensive permit . . . the applicant and the project . . . shall be fundable by a subsidizing agency under a low and moderate income housing subsidy program.” MASS. REGS. CODE tit. 760, § 31.01(1)(b) (2002). Fundability, in turn, “shall be established by submission of a written determination of Project Eligibility by a subsidizing agency . . .” *Id.* § 31.01(2).

¹²¹ HOUS. APPEALS COMM., COMMONWEALTH OF MASS., GUIDELINES FOR LOCAL REVIEW OF COMPREHENSIVE PERMITS (1999), at <http://www.state.ma.us/dhcd/components/hac/guide.htm> (last visited Feb. 2, 2003); see also *Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 294 N.E.2d 393, 420 (Mass. 1973) In *Board of Appeals of Hanover*, the SJC discussed the importance of full disclosure and transparency in the 40B application process:

The board’s and the committee’s power to require full disclosure of the applicant’s present or planned property interest, and their power to grant conditional permits that do not become operative until the applicant has satisfied the funding agency’s property interest requirements, provide ample protection against the unlikely possibility of frivolous applicants who have no present or potential property interest in the site.

Id. One wonders what the court meant by the use of the word “potential.” See *id.* Any and all applicants have the potential of acquiring the necessary property interest in the site. See MASS. REGS. CODE tit. 760, § 31.01(3) (specifying the extent of property interests).

Either a preliminary determination in writing by the subsidizing agency that the applicant has sufficient interest in the site, or a showing that the applicant or any entity 50% or more of which is owned by the applicant, owns a 50% or greater interest, legal or equitable, in the proposed site, or holds any option or contract to purchase the proposed site, shall be considered by the Board or the Committee to be conclusive evidence of the applicant’s interest in the site.

Id. The court in *Board of Appeals of Hanover* neglected to foresee how entrepreneurial applicants would satisfy this requirement. See 294 N.E.2d at 420–21 (discussing eligibility without mention of entrepreneurs). The requirement is presumably satisfied if a purchase and sales agreement is executed with terms highly favorable to the offeror. For example, a speculator executes a purchase and sales agreement with the owner of developed, underdeveloped, or marginal land contingent upon the receipt of a comprehensive permit for a density eight or ten times what the underlying zoning allows. No deposit is made, no expiration date is included, and no penalties are imposed for breach by the offeror. This will satisfy the regulatory requirements. See MASS. REGS. CODE tit. 760, § 31.01(3). In the alternative, a landowner executes a purchase and sales agreement or a deed to herself as trustee of a trust. The beneficiary of the trust is herself. This purchase and sales agreement and/or deed will also satisfy the regulatory requirements. See *id.*

sidered some sort of trustee with the host community as beneficiary, and the land subject to the comprehensive permit as corpus.

In fact, the SJC and the HAC have elevated the role of the gatekeeper to nothing short of trustee status. Because of the trust imputed to the subsidizing agency in its review of applications for project eligibility status, the SJC and the HAC have established the principle that a local government has extremely limited authority to review or comment upon the matters contained within the project eligibility approval.¹²² This point is worth restating. The SJC and the HAC presume that the subsidizing agency is professional, thorough, and diligent in its investigation of applications for project eligibility status. This implies that the agency has, among other things, investigated the parcel subject to the application, investigated the qualifications of the applicant, and ensures that the proposal is consistent with neighborhood characteristics.¹²³

The importance of a thorough project-eligibility review, and perhaps a basis for the SJC's and the HAC's blind reliance on the word of the subsidizing agency, is that once issued, the ticket becomes not just a ticket to the local board of appeals, but also to the HAC. And a ticket to the HAC almost always ensures a successful outcome for the applicant-developer.¹²⁴

In practice, however, the gatekeeper is an illusion and the trustee is in breach. The process is a charade; one designed to lure the public into a belief that government agencies are watching out for the public interest. Whether the courts and the HAC understand the illusory effect of the project eligibility process as it is being abused is unclear. In fact, the gatekeeper responsible for issuing the majority of project eligibility letters, MassHousing, rejects any notion that it is obligated to comport with any rule or regulation promulgated by the Department of Housing and Community Development.¹²⁵ Free, at least in its

¹²² See *Bd. of Appeals of Hanover*, 294 N.E.2d at 420–21; *Welch v. Easton Bd. of Appeals*, No. 94-06, slip op. at 2–3 (Mass. Hous. App. Comm. Feb. 28, 1995) (citing MASS. REGS. CODE tit. 760, § 31.01(2)) (“Prior to applying for a comprehensive permit, a proposal must be submitted to a subsidizing agency for preliminary approval, it is then ‘presumed fundable if a subsidizing agency makes a written determination of project eligibility’”).

¹²³ See MASS. REGS. CODE tit. 760, § 31.01(2)(b).

¹²⁴ See 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, 397–98 (2001) (“The pattern of decisions by the HAC is striking: local zoning board decisions have been upheld in only 18 cases and overruled in 94 cases.”).

¹²⁵ See *Town of Duxbury v. Mass. Hous. Fin. Agency*, No. PLCV2002-00298 (Mass. Super. Ct. filed March 12, 2002). The Town of Duxbury alleged that MassHousing failed to

opinion, from any state oversight and responsibilities, the state's largest producer of project eligibility letters believes it can issue admission tickets to any applicant, for any parcel of land, at arguably any density. Without the assurance that the applicant is a bona fide developer and that the land sought for development is appropriate for the density proposed, the comprehensive permit process, already chaotic and unpredictable, becomes intolerable.¹²⁶ As currently applied, cities and towns cannot rely on the subsidy agents to weed out inappropriate applications and, at the same time, are estopped from doing so themselves.¹²⁷

If the applicant's 40B application is denied, he or she may take an appeal to the HAC, where victory is almost certain.¹²⁸ If approved

comply with the "gatekeeper" requirements of title 760, section 31.01 of the Code of Massachusetts Regulations. *Id.* MassHousing's Answer denied that the relevant regulations are "binding upon MassHousing." See Defendant's Motion for Summary Judgment at 7, *Town of Duxbury v. Mass. Hous. Fin. Agency* (Mass. Super. Ct. filed Mar. 12, 2002) (No. PLCV2002-00298) (withdrawn). MassHousing advanced a similar argument: "It should be noted at the outset, that [MassHousing] is not, in any technical sense, bound to obey the rules promulgated by the HAC pursuant to Chapter 40B." *Id.*

¹²⁶ The irony is the fact that the project eligibility letter provides the applicant with an almost impenetrable presumption of validity, yet we know that the subsidizing agencies believe they have no responsibilities to comply with the regulations promulgated by the State, even if they performed the due diligence the courts and the public presume they have done. See *Town of Duxbury v. Mass. Hous. Fin. Agency*, No. PLCV2002-00298 (Mass. Super. Ct. filed Mar. 12, 2002).

¹²⁷ This fact raises the question as to the true underlying purpose of the statute. If, for example, the purpose of the statute was to create affordable housing units, units of housing that were affordable would count toward the required quota. Mobile homes, generally more affordable than "stick-built" homes, would thus count toward the municipal requirement. Mobile rental certificates, often referred to as "Section 8" vouchers, would also qualify. But the State's leading advocate for affordable housing, the Citizens Housing and Planning Association (CHAPA), has continually opposed the counting of mobile homes and Section 8 vouchers toward the requirement: "If the Legislature agrees to count mobile homes and Section 8 vouchers, 67 communities will immediately go over the 10% affordable housing goal without building one new unit of housing." CITIZENS' HOUS. & PLANNING ASS'N, *The Impact of Counting Mobile Homes and Vouchers Under Chapter 40B*, in OBTAINING COMPREHENSIVE PERMITS 141 (MCLE, Inc., No. 2002-88006-25, 2002). Given CHAPA's position, it seems clear that the goal of 40B might have very little to do with creating affordable housing, but rather simply the construction work related to the creation of housing. See *id.*

¹²⁸ Recently, however, the HAC has upheld two comprehensive permit denials on Cape Cod. *Stuborn Ltd. P'ship v. Barnstable Bd. of Appeals*, No. 98-01, slip op. at 7-8 (Mass. Hous. App. Comm. Sept. 18, 2002) (finding that Barnstable's comprehensive plan included an aggressive campaign to build affordable housing in each of the town's villages); *Dennis Hous. Corp. v. Dennis Bd. of Appeals*, No. 01-02, slip op. at 5-6 (Mass. Hous. App. Comm. May 7, 2002) (finding that a fifty-unit building within a historic district would interfere too much with wetlands and stormwater runoff, and would leave no useable open space). It is important to note, though, that the HAC cannot overrule state legislation. See,

with too many conditions, then the applicant may likewise appeal, and victory is again almost certain.¹²⁹

Through an elaborate system of regulations and strengthened by over thirty years of administrative decisions, the Comprehensive Permit Statute has, according to several commentators, produced approximately 25,000 units of affordable housing.¹³⁰ But as noted previously, this Article does not attack the ends, but rather the means of 40B. That 1000, 25,000, or 100,000 housing units have been created under the statute is not relevant to this debate. Instead, the debate should focus on whether the means sought to accomplish the purported objective are constitutionally supportable and, if not, what alternate objectives exist. After all, if the means sought to accomplish the end result are unconstitutional or violate public policy,¹³¹ then the ultimate results are irrelevant.¹³²

e.g., Bd. of Appeals of N. Andover v. Hous. Appeals Comm., 357 N.E.2d 936, 940 (Mass. App. Ct. 1976). Because nine of the Cape's fifteen towns have adopted comprehensive plans in accordance with the Cape Cod Commission Act (state legislation), these decisions could be read as precluding HAC interference with properly-promulgated comprehensive plans. At issue is how much noblesse oblige should be afforded the HAC by these decisions. One view is that the HAC was aware of the overwhelming evidence that the Cape Cod towns (through the Cape Cod Commission Act) have been developing affordable housing at a faster pace and more equitably through the inclusionary requirements of the Cape Cod Commission Act. A reversal by the HAC may have illustrated that the Comprehensive Permit Statute cares little about municipal efforts to build affordable housing and far more about getting housing built, anywhere, without regard to promulgated rules or regulations.

¹²⁹ See Krefetz, *supra* note 124, at 398 ("It is quite significant that in cases appealed to the HAC, the Committee rarely has found that the local decision was 'reasonable and consistent with local needs.'").

¹³⁰ The range of estimates is extreme, but averages approximately 25,000. *See id.* at 392 (stating that as of 1999, over 21,000 dwelling units, 18,000 of which are affordable, have been built using the Comprehensive Permit Statute); Thomas Frillo, *The Other Lottery Priced Out? With the Anti-Snob-Zoning Law and a Little Luck, You'll Be in the Market*, BOSTON GLOBE, Dec. 8, 2002, at J1 (reporting that as of December, 2002, 30,000 affordable dwelling units have been built); 40B FACT SHEET, *supra* note 66 (reporting that since 1970 more than 400 developments have been built in more than 200 communities, representing approximately 30,000 units of affordable housing).

¹³¹ A careful review of three decades of decisions by the HAC and the administrative code governing the Committee evidences what DeTocqueville labeled "administrative despotism":

Over this kind of men stands an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate. That power is absolute, thoughtful of detail, orderly, provident and gentle. It would resemble parental authority if, father like, it tried to prepare its charges for a man's life, but on the contrary, it only tries to keep them in perpetual childhood . . . Why should it not entirely relieve them from the trouble of thinking and all the cares of living?

B. *The Massachusetts Comprehensive Permit Law Violates Procedural and Substantive Due Process*

Local legislative actions intended to protect public health, safety, and welfare generally receive the deferential presumption of validity from a reviewing court.¹³³ The presumption of validity is based, in part, on the belief that the legislative action is intended to protect public health, safety, and welfare. And although state legislative authority is far broader than that of local governments,¹³⁴ statutes promulgated by state legislatures must nevertheless comport with fundamental principles of due process and related constitutional guarantees.¹³⁵

....

Having thus taken each citizen in turn in its powerful grasp and shaped him to its will, government then extends its embrace to include the whole of society. It covers the whole of social life with a network of petty, complicated rules that are both minute and uniform, through which even men of the greatest originality and the most vigorous temperament cannot force their heads above the crowd. It does not break men's will, but softens, bends, and guides it; it seldom enjoins, but often inhibits, action; it does not destroy anything, but prevents much being born; it is not tyrannical, but it hinders, restrains, enervates, stifles, and stultifies so much that in the end each nation is no more than a flock of timid and hardworking animals with the government as its shepherd.

....

A great many people nowadays very easily fall in with this brand of compromise between administrative despotism and the sovereignty of the people.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 692-93 (George Lawrence trans., J.P. Mayer ed., Harperperennial 1988).

¹³² Mario Cuomo eloquently illustrated this point:

"Survival of the fittest" may be a good working description of the process of evolution, but a government of humans should elevate itself to a higher order, one which tries to fill the cruel gaps left by chance or by wisdom we don't understand. I would rather have laws written by Rabbi Hillel or Pope John Paul II than by Darwin.

Mario Cuomo, *First Inaugural Address*, in *MORE THAN WORDS* 7, 10 (1993).

¹³³ See discussion *supra* Part II.

¹³⁴ See MANDELKER ET AL., *supra* note 51, at 26 (articulating the principle that although the United States Constitution places express limits on the powers of the federal government, state constitutions place no such limitations on the exercise of state power, which is bound only by the limits of due process).

¹³⁵ See *State v. Ludlow Supermarkets, Inc.* 448 A.2d 791, 794-95 (Vt. 1982) (noting that, unless a state law or regulation uses a suspect classification—one based upon race, sex, religion, or national origin—the judiciary will treat the governmental action with great deference).

Consider the following example: Jamesville, a medium-sized town in Massachusetts adopts a capital budget¹³⁶ and a comprehensive plan. Less than ten percent of the town's housing stock qualifies as subsidized under 40B. The town, unfortunately, has little hope of withstanding an appeal of a local denial of a comprehensive permit. The fact that the capital budget indicates that the town has no financial ability to build a new school, wastewater treatment plant, or library within the next five years has, at best, limited evidentiary value before the HAC.¹³⁷

Assuming that the HAC, in derogation of the local comprehensive plan and capital budget, grants the comprehensive permit, where do we find the public benefit? Is there a public benefit in eradicating the local planning process? Is there a public benefit in ignoring the will and votes of the local legislature? Is there a public benefit in creating and enforcing a statute that transforms all land parcels, large and small, vacant and developed, upland and wetland, flat or rocky, into developments of unlimited potential densities? Where is the public benefit in the chaos this statute creates?

Whatever benefits are passed on to the purchasers or renters of the dwelling units contained within a 40B development, they are dwarfed by the damage caused to due process and the public's sense of security in the land use system. Land development in the absence of predictable rules is anarchy.¹³⁸ Although rules and regulations are constantly changing, their change is the result of a deliberative process—due process.

¹³⁶ A capital budget, often referred to as a capital improvement budget, provides a listing and method of payment for a city's or town's capital needs including: buildings (schools, police, and fire stations), infrastructure (water and wastewater treatment systems), and equipment (fire trucks, ambulances, and police cruisers). ROBERT BERNE & RICHARD SCHRAMM, *THE FINANCIAL ANALYSIS OF GOVERNMENTS* 58 (1986). Capital budgets (and capital plans, a long-range projection of capital needs) are the foundation of impact fee programs. See, e.g., N.H. REV. STAT. ANN. § 674.21(V)(a) (1996) (requiring that impact fees "be a proportional share of . . . capital improvement costs . . . reasonably related to the capital needs created by the development").

¹³⁷ See MASS. REGS. CODE tit. 760, § 31.05(1) (2002) ("Consistency with local needs is the central issue in all cases before the Committee.") Recall that the "consistency with local needs" standard is satisfied when a city or town builds the requisite number of dwelling units consistent with the ten percent quota requirements. See MASS. GEN. LAWS ch. 40B, § 20 (2000).

¹³⁸ See BLACK'S LAW DICTIONARY 84 (6th ed. 1990) (defining anarchy as the "absence of government . . . destructive of and confusion in government At its best it pertains to a society made orderly by good manners rather than law, in which each person produces according to his powers and receives according to his needs . . .").

The Massachusetts statute, 40B, fails to comport with procedural and substantive due process. The statute, by its very definition, creates an unpredictable, and thus unfair, outcome. By suspending local rules and regulations, or at least allowing for the possibility that local rules and regulations will be suspended, the statute violates fundamental principles of fairness.

C. *The Comprehensive Permit Statute Represents an Unconstitutional "Giving"*¹³⁹

A legislative action can also lose its presumption of validity where the action creates a constitutional violation, including "taking" private property without compensation. Regulatory takings—where government goes "too far" in regulating private property—have been the subject of numerous decisions.¹⁴⁰ For now, however, I suggest that 40B not be viewed as constituting a regulatory taking, but rather a regulatory "giving."

A theoretical regulatory taking argument could emerge from an inclusionary zoning program.¹⁴¹ The Comprehensive Permit Statute is the polar opposite of an inclusionary zoning program, however. Rather than *take* affordable housing units from the developer, it *gives* unlimited density bonuses to the developer.

A regulatory taking is an action by government that so deprives a landowner of economic value that the government's action is as if the land had been taken by eminent domain. A regulatory "giving" is the opposite of a regulatory taking. A giving is an action by government that grants unearned or uncompensated benefits to the private sector. The Comprehensive Permit Statute is a regulatory giving in that the applicant is given—gifted—an unlimited development density and

¹³⁹ See Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 577–89 (2001) (arguing the flipside to the traditional concept that individuals should be compensated for "takings" and asserting that governments should also be compensated for "givings" in certain cases). The use of the phrase "givings" in this Article is adopted from this work. See *id.*

¹⁴⁰ See generally, *e.g.*, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *William Haas & Co. v. City of San Francisco*, 605 F.2d 1117 (9th Cir. 1979).

¹⁴¹ See Daniel J. Curtin, Jr. et al., *Inclusionary Housing Ordinance Survives Constitutional Challenge in Post-Nollan-Dolan Era*, LAND USE L. & ZONING DIG., Aug. 2002, at 3 (arguing that inclusionary housing ordinances could withstand a facial constitutional challenge).

unlimited profit potential¹⁴² in exchange for a perceived public benefit. As takings jurisprudence weighs a variety of factors to evaluate whether government's actions have "gone too far," so too can an evaluation of governmental givings.¹⁴³

At issue is the giving, or the gift, of 40B. Recall that under 40B, the applicant need not obey local zoning regulations, including but not limited to: use, density, area, lot coverage, and frontage.¹⁴⁴ An unlimited density bonus is gifted in exchange for the set-aside of one below-market dwelling unit for every four market-rate units proposed. Thus, a development of 100 dwelling units must contain at least twenty-five sold or rented at a rate no greater than eighty percent of median income. That twenty-five percent of the dwelling units must be sold or rented at a price below market rates does not transform the legislation into a permissible quid pro quo. The end result remains a gift. The donee-developer is the beneficiary of the gift. The donor-municipality and abutting property owners pay the cost.

The costs of the gift can be measured in several ways. First, the cost of new development not otherwise planned for, foreseeable, or quantifiable is imposed upon the community, regardless of infrastructure limitations. These costs include those related to education, pub-

¹⁴² Neither the statute nor the regulations governing the HAC define the profit allowed a comprehensive permit developer. This raises three significant problems. First, the National Association of Home Builders determined that the average profit margin earned by home builders in the country, before taxes, is approximately 6.35%. NAT'L ASS'N OF HOME BUILDERS, *THE BUSINESS OF BUILDING 8* (2001). Yet the subsidy programs used in the comprehensive permit program for fee based projects allow a twenty percent profit. See, e.g., HOME OWNERSHIP DIV., MASSHOUSING, HOUSING STARTS, available at <http://www.masshousing.com/sf/housingstarts/housingstarts.htm> (last visited Feb. 2, 2003). Second, the cost accounting to determine the actual profit earned by an applicant is suspect. To avoid reaching the twenty percent profit cap, an applicant merely needs to "increase" his costs associated with the project. Increases in "overhead" or "project management" are categories that provide for almost unlimited deception. Third, and perhaps most disturbingly, because the statute requires that the local board not deny or saddle an approval with so many conditions as to render the project "uneconomic," a clever applicant merely submits a pro forma estimate weighted with development costs. See MASS. GEN. LAWS ch. 40B, § 20 (2000). This will result in a pro forma profit well below the twenty percent cap. The most notorious of these schemes includes the applicant selling the land that he bought for \$150,000 to himself for \$2,000,000, for example. This "transaction" purports to show a land acquisition cost high enough to cram an endless number of dwelling units on the land without the project ever reaching the twenty percent cap. And because the calculation of the allowed profit is made during the local deliberative process, this charade allows the developer dwelling units *far* in excess of what is required to keep the project from becoming "uneconomic."

¹⁴³ See *Penn. Cent.*, 438 U.S. at 136-37.

¹⁴⁴ See discussion *supra* Part III.

lic safety, water and wastewater services, and so on. As previously discussed, the HAC has never accepted the cost burdens imposed by a 40B project as justification for permit denial.¹⁴⁵ Conversely, limitations on infrastructure are seen as the “community’s problem” and must be addressed, regardless of the imposition of new development.¹⁴⁶

Second, cities and towns develop long-range wastewater and water supply, open space, and building needs plans because it makes good sense to do so. These plans are virtually thrown out the window—along with local zoning and subdivision regulations, among others—in the face of a comprehensive permit. For example, the city or town’s decision to defer extending wastewater service to a portion of the city or town until three years from today is reversed to accommodate the comprehensive permit.

Third, the cost of losing the public’s trust, although not quantifiable, is certainly unpalatable. As long as the Comprehensive Permit Statute remains as is, no parcel of land, whether fully built upon, partially built upon, undeveloped, or historically considered “undevelopable,” is safe from a 40B application. This fact leaves the public—landowners, tenants, and public officials—in a constant state of uncertainty. The public trust is eroded when government officials, in this case the board of appeals, are forced to elevate one development project in lieu of all other projects and issues. The erosion is a giving to the 40B applicant: his application has thrown municipal plans, programs, and reasonable goals and objectives to the wind.

Finally, a discussion of takings and givings raises questions of policy. One approach is that taken by Massachusetts. To stimulate housing production, developers, speculators, or anyone else are granted a permit to produce as many dwelling units as can be engineered on a parcel of land, provided twenty-five percent of the units be sold or rented at below-market prices. Another approach is that taken by many other states. To stimulate housing production, cities and towns must develop realistic and measurable plans and programs to ensure that dwelling units are built in accordance with the plan.

¹⁴⁵ *Id.*

¹⁴⁶A pending question is whether the costs imposed by a comprehensive permit project violate the prohibitions against “unfunded mandates,” the so-called Proposition 2 ½ tax cutting amendment enacted in 1981. *See* MASS. GEN. LAWS ch. 29, § 27C (2000). There can be no doubt that the comprehensive permit project is “unfunded.” There can be no doubt that the statutory scheme established by 40B is a “mandate.” At issue is whether the requirements imposed upon the State by the statute are triggered since 40B was enacted before chapter 29. *See id.* § 27C; MASS. GEN. LAWS ch. 40B, §§ 20–23 (2000).

The policy question is not who should provide affordable housing. The answer to that question is clear that the private sector is the better provider. But the real question is, rather, how much control should be granted to the private sector in the pursuit of affordable housing development? The following discussion suggests that mandatory inclusionary zoning and/or impact fee requirements are appropriate and measured controls that ensure predictable development of affordable housing.

IV. AN EQUITABLE AND PROVEN METHOD OF DEVELOPING AFFORDABLE HOUSING: INCLUSIONARY ZONING

Given the controversy attendant with a statute that yields unpredictable results, it would seem that a solution to the Massachusetts affordable housing problem that avoided such controversies would be embraced by all concerned. Inclusionary zoning, which requires residential developers to provide affordable housing, represents one such solution.¹⁴⁷ Mandatory inclusionary zoning, however, is not currently

¹⁴⁷ Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 973 (2002) (stating that policymakers and citizens across the country promote inclusionary zoning as a way to solve shortages of affordable housing). An additional solution is the use of impact fees, one-time charges against new development to raise revenue for public facilities needed by the new development. Arthur C. Nelson, *Development Impact Fees: The Next Generation*, in EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA 87 (Robert H. Freilich & David W. Bushek eds., 1995). Unfortunately, impact fees are not authorized in the Commonwealth of Massachusetts with the exception of towns on Cape Cod. See, e.g., *Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1107 (Mass. 1984) (holding that an augmented fire services availability charge was neither a valid municipal users fee nor a valid excise tax and therefore did not conform to constitutionally-permissible forms of monetary exaction); *Greater Franklin Developers Ass'n v. Town of Franklin*, 730 N.E. 2d 900, 902 (Mass. App. Ct. 2000) (using the *Emerson College* analysis to find that a "school impact fee" was neither a permissible tax nor a valid municipal fee because it "failed to benefit fee payers in a manner not shared by other members of the community"). By virtue of the Cape Cod Commission Act, towns on Cape Cod that have a comprehensive plan, certified by the Cape Cod Commission, are enabled to impose impact fees on new development. Cape Cod Commission Act of 1989 § 9(c), 1989 Mass. Acts 716; see MASS. GEN. LAWS ch. 40B, § 4. The grant of authority to Cape Cod towns to impose impact fees (as well as enter into development agreements that would otherwise be deemed illegal contract zoning) coincides with the Cape Cod Commission Act's requirement of comprehensive plan development and consistency with the Regional Policy Plan for Cape Cod. Cape Cod Commission Act of 1989 § 9(c), 1989 Mass. Acts 716; see MASS. GEN. LAWS ch. 40B, § 4. Whereas towns are not required to prepare and have certified a comprehensive plan, nine of the fifteen towns have certified plans and the remaining six are presumed to have plans in place by the end of 2004. See generally EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA, *supra* (providing additional information on impact fees).

authorized in Massachusetts.¹⁴⁸ Ironically, the same state that has pioneered a crude bludgeon to force cities and towns to “accept” affordable housing has prohibited those same cities and towns from developing affordable housing in a manner successfully used elsewhere. Common sense dictates that if inclusionary zoning were in existed in every suburban and rural community in the State, the placement of limitations on the use of restrictive zoning in the suburbs—the implied purpose of the Comprehensive Permit Statute—would be unnecessary.¹⁴⁹

The requirement that a developer of land or a petitioner for an adjudicative permit set aside land, money, or “things” is a traditional and common practice.¹⁵⁰ The validity of municipal exactions of land, money, or “things,” as required by legislation and adjudicative per-

¹⁴⁸ See Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 *FORDHAM URB. L.J.* 23, 47–48 (2001) (asserting that Massachusetts has a form of voluntary inclusionary zoning). Section 9 of chapter 40A of the Massachusetts General Laws authorizes increases in density above that allowed by the underlying zoning upon the set aside, of among other things, affordable housing units. MASS. GEN. LAWS ch. 40A, § 9 (2000 & Supp. 2002). The limitation to this enabling authority is that a special (adjudicative) permit is required from a local board, thus increasing the odds that the local board will exact additional public benefits from the developer and decreasing the odds that the developer will be able to challenge the exaction upon appeal successfully. See *id.* Simply put, the special permit requirement creates an option that few developers will choose given the other option available to them—a comprehensive permit. MASS. GEN. LAWS ch. 40B, §§ 20–23. As a result, inclusionary zoning in Massachusetts will never achieve successful results and, as long as the comprehensive permit option is available, is unlikely to be an option selected by a developer.

¹⁴⁹ See MASS. GEN. LAWS ch. 40B, § 2 (“The purpose of this chapter is to permit a city or town to plan jointly with cities or towns to promote with the greatest efficiency and economy the coordinated and orderly development of the areas within their jurisdiction and the general welfare and prosperity of their cities.”). An easy solution to the affordable housing crisis, however, is not so attractive to some. The benefits attributed to the comprehensive permit developer are too good to be true. As discussed, in exchange for offering twenty-five percent of the units below market, he can develop land at unlimited densities. See *supra* Part III. He is not constrained by local rules and regulations. He can appeal to a state agency whose record of accomplishment ensures his success. His “profit cap” is far greater than he would ever achieve developing market-rate dwellings (twenty percent of total development costs for a fee-based project and a ten percent annual rate of return for rental projects). Clever accounting practices avoid the need to worry about the cap. Given all these benefits, why would the development community embrace inclusionary zoning, a process that makes the developer share in the community’s burden?

¹⁵⁰ See APA GUIDEBOOK, *supra* note 28, §§ 8-601, 8-602, at 8-130 to -165 (listing various dedication, impact fee, and exaction requirements provided for in state statutes); Fred Bosselman, Dolan’s *Mysteries Explained*, LAND USE L. & ZONING DIG., Jan. 1999, at 3.

mits, is well settled.¹⁵¹ It should be no surprise, therefore, that cities and towns seeking to increase the number of dwelling units sold or rented at below market rates would be attracted to the time-tested practice of exactions—quid pro quos—in exchange for the grant of a development permit.¹⁵²

V. INCLUSIONARY ZONING

Inclusionary zoning—the method of exacting on- or off-site dwelling units or fees-in-lieu-of the exaction—in exchange for subdivision approval, approval of an adjudicative permit, or a variance, is a logical tool for increasing the stock of below-market rate housing within a particular development or the community at large.¹⁵³ Inclu-

¹⁵¹ Ehrlich v. City of Culver City, 911 P.2d 429, 439 n.6 (Cal. 1996) (noting that, regarding *Nollan* and *Dolan*, “[s]cholarly comment on the two cases is almost unmanageably large”).

¹⁵² A study completed in 2002 concluded that over 50,000 affordable dwelling units had been created in California via inclusionary regulations. Kautz, *supra* note 141, at 979. The inclusionary-housing ordinance of Montgomery County, Maryland has produced almost 11,000 affordable dwelling units. KAREN D. BROWN, BROOKINGS INST. CTR. ON URBAN METRO. POLICY, EXPANDING AFFORDABLE HOUSING THROUGH INCLUSIONARY ZONING: LESSONS FROM THE WASHINGTON METROPOLITAN AREA 2, 16 (2001) (“Many jurisdictions throughout the country have implemented inclusionary zoning ordinances, from Burlington, Vt. to Santa Fe, N.M. to dozens of communities in California. Nationwide, Montgomery County, Md. has been the most successful.”); Cummins, *supra* note 9, at 216 (“If cities in the metro area [Minneapolis-St. Paul] were to adopt this approach [inclusionary zoning], up to \$15,000.00 per housing unit could be saved and nearly 40,000 affordable units could be built within twenty-five years.”).

¹⁵³ Kent Conine, former vice president and current president of the National Association of Homebuilders, while not overtly opposed to inclusionary zoning requirements, raises an interesting question of equity:

Do programs impose a cost, and if so, who bears that cost—the builder or the purchaser of the market rate homes? If there is a cost to the builder (even if only in more work or regulatory complications), is it fair for the builder to shoulder the cost of providing a needed social good?

Kent Conine, *A Home Builder's Policy View on Inclusionary Zoning*, NEW CENTURY HOUSING (Ctr. for Hous. Pol'y, Washington, D.C.), Oct. 2000, at 27. Of interest, is applying Mr. Conine's comments to the Massachusetts comprehensive permit statute. In that case, there is no cost to the builder for building affordable dwellings. Rather, as discussed previously, there is an unearned and unpaid for gift. Mr. Conine, and presumably most land developers, would argue that the cost should be born by the community at large and not by a private developer alone. But it could reasonably be argued that the burden should not be born solely by those abutting a 40B development. In fact, that is the net result of the Massachusetts comprehensive permit statute. Those abutting the proposed project, individuals who could not have predicted the development's scale or impact, are left shouldering the burden of the legislature's mandate. In essence, the abutters to a 40B project are held

sionary zoning requirements are highly effective within rapidly growing suburban and rural communities, but can be tailored to work effectively in urban areas as well.¹⁵⁴

Inclusionary zoning has a proven track record of success and is particularly well-suited for adoption by Massachusetts cities and towns given the ad hoc adjudication that accompanies Massachusetts land use regulation. Inclusionary zoning requirements could exact affordable dwellings, lots, fees-in-lieu-of, or a combination of the three, within every new subdivision created throughout Massachusetts.

Within a plan state's suburban and rural communities, inclusionary zoning can ensure that the housing element and attendant goals are met by requiring that all new developments—residential and non-residential—exact a percentage of dwelling units or fees-in-lieu-of dwelling units. A percentage exaction ensures that new development does not continually force the municipality below the target goal. For example, if the housing plan calls for no less than fifteen percent of the total housing stock to meet affordable criteria, an inclusionary regulation would need to ensure that no less than fifteen percent of the dwelling units within a new subdivision meet the established affordability criteria.¹⁵⁵

Within a non-plan state, such as Massachusetts, inclusionary zoning can also be effective, albeit less so than if the city or town had a comprehensive plan linking plan elements and regulations. The inclusionary requirement would be the same as in a plan state. The options include requiring the set-aside of land “on-site,” set-aside of land

accountable for their municipality's “failure” to achieve the 40B mandate of affordable housing.

¹⁵⁴ Others note that there are several other techniques that have proven useful in the creation of low- and moderate-income housing units. See, e.g., John M. Payne, *Fairly Shaving Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. 365, 374 (2001) (“[I]nclusionary zoning is not an end in itself; it is only one example Consider some of the other market regulation techniques that might easily be required as part of a *Mount Laurel* compliance program: rent control laws, anti-gentrification laws, restrictions on condominium conversions, and zoning for ‘mobile’ homes.”).

¹⁵⁵ This requirement points out yet another irony of the Massachusetts comprehensive permit statute. Not formally enabled to adopt inclusionary zoning requirements, Massachusetts cities and towns could hardly be expected to keep pace with the ten percent requirement sufficient to keep an applicant from an entitlement to, and approval from, the HAC. Simply put, for every market-rate building permit issued in Massachusetts, the city or town falls one-tenth of a percentage point behind the Sisyphean quota. Perhaps it is no wonder that less than thirty of the State's 351 cities and towns have met this target in the thirty-four years since the statute was enacted. DEP'T OF HOUS. AND COMMUNITY DEV., CH. 40B SUBSIDIZED HOUSING INVENTORY THROUGH OCTOBER 1, 2001 (revised Apr. 24, 2002), at <http://www.state.ma.us/dhcd/components/hac/HsInvRev.pdf>.

“off-site,” payment of fees in lieu of the set-aside, or a combination of the three.¹⁵⁶ For example, a zoning ordinance could require that every subdivision plan containing five lots or more set one lot aside for sale to a moderate-income purchaser. In the alternative, the ordinance could allow the applicant to pay the equivalent of the lot set-aside requirement¹⁵⁷ into a fund established for the purposes of developing affordable housing.

In urban and mostly developed cities and towns, inclusionary zoning requirements could exact affordable dwellings units or fees-in-lieu-of instead of requiring the construction of dwelling units¹⁵⁸ as redevelopment or urban infill occurs. There are numerous examples of successful inclusionary zoning programs in the nation’s urban centers. Although many of these programs are often referred to as “linkage” or “impact fee” regulations, the end result—requiring the development community to pay a fair-share cost for affordable housing—remains the same.¹⁵⁹

¹⁵⁶ See BROWN, *supra* note 152, at 2.

¹⁵⁷ An example of a fees-in-lieu-of provision drafted for the Town of Duxbury, Massachusetts follows:

The applicant for development . . . may pay fees in lieu of the construction of affordable units. . . . [T]he fee in lieu of the construction or provision of affordable units is determined to be \$200,000 per unit. For example, if the applicant is required to construct two affordable income units, they may opt to pay \$400,000 in lieu of constructing or providing the units. Unless and until adjusted by Town Meeting, the fee in lieu of the construction of affordable units shall increase three (3%) percent every twelve months

DUXBURY, MASS., ZONING BYLAWS art. 560.12(1) (2003) (draft).

¹⁵⁸ Although it is clear that adjudicative permitting is subject to judicial review based upon the tests enunciated in *Nollan* and *Dolan*, at issue is whether exactions such as fees-in-lieu-of the set-aside of affordable dwelling units is also measured against the “nexus” and “proportionality” standards. The Supreme Court narrowed the applicability of *Nollan* and *Dolan* to instances where real property—and not money—is the subject of the exaction. *See City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 702–03 (1999); *E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998); *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996). A more conservative approach, however, is to assume that the nexus and proportionality tests apply to all exaction, including the acceptance of fees-in-lieu-of the set-aside of affordable dwelling units.

¹⁵⁹ Successful “urban” inclusionary zoning and linkage programs are numerous. *See, e.g., SAN FRANCISCO, CAL., PLANNING CODE* § 313 (2003) (requiring that commercial developers contribute land or money to a housing developer, or pay a fee to the city, to subsidize housing development as a condition of the “privilege” of development); *SEATTLE, WASH., MUNICIPAL CODE*, § 22.210 (2003) (providing relocation assistance to low-income tenants displaced by demolition, substantial rehabilitation, or change of use of residential rental property, or the removal of use restrictions from assisted housing developments). Boston’s “linkage” program requires “the payment of a development exaction, or an equivalent in-kind contribution, for the creation of affordable housing and project-related

CONCLUSION

A statute that allows the private sector to demand a waiver of all locally adopted regulations for any land use—housing, agriculture, telecommunications, or wastewater treatment plants—is doomed to fail. That failure is due to the conflict between the broad grant of power from state to local governments and the State's subsequent rescission of this power for specified items. The conflict does not lie with the rescission itself, as the power to rescind is not being challenged. Rather, the illogic lies with mandating that cities and towns perform certain activities or meet specified quotas without enabling the city or town to do so on a comprehensive basis. Cities and towns face numerous and inextricably linked challenges, providing affordable housing is but one of them.

The Massachusetts Comprehensive Permit Statute, 40B, must be repealed or reformed.¹⁶⁰ Some aspects of the comprehensive permit statute could be left as is, if the locus that is subject to the application was identified in the city or town's comprehensive plan as a good candidate for an affordable housing development and was required to receive municipal approval before, rather than after, the issuance of financial support from a state or federal subsidizing agency. Similarly, the comprehensive permit process could be successfully used where local government approval is a condition precedent to the award of financial assistance or the issuance of a permit.¹⁶¹ Otherwise, the State must establish mandatory planning and consistency requirements, including the adoption of a housing element and the production of a specified percentage of low- and moderate-income housing. Cities and towns should be allowed to adopt mandatory inclusionary housing regulations, impact fees, and development agreements as they seek to accomplish the housing and other elements of their comprehensive plans.

job training programs." CYNTHIA M. BARR, *BOSTON ZONING: A LAWYER'S HANDBOOK* 93 (1997).

¹⁶⁰ The statute has not been revised in thirty-four years. Repairs to the statute have been attempted through alterations to the governing administrative regulations.

¹⁶¹ For example, the Massachusetts Department of Housing and Community Development's (DHCD) Local Initiative Program requires that the chief elected official of the city or town approve a comprehensive permit project before any review and approval by DHCD. LOCAL INITIATIVE PROGRAM, MASS. DEP'T OF HOUS. AND CMTY. DEV., LOCAL INITIATIVE PROGRAM FACT SHEET, at http://www.state.ma.us/dhcd/publications/fact_sheets/lip.pdf (last visited Feb. 2, 2003). The local government approval is the "subsidy" that allows the project to move forward. See MASS REGS. CODE tit. 760, § 45.04 (2002) (explaining the requirements for a valid Comprehensive Permit Project).

In summary, a solution to the affordable housing crisis in Massachusetts requires the following:

First, Massachusetts must establish mandatory planning and regulatory consistency requirements¹⁶² similar to those adopted in California¹⁶³ and Rhode Island.¹⁶⁴

Second, it must articulate a statewide housing plan. The default plan in place is the requirement that every city or town have ten percent of its housing stock subsidized. This plan, as thirty-four years of history has shown, has failed. The State needs a true plan, not an arbitrarily arrived at quota.

Third, cities and towns should be given a time frame within which measurable progress toward achieving the state, regional, or municipal housing goals can be met. This time frame should be established as part of the housing element¹⁶⁵ within the comprehensive plan.

¹⁶² Massachusetts must unfortunately solve additional problems, such as the reformation of the State's zoning and subdivision regulations. Portions of the Zoning Act have been referred to by the Massachusetts Appeals Court as "infelicitous." *Fitzsimonds v. Bd. of Appeals of Chatham*, 484 N.E.2d 113, 115 (Mass. App. Ct. 1985); see MASS. GEN. LAWS ch. 40A, § 9 (2000). The American Planning Association has also referred to the Massachusetts regulatory program as "confusing, outdated and restrictive." FENUCAN ET AL., *supra* note 13, at 71.

¹⁶³ California law requires that the comprehensive plan's housing element contain programs to develop new affordable housing, preserve existing affordable housing stock, and identify locations for emergency shelters for the homeless.

¹⁶⁴ The Rhode Island Low and Moderate Income Housing Act of 1956 was modeled after the Massachusetts comprehensive permit law. Rhode Island Low and Moderate Income Housing Act, R.I. GEN. LAWS § 45-53-1 (1999 & Supp. 2003). The Act provides for an appeal to a state administrative agency (the State Housing Appeals Committee). *Id.* § 45-53-5. It also requires Rhode Island cities and towns to have ten percent of their housing stock subsidized. *Id.* § 45-53-3(2)(ii). A key distinction, however, is that Rhode Island is a plan state and a housing element is a required component of a city's or town's comprehensive plan. *Id.*; Rhode Island Comprehensive Planning and Land Use Act, R.I. GEN. LAWS § 45-22.2-3(a)(4) ("Comprehensive planning and its implementation will promote the appropriate use of land. The lack of comprehensive planning and its implementation has led to the misuse, underuse and overuse of our land and natural resources."). Precisely because Rhode Island is a plan state and cities and towns have adopted comprehensive plans to address affordable housing (recall that the Rhode Island requirements are otherwise the same as, and no less punitive than, Massachusetts's), the Low and Moderate Income Housing Act defines "consistent with local needs" as the existence of ten percent subsidized housing or the existence of a housing element within a comprehensive plan that will enable the development of subsidized housing in excess of ten percent. R.I. GEN. LAWS § 45-53-3(2). Thus, cities or towns that have adopted a comprehensive plan and regulations in accordance with the plan that support the development of affordable housing are deemed to have satisfied the state goal. *Id.* § 45-53-3.

¹⁶⁵ As of the writing of this Article, the Department of Housing and Community Development has been charged with drafting guidelines for the preparation of a housing

Fourth, municipalities must be provided with appropriate enabling authority to exact impact fees, adopt mandatory inclusionary zoning regulations, and enter into development agreements in the fulfillment of their housing and other planning goals.¹⁶⁶

Finally, if municipalities fail to achieve the mandated goals as established by the statewide plan and/or the goals established by the local comprehensive plan, then, and only then, should there be an option for abdication of local zoning regulations or appeals to an administrative agency with the power to reverse the local presumption of validity.

plan to achieve compliance with Massachusetts regulations. MASS. REGS. CODE tit. 760, § 31.0 (2003). But as discussed throughout this article, achieving compliance with one statutory requirement does not ensure that other requirements or needs will be addressed in a coordinated fashion. Notwithstanding a municipality's desire to comply with DHCD's guidelines until the statute is reformed, this Article suggests that a successful recipe for the housing element of a comprehensive plan consist of the following steps: (1) an analysis of the city or town's existing housing supply including determining the number and type of housing units, the occupancy of these units, and the cost to purchase or rent these units; (2) an analysis of the housing demand within the city or town; (3) an analysis of the city or town's housing need. The need for affordable housing is generally determined using one of two approaches. First, goals consistent with the municipality's comprehensive plan should be adopted. Second, the implementation of the housing element of a comprehensive plan requires adoption of regulatory and non-regulatory tools. The list of regulatory tools include inclusionary zoning; impact fees; development agreements; rezoning to accommodate multifamily development or greater density; adjudicative permit options; and use of the waiver provisions of the Subdivision Control Law to exact public benefits such as affordable housing. MASS. GEN. LAWS ch. 41, § 81R (2000). Each of the above-noted tools is adopted, however, in concert with a comprehensive plan.

¹⁶⁶ See Brad K. Schwartz, Note, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719, 732-33 (2000).

