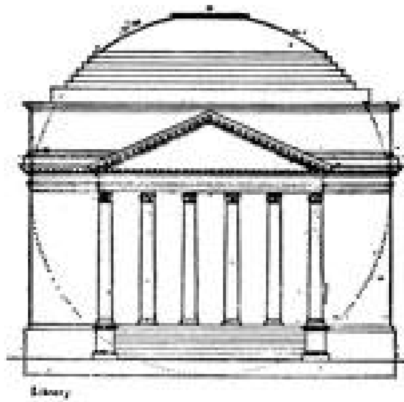

Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing

Author(s): Paul K. Stockman

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NOTES

ANTI-SNOB ZONING IN MASSACHUSETTS: ASSESSING ONE ATTEMPT AT OPENING THE SUBURBS TO AFFORDABLE HOUSING

Paul K. Stockman

INTRODUCTION

By all accounts, America remains in the midst of an "affordable housing crisis."[1] Middle-income Americans in many parts of the country are finding that high housing costs deny them the opportunity to own a home, the classic and enduring symbol of the American Dream.[2] The level of homeownership, after rising for decades, fell throughout the first half of the 1980s,[3] as younger, first-time buyers were increasingly forced out of the market.[4] Those who can afford to buy often face crushing mortgage payments,[5] leav-

[1] This phrase has practically become a cliché. Further, it should be noted that the term "affordable housing" is imprecise and somewhat overinclusive, for it captures a wide variety of discrete phenomena. See, e.g., David C. Schwartz, Richard C. Ferlauto & Daniel N. Hoffman, A New Housing Policy for America 3 (1988) (setting out "five broad housing trends").

[2] See, e.g., Kirstin Downey & Paul Taylor, A Home of Their Own Is Out of Most Renter's Reach, Wash. Post, Nov. 10, 1991, at A1. For an exploration of the symbolic value of homeownership in America, see Constance Perin, Everything in Its Place 32-77 (1977) (arguing that owning or renting a home is a symbol society uses to evaluate people and their social status).

[3] See H. James Brown & John Yinger, Home Ownership and Housing Affordability in the United States: 1963-1985, at 6-7 (1986), (homeownership rates increased for 35 years, peaking in 1980, and fell 1.5% between 1980 and 1985); Schwartz et al., supra note 1, at 6-17.

[4] See Brown & Yinger, supra note 3, at 6-7 (homeownership among those aged 25-29 fell from 41.7% in 1981 to 37.7% in 1985); see also Schwartz et al., supra note 1, at 10-15 (describing this phenomenon in more detail). For anecdotal evidence on the difficulties young middle-income Americans face when buying a home, see Affordable Housing Act of 1989: Hearing Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, 101st Cong., 1st Sess. 15-16 (1989) (opening remarks of George Holbrook); Mary Sit, Out of Reach, Boston Globe, Oct. 23, 1990, at 29 (interviewing Boston-area, middle-income residents unable to buy homes).

[5] In 1968, the average cash-costs burden of homeownership for recent purchasers (using median home value and median household income) was 20.19% of income. By 1980, that burden had risen to 36.86% of median income. Brown & Yinger, supra note 3, at 18.

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ing them vulnerable to even small economic disruptions.[6] As a result, the number of renters has increased,[7] as have the problems facing renters.[8] Real rents, adjusted for inflation, rose 18% between 1975 and 1983.[9] Correspondingly, rent burdens dramatically increased; the median rent burden grew from 20% of income in 1970 to 29% of income in 1983.[10] Nearly half of the poorest quartile of renters devoted over half of their income to rent; almost 27% paid more than three-quarters of their income for housing.[11]

One of the most significant causes of this housing crisis has been the financial impact of government regulations on the cost of constructing new housing units.[12] Locally imposed zoning regulations are among the most costly types of regulatory regimes.[13] In particular, many communities use zoning laws to raise indirectly the cost of housing, thus screening out the socioeconomically "undesirable," or those who cost the community more than they generate in tax revenues.[14] Such exclusionary zoning practices are not new, nor are calls for reform.[15] Starting in the 1960s, scholars and policymakers examined exclusionary zoning in depth and suggested a variety of methods to eliminate it. Most such attempts were unsuccessful, falling prey to suburban political pressures.[16]

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6 One indication of this is that mortgage delinquency rates have risen significantly, recently reaching a five-year high. Kirstin Downey, Mortgage Delinquency Rate Rises, Wash. Post, Sept. 14, 1991, at F1. Foreclosure rates are up as well. Jacqueline L. Salmon, Foreclosures on Expensive Homes Increasing, Wash. Post, Oct. 12, 1991, at E1. Payments by mortgage insurers increased ten-fold between 1980 and 1985. Brown & Yinger, supra note 3, at 7.

7 Brown & Yinger, supra note 3, at 10-11.

8 See Schwartz et al., supra note 1, at 17-25.

9 Id. at 17.

10 Brown & Yinger, supra note 3, at 13.

11 Id. at 29.

12 See Stuart S. Hershey & Carolyn Garmise, Management Information Serv., Streamlining Local Regulations: A Handbook for Reducing Housing and Development Costs 3-4 (1983); Alan Mallach, Inclusionary Housing Programs 56-85 (1984); Stephen R. Seidel, Housing Costs & Government Regulations (1978); David E. Dowall, The Effects of Land-Use and Environmental Regulations on Housing Costs, *in* Housing Policy for the 1980s, at 113-25 (Roger Montgomery & Dale R. Marshall eds., 1980). See generally William A. Fischel, The Economics of Zoning Laws (1987) (analyzing the allocative and distributive impacts of land-use regulation).

13 See Seidel, supra note 12, at 159-94.

14 See infra text accompanying notes 35-38.

15 An explosion of scholarly effort has examined suburban exclusionary zoning and has suggested solutions to the problems. One commentator noted that, by 1974, there already had been over 250 separate books, articles, and studies published on this topic. 2 Robert M. Anderson, American Law of Zoning § 8.01, at 5 (2d ed. 1976).

16 The National Commission on Urban Problems' ("Douglas Commission") 1968 report contained one of the most influential accounts of exclusionary zoning. See National Comm'n on Urban Problems, Building the American City 199-253 (1969) [hereinafter Building the

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With the rapid increases in housing prices, the problems of exclusionary zoning have risen to new prominence.[17] Exclusionary zoning once served merely to keep out the poor; now it constrains the dreams of even the middle class. Many children of the suburbs find that they no longer can afford to live in the communities where they grew up. Teachers, firemen, and policemen often cannot live among those they serve because of the restrictive costs of housing.[18]

Although attempts to "open up the suburbs" have largely failed, one of the earliest programs remains in force. Enacted in 1969, the Massachusetts Low and Moderate Income Housing Act[19] was the first state legislation to address directly suburban exclusionary zoning.[20] The new challenges created by the current affordable housing crisis have made an assessment of its effectiveness timely.[21] To the extent the Act creates a coherent and effective regime, it serves as a model for other states grappling with the current housing crisis.

Part I of this Note examines the causes, manifestations, and effects of exclusionary suburban zoning. Part II describes the history, substance, and procedure of the Massachusetts Act and related provisions, and Part III assesses the Act as written and as enforced. Part IV recognizes that "zoning does not build housing"[22] and examines the practical effectiveness of the Act in creating affordable housing. Finally, this Note concludes by offering several modifications that would further enhance the effectiveness of the Massachusetts Act.

American City]. For a detailed history of the attempts to address exclusionary zoning, see Michael N. Danielson, The Politics of Exclusion 159-322 (1976).

[17] See, e.g., Kirstin Downey, Homeowners Back Cheap Housing, But in Someone Else's Back Yard, Wash. Post, Nov. 12, 1991, at A1.

[18] For anecdotal evidence of this problem, see Susan Bickelhaupt, They Can't Go Home Again: Steep Housing Costs Often Exclude Natives, Town Employees, Boston Globe, Jan. 2, 1989, at 22.

[19] Act of Aug. 23, 1969, ch. 774, 1969 Mass. Acts 712 (codified at Mass. Gen. Laws Ann. ch. 40B, §§ 20-23 (West 1979 & Supp. 1991)). The Act also is known as "Chapter 774" (after its designation in the session laws), the "Zoning Appeals Act," or the "Anti-Snob Zoning Act." Throughout this Note, it simply is referred to as the "Act" or the "Massachusetts Act."

[20] Danielson, supra note 16, at 300.

[21] The last detailed assessment of the Act to appear in the scholarly legal press was published in 1981. See Emily F. Reed, Tilting at Windmills: The Massachusetts Low and Moderate Income Housing Act, 4 W. New Eng. L. Rev. 105 (1981). An earlier overview appeared in 1974. See Paul M. Vaughn, Note, The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall, 54 B.U. L. Rev. 37, 42-45 (1974). Since the publication of these works, new regulations and incentive programs have dramatically altered the landscape. See infra text accompanying notes 127-63.

[22] Daniel R. Mandelker, Environment and Equity 83 (1981).

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I. The Causes and Effects of Exclusionary Suburban Zoning

A. The Origins of Suburban Snob Zoning

The exclusionary effect of zoning regulations has been apparent from the very beginning.[23] In *Ambler Realty Co. v. Village of Euclid*,[24] the first constitutional challenge to zoning laws, the trial court struck down Euclid's zoning ordinance, finding that its effect was "to classify the population and segregate them according to their income or situation in life."[25] The United States Supreme Court reversed, upholding the town's exclusion of apartments from single-family residential neighborhoods and essentially permitting socioeconomic segregation.[26]

Two related historical developments highlight the especially pernicious aspects of zoning and illustrate how the process reduces the overall welfare of an urban community. First, the social geography of the American city fundamentally shifted.[27] In the preindustrial city people of all socioeconomic groups lived together because workers needed to be within walking distance of their jobs.[28] Improvements in transportation—streetcars, railroads, and ultimately automobiles—eliminated this need.[29] Accordingly, the middle and upper classes evacuated to newer, more pastoral suburban areas, relegating the center cities to recent immigrants and to the poor.[30]

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[23] Indeed, the term "exclusionary zoning" is tautological because all zoning by definition excludes something. See Bernard H. Siegan, Land Use Without Zoning 88 (1972).

[24] 297 F. 307 (N.D. Ohio 1924), rev'd, 272 U.S. 365 (1926).

[25] Id. at 316; see also Simon v. Town of Needham, 42 N.E.2d 516, 519 (Mass. 1942):

> A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there . . . nor for the purpose of protecting . . . large estates . . . . The strictly local interests of the town must yield . . . [to] the general interests of the public at large . . . .

R.B. Constr. Co. v. Jackson, 137 A. 278, 286 (Md. 1927) (Offutt, J., dissenting) (calling zoning "nothing more than a vast, comprehensive and complete plan or scheme of segregation" to classify the population according to its means). Early on, moreover, knowledgeable observers such as Bruno Lasker, Lewis Mumford, and Ernest Freund were concerned that zoning would be exploited for exclusionary effect. See Seymour I. Toll, Zoned American 258-68 (1969) (containing an excellent history of the development of zoning in the United States).

[26] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[27] See generally Danielson, supra note 16, at 5-14 (chapter entitled "The Differentiated Metropolis").

[28] See Sam B. Warner, Jr., The Private City 50 (1968) ("Most areas of the new big city were a jumble of occupations, classes, shops, homes, immigrants, and native Americans.").

[29] See generally Sam B. Warner, Jr., Streetcar Suburbs: The Process of Growth in Boston 1870-1900 (2d ed. 1978) (discussing the effects of transportation improvement).

[30] See Robert E. Park, Ernest Burgess & Roderick D. McKenzie, The City 50-58 (1925) (describing a "concentric circles" model, with social status increasing proportionally as one moves farther from the city center).

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After the World Wars, this process accelerated dramatically, and it continues today.

Second, the city's political geography changed as well. At first, expanding cities annexed the outlying areas. Near the end of the last century, however, newer suburban areas resisted such annexation into the largely immigrant, usually poorer, often machine-led cities.[31] This reticence increased as states imposed restrictive municipal annexation laws and permissive municipal incorporation laws.[32] This ultimately splintered the metropolitan unit, creating a "crazy-quilt" of separate, often tiny municipalities.[33] Neighborhood-like units thus could erect legal boundaries to enforce their own parochial interests.[34]

These developments created a perverse set of incentives to exclude outsiders. Groups of people, particularly the upper and middle classes, sorted themselves into socially and economically homogeneous residential communities, which formed distinct and independent local governments. These suburban political units then adopted strict zoning ordinances designed to ensure the uniformity of their communities.

B. Exclusionary Land-Use Strategies

Municipalities create several ostensible justifications for restricting land use. First, communities assert that zoning protects property values by

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31 See Danielson, supra note 16, at 15-17.

32 See Daniel R. Mandelker, Dawn C. Netsch, Peter W. Salsich, Jr. & Judith W. Wegner, State and Local Government in a Federal System 29-30 (3d ed., The Michie Co. 1990); see also Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 Colum. L. Rev. 346, 357-63 (1990) (discussing the approval of suburban independence).

33 For example, in 1967 the Standard Metropolitan Statistical Area ("SMSA") of Chicago was composed of 1,113 local governments; the Philadelphia SMSA had 871, and the Pittsburgh SMSA had 704. The average SMSA had 91. Moreover, two-thirds of all municipalities in SMSAs had fewer than 5,000 residents; one-third had fewer than 1,000. Also, one-half of such municipalities were smaller than one square mile in land area. Building the American City, supra note 16, at 7.

34 One report devotes an entire section to this phenomenon, called "Local Government as the Representative of Those Who Got There First." Task Force on Land Use and Urban Growth, The Rockefeller Bros. Fund, The Use of Land: A Citizens' Policy Guide to Urban Growth 225 (William K. Reilly ed., 1973). Others have commented that this is "akin to giving each rich, middle class and poor neighborhood the power to tax, spend, and zone. Such decentralization of power can and does play hob with the goal of social justice." Advisory Comm'n on Intergovernmental Relations, Urban America and the Federal System 17 (1969).

These suburbs rarely take larger, metropolitan-wide concerns into account. "The constituency served by local officials making land-use decisions is quite different from that of the metropolitan area .... It is hardly surprising that the interests and desires of one small jurisdiction do not always conform to the needs of the larger area of which it is a part." Building the American City, supra note 16, at 211.

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preventing neighbors from imposing costs upon each other. Second, municipal officials claim to use zoning to protect the ambience of their community. In particular, many suburban communities want to preserve a rural, pastoral atmosphere, with wide expanses of open space, little traffic and noise, and plenty of domestic privacy.[35] Similarly, municipalities suspiciously claim to use zoning to "preserve the character of the neighborhood." Although this sounds innocuous, such language is frequently "a code for the desire to preserve economic, ethnic and racial homogeneity."[36]

In addition, many municipalities impose restrictive zoning laws in an effort to protect the tax base and to keep local residential property taxes low, a technique referred to as "fiscal zoning."[37] Municipal planners assume that apartments and smaller homes, generating less taxes, are occupied by families with lower incomes and more school-age children, who consume a greater share of municipal services. Large, single-family homes on spacious lots, on the other hand, generate more revenue and attract wealthier residents who place fewer demands on the municipal fisc.[38] Although theoretically intuitive, these assumptions are largely empirically unwarranted.[39]

Many types of local regulations can have exclusionary effects and raise housing costs.[40] Density controls, which limit the amount of housing that can be built in a particular area, are the most frequently used regulatory restrictions.[41] Such controls include large minimum lot sizes, long frontage

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[35] See Seidel, supra note 12, at 162-64.

[36] Id. at 164; see also Fischel, supra note 12, at 140 (arguing that "a community would be willing to pay to acquire certain illegitimate restrictions even if they were not part of zoning").

[37] See Building the American City, supra note 16, at 19; Seidel, supra note 12, at 164.

[38] For the contours of the argument, see Building the American City, supra note 16, at 18-19, 211-13; Danielson, supra note 16, at 43-45; Seidel, supra note 12, at 164-65.

[39] See Seidel, supra note 12, at 164-65. For example, studies have demonstrated that, contrary to the conventional wisdom, multifamily housing generates more in tax revenues (net of demand for government services) than single-family homes. See Richard F. Babcock & Fred P. Bosselman, Exclusionary Zoning: Land Use Regulation and Housing in the 1970s, at 53 & nn.19 & 22 (1973); Franklin J. James, Jr. & Oliver D. Windsor, Fiscal Zoning, Fiscal Reform, and Exclusionary Land Use Controls, 42 J. Am. Inst. Planners 130, 133-34 (1976). Furthermore, the true fiscal impacts are contextual, depending upon state-aid policies for education (typically a local government's greatest expense). See Babcock & Bosselman, supra, at 52-53 & n.18.

[40] Stephen Seidel has identified six categories of regulation, in addition to zoning laws, that may have such an effect: building codes, see Seidel, supra note 12, at 71-100, 305-06; energy conservation regulations, see id. at 101-18, 306-07; subdivision regulations, see id. at 119-57, 307-09; growth controls, see id. at 195-233, 310-11; environmental regulations, see id. at 235-60, 312-13; and settlement and financing costs, see id. at 261-300, 313-15. These categories of exclusionary restrictions are merely a sample of those most frequently used; a municipality may adopt "innumerable" regulations to further exclusionary ends. Babcock & Bosselman, supra note 39, at 7.

[41] Seidel, supra note 12, at 171.

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requirements, and wide setbacks from property lines.[42] Municipalities also limit—often nearly banning—the construction of multifamily housing.[43] These constraints raise the cost of new housing in a number of ways. First and most obviously, when larger lots (or, in the case of apartment bans, separate lots) are mandated, the cost of the additional land raises the total cost of the housing unit.[44] Second, limiting the number of smaller parcels (or lots zoned for multifamily units) increases demand for such lots, thus raising the cost of land in areas zoned for higher densities.[45] Third, lower densities increase the cost of property improvements because they require longer streets, sewers, water lines, and sidewalks.[46] Such restrictions can add many thousands of dollars to the price of a new home.[47]

Other restrictions such as minimum floor areas and prohibitions on mobile or manufactured homes[48] increase the construction cost of the dwelling itself. Municipalities also increase builders' costs by making the zoning process expensive, time-consuming, and burdensome.[49] Such practices not only create direct costs in the form of filing fees and payments to lawyers,

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[42] See Babcock & Bosselman, supra note 39, at 10; Seidel, supra note 12, at 171-80; see also Building the American City, supra note 16, at 213-15 (discussing large-lot zoning, one species of density restriction).

[43] See Babcock & Bosselman, supra note 39, at 7-9; Building the American City, supra note 16, at 215; Seidel, supra note 12, at 168-70.

[44] See, e.g., Building the American City, supra note 16, at 213 (land prices per lot diminish as minimum lot size is reduced). Note, however, that the price reduction is not commensurate with the size reduction. For example, "a half-acre lot will cost less than a 1-acre lot, but will cost more than half the price" of the 1-acre lot. Id. This suggests that other factors also influence raw land cost. See infra note 49 and accompanying text on administrative costs; see also Seidel, supra note 12, at 176 (describing this as "the most elusive aspect of zoning's cost effects").

[45] See Building the American City, supra note 16, at 214; Seidel, supra note 12, at 175.

[46] See Building the American City, supra note 16, at 214; cf. Seidel, supra note 12, at 180 (suggesting that lot width is the critical determinant of these costs but noting that "[t]he record is unclear as to whether . . . wide spacing of lots increase[s] total public facilities installation costs").

[47] For example, in 132 projects built under the aegis of the Joint Venture for Affordable Housing, the average savings per unit was $8,573. The bulk of these savings was realized from changes in density and development requirements. Michael Carliner, Regulatory Costs and Affordable Housing, Housing Economics, May 1989, at 9-11.

[48] See Babcock & Bosselman, supra note 39, at 8-9, 11; Building the American City, supra note 16, at 215-16; Seidel, supra note 12, at 170-71, 180-82.

[49] See Babcock & Bosselman, supra note 39, at 13-17. Municipalities ensure this through excessively restrictive zoning that forces developers to apply for variances and enter the bureaucratic process. The Douglas Commission discussed this wait-and-see zoning. See Building the American City, supra note 16, at 206-08, 216. For an economic discussion of these transaction costs, see Fischel, supra note 12, at 133-35.

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architects, and other expert consultants, they also delay the realization of income from construction projects.[50]

C. The Harmful Effects of Exclusionary Zoning

Suburban exclusionary zoning does much more than simply raise housing costs, however. Most strikingly, such practices regressively redistribute the costs of local government. When the city contained all socioeconomic groups, all groups contributed to city programs. As suburbanization evolved, however, the middle and upper classes escaped that burden by fleeing into suburban enclaves sheltered from the city's taxing power. As a result, they took much of the tax base and left most of the burden:

> Suburban commuters, who daily travel in and out of the city, use the city's transportation system and other services, but do not pay city property taxes, are themselves a source of central city expense. . . . The central cities also tend to bear the costs of providing facilities like hospitals, libraries and museums which serve the region as a whole but are funded out of city, and not suburban budgets.[51]

The working class and the poor who remained in the city were left to shoulder a disproportionate share of these costs.[52]

This is especially unfair, given that, under the best of circumstances, cities are more expensive to operate than suburbs or rural towns.[53] City expenses, moreover, further increase as the city becomes poorer. Poorer families tend

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[50] See Babcock & Bosselman, supra note 39, at 16.

[51] Briffault, supra note 32, at 424 n.337; see Leonard S. Rubinowitz, Low-Income Housing: Suburban Strategies 23 (1974); see also 2 Advisory Comm'n on Intergovernmental Relations, Fiscal Balance in the American Federal System 72 (1967) [hereinafter Fiscal Balance] (mentioning "the need to service commuters" as contributing to the cities' higher levels of expenditures).

[52] See Building the American City, supra note 16, at 50 (noting that "the poor tend to concentrate in the central cities" and that the "suburbs do not carry their share of the total poor"); Rubinowitz, supra note 51, at 10 ("Low- and moderate-income people tend to live in central cities rather than the suburbs of metropolitan areas.").

This segregation means that suburbia "exacts a subsidy from the central city by imprisoning low-income families and poor families in the central city . . . ." Building the American City, supra note 16, at 5; see also Anthony Downs, Opening Up the Suburbs 10-11 (1973) (noting that "the major social costs of creating wonderful neighborhood environments for the wealthy and good ones for the middle class are loaded onto the poorest households least capable of bearing such burdens").

[53] See Building the American City, supra note 16, at 5-6. Note the demands of urban life:

> [T]he main reason for higher public expenditure in cities is that urban life requires public provision of some services that, under rural conditions, need not or cannot be supplied, like street cleaning, and public sewerage systems. Also cities call for increased intensity of other kinds of public services such as fire protection.

Id.

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to have more school-age children[54] who must be publicly educated.[55] Poorer neighborhoods often have higher crime rates, more unemployment, increased drug addiction, and lower health standards. In addition, they generally require greater police and fire protection.[56] The ultimate effect is that the lion's share of the metropolitan governmental expense is funded by those least able to pay.

In the worst case scenario, suburban flight threatens the city's financial viability.[57] Employers seeking lower expenses have moved a massive number of city jobs into the suburbs.[58] This practice only compounds the regressive social costs of exclusion because suburban communities that welcome the employers refuse to allow construction of modestly priced housing for the workers.[59] As a result, the supply of entry-level jobs is taken from those people who need them most. Many of the urban poor do not even seek

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[54] Cf. id. at 45-46 (noting that children in large families were more likely to be poor than children with either one or no siblings).

[55] Underprivileged children are more expensive, pupil for pupil, to educate. See Fiscal Balance, supra note 51, at 6 ("[T]he central city school districts must carry a disproportionately heavy share of the educational burden—the task of educating an increasing number of 'high cost' underprivileged children. *Children who need education the most are receiving the least!*").

[56] See id. at 72.

[57] A kind of "snowball effect" results from suburban flight. As costs increase, taxes increase, and services must be cut back. More people and businesses then flee to the suburbs, and the process repeats itself in a downward spiral. See Rubinowitz, supra note 51, at 23-24.

Higher center-city tax burdens in part prove this. See Fiscal Balance, supra note 51, at 72 ("Local taxes in the central cities average 7.6 percent of the personal income of the residents; outside the central cities they equal only 5.6 percent of income.").

[58] See Building the American City, supra note 16, at 47-48; Downs, supra note 52, at 17-22; Rubinowitz, supra note 51, at 11-13; cf. Herbert M. Franklin, David Falk & Arthur J. Levin, In-Zoning: A Guide for Policy-Makers on Inclusionary Land Use Programs 52-55 (1974) (inclusionary zoning programs may increase low-income workers' access to new job opportunities).

[59] See Danielson, supra note 16, at 40-41 (citing examples of suburban intransigence, such as 20 New Jersey suburbs setting aside land to support 1.17 million jobs but only enough residential developments for 144,000 families).

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such jobs,[60] and those who do face time-consuming and costly "reverse commutes."[61]

These regressive effects ultimately harm everyone. Employers, having committed themselves to suburbia with long-term capital expenditures in the hopes of decreasing costs, face *increased* production costs as a result of exclusionary zoning practices.[62] In many high-cost areas, employers have difficulty recruiting entry-level personnel.[63] They often must pay wage premia[64] and in some cases have resorted to privately busing workers from the cities to suburban jobsites.[65] Some employers even have problems recruiting managers and executives because of high housing costs.[66] Furthermore, even when employers find the workers, absenteeism and turnover rates are higher in the suburban sites.[67] Ultimately these costs are passed on and reflected in the cost of the produced goods and services. Thus, in a significant way, exclusionary suburban practices cost everyone money.

Exclusionary practices not only burden city centers but have other intracommunity economic effects. Zoning rules benefit the earlier residents of a community at the expense of the later arrivals. First, a wealth effect occurs because "the assignment of rights under zoning is an important form

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[60] See John F. Kain, Housing Segregation, Negro Employment, and Metropolitan Decentralization, 82 Q.J. Econ. 175-97 (1968) (arguing that separation between workplace and residence makes it more difficult to learn of available jobs because most job vacancy information for low-income positions is conveyed informally); Susan G. Nelson, Housing Discrimination and Job Search, *in* Residential Location and Urban Housing Markets 329-47 (Gregory K. Ingram ed., 1977) (noting that residential patterns cause blacks to search for jobs differently, thus resulting in lower incomes). Although these articles explicitly address only racial segregation, economic segregation logically should produce similar results.

[61] See Building the American City, supra note 16, at 48; Rubinowitz, supra note 51, at 14-16.

[62] The National Job-Linked Housing Center estimated in 1972 that the cost to industry of the lack of housing amounted to millions of dollars. Danielson, supra note 16, at 141.

[63] See id. at 141; Rubinowitz, supra note 51, at 17.

[64] Homeownership Affordability: Hearing Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, 100th Cong., 1st Sess. 42 (1987) (Chairman of the Long Island Association's Committee on Housing stating that "as the price of housing escalates, businesses are forced to raise salaries to remain competitive").

[65] See id. at 40.

[66] For example, the Chairman of the Long Island Association's Committee on Housing, Robert R. McMillan, stated:

> Long Island businesses are faced every day with refusals from perspective [sic] employees, not because of a lack of culture, parks, beaches, golf courses or educational facilities, but because those employees interested in the new job opportunity, come to Long Island to look for housing and realize they cannot secure an adequate place to live.

Id. at 39.

[67] See Danielson, supra note 16, at 141; Rubinowitz, supra note 51, at 18.

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of homeowners' wealth. . . . Thus an 'overgenerous' assignment of rights to (original) homeowners may result in more restrictive land use controls."[68] Second, local communities (obviously) have a monopoly over zoning.[69] Professor William Fischel writes:

> [M]onopoly power by the community enables it to raise land prices, and thus housing prices, above the market equilibrium by restricting the supply of sites more than either landowners or a competitive set of communities would. This increases the wealth of community residents who are homeowners prior to the adoption of the restrictions.[70]

This redistribution is regressive because a suburb's earliest residents, who typically enact the zoning laws, tend to be wealthier than the later arrivals. The benefits of zoning thus "accrue[ ] chiefly to some of the wealthiest members of our society."[71] Ultimately, Fischel concludes, "the free entitlements that zoning offers to suburban residents are like offers of free memberships to the best country clubs to the rich, while all others must pay to get in."[72]

In addition, suburban exclusionary zoning, by reducing residential density, creates another cluster of harmful effects, aptly termed "the costs of sprawl."[73] Low-density development increases construction costs and operating expenses[74] and also can increase pollution, create other adverse environmental effects, and waste energy resources.[75] The results of one study "show a surprising consistency: 'planning' to some extent, but higher densities to a much greater extent, result in lower economic costs, environmental

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68 Fischel, supra note 12, at 136-37.

69 Indeed, it has been suggested that zoning is an attempt by homeowners to create a monopoly. Michael L. Goetz & Larry E. Wofford, The Motivation for Zoning: Efficiency or Wealth Redistribution, 55 Land Econ. 472-85 (1979), cited in Fischel, supra note 12, at 149 n.11.

70 Fischel, supra note 12, at 141.

71 Id. at 137.

72 Id.

73 Real Estate Research Corp., The Costs of Sprawl (1974) [hereinafter The Costs of Sprawl] (report prepared for the Council on Environmental Quality, the Housing Urban Development's Office of Policy Development & Research, and the Environmental Protection Agency's Office of Planning & Management, presenting an executive summary of the cost analysis of suburban low-density development).

74 Id. at 3-4; see also supra notes 44-47 and accompanying text (discussing increased costs).

75 In contrast to low-density development, high-density, planned communities generate 45% less air pollution because such developments consume less energy for heating and automobile use. Higher-density developments can reduce storm water runoff pollution and sediment as well. Moreover, high-density development preserves natural habitats for wildlife and vegetation. The Costs of Sprawl, supra note 73, at 4-5.

High-density communities can consume up to 44% less energy than sprawling suburban areas by reducing residential heating and cooling requirements and automobile use. Water use can be reduced 35% by eliminating lawn watering. Id. at 5-6.

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costs, natural resource consumption, and some personal costs for a given number of dwelling units."[76] Sprawl also carries personal costs, most notably the value of the extra time spent commuting.[77]

Finally, exclusionary zoning not only creates direct economic shifts but carries substantial nonpecuniary costs as well. There are serious demoralization costs generated by social immobility and social unrest. Low- and moderate-income people concentrated in economically segregated neighborhoods are denied the full range of opportunities available to the middle and upper classes. As the National Commission on Urban Problems ("Douglas Commission") concluded:

> Our society is designed to assure most of us available alternatives to where we live, how we live, and what we do. Big-city slumdwellers do not have this freedom of choice. They are denied a full range of opportunities in education, jobs, and housing. Mainstream Americans take those opportunities for granted and slumdwellers know this. They know how the more prosperous half lives and they aspire to the same way of life. The fact that they cannot achieve this way of life is a source of much of their anger and bitterness.[78]

Often that anger results in higher crime rates; sometimes it explodes into more widespread violence: "The civil disorders of the hot summer of 1967 followed us and preceded us. We saw the ugly, burned-out urban streets that were still smoldering in some places, and we sensed the tension and the anxiety in communities that would erupt not too long after our being there."[79]

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[76] Id. at 6; cf. Fischel, supra note 12, at 268 (sharply criticizing the study but conceding that zoning is a primary cause of sprawl).

On a more esoteric level, Fischel also argues that sprawl causes the loss of "agglomeration economies"—incentives for living in close proximity that led to the formation of cities. In particular, Fischel is concerned about the loss of the specialization and innovation fostered by proximity. Id. at 252-54, 269-70. See generally Jane Jacobs, The Economy of Cities 85-106 (1969) (popularizing the concept of agglomeration economies).

[77] The Costs of Sprawl, supra note 73, at 6. Note also that:

> To excessive commuting one should add the excessive travel to stores, schools, and recreation facilities. Some of these destinations may respond to sprawl by moving out to suburbs. This reduces the direct commuting costs of the households, but it may add to the transportation costs of the firms.

Fischel, supra note 12, at 2.

[78] Building the American City, supra note 16, at 2.

[79] Id. at 1. An influential voice in this area has been sociologist William Julius Wilson. According to Wilson, ghetto poverty gives rise to "concentration effects," social problems that are qualitatively different from those faced by the rural and suburban poor. Cultural patterns emerge that essentially reinforce maladaptive social behavior, such as teenage pregnancies and school dropouts. See William J. Wilson, Studying Inner-City Social Dislocations, 56 Am. Soc. Rev. 1, 9-11 (1991).

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Exclusionary zoning practices also offend ideals of equity and morality.

> The community that seeks to seal itself off from the social crises of our time, to live in quiet luxury in the midst of segregate squalor, is violating the most basic standards of morality . . . . A balanced housing supply, on the other hand, brings with it all the advantages of cultural diversity, and the satisfaction of contributing one's share toward society.[80]

Exclusionary zoning is immoral, according to commentators, because it squelches traditional American avenues of social mobility, trapping the disadvantaged in slums[81] and denying the children of the poor the superior educational opportunities available in the suburbs.[82] In addition, exclusionary zoning deprives a community of all of the salutary benefits created by diversity and contact with people from varied backgrounds.[83] In short, exclusionary zoning further polarizes an already divided society.[84]

II. The Massachusetts Zoning Appeals Regime

A. *The Origins of the System*

Academicians and policymakers turned their attention to exclusionary zoning, which had quietly existed for decades, as urban decay and social unrest grabbed headlines in the 1960s.[85] The national problems confronting

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[80] Babcock & Bosselman, supra note 39, at 54. Anthony Downs makes the most eloquent, morally based arguments against exclusionary zoning. See Downs, supra note 52, passim. Although the rhetoric, drawn from the socially active '60s and '70s, seems dated, the potential of the vision and the optimism with which it is conveyed still are powerful.

[81] See Downs, supra note 52, at 28-32.

[82] Id. at 32-36. Education has long been seen as a primary vehicle for social mobility. See, e.g., Horace Mann, Education and Prosperity 6 (1848) (arguing that education is "the great equalizer of the conditions of men—the balance-wheel of the social machinery").

[83] See Babcock & Bosselman, supra note 39, at 50.

[84] See Downs, supra note 52, at 42-45; National Advisory Comm'n on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 225-26 (1968). This national commission commented that:

> The nation is rapidly moving toward two increasingly separate Americas. Within two decades, this division could be so deep that it would be almost impossible to unite: a white society principally located in suburbs, in smaller central cities, and in the peripheral parts of large central cities; and a Negro society largely concentrated within large central cities. The Negro society will be permanently relegated to its current status . . . . In the long run, continuation and expansion of such a permanent division threatens us with two perils. The first is the danger of sustained violence in our cities. . . . The second is the danger of a conclusive repudiation of the traditional American ideals of individual dignity, freedom, and equality of opportunity.

Id.

[85] See supra notes 15-16 and accompanying text.

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these scholars and politicians did not spare Massachusetts.[86] Moreover, the problems caused by the shortage of affordable housing and the jobsite-residence mismatch were exacerbated by the loss of thousands of existing affordable housing units, as urban renewal and highway programs displaced thousands of low- and moderate-income city dwellers.[87]

Concerned about these problems, the Massachusetts Senate in 1967 commissioned the Legislative Research Council to investigate whether localities used zoning power unjustly.[88] The council determined that restrictive suburban zoning practices adversely affected the supply of low- and moderate-income housing and urged action.[89] The findings of the Douglas Commission and the President's Committee on Urban Housing echoed the council's view.[90]

The Massachusetts legislators responded to these findings by introducing five bills during the 1969 legislative session that would restrict local zoning power.[91] These bills were referred to a joint Committee on Urban Affairs, which then released a legislative report and a consolidated bill in June, 1969.[92] The committee report highlighted the need for legislative steps: " 'The Committee . . . has found that there is an acute shortage of decent, safe and low and moderate cost housing throughout the Commonwealth. . . . Unless shortsighted controls can be avoided, regional needs considered, and the whole process of building made faster, both suburb and city will suffer together.' "[93]

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86 See Vaughn, supra note 21, at 42-45 (describing Massachusetts' affordable housing shortage and the migration of jobs into the suburbs surrounding Boston).

87 See Reed, supra note 21, at 105-06.

88 See Board of Appeals v. Housing Appeals Comm., 294 N.E.2d 393, 403 (Mass. 1973).

89 For detailed descriptions of the council's conclusions, see id. at 403-04; Reed, supra note 21, at 106-07.

90 See Building the American City, supra note 16; President's Committee on Urban Housing, A Decent Home (1969); Reed, supra note 21, at 107.

91 See *Housing Appeals*, 294 N.E.2d at 404 & n.10 (listing the bills introduced).

92 Id. at 404-05.

93 Mass. Regs. Code tit. 760, § 30.01(2) (1991) [hereinafter Mass. Regs.] (quoting the June, 1969 report of the Committee on Urban Affairs). The report further elaborated on the sense of urgency:

> "This emergency cannot be relieved, by either private or public action, solely within the confines of the cities because of the already high density and the increasing cost of land and construction. . . .
>
> Yet necessary land in such areas is often unavailable because of restrictive zoning controls or similar local regulations. Moreover, where land is available, the process of obtaining local approval is so protracted as to discourage all but the most determined and well-financed builders who often do not have the interests of the community at heart."

Id. (quoting the June, 1969 report of the Committee on Urban Affairs).

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The bill was fiercely contested, becoming the "hottest issue of the legislative session."[94] It ultimately passed only because of what Emily Reed has termed "a fortuitous convergence of political issues and circumstances."[95] The key to passage was the formation of an unlikely coalition—" 'a rather unholy alliance' "[96] between liberals and the more conservative representatives of Boston's working class ethnic neighborhoods. One legislator bluntly called this coalition a " 'one-shot deal.' "[97] This coalition united solely because of the events surrounding the passage of a 1966 bill addressing race relations. Through the efforts of suburban liberals, the legislature passed a racial imbalance bill that outlawed de facto segregation and that mandated, in effect, desegregation of the Boston public schools.[98] This bill was strongly opposed by the politicians from Boston's white neighborhoods,[99] who felt that the law " 'was being shoved down their throats by liberal suburban legislators.' "[100] Three years later, they had not forgotten this episode and saw the 1969 housing bill as an opportunity to seek retribution against the subur-

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[94] Danielson, supra note 16, at 301. For a vivid description of the political battle and its rhetoric, see id. at 300-03.

[95] Reed, supra note 21, at 108. Many political circumstances factored into the bill's passage. First, the Committee on Urban Affairs had a strong liberal majority and a compliant chairman supporting the bill. Second, the House Speaker was eager to pass as much legislation as possible during the 1969 session in order to head off proposals to reduce the size of the Massachusetts House of Representatives. Third, the Democratic leadership in the legislature was eager to embarrass liberal Republican Governor Francis Sargent, who would appear hypocritical if he vetoed the bill but would anger suburban Republican supporters if he signed it. David Listokin, Fair Share Housing Allocation 99 (1976) (citing Karen Jean Schneider, Innovation in the State Legislation: The Massachusetts Suburban Zoning Act, at chs. 2-4 (1970) (unpublished honors thesis, Radcliffe College)).

[96] James Breagy, Overriding the Suburbs 10 (1976) (quoting Rep. Martin Linsky).

[97] Id. (quoting Rep. Martin Linsky).

[98] See Mass. Gen. Laws Ann. ch. 15, § 1*I* (West 1981 & Supp. 1991); Mass. Gen. Laws Ann. ch. 71, § 37D (West 1982); see Danielson, supra note 16, at 302; Listokin, supra note 95, at 99; Reed, supra note 21, at 108.

[99] See J. Anthony Lukas, Common Ground 130-31, 132, 219-20 (1985) (discussing the Boston School Committee's attempts to circumvent the Massachusetts Racial Imbalance Act and the massive popular opposition to the Act in Boston's neighborhoods). Louise Day Hicks, School Committee Chairwoman and popular candidate for mayor, expressly linked the issues:

> "If the Negro lacks mobility in finding housing, the School Committee cannot be held responsible," she said. "This is a problem for the entire community." And "Boston schools are a scapegoat for those who have failed to solve the housing, economic, and social problems of the black citizen." And still more pointedly: *"If the suburbs are honestly interested in solving the problems of the Negro, why don't they build subsidized housing for them?"*

Id. at 133 (emphasis added) (quoting Hicks).

[100] Danielson, supra note 16, at 303 (quoting Robert Engler, Subsidized Housing in the Suburbs: Legislation or Litigation?, 72 (1972)).

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ban liberals. They sought vengeance and to an extent succeeded:[101] the bill was enacted in August,[102] although it cleared the Senate by only two votes.[103]

B. The Massachusetts Act

Due to its nature as a compromise measure, the language of the Massachusetts Act is vague but carefully chosen.[104] The Act applies to "low and moderate income housing"[105] but defines that category narrowly to encompass "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing . . . whether built or operated by any public agency or any nonprofit or limited dividend organization."[106]

The Act creates a two-step administrative process. First, it consolidates the permit application and hearing process: "Any public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing may submit to the [local zoning] board of appeals . . . a single application to build such housing in lieu of separate applications to the applicable local boards."[107] The local zoning board of appeals must hold a public hearing within thirty days. The zoning board of appeals then has the power to issue a comprehensive permit and may attach to it any conditions and requirements. If the zoning board of appeals fails to convene a hearing as prescribed, or fails to render a decision on the comprehensive permit within forty days after the close of hearings, the comprehensive permit is

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[101] Eleven of the "liberal" supporters of the racial imbalance bill voted against the anti-snob zoning bill. Id. at 302. " 'One of the most embarrassing sights of the current legislative session was the spectacle of the so-called 'liberal' legislators, who strongly advocated the racial imbalance law, casting their votes against a bill which would really do something about the problem.' " Id. (quoting Thomas Gallagher, Suburbs Seek Sargent's Aid, Boston Herald, Aug. 22, 1969).

[102] Act of Aug. 23, 1969, ch. 774, 1969 Mass. Acts 712 (codified at Mass. Gen. Laws Ann. ch. 40B, §§ 20-23 (West 1979 & Supp. 1991)).

[103] Danielson, supra note 16, at 303.

[104] See Reed, supra note 21, at 111-12; Vaughn, supra note 21, at 47.

[105] Mass. Gen. Laws Ann. ch. 40B, § 20.

[106] Id. Whether housing units constructed in accordance with a qualifying program are indeed "low or moderate income housing" is to be determined by the definition in the applicable statute. Id. The Executive Office of Communities & Development ("EOCD"), responsible for promulgating the regulations under the Act, maintains a list of qualifying federal, state, and local programs. See Mass. Regs., supra note 93, §§ 30.02, 31.04(1)(a). A compilation of applicable regulations is available from the Housing Appeals Committee ("HAC").

[107] Mass. Gen. Laws Ann. ch. 40B, § 21. The local zoning board of appeals is required to notify other local boards and must consider their recommendations. The local zoning board of appeals also may request that representatives of a board or boards attend the hearing. Id.

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deemed granted. If a comprehensive permit is issued, aggrieved parties may obtain immediate judicial review.[108]

If an application for a comprehensive permit is denied, or granted with conditions and requirements that appear to make the project "uneconomic,"[109] the second phase of the Act's administrative process begins. The applicant may appeal the adverse local decision to the state Housing Appeals Committee ("HAC"), an administrative body established within the Department of Community Affairs of the Executive Office of Communities & Development.[110] Within twenty days, the HAC begins a formal administrative hearing;[111] a decision must be issued within thirty days of the end of the hearing.[112]

As its primary inquiry, the HAC must decide whether the action of the local zoning board of appeals is "consistent with local needs."[113] Local

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[108] Id.

[109] "Uneconomic" is defined as follows by the statute:

> [A]ny condition . . . to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing . . . .

Id. at ch. 40B, § 21.

[110] Id. at ch. 40B, § 22; see also Mass. Gen. Laws Ann. ch. 23B, § 5A (West 1981) (establishing the HAC).

[111] Mass. Gen. Laws Ann. ch. 40B, § 22; see also Mass. Regs., supra note 93, §§ 30.03-.13 (procedural regulations governing the housing appeals process). In general, the regulations provide for a process that is highly regimented and trial-like, with pleadings, id. § 30.06, motions, id. § 30.07, an orderly presentation of evidence, id. § 30.09(5)(c), provisions for deposing witnesses, id. § 30.11(1), and the filing of briefs, id. § 30.13(1).

[112] Mass. Gen. Laws Ann. ch. 40B, § 22. A decision of the HAC may be appealed to the Massachusetts Superior Court in accordance with the provisions of the Massachusetts Administrative Procedure Act. See Mass. Gen. Laws Ann. ch. 30A (West 1992). On appeal, the reviewing court must show great deference to the HAC's decision, determining only if there was "substantial evidence" to support the decision. Board of Appeals v. Housing Appeals Comm., 294 N.E.2d 393, 418 (Mass. 1973). "Substantial evidence" is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." Id. (citing Mass. Gen. Laws Ann. ch. 30A, §§ 1(6), 14(7)(e) (West 1992)).

[113] Mass. Gen. Laws Ann. ch. 40B, § 23. In addition, if conditions or restrictions on a permit are appealed, the HAC also must determine whether the conditions in fact render the project uneconomic. Id.; Mass. Regs., supra note 93, § 31.05(3). See supra note 109 for the definition of uneconomic.

It should be noted that the actual statutory language is "reasonable and consistent with local needs." Mass. Gen. Laws Ann. ch. 40B, § 23. In practice, the word "reasonable" has little significance. Presumably, the HAC could overturn local decisions even when the statutory thresholds are met, if the board of appeals acted unreasonably. Existing regulations, however, do not allow the HAC to consider a decision's reasonableness. See Mass. Regs., supra note 93, § 31.05(1). In any event, it has never been interpreted by a court, and most commentators seem to have overlooked it.

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action will be conclusively presumed consistent with local needs if the municipality has met one of the following numerical thresholds:[114] at least 10% of the city's local housing consists of low- and moderate-income housing;[115] subsidized housing occupies more than 1.5% of the community's total land area;[116] or the grant of a permit will result in the construction, within the span of a year, on the larger of ten acres or .3% of the locality's total land area.[117] The city bears the burden of demonstrating that it has met a statutory threshold.[118]

If the city has not satisfied one of these quotas, local action still may be "consistent with local needs" under two conditions. First, the locality must prove "that there is a valid health, safety, environmental, design, open space, or other local concern" supporting its denial or imposition of uneconomic conditions.[119] Second, the municipality must further establish that these concerns outweigh the "regional housing need."[120] In such an instance, "regional housing need" is strongly presumed to outweigh local planning considerations.[121]

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[114] Mass. Gen. Laws Ann. ch. 40B, § 20; see also Mass. Regs., supra note 93, § 31.06(5) (stating that the local zoning board "may show conclusively that its decision was consistent with local needs by proving that one of the statutory minima . . . has been satisfied").

[115] Mass. Gen. Laws Ann. ch. 40B, § 20; see also Mass. Regs., supra note 93, § 31.04(1) (describing the manner of calculating the housing-unit minimum).

[116] Mass. Gen. Laws. Ann. ch. 40B, § 20. This includes land zoned for residential, commercial, or industrial uses and all unzoned land where such uses are permitted. Land owned by the state and federal governments, wetland areas protected by state law, and bodies of water are excluded. Also protected are flood plains, open spaces, or conservation areas on which all residential, commercial, and industrial uses are prohibited. Mass. Regs., supra note 93, § 31.04(2).

[117] Mass. Gen. Laws. Ann. ch. 40B, § 20; see also Mass. Regs., supra note 93, § 31.04(3) (describing computation of the annual land-area minimum).

[118] Mass. Regs., supra note 93, § 31.06(5).

[119] Id. § 31.06(6). Such concerns are valid only so long as planning requirements are applied "as equally as possible" to subsidized and nonsubsidized housing alike. Mass. Gen. Laws Ann. ch. 40B, § 20. The applicant bears the burden of proving unequal treatment. Mass. Regs., supra note 93, § 31.06(4).

Note that the lack of municipal services rarely will be a valid reason to deny a permit. The local board must show that "installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly." Id. § 31.06(8).

[120] Mass. Regs., supra note 93, §§ 31.06(6)-(7). "Housing need" is defined as "the regional need for low and moderate income housing considered with the number of low income persons in a city or town." Mass. Gen. Laws Ann. ch. 40B, § 20. The locality bears the burden of proof as to both of these conditions. Mass. Regs., supra note 93, §§ 31.06(6)-(7).

[121] Mass. Regs., supra note 93, § 31.07(1)(e) (citing Board of Appeals v. Housing Appeals Comm., 294 N.E.2d 393, 413 (Mass. 1973)). A municipality seeking to rebut this presumption bears a heavy burden. It must show, for example, that the design of the proposed housing is

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C. *Coordinated Developments in Anti-Snob Zoning*

The Act has not been the sole tool used to reduce the problems associated with exclusionary practices. Judicial decisions, executive orders, and regulatory initiatives all have played significant roles in expanding and clarifying the scope of the Act as originally written.[122]

Progress under the Act was limited for the first several years as the Act's constitutionality and scope remained unsettled.[123] In particular, it was unclear whether the Act conferred the power on local boards to override local zoning regulations. The Massachusetts Supreme Judicial Court finally resolved these questions in the 1973 landmark case *Board of Appeals v. Housing Appeals Committee.*[124]

In *Housing Appeals*, the court affirmed the HAC's order granting construction permits to low-income housing developers in the towns of Hanover and Concord. In so doing, the court upheld the Act's constitutionality[125] and, in examining the legislative history, explicitly concluded that "the Legislature has given the boards the power to override local exclusionary zoning practices."[126]

"seriously deficient" and that additional open space is "critically needed." Id. § 31.07(2)(b). In addition, the HAC strictly scrutinizes the content of local regulations, which must "bear a direct and substantial relationship to the protection of such local concerns." Id. An even stronger showing is required where housing need is relatively great. Id. § 31.07(2)(c).

The statutory definition of "consistent with local needs" incorporates all the above-discussed factors, but it is unclear as to how they are to be grouped, weighed, and balanced. The balancing test currently in use is a product of the decision in *Housing Appeals*. See Vaughn, supra note 21, at 57 & n.147.

[122] Administrative regulations providing procedural rules for the HAC, Mass. Regs., supra note 93, §§ 30.01-.15 and detailing the HAC's criteria for decisions, id. §§ 31.01-.10, have been discussed together with the statutory provisions they clarify and supplement. See supra notes 106-21 and accompanying text. Other regulatory initiatives are discussed separately. See infra notes 130-63 and accompanying text.

[123] See Danielson, supra note 16, at 305 (discussing the hesitancy of developers and suburbs in the face of uncertainty); Vaughn, supra note 21, at 38 (same).

[124] 294 N.E.2d 393 (Mass. 1973).

[125] The court rejected the towns' arguments that the statute violated the home rule amendment to the Massachusetts Constitution, id. at 407-10, that it was unconstitutionally vague, id. at 411-14, that its zoning overrides were unconstitutional spot zoning, id. at 410-11, and that its alternative methods of reviewing grants and denials of comprehensive permits violated state and federal equal protection guarantees, id. at 416.

[126] Id. at 423; see also id. at 403-07 (analysis of legislative history). This was reinforced by the court's decision in Mahoney v. Board of Appeals, 316 N.E.2d 606 (Mass. 1974), appeal dismissed, 420 U.S. 903 (1975), which reaffirmed *Housing Appeals* and expressly ratified the HAC's override of a local zoning bylaw.

The *Housing Appeals* decision also clarified a number of procedural issues. For example, it organized the two halves of the balancing test. See supra notes 120-21 and accompanying text. Subsequent decisions resolved other questions. See, e.g., Town of Chelmsford v. DiBiase, 345

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Even after *Housing Appeals*, municipalities continued to resist and to delay significant progress in implementing the Act. Angered by this intransigence on the part of affluent suburban areas, Governor Edward J. King promulgated Executive Order 215 in 1982, directing all state agencies to withhold "discretionary development-related financial assistance" to communities that are "unreasonably restrictive of new housing growth" because of exclusionary measures.[127] Under the order, funds will be denied even if the state is acting only as "a mere conduit for federal funds."[128] Some of the programs to which the order applies include:

> economic development assistance; open space and recreation funds; technical assistance grants; so-called "urban systems" transportation improvements; conservation land grants; elderly housing; sewer collection system and water system grants; parking facility funds; convention center facility grants; federal grant funds for development-related activities; and the review of federal grant applications for development assistance.[129]

Executive Order 215, although powerful in its own right, represents only one half of a "carrot and stick" housing regime. Various state subsidy programs make production of affordable housing more attractive to developers as well as to local communities. The key feature of such programs is the promotion of mixed-income development, rather than the traditional, greatly feared, strictly low-income "projects."[130] Three of the most important subsidy programs are the Homeownership Opportunity Program

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N.E.2d 373 (Mass. 1976) (HAC cannot override a town's good-faith taking of land); see also infra note 130 (discussing holding of Zoning Bd. of Appeals v. Housing Appeals Comm., 433 N.E.2d 873 (Mass. 1982)).

[127] Exec. Order No. 215, para. 1 (1982), *reprinted in* Executive Office of Communities & Dev., Local Housing Policies and State Development Assistance: A Guide to Executive Order 215, at 2 (1985) [hereinafter Exec. Order 215].

[128] Harold A. McDougall, From Litigation to Legislation in Exclusionary Zoning Law, 22 Harv. C.R.-C.L. L. Rev. 623, 648 (1987).

[129] Exec. Order 215, supra note 127, at para. 1.

[130] Mixed-use developments are eligible for the Act's comprehensive permit and zoning appeals process as long as developers meet its eligibility criteria. Zoning Bd. of Appeals v. Housing Appeals Comm., 433 N.E.2d 873 (Mass. 1982). Most developers do this by qualifying as a "limited dividend organization":

> any applicant which proposes to sponsor housing under [the Act]; and is not a public agency; and is eligible to receive a subsidy from a state or federal agency after a comprehensive permit has been issued and which . . . agrees to limit the dividend on the invested equity to no more than that allowed by the applicable statute or regulations governing the pertinent housing program.

Mass. Regs., supra note 93, § 30.02.

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("HOP"), the State Housing Assistance for Rental Production ("SHARP"), and the Tax-Exempt Loans to Encourage Rental Housing ("TELLER").

HOP, established in 1986, is potentially the most significant such incentive program. Most importantly, HOP not only creates affordable housing but explicitly encourages socioeconomic integration. Its implementing regulations state that the "goal of producing housing that is affordable by Low or Moderate Income Households must be considered in conjunction with the social and economic benefits associated with housing developments which serve households with a variety of incomes."[131]

For proposed developments to qualify for HOP assistance, at least thirty percent of the housing units in the proposed development must be set aside for low- and moderate-income households.[132] These units are subject to strict resale controls, lasting at least forty years, to ensure that they remain "affordable."[133] The program provides a number of incentives,[134] including low-interest mortgage loans and guarantees to developers, low down payment mortgages to low- and moderate-income would-be homeowners, and grants to cities and towns to encourage municipal construction.[135] Although HOP encourages communities to donate land and to negotiate with developers for construction of more affordable housing,[136] it recognizes the comprehensive permit and appeal process as a method of resolving conflicts in favor of the developer.[137]

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[131] Mass. Regs., supra note 93, § 37.03.

[132] Id. § 37.10. Developments that have demonstrated community support are not subject to the stricter standards set forth in § 37.10. Id. § 37.05. For example, the regulations require only a 25% minimum set-aside for low- and moderate-income households in these developments. Id. § 37.06.

[133] Id. § 37.08.

[134] Id. § 37.03.

[135] See Peter S. Canellos, Changes in Rules, Attitudes Prescribed on Housing Logjam, Boston Globe, Jan. 3, 1989, at 1, 5; see also Mass. Regs., supra note 93, § 37.07 (discussing HOP-financed or HOP-assisted mortgages to low- and moderate-income households).

[136] The EOCD regulations state:

> It is the primary goal of the HOP Program to encourage communities to play an active role in organizing a local housing partnership, identifying their housing needs and taking specific steps to develop the type of housing that is appropriate to meet those needs. The HOP Program, therefore, has been designed to give priority consideration to applications that are submitted as collaborative (i.e. joint) efforts between the community and the proposed developer and will allocate its resources accordingly.

Mass. Regs., supra note 93, § 37.05.

[137] Id. § 37.05(3) (stating that applications will be considered from "a developer who has not been successful in securing either the participation or the approval of the involved community . . . but otherwise has an eligible proposal"); see also Canellos, supra note 135, at 5 (arguing that developers may use threat of appeal as a negotiating tool).

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Established in 1983, SHARP encourages the production of mixed-income apartment developments. Under SHARP, the Massachusetts Housing Finance Agency ("MHFA") provides low-interest, long-term loans to developers if a quarter of the units are permanently reserved for low-income tenants. Developers then market the low-income units to holders of federal Section 8 or state Chapter 707 rental-housing vouchers.[138]

TELLER authorizes local housing authorities to issue tax-free bonds to financing-qualified, mixed-income developments. To qualify, at least 20% of the TELLER units must be rented to households with incomes less than half the area median. Alternatively, at least 40% of the units must be rented to households with incomes less than 60% of the area median. These units, however, may revert to the market rate after fifteen years.[139]

Furthermore, in response to the 1989 report of the Special Commission Relative to the Implementation of Low and Moderate Housing Provisions,[140] the Department of Community Affairs promulgated regulations establishing a new Local Initiative Program ("LIP").[141] Critics complained primarily that the HAC too narrowly defined "low and moderate income housing," excluding all affordable housing not *monetarily* subsidized by the federal or state government. Such a definition provided cities with "little incentive to undertake housing initiatives which do not require direct state or federal financial assistance."[142]

The 1990 regulations explicitly recognize that technical assistance given by the Department of Community Affairs[143] is a subsidy that makes recipient projects "low or moderate income housing" within the scope of the

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[138] Canellos, supra note 135, at 5; Andrew J. Dabilis, Many Try to Slam Door on Subsidized Housing, Boston Globe, Jan. 2, 1989, at 1, 22.

[139] Canellos, supra note 135, at 5.

[140] See Special Comm'n Relative to the Implementation of Low and Moderate Housing Provisions, Report of the Special Commission Relative to the Implementation of Low and Moderate Housing Provisions 11 (1989) (unpublished report, on file with the Virginia Law Review Association) [hereinafter Special Comm'n Report] (discussing various criticisms).

[141] Mass. Regs., supra note 93, §§ 45.01-.09.

[142] Id. § 45.01 (introducing the LIP program and its goals); see also Andrew J. Dabilis, Panel Urges Changes to State Antisnob Law, Boston Globe, Apr. 10, 1989, at 22 (reporting that State Senator Frederick Berry, Cochairman of the Special Commission, recommended that more affordable housing units be built without subsidies by granting density bonuses to developers); Special Comm'n Report, supra note 140, at 21-22, 24 (stating that the LIP definition of affordable housing does not require direct subsidization).

[143] Such assistance "may include, but is not limited to, assistance in evaluating sites, selecting developers, reviewing development proposals, determining project feasibility, and monitoring compliance with Use Restrictions and Regulatory Agreements." Mass. Regs., supra note 93, § 45.05.

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Act.[144] Communities participate in LIP by requesting that developments be certified by the department as "Local Initiative Units" or "Comprehensive Permit Projects."[145] Thus, privately developed affordable housing units may contribute to the town's ten percent affordable housing "quota."[146]

LIP also indirectly addresses the concern that towns often build relatively noncontroversial elderly housing, while ignoring the greater need for family housing.[147] The new regulations expressly state that "[t]he most critical needs in the Commonwealth are for family and special needs housing in general and low-income family housing in particular."[148] To this end, the regulations prohibit the grant of otherwise-permissible approvals if housing "is unresponsive to local and regional housing needs"[149] or if such approval would raise the proportion of subsidized elderly housing in the community to more than five percent of the total housing stock.[150]

The 1989 report of the Special Commission also recommended that the zoning appeals process under the Act become "more responsive to local concerns."[151] In response, the Department of Community Affairs developed regulations "to allow communities increased participation and influence over the housing development process."[152] These regulations modified the Act's process in two distinct ways.

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[144] Id. §§ 45.05-.06. According to the regulations, the "Department shall provide subsidy, in the form of technical assistance, to each Local Initiative Unit and Comprehensive Permit Project." Id. § 45.02. These units are then considered "Subsidized Housing Units," defined as "low and moderate income housing" under the Act. Id.

[145] Id. §§ 45.03-.04 (setting out the requirements that must be satisfied for the developments to qualify). Application for such status must be made by the town's "Chief Elected Official." Id.

[146] Id. § 45.06 (stating that "Local Initiative Units and Comprehensive Permit Projects approved by the Department shall be . . . included in the Subsidized Housing Inventory"); see also Mass. Gen. Laws Ann. ch. 40B, § 20 (setting the 10% goal).

[147] As one critic explained this problem:

> The Act makes no distinction between family and elderly housing. Because of this definitional defect, suburbs are allowed to permit only elderly housing and to exclude housing for the vast majority of the urban poor. Thus, although the need for family housing is far greater than the need for elderly housing, it is accorded less attention because of this loophole in the Act.

Reed, supra note 21, at 121.

[148] Mass. Regs., supra note 93, § 45.07.

[149] Id. § 45.07(1).

[150] Id. § 45.07(2). This provision may be waived if "owing to specific circumstances of housing need or market conditions, . . . strict application of this provision would not be in the public interest." Id.

[151] Special Comm'n Report, supra note 140, at 1.

[152] Mass. Regs., supra note 93, § 46.01.

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First, the regulations require the developer to solicit and consider the views of local officials.[153] Under the regulations, the Department of Community Affairs issues guidelines ensuring that no project receives subsidies—which allow the developer to apply for a comprehensive permit—unless three conditions are met. The developer must make "good faith efforts to present the proposed project to and seek support from the [municipality's] Chief Elected Official."[154] That official must then have an opportunity to comment upon the proposed development,[155] and, finally, the department is required to give those comments "due consideration."[156]

Second, the department may grant, with the assent of a Community Review Board, "Certifications of Performance."[157] A community achieves certification once it meets several standards of performance promulgated by the department.[158] First, five percent of the municipality's existing housing stock must consist of subsidized low- and moderate-income housing. Second, there must be "recent effort" in providing low- and moderate-income housing (generally defined as the addition of low- or moderate-income housing equal to one percent of the community's year-round housing stock within the past five years) that is "the result of affirmative local action and/or support." Third, there must be a "reasonable local process" for considering proposed developments, a process that has a demonstrably "positive effect on the provision of low and moderate income housing." Finally, a "substantial share" of the community's subsidized housing must be for families.[159]

A community may satisfy these standards of performance in two ways. First, the community may submit a Housing Development Action Plan conforming to department guidelines.[160] Second, the municipality may take

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[153] Id. § 46.03.
[154] Id. § 46.03(1).
[155] Id. § 46.03(2).
[156] Id. § 46.03(3).
[157] Id. § 46.07; see also id. § 46.10 (ordering the establishment of a Community Review Board to review the applications for Certifications of Performance).
[158] Id. § 46.07; see id. § 46.06 (ordering the establishment of standards of performance).
[159] See Executive Office of Communities & Dev., Community Participation in Subsidized Housing Development 2 (Jan. 8, 1990) (unpublished report, on file with the Virginia Law Review Association).
[160] Mass. Regs., supra note 93, § 46.04. These plans must include an evaluation of present housing needs, a projection of future housing needs, numerical goals, a plan for achieving these goals, procedures and criteria for evaluating proposed low- and moderate-income housing developments, specific provisions for low-income family and special-needs housing, and evidence of conformity with other land-use planning objectives. Id. Such a plan may be submitted only after a public hearing and other opportunities for public participation. Id. In addition, the department may promulgate additional guidelines governing submission of plans. Id. § 46.11.

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"other municipal actions,"[161] demonstrating that it "has made progress in reaching the ten percent objective . . . at the most substantial rate that is feasible for a community of similar size and housing characteristics."[162] Such certification gives rise to a presumption that the actions of a local board of appeals pursuant to an approved Housing Development Action Plan are "consistent with local needs" for purposes of the Act.[163]

III. An Assessment of the Massachusetts Zoning Appeals Regime

Critics sharply dispute the effectiveness and wisdom of inclusionary housing programs in general and the Massachusetts zoning appeals system in particular. Although such criticisms are valuable and merit discussion, it is misleading to evaluate the Massachusetts scheme only by raising and assessing individual criticisms. At the outset, one must recognize that any attempt to socioeconomically diversify suburbia must confront the enormously strong symbolic appeal of localism.[164] At the same time, an inclusionary

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[161] Id. § 46.07.

[162] Id. § 46.06.

[163] Id. § 46.09.

[164] To begin with, the town intuitively seems to be one of the most fundamental units of social organization. As Alexis de Tocqueville explained, "it is man who makes monarchies and establishes republics, but the township seems to come directly from the hand of God." 1 Alexis de Tocqueville, Democracy in America 60 (Henry Reeve trans., Phillips Bradley ed., Alfred A. Knopf 1945) (1840). Indeed, almost from the very beginning of the Republic, localities have been praised as the birthplace of American culture. Max Lerner found in localities "the seed ground of what is characteristically American." 1 Max Lerner, America as a Civilization 151 (1957).

Localities also have been lauded as repositories of political virtue and popular participation—"little republics," in Thomas Jefferson's words. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), *in* 13 The Writings of Thomas Jefferson 394, 400 (Albert E. Bergh ed., 1905). "Municipal institutions," wrote Tocqueville:

> constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty.

Tocqueville, supra, at 61.

With the coming of suburbanization and residential municipalities, the locality has taken on yet another symbolic role, becoming the defender of home and family, "a quiet place where . . . family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (upholding a zoning ordinance restricting the number of unrelated people who could share a single dwelling). For a more complete exploration of localism in America, see Gerald Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1057 (1980) (arguing that local governments are the only avenue for widespread political participation by the citizenry); Charles M. Tiebout, A Pure Theory of Local Government Expenditures, 64 J. Pol. Econ. 416 (1956) (an efficiency-based argument for local autonomy).

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program must not offend another broad strain of American thought that views municipalities with justifiable suspicion.[165] A program like the Massachusetts regime therefore will generate considerable controversy.[166] What some view as an infirmity in a legislative schema, however, may represent a necessary trade-off required to achieve an important policy goal. In short, any program that aspires to even modest success must "straddle the fence," maintaining a balance between competing social and moral visions.

With this in mind, the following analysis assesses the Massachusetts regime's ability to satisfy and to balance a series of often-conflicting goals. The evaluation centers around five goals: (1) An inclusionary zoning program should socioeconomically integrate a suburban community in a process that is both incremental and self-limiting to prevent overcorrection; (2) An inclusionary zoning program should create as much affordable housing as possible, ideally meeting the region's need for low- and moderate-income housing; (3) An inclusionary zoning program should not give rise to counterproductive side effects; (4) The substance and procedure of an inclusionary zoning program should facilitate the consideration of legitimate local concerns; (5) An inclusionary zoning program should be relatively easy and inexpensive to administer, minimizing delays and total development costs on local and state treasuries.

It should be emphasized, however, that a successful inclusionary housing program cannot focus solely on the *creation* of affordable housing. The *location* of affordable housing should be a primary concern as well. Any subur-

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[165] The classic antilocalist text is *The Federalist No. 10*, warning of "the violence of faction" and "their propensity to . . . dangerous vice." The Federalist No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961). In particular, Madison was concerned about the untrammeled exercise of majoritarian power. A majority may "sacrifice to its ruling passion or interest, both the public good and the rights of other citizens." Id. at 45. This, Madison believed, was more likely to happen in smaller societies:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently a majority will be found of the same party; and the smaller the number of individuals composing a majority, and the smaller compass within which they are placed, the more easily they will concert and execute their plans of oppression.

Id. at 48. For a discussion of modern scholarly critiques of localism, see Briffault, supra note 32, at 403-35.

[166] Indeed, this difficulty has caused some to abandon entirely the effort to open the suburbs. After the failure of New York's Urban Development Corporation experiment, its director Edward J. Logue reluctantly concluded that "[t]here is no constituency in the United States today of any consequence for opening up the suburbs." Danielson, supra note 16, at 325. Prominent sociologist Nathan Glazer grimly decided after examining the range of strategies needed to effect change that "the task is impossible. . . . I don't see how we can expect anything but resistance." Nathan Glazer, On "Opening Up" the Suburbs, 37 Pub. Interest 89, 110-11 (1974).

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ban inclusionary program that ignores or minimizes the importance of the location of housing will have only limited success at great cost.[167] The essential and central purpose of inclusionary zoning programs therefore must be the effective integration of the suburbs, to the greatest extent possible, even if the houses and apartments thereby generated do not meet completely the demand for affordable housing.

A. *Achieving Optimal Suburban Integration*

Some housing advocates criticize the Act for limiting a municipality's obligation to construct affordable housing through the use of numerical ceilings. They fear that these admittedly arbitrary limits may enable communities to avoid meeting their "fair share" of the actual need for low- and moderate-income housing.[168] On the other hand, conservative critics argue that any attempt at what they call "forced integration"[169] is unwarranted and potentially harmful. These critics cite studies that question the desirability of socioeconomic integration[170] and that attempt to correlate socioeconomic homogeneity with "less violent crime, less property crime, better academic performance by students, less rancorous conflict in public decision-making, more fiscal integrity in the community's budget process, and closer congruity between public opinion and governmental policy."[171] Integration and increased heterogeneity, these critics argue, "would spoil the hard-won 'sanctuary' of the middle class."[172]

The challenge, then, is to heterogenize as much as possible while keeping potential adverse consequences de minimis. Even some of the strongest advocates of opening the suburbs admit that "enough homogeneity must be present to allow institutions to function and interest groups to reach worka-

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[167] The cheapest and easiest places to build affordable housing, after all, are where raw land costs are lowest. But constructing affordable housing in these places—rural areas or inner-city ghettoes—will do nothing to solve the fiscal imbalances, suburban sprawl, social immobility, and unrest that suburban exclusionary practices create.

[168] See Reed, supra note 21, at 120; Rubinowitz, supra note 51, at 91 ("[T]he statutory quotas bear no direct relation to this regional shortage. In fact, the shortage is likely to be so great that a program which fulfilled every community's obligations under the law would fall far short of meeting the regional needs.").

[169] See, e.g., Richard M. Nixon, News Conference (Dec. 10, 1970), *in* N.Y. Times, Dec. 20, 1970, at 36 ("I believe that forced integration in the suburbs is not in the national interest.").

[170] See, e.g., Amos H. Hawley & Vincent P. Rock, Introduction to Segregation in Residential Areas 1, 20 (Amos H. Hawley & Vincent P. Rock eds., 1973) ("At present, the desirability of intervention to foster socioeconomic mixing in residential areas is uncertain. . . .").

[171] G. Alan Tarr & Russell S. Harrison, Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning, 15 Rutgers L.J. 513, 562-63 (1984) (footnotes omitted).

[172] Downs, supra note 52, at 166.

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ble compromises."[173] After studying the problem Richard Babcock and Fred Bosselman concluded:

> [A] balance of housing goals must be established at a level that will maintain a reasonable amount of various types of housing in each community and not exceed a hypothetical tipping point. Moreover, some assurance needs to be given to local communities that the "reasonable" number of apartments or mobile homes they might be willing to accept is not the nose of the camel—the advance guard of an inundation that will turn the community rapidly into a suburban slum.[174]

Anthony Downs justifies the need for a quota in a slightly different fashion, citing the need for "middle-class neighborhood dominance":

> Most middle- and upper-income households want to live where they are personally safe, where their homes are safe and at least maintain initial economic values, and where their children are exposed to cultural value-reinforcing experiences . . . . These conditions create neighborhood viability for them. None would be seriously weakened by the presence of some low- and moderate-income households in the area. Hence middle- and upper-income households can attain their basic residential objectives through *dominance* of their neighborhoods and do not require *total exclusion* of low- and moderate-income households.[175]

Therefore, a program recognizing these concerns, designed to ensure the preservation of middle-class mores and to avoid passing the "tipping point," may meet with considerable success.[176]

Other critics of inclusionary programs fear that the programs will be unsuccessful in achieving true heterogeneity and instead will merely "disperse ghettoes."[177] Low- and moderate-income suburban housing, they argue, will be spatially isolated, "set off in the 'corner' of the various suburbs."[178] These concerns have been addressed largely by the increased reli-

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[173] Herbert J. Gans, People and Plans 175 (1968).

[174] Babcock & Bosselman, supra note 39, at 116.

[175] Downs, supra note 52, at 94-95. Downs addresses, and dismisses, the charge of "middle-class chauvinism" that immediately springs to mind. See id. at 97-98.

[176] For instance, a study found that an "overwhelming majority" of suburban Dayton residents would "accept low- and moderate-income households into their neighborhood" if there were assurances that the crime and delinquency rate would not increase, that the households would share similar values, and that property values would not be affected. Nina J. Gruen & Claude Gruen, Low and Moderate Income Housing in the Suburbs: An Analysis for the Dayton, Ohio Region 67-75 (1972).

[177] Vaughn, supra note 21, at 70.

[178] Id.

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ance on mixed-income developments as a source of affordable suburban housing. Furthermore, house-by-house integration is not essential to the effective operation of an inclusionary program. Anthony Downs, for example, favors integration at the neighborhood level, not at the block level, to maximize access to jobs and schools while allowing lower-income families to reside near one another.[179] Herbert Gans, in his study of the Levitt & Sons development at Willingboro, New Jersey, has made similar suggestions:

> Putting together all the arguments for and against homogeneity suggests that the optimum solution . . . is *selective homogeneity at the block level* and *heterogeneity at the community level.* . . . Selective homogeneity on the block will improve the tenor of neighbor relations, and will thus make it easier—although not easy—to realize heterogeneity at the community level.[180]

Moreover, concerns about psychological isolation,[181] though not unjustifiable,[182] may be overblown. First, once middle-class dominance is assured, interaction between various socioeconomic groups may take place rather fluidly.[183] Second, even if there is a degree of isolation, intergroup interaction still takes place within the public schools and other civic institutions. The

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[179] See Downs, supra note 52, at 103-14, 166-67.

[180] Herbert J. Gans, The Levittowners 172 (Columbia Univ. Press 1982) (1967).

[181] See, e.g., Hawley & Rock, supra note 170, at 20 ("There is no evidence from field studies that socioeconomic mixing is feasible. The trend in the movements of urban population is toward increasing separation of socioeconomic categories . . . .").

[182] For example, *Boston Globe* columnist Bella English chronicled pervasive discrimination in the wealthy Boston suburb of Wellesley:

> When Jean Brissette's daughter first started at Wellesley High, a boy asked her for a date. He later called and told her he couldn't make it. "My father says I can't go out with you. You live on Barton Road," he said.
>
> Living on Barton Road—the location of the town's only low-income housing project—is like wearing a scarlet "B" on your forehead. The words "Barton Road" carry an indelible stigma in this wealthy town, where the average home costs $400,000.

Bella English, A Scarlet 'B' in Wellesley, Boston Globe, Jan. 30, 1989, at 17. On the other hand, existence of this type of irrational conduct may be, arguably, precisely the reason why suburbs should be socioeconomically integrated. The only way to eliminate these destructive stereotypes is to encourage contact and communication.

[183] See Gans, supra note 180, at xiv-xvi. For example, Gans describes Willingboro, 38% black: "I was told that while interracial social life is rare, all churches, organizations and voluntary associations are integrated. . . . [T]he community is a collection of individual households who live together as good neighbors . . . ." Id.; see also Andrew J. Dabilis, Area Affordable Housing Movement Stalls: Some Modest Gains in Manchester, Boston Sunday Globe, Dec. 23, 1990, (North Weekly), at 1 North (reporting that neighbors of a family living in an affordable housing unit in wealthy Manchester-by-the-Sea have been "gracious and accepting").

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town meeting structure of local government in many New England suburbs also increases the likelihood that this interrelation will occur.

Essentially, the Massachusetts zoning regime operates as recommended by Babcock, Bosselman, and Downs. A community that meets the statutory minima is assured that no more housing will be built against its wishes. Furthermore, the ten percent threshold is low enough to ensure continued middle-class dominance and to prevent the problems some critics fear will result from heterogenization. In this instance, the law implicitly sacrifices full attainment of the regional housing need in favor of constructing a program that will successfully promote a moderate level of heterogeneity. All things considered, the Act is an effective vehicle for achieving reasonable and stable levels of suburban heterogeneity.

B. Maximizing the Creation of Affordable Housing

A housing program not only should promote socioeconomic heterogeneity but ensure that affordable housing is available. Although impossible to achieve both goals fully, it is essential that construction projects address the need for affordable housing. In negotiating the tension between these goals, the Act has developed, perhaps inevitably, some minor problems.

In particular, the Massachusetts system does not adequately distinguish between family and elderly housing.[184] Suburban communities tend to favor elderly housing over family housing: "The elderly are a very good way to salve your social conscience. They generally pose few social problems, and even if they are bad tenants, there's a substantial probability that they will die or move into a retirement home in a few years . . . ."[185] The elderly have no children requiring public education and otherwise make few demands on the town treasury.[186] As a result, many communities construct disproportionate amounts of elderly housing while ignoring family housing and thus fail to address effectively the need for *all* types of affordable housing.[187]

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[184] See Advisory Comm'n on Housing and Urban Growth, American Bar Ass'n, Housing for All Under Law 576-77 (Richard P. Fishman ed., 1978) [hereinafter Housing for All]; Reed, supra note 21, at 121.

[185] John Weicher, Panel Discussion: Redistribution and Regulation of Housing (1983), *in* Symposium, Redistribution of Income Through Regulation in Housing 32 Emory L.J. 767, 818 (1983).

[186] See supra notes 37-39 and accompanying text (discussing the practice of fiscal zoning).

[187] See supra note 147. Only one-third of the units constructed pursuant to the Act have been family housing; more than 10,000, however, are elderly housing. Margaret R. Guzman, Chapter 774: Anti-Snob Zoning, Two Decades of Impact 26-27 & n.41 (1989) (unpublished government honors thesis, Clark University, on file with the Virginia Law Review Association).

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It is possible that this problem may not be as severe as was feared.[188] Construction of affordable elderly housing may result indirectly in the creation of affordable family housing, through the economy's "trickle-down" method of housing production.[189] Furthermore, the 1990 LIP limits construction of elderly housing not needed in the community.[190] Nevertheless, such provisions, encouraging family-housing production, should be required of all communities, not just those that choose to participate in LIP.

Some criticize the Act for its narrow eligibility criteria. The restrictive definition of "low or moderate income housing," they argue, limits the Act to covering only directly subsidized projects.[191] Although some believe this discourages private developers who otherwise could construct affordable housing,[192] this concern no longer is significant in light of recent developments. First, HOP encourages mixed-income development and has significantly involved private developers, creating a widely praised public/private partnership. "The program, its architects say, has in two years created roughly 6,000 units of housing statewide, approximately 2,000 of them subsidized for moderate-income buyers. . . ."[193] Second, LIP provides technical assistance to privately funded developments and brings them within the statutory scheme.[194]

Some critics also have questioned the system's passive approach. Critic Louis Rubinowitz notes that "the law is not self-executing; housing does not appear automatically."[195] The Boston Metropolitan Area Planning Council further explains these concerns:

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[188] But see Letter from Werner A. Lohe, Counsel, HAC, to author (June 24, 1991) (on file with the Virginia Law Review Association) ("I can't prove it, but I think [this problem] is fairly severe . . . [and] still largely unaddressed.").

[189] See infra notes 203-04 and accompanying text.

[190] See Mass. Regs., supra note 93, § 45.07; see also supra notes 147-50 and accompanying text (discussing construction of elderly housing).

[191] Mass. Gen. Laws Ann. ch. 40B, § 20.

[192] See Reed, supra note 21, at 121 & n.122. Indeed, it was feared that the Act would not apply to so-called "turnkey" projects, in which a private developer constructed low-income housing and sold or leased it to local housing authorities. See Danielson, supra note 16, at 304; Rubinowitz, supra note 51, at 91.

[193] Canellos, supra note 135, at 5. The praise for the program is strong:

> [M]ost agree, the Homeownership Opportunity Program is a significant innovation. The program gives developers an incentive to break through exclusive zoning, virtually ensuring that the units they build will be sold, and reduces prices on family-sized units below $100,000 with a relatively inexpensive average subsidy of $13,000.
>
> . . . .
>
> "The HOP program brought a lot of new developers into the field," [Marc] Draisen [Executive Director of the Citizens Housing and Planning Association] said.

Id.; see also supra notes 131-37 and accompanying text (describing HOP).

[194] See supra notes 143-46 and accompanying text.

[195] Rubinowitz, supra note 51, at 93.

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> "[T]he law merely creates a new method . . . for relief from restrictive provisions in local zoning and building codes. The initiative remains with these developers to find a site, to obtain financing and to develop a low- or moderate-income housing proposal. The law has no ameliorating effect on the availability of sites, the high cost of land, or the scarcity of federal and state funds for housing, each of which has a significant effect on the production of housing."[196]

This "flaw," however, in fact may be one of the Act's greatest virtues. The American Bar Association's Advisory Commission on Housing and Urban Growth believes that the "relative passivity of the law is largely responsible for its durability."[197] The commission contrasted the Act to a similar but more activist New York regime, which despite initial successes was an overall failure.[198] By making participation optional on the part of developers, the Act avoids creating some of the disincentives that plague other inclusionary schemes.[199]

The Massachusetts scheme must trade off full satisfaction of the need for low- and moderate-income housing in order to gain political acceptance and to ensure successful suburban diversification. Nonetheless, it contains no structural impediments that prevent the creation of a significant amount of affordable housing. In short, the Act's passive approach is essential to the program's continued existence and feasibility.

C. *Avoiding Undesirable Side Effects*

An inclusionary housing program not only must facilitate the construction of low- and moderate-income suburban housing but also must minimize opportunities for circumvention and subversion. Some scholars have criticized suburban inclusionary measures for actually *increasing* suburban exclusion under the guise of eliminating it and for slowing the production of affordable housing.[200] Without careful structuring, inclusionary program requirements may act merely as a construction tax, slowing overall

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[196] Id. at 94 (quoting Boston Metropolitan Area Planning Council, 774 Plus Two: An Interpretive Analysis of Chapter 774 and a Review of Activities 6 (1972)).

[197] Housing for All, supra note 184, at 575.

[198] See id.. The New York scheme similarly provided bypass mechanisms for local zoning laws, but it ultimately was repealed because of suburban complaints. See Danielson, supra note 16, at 306-22 (describing the New York Urban Development Corporation's rise and fall in more detail).

[199] See, e.g., infra text accompanying notes 200-02.

[200] See Robert S. Ellickson, The Irony of "Inclusionary Zoning," 43 S. Cal. L. Rev. 1167, 1216 (1981) ("The irony of inclusionary zoning is . . . that, in the places where it has proven most likely to be adopted, its net effects are apt to be the opposite of the ones advertised.").

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growth.[201] This could sap potential profitability and largely stall residential housing starts.[202]

Beyond this, such a course of action also would reduce the *overall* level of affordable housing in the market because construction of a housing unit *at any level of affordability* increases the supply of affordable housing. When a household occupies a new dwelling—even a million-dollar mansion—another one is vacated. This process recurs down the line and ultimately results in the creation of affordable housing.[203] "Consequently," believes Robert Ellickson, "an excellent way—perhaps even the best way—to improve the housing conditions of low- and moderate-income families is to increase the production of housing priced beyond their reach."[204]

The genius of the process under the Act is that its passive approach implicitly recognizes these realities. By not mandating any specific inclusionary measures, such as minimum percentages of affordable units in all new developments, it leaves market-rate developments alone. It is the builder's option to include affordable units; presumably, the builder will act only when existing bonuses and subsidies make it profitable to do so.[205] The Act does not impose any involuntary construction taxes that will stifle production of affordable housing. Indeed, it allows such locally based restrictions to be swept away.

Finally, critics contend that developers can use the Act to extort concessions from local zoning authorities for projects not involving affordable

201 See id. at 1187-92 (discussing the operation of inclusionary programs as a "tax on the construction of new housing").

202 See After Mount Laurel: The New Suburban Zoning 189 (Jerome G. Rose & Robert E. Rothman eds., 1977).

203 See Ellickson, supra note 200, at 1185 ("The infusion of new housing units into a regional market sets off a chain of moves that eventually tends to increase vacancy rates (or reduce prices) in the housing stock within the means of low- and moderate-income families.").

204 Id. The filter-down process Ellickson describes is not without friction, transaction costs, or delays. Furthermore, construction of new market-rate units does not necessarily generate affordable housing on a one-to-one basis. Some older housing units at the bottom of the chain are taken out of commission, and some newer units are occupied by newly formed households.

Still, there is general agreement that this process does work. See Edwin S. Mills, Urban Economics 123 (2d ed. 1980) ("*[T]he filter-down process provides higher quality housing for the poor than can be provided by construction of new houses for them.*"); John C. Weicher, Housing: Federal Policies and Programs 25-26 (1980) ("[There is] less low-quality housing in areas where there is a high rate of private new housing construction, relative to household formation, even though the private new units are occupied by relatively high-income households who certainly did not live in substandard housing before moving in.").

205 In the case of the nonprofit organization, construction is dependent upon being able to break even after subsidization. Presumably, the current mixed-income subsidy programs (such as HOP, SHARP, and TELLER) allow profitability, given that profit-maximizing developers freely elect to receive their subsidies.

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housing.[206] Because the Act's comprehensive permit process generates substantial costs—costs a developer is not likely to bear lightly—there is no significant threat of extortion.[207] This is an expensive bluff, the costs of which probably would not outweigh any expected benefits.[208] In sum, the Massachusetts system successfully overcomes the problems that may plague other remedial schemes, and it is not vulnerable to easy circumvention.

D. *Considering Legitimate Local Interests*

State inclusionary legislation obviously must be able to abridge local sovereignty in order to succeed. At the same time, the legislatively mandated process should consider legitimate local concerns. Not all local fears, after all, are fairly traceable to prejudice or discrimination. For instance, localities may be genuinely concerned about excessive traffic, inadequate sewage treatment facilities, the preservation of open space, or the protection of environmentally sensitive areas. Granting such consideration is not merely advisable but is necessary if an inclusionary program is to survive and function. The compelling symbolism of the localist ideology demands that municipalities maintain a visible role in the process.

Some have accused the Massachusetts program of failing to consider local concerns[209] and disrupting the municipal planning process.[210] This argument is overdrawn, however. First of all, the structure of the Act gives localities an opportunity to influence the development process in the consolidated hearing. The first actions occur strictly at the local level, and each local agency with a stake in the matter may comment on the proposal.[211] Furthermore, as one commentator has noted, "to describe land use practices in most American communities as examples of planning is purely euphemis-

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[206] See Listokin, supra note 95, at 101; Samuel A. Sherer, Note, Snob Zoning: Developments in Massachusetts and New Jersey, 7 Harv. J. on Legis. 246, 264-65 (1970); Vaughn, supra note 21, at 69-70 & n.223.

[207] For example, a developer would need to form a limited-dividend subsidiary, which would substantially limit potential profit levels. Pursuit of a comprehensive permit further requires significant expenditure of time and money. Moreover, such an extorted zoning variance may be invalidated as contract zoning. See Vaughn, supra note 21, at 69 n.222.

[208] Moreover, from a moral standpoint this problem is not that serious. It is disturbing, of course, when anyone successfully blackmails. At the same time, it is difficult to feel sorry for a town that has brought unwelcome development upon itself through an irrational prejudice against low- and moderate-income residents. One might argue, in that case, that the recipient town got exactly what it deserved.

[209] See, e.g., Reed, supra note 21, at 124 (arguing for a definition of "planning factors" to be broad and to include more local concerns).

[210] See Vaughn, supra note 21, at 71.

[211] Mass. Gen. Laws Ann. ch. 40B, § 21.

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tic."[212] In light of the ways localities design and administer comprehensive plans, many scholars are justifiably dubious about their wisdom and effectiveness.[213]

In addition, subsequent refinements and elaborations of the process under the Act render this criticism a makeweight. Applicable regulations allow the introduction of evidence on a wide variety of local concerns.[214] Also, since the 1990 revisions, a community may structure its obligation to meet affordable housing quotas pursuant to a Housing Development Action Plan. Once such a plan is duly prepared, the HAC must, in the absence of rebutting evidence, sanction any actions taken pursuant to the plan.[215]

To summarize, the Massachusetts zoning appeals system, as currently structured, is extremely solicitous of local concerns. Indeed, it may be overly so.[216] In any case, localities retain a strong voice in the placement of affordable housing, and they have ample opportunity to ensure that legitimate planning considerations are addressed and resolved.

E. Minimizing Administrative Costs

Finally, an inclusionary zoning system should be cheap, quick, and easy to administer. There clearly are certain unavoidable transaction costs inherent in any administrative mechanism. First, there are the additional costs needed to pursue administrative action: filing fees, expert witness fees, attorney fees, and so forth. Second, there are the costs that result from delay; these are especially significant in the housing industry, where interest on construction loans can accumulate day by day.[217] Additional levels of bureaucracy necessarily will create more expenses and opportunities for delay.[218] There is no alternative in this situation, however, because existing

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212 Vaughn, supra note 21, at 71.

213 See Richard F. Babcock, The Zoning Game (1969); Bernard H. Siegan, Other People's Property 1-9 (1976); Jan Z. Krasnowiecki, Abolish Zoning, 31 Syracuse L. Rev. 719 (1980); A. Dan Tarlock, Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against, 9 Urb. L. Ann. 69 (1975).

214 See Mass. Regs., supra note 93, § 31.07(3) (a page-long, nonexclusive list of topics the HAC may consider).

215 See supra notes 160-63 and accompanying text.

216 It would not be difficult for recalcitrant communities to obstruct construction of affordable housing under the pretense of legitimate planning concerns. In addition, the encouragement of local comment certainly increases the administrative costs and delays. See infra notes 232-35 and accompanying text.

217 See Babcock & Bosselman, supra note 39, at 16 ("The longer the delay, the longer a developer's initial investment is tied up without any offsetting income. If he takes out a loan to pay the planning expenses and to buy land, delays prolong the period before he can begin to pay back the loan . . . .").

218 For example, according to one commentator:

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local mechanisms are incapable of addressing the problems arising from exclusionary zoning. Although it is impossible to avoid such expenses completely, the costs still should be kept as low as possible, without sacrificing the responsiveness and accuracy of the administrative process.

The Act and its regulations reduce some administrative costs and delays. First, the Act's statutorily set quotas, although arbitrary, provide simple, easy-to-apply rules.[219] Developers, local authorities, and state officials alike can determine a locality's obligation quickly and easily.[220] In addition, restrictions on evidence,[221] allocations of the burden of proof,[222] and a variety of presumptions[223] streamline the administrative process.[224]

Nevertheless, there remain significant impediments within the zoning appeals system that complicate administration and delay the resolution of individual cases. In fact, it is in this area in which the flaws of the Massachusetts scheme are most apparent. As one commentator noted, "[e]xtensive delay has become endemic to the current system, and such delays have made the cost of a Chapter 774 appeal so high as to preclude all but the best financed and most persistent applicants from utilizing the statute."[225]

> The major issues still obstructing an effective use of Chapter 774 are found within the current administrative process which often requires both local and state level hearings before the developer can begin to build. By creating an additional layer between the local decision and judicial review, this process places further time and financial burdens upon prospective developers.

Vaughn, supra note 21, at 61.

[219] See Listokin, supra note 95, at 56 (describing "simplicity" as one of the appeals of an equal-share allocation plan); see also id. at 27-86 (describing different methods of fair-share allocation). The methodology of fair-share allocation can be incredibly complex. See, e.g., Robert W. Burchell, W. Patrick Beaton & David Listokin, Mount Laurel II: Challenge and Delivery of Low-Cost Housing (1983) (proposing a 430-page allocation plan for New Jersey).

[220] But see Reed, supra note 21, at 120-21 ("The two land area percentage minimums . . . assume a level of statistical sophistication that, for the most part, is lacking in developers' offices, suburban planning departments, lay boards of appeals, and the HAC."). Reed overstates her case, however. Even if calculating the quotas is not effortless, it still has to be much easier than determining an allocation by following a complex, multivariable formula.

[221] See supra note 121.

[222] See Mass. Regs., supra note 93, § 31.06 (allocating burdens of proof).

[223] See id. § 31.07(1).

[224] Furthermore, there may be a preliminary conference to clarify the issues and evidence. Id. § 30.09(4). There also are a series of statutory deadlines designed to shorten the administrative process. See Mass. Gen. Laws Ann. ch. 40B, §§ 21-23.

[225] Vaughn, supra note 21, at 63; see also supra note 218 (further criticizing the Act's administrative procedures).

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First, although there are statutory deadlines that in theory limit the comprehensive permit process to a maximum duration of roughly 170 days,[226] the HAC does not enforce them.[227] The committee often delays closing the hearing until its decision is ready.[228] Some of this may be attributable to staffing problems[229] and fiscally imposed limitations.[230] In addition, it is likely that the HAC waits, where possible, for a negotiated solution to avoid further antagonizing suburban interests with whom state planning officials must later deal.[231]

Second, even if the HAC were predisposed toward expeditious action, suburban municipalities often drag their feet as much as possible, employing a wide range of "dilatory tactics."[232] To begin with, local zoning boards of appeals in the past almost invariably denied comprehensive permits at the local level or issued them with unrealistic conditions.[233] Then, at the state level, localities take advantage of the de novo hearing process. For instance, towns will attempt "to offer evidence on all conceivable issues."[234] Often, the local board will demand separate hearings on each issue for each site, resulting in redundant proceedings.[235]

Third, subsequent state legislation has effectively limited the comprehensive permit process. Even a developer who has obtained a comprehensive

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226 Mass. Gen. Laws Ann. ch. 40B, §§ 21-23 (listing deadlines: submission of application to hearing before the local board of appeals, 30 days; termination of hearing to decision, 40 days; decision to appeal, 20 days; appeal to hearing, 20 days; hearing to decision, 30 days; decision to compliance by the board of appeals, 30 days).

227 See Reed, supra note 21, at 122.

228 Id. Although the developer conceivably could compel the HAC to act, this is unlikely because the developer must maintain cordial relations with the HAC; in fact, the developer will most likely willingly agree to extensions. Id. Other parties have no standing to complain about the HAC's tardiness. Board of Appeals v. Housing Appeals Comm., 363 N.E.2d 548 (Mass. App. Ct. 1977) (rescript opinion).

229 See Vaughn, supra note 21, at 63.

230 For instance, the budget for the HAC was eliminated for 1975 because no member of the state legislature was willing to sponsor legislation funding the controversial committee. Eventually, alternative sources of funding were found. Still, this illustrates the difficulties under which the HAC has labored. See Listokin, supra note 95, at 107.

231 See Sharon P. Krefetz, Low- and Moderate-Income Housing in the Suburbs: The Massachusetts Antisnob Zoning Experience, *in* Housing Policy for the 1980s, at 129, 135-36 (Roger Montgomery & Dale R. Marshall eds., 1980).

232 See Reed, supra note 21, at 122; Vaughn, supra note 21, at 63.

233 See, e.g., Krefetz, supra note 231, at 132. But see infra note 258 (on granting permits).

234 Reed, supra note 21, at 122. Although the "Committee will hear evidence only as to matters actually in dispute," Mass. Regs., supra note 93, § 31.07(3), a hesitant municipality can, and often will, place just about everything in dispute.

235 See Reed, supra note 21, at 122; Vaughn, supra note 21, at 66.

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permit faces other significant administrative hurdles.[236] Once a developer surmounts all these barriers, the town may seek judicial review in the state court system.[237] Municipalities have continued to seek review, even though the Act's constitutionality is well-established.[238] Although the courts deferentially review HAC action, and local boards of appeals rarely win, this process takes time.[239] Indeed, through the pursuance of lengthy appeals, localities have succeeded in defeating proposals for affordable housing development.[240]

To an extent, some delay is necessary in order to gather, present, and consider all relevant evidence adequately. In addition, Executive Order 215's powerful "stick" and the MHFA's lucrative "carrots" may take away some of the incentive for imposing endless delays. Also, the importance of fully addressing environmental concerns is not in question. The delays currently miring the system, however, seriously impede fulfillment of the Act's intentions and must be resolved for the zoning appeals scheme to be fully effective.

IV. An Evaluation of the Practical Effectiveness of the Massachusetts Zoning Appeals Regime

The zoning appeals regime in place in Massachusetts *can be* effective in creating a significant level of affordable housing in the suburbs. Showing that the system *has been* effective, however, is a different matter entirely. Empirical results, to the extent available, show mixed results that lead to

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[236] Under the terms of the Massachusetts Environmental Policy Act ("MEPA"), Mass. Gen. Laws Ann. ch. 30, §§ 61-62H (West 1979), a developer may have to file a detailed environmental impact report, if the project may cause "damage to the environment." Id. ch. 30, §§ 61, 62A. This report is then circulated to a variety of state agencies, which must make written comments that can delay the project an additional 105 days. Id. ch. 30, § 62 B-D. The regulations attempt to reconcile and accommodate MEPA review but do not streamline the MEPA process or incorporate it into the housing appeals regime. See Mass. Regs., supra note 93, § 31.08(3).

Moreover, if any area designated a wetland is involved, the developer must seek a wetlands permit from the *local* conservation commission, thus giving cities and towns another chance to defeat the project. See Mass. Gen. Laws Ann., ch. 131, § 40 (West 1991). Although this process is governed by comprehensive state guidelines, a locality still may delay and obstruct an application. It also may simply ignore state requirements.

Finally, if the project affects an historic district, the local historic district commission also must review the project. Mass. Gen. Laws Ann. ch. 40C, § 6 (West 1979). The potential for delays and obstruction inherent in these provisions should be obvious.

[237] See Housing for All, supra note 184, at 576.

[238] See Krefetz, supra note 231, at 134.

[239] See id.

[240] See Housing for All, supra note 184, at 576; Krefetz, supra note 231, at 134.

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wildly varied conclusions about the Act's effectiveness.[241] Even similar results are subject to wildly varying interpretations. For example, interpreting essentially the same data from 1973 on the progress in granting comprehensive permits and in the construction of projects, one commentator concluded that the Act "facilitated very little suburban housing development,"[242] whereas another touted the "quantifiable housing gains."[243] The debate among housing experts is, in effect, over whether the glass is half empty or half full. Considering the compromising approach inherent in the system, this disagreement probably is inevitable.

At first, progress was very slow. Developers, towns, and the HAC were reluctant to move until reassured about the Act's constitutionality.[244] By mid-1973, only six comprehensive permits had been issued, and construction was underway on only four projects—roughly 400 units—earmarked for the elderly.[245] The HAC had received twenty-five appeals and had issued five decisions.[246]

After the decision in *Board of Appeals v. Housing Appeals Committee*[247] quelled doubts about the Act's constitutionality, things began to move more quickly.[248] By late 1975, over 7,500 units were planned, pending, under construction, or occupied.[249] Still, only 1,108 units had been completed and occupied.[250] By 1979, there had been 111 proposals to construct 14,639 units; 3,600 units had been completed, and another 2,000 were under con-

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241 For instance, one commentator argues that the Act is merely "tilting at the exclusionary zoning windmill by addressing a phantom cause of an unexplained phenomenon." Reed, supra note 21, at 132. By contrast, another has declared it the "first breach in the exclusionary wall." Vaughn, supra note 21, at 37.

242 Rubinowitz, supra note 51, at 90.

243 Vaughn, supra note 21, at 72.

244 See Babcock & Bosselman, supra note 39, at 174-75; Danielson, supra note 16, at 305-06; Housing for All, supra note 184, at 574; Rubinowitz, supra note 51, at 90.

245 Rubinowitz, supra note 51, at 90; cf. Vaughn, supra note 21, at 72 (giving similar statistics).

246 Vaughn, supra note 21, at 72.

247 294 N.E.2d 393 (Mass. 1973).

248 See Danielson, supra note 16, at 306.

249 The total is 7,676. Local boards had granted 27 comprehensive permits, for a total of 2,281 units. Housing for All, supra note 184, at 576. Another 1,547 were in the planning stage at the local level. Id. At the state level, 1,610 units of housing were at the planning stage, and 2,038 were pending before the courts. Listokin, supra note 95, at 103. There were 1,108 units under construction or completed: 908 units following local action, and 200 units following HAC action. Id. at 102-03. There are no precise definitions for these categories, and thus there may be some double-counting. Still, these figures give a reasonably accurate approximation of the magnitude of activity under the Act.

250 Listokin, supra note 95, at 102-03.

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struction or in the final stages of planning.[251] Eighty-two of Massachusetts' 351 municipalities had received at least one application for a comprehensive permit.[252]

During the 1980s, progress under the Act further accelerated,[253] due in part to the new housing incentives.[254] Executive Order 215 also prompted new activity; the threat (or reality[255]) of lost funding prodded into action many municipalities that once "assumed an ostrich-like posture and ignored Chapter 774's existence altogether."[256] The rapid housing price increases of the 1980s[257] also may share responsibility for the new activity, instilling a new sense of urgency. Moreover, despite continued opposition, it appeared that many communities began to resign themselves to reality and haltingly

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[251] Krefetz, supra note 231, at 132-33 (using 1978 data); cf. Reed, supra note 21, at 125 (14,839 units were applied for; 3,462 were built). For additional data on HAC activity during this period, see Guzman, supra note 187; Cynthia Lacasse, An Overview of Chapter 774: The Anti-Snob Zoning Law (Mar. 1987) (unpublished manuscript, on file with the Virginia Law Review Association).

[252] Reed, supra note 21, at 125.

[253] Andrew J. Dabilis, Area Affordable-Housing Movement Stalls: 3 of 37 Communities Hit Target, Boston Sunday Globe, Dec. 23, 1990, (North Weekly), at 1 North, 7 North (citing Clark Zeigler, Director of the Massachusetts Housing Partnership).

[254] See supra text accompanying notes 131-39. These incentives, in addition to spurring builder interest in the construction of affordable housing, also may have increased builder tenacity. Between 1969 and 1978, builders appealed only 71% of permit denials or conditional grants. By 1986, 92% of all denials or conditional grants had been appealed. Lacasse, supra note 251, at 9. Between 1986 and 1989, 96 appeals were brought before the HAC compared to a total of 135 from 1969 to 1986. Guzman, supra note 187, at 31.

[255] Five wealthy Boston suburbs—Weston, Boxford, Topsfield, Somerset, and Hamilton—were declared ineligible for state funding because of their intransigence on the affordable housing issue. Peter S. Canellos, After 20 Years, Anti-Snob Zoning Found Ineffective, Boston Globe, Jan. 1, 1989, at 1, 16. Topsfield, for example, with 4.46% of its housing stock subsidized, lost funding when it returned $1,000,000 in state building grants and rejected attempts to build affordable housing. Dabilis, supra note 253, at 7.

[256] Krefetz, supra note 231, at 133 (noting that the "typical suburban response" to the law was "no response"). Not all municipalities were shaken by the risk of lost revenue, however. For example, note the experiences of Topsfield:

> "They could care less," said one woman who worked on Topsfield's affordable housing siting committee . . . . "It was so disappointing. People said 'Raise our taxes, we don't care,' " of the threatened state sanctions. At the town meeting that turned down affordable housing on town-owned land, she said, people stood and said they just didn't want low-income people from cities like Lynn [a working-class city with a large immigrant and minority population] moving in.

Dabilis, supra note 253, at 7.

[257] The median home price in the Boston area for the second quarter of 1979 was $79,400. Ten years later, in the second quarter of 1989, that price had risen 134% to $186,200. Matt Carroll, Bay State Real Estate Prices Up, Sales Fall, Boston Globe, May 9, 1990, at 57 (data from the Greater Boston Real Estate Board).

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recognized an obligation to meet local housing needs.[258] Indeed, this gradual attitudinal evolution had been going on for some time. As HAC Chairman Murray Corman explained:

> "[T]he early hostility of municipal officials to the very existence of the zoning appeals law has subsided as they see that the procedures of the Committee are open and even-handed, do not represent any state effort to "railroad" through new housing projects, and in the initial cases at least have involved projects that will benefit primarily low-income residents of the suburbs where they are to be built."[259]

By 1989, 33,884 units had been proposed via comprehensive permit applications. Of these, 20,623 "are currently built and occupied or will be shortly."[260]

These figures, however, may underestimate the impact of the Act on the construction of affordable housing. In many cases, it appears that the Act has stimulated the liberalization of zoning laws, thereby allowing construction of subsidized housing as of right.[261] Emily Reed's study of the Act's effectiveness in the Springfield Standard Metropolitan Statistical Area ("SMSA") buttresses this conclusion.[262] By 1979, only 300 units had been constructed in the SMSA pursuant to the Act, out of 944 that were proposed.[263] Between 1970 and 1978, however, 11,615 new subsidized housing units had been built in the SMSA.[264] Of these, 3,439 were built in suburban

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[258] " 'It's clear every town has a responsibility to address its own housing needs and that's pretty universally accepted, even in the more affluent towns.' " Dabilis, supra note 253, at 7 (quoting Clark Zeigler, Director of the Massachusetts Housing Partnership). Between 1969 and 1978, local boards unconditionally granted only 15.3% of all applications. Between 1979 and 1986, on the other hand, approximately 71% of all comprehensive permit applications were granted unconditionally. See Guzman, supra note 187, at 30; Lacasse, supra note 251, at 9.

[259] See Danielson, supra note 16, at 306 (quoting Corman).

[260] Special Comm'n Report, supra note 140, at 9.

[261] See Reed, supra note 21, at 131. Reed, however, labels this construction as "token." One early example of this liberalization is the town of Lexington's adoption of a floating zone for subsidized housing. See Rubinowitz, supra note 51, at 93; Vaughn, supra note 21, at 72 n.234. Note, however, that little progress was made after this step was taken—developers were unable to secure the town meeting's two-thirds vote required for rezonings. Rubinowitz, supra note 51, at 93. The debate in Lexington continued recently. See Jordana Hart, Housing Plan Appears to Gain in a Mixed Lexington Vote, Boston Sunday Globe, May 6, 1990, (Northwest Weekly), at 4 Northwest (describing Lexington's debate on subsidized rental housing). In addition, scattered-site, single-family, subsidized housing often may be built as of right under the terms of existing zoning laws.

[262] Reed, supra note 21, at 125-32. Her study concentrated on the 21 towns in the SMSA.

[263] Id. at 128.

[264] Id. at 129 (Table 3).

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areas.[265] Eight of the twenty-one communities had constructed their entire subsidized housing stock subsequent to the Act's enactment.[266] The amount of subsidized housing in seven other communities more than tripled between 1970 and 1978.[267]

Of course, the resultant dwelling units do not come close to meeting the overall need for subsidized housing.[268] Nevertheless, there clearly has been a significant amount of housing created pursuant to the comprehensive permit/zoning appeals process under the Act. If the 20,623 units constructed under the Act each shelter a median-sized household,[269] 52,795 Massachusetts residents have found housing as a *direct* result of the Act.

The success of the zoning appeals process in increasing suburban diversity is more difficult to appraise. On the surface, progress seems dismally slow: in 1988, the most recent year for which information is available, only twenty-eight of Massachusetts' 351 cities and towns had met the statutory criteria. Ninety-five communities had no subsidized housing at all. This category, moreover, includes many of the state's wealthiest communities.[270]

Such figures, however, understate the progress that has been made.[271] When the Act was passed in 1969, only two localities—the city of Boston and the town of Malden—met the statutory minima.[272] In addition, there has been significant progress that is not reflected in the figures: a number of towns that do not satisfy the Act's targets nonetheless have doubled or tripled the number of subsidized units within their borders since the mid-

265 Id. (subtracting figures for the cities of Springfield, Chicopee, and Holyoke).

266 Id.

267 Id. In addition, the quantity of subsidized housing in two other municipalities more than doubled in the same time period. Id.

268 For example, in 1978, the 16,720 subsidized dwelling units in the SMSA met only 47.1% of the need for subsidized housing. Id. at 126 (Table 2). The mayor of Springfield in 1980 declared a "housing emergency," and the housing authority stopped taking applications for subsidized housing because of the length of the waiting list. Id. at 131-32. This failure to meet total housing need led Reed to conclude that the Act was a failure. Id. at 132.

269 The median Massachusetts household in 1988 had 2.56 persons. U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 1990, at 48 (110th ed. 1990).

270 Andrew J. Dabilis, Many Communities Lag on Affordable Housing, Boston Globe, Nov. 15, 1988, at 1, 27.

271 Indeed, Margaret Guzman has sharply criticized the misplaced reliance of many on the number of communities exceeding the 10% threshold. Such reliance, she argues, oversimplifies a complicated regime. Guzman, supra note 187, at 22, 23-24. In addition, the housing inventory is itself subject to methodological flaws. Id. at 22-23. Still, the EOCD's housing inventory remains the favorite statistical measure of journalists and other popular commentators. See, e.g., Dabilis, supra note 253; Dabilis, supra note 270.

272 Reed, supra note 21, at 125 n.147.

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1980s.[273] Further, many of those localities without subsidized housing are small rural communities; only six of the 225 cities and towns with populations greater that 5,000 have no subsidized units.[274] Many housing specialists close to the issue in Massachusetts rate the program a success. " 'Without the law,' " commented one Boston real estate lawyer, " 'there would be virtually no affordable housing being built in [the] suburbs.' "[275]

V. Conclusion

To praise the Massachusetts scheme for its progress, however, is not to suggest that it needs no improvement. Indeed, a number of refinements could greatly increase its effectiveness. First, the Act should guard more closely against overconstruction of elderly housing at the expense of family housing, extending LIP limits to encompass all localities.[276] Although a more accurate determination of actual need could be obtained by substituting a more complex fair-share calculation, the five-percent limit written into LIP[277] is easy to administer and coordinates well with the other statutory minima.

More importantly, the system needs further safeguards against delay. Some delay is, of course, a necessary evil. At present, however, the process is so time-consuming that its effectiveness is compromised. First, the local consolidated hearing should be streamlined. Although the deadlines built into the Act constrain localities to a degree, the hearing process continues to cause significant delays. Hearings can last for days and, with adjournments, can drag on interminably.[278] Therefore, there should be a strict limit, such as a thirty-day limit, on the amount of time that can elapse between a hearing's commencement and its closure, including adjournments. Because this time limit would be for the benefit of the developer, however, the developer should retain the option of tolling it.

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[273] Dabilis, supra note 270, at 27.

[274] Id. Many of these small communities probably will never be able to reach the 10% target. Indeed, they may not even be desirable locations for subsidized housing, as they "are not centrally located to industry, have little or no access to public transportation and have not historically practiced exclusionary zoning." Guzman, supra note 187, at 24-25.

[275] Dabilis, supra note 270, at 27 (quoting attorney John Nolan); see also Lacasse, supra note 251, at 9 (stating that the Act "appears to be effective in filling a real need in the Commonwealth today").

[276] See supra notes 184-90 and accompanying text.

[277] See supra note 150 and accompanying text.

[278] For instance, in one case, the hearing on the comprehensive permit began on July 9, and ended on December 15, after twelve separate sessions. Milton Commons Assocs. v. Board of Appeals, 436 N.E.2d 1236, 1237 (Mass. App. Ct.), review denied, 440 N.E.2d 21 (Mass. 1982).

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Second, localities' ability to create delays in the appeals process also should be constrained.[279] This problem is best attacked in a coordinated fashion. The scope of issues that may be heard should be narrowed by limiting, to a degree, the de novo hearing before the HAC. One option would be to impose procedural default rules upon the locality; that is, issues that were not addressed in the consolidated hearing below could not be heard before the HAC, absent a showing of good cause. This would be consistent with the underlying purpose of the de novo hearing, which was designed to prevent inadequate records at the local level from impeding the resolution of issues before the HAC.[280] Instead of creating an entirely new record at the state level, however, this modification would encourage the compilation of a complete administrative record below. This rule should be relatively simple to apply. In addition, the locality should be limited to calling one expert witness per discipline (again, absent a showing of good cause). The HAC's ability to exclude duplicative or redundant testimony also should be explicitly set forth in its procedural regulations.[281]

Third, subsequently enacted state environmental laws should be integrated into the comprehensive permit process. Any needed local approvals[282] should be explicitly subsumed into the initial consolidated hearing process, with the local board of appeals consulting relevant local agencies

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[279] Ideally, the HAC's ability to draw out proceedings should be limited; this is problematic in practice, however. To begin with, the HAC can always ask for an extension, and developers requiring HAC approval are loath to oppose such a request. See supra note 228. Of course, a time limit such as that recommended above for local boards is possible. This poses more problems on the state level, though, where reasoned deliberation and due consideration of legitimate local concerns is more important. Moreover, the HAC sometimes may be constrained by budget crises, staffing shortages, or other contingencies, which may prevent it from keeping a current docket. In such a case, compelling a quick decision may be counterproductive. In short, the most feasible (if not the best) alternative simply is to trust the HAC to keep its mission and the costs of excessive delay in mind and to conduct the hearing as expeditiously as possible.

[280] One commentator suggests:

> To date the local board records that have reached the Committee have been inadequate. The Committee has consistently had to hold the first real hearing on the case. Only by use of the de novo hearing has the Committee avoided the need for constant remands to local boards with the resulting delay and increased cost to the applicant.

Vaughn, supra note 21, at 62 (footnotes omitted).

[281] Cf. Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

[282] The approval of the conservation commission when wetlands are involved, or the approval of the historic district commission when necessary are two examples. See supra note 236.

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and making determinations on the matter.[283] At the state level, the Massachusett Environmental Policy Act's procedures could be administered easily under the aegis of the HAC, which would seek comments from the statutorily designated state agencies and weigh them in the decisionmaking process along with the other enumerated planning objectives.[284]

Finally, appeals to the courts from HAC decisions—often frivolous and interposed merely for delay—should be strongly discouraged. Although the deferential standard of review provides reasonable assurance that the HAC's decision will stand,[285] it does not relieve an applicant from the burdens and delays involved in litigating the appeal. Other measures are needed to streamline the appellate process. First of all, municipalities that appeal should be required to explicitly set forth their grounds for appeal, presenting facts that they believe warrant reversal of the HAC's decision.[286] Such a

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[283] There is no reason why the actions of the local conservation commission should be accorded more consideration than those of the board of health, or the fire inspector, or any other local board that currently must proceed within the confines of the consolidated hearing process.

[284] See supra note 214 and accompanying text (discussing local planning objectives and their consideration); supra note 236 (discussing MEPA's requirements).

An alternative approach is suggested by the New Jersey Supreme Court in Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J.), cert. denied and appeal dismissed, 423 U.S. 808 (1975). Justice Frederick W. Hall, writing for the court, balanced affordable housing against environmental protection and favored affordable housing. Towns could block construction of affordable housing for environmental reasons, he ruled, only when clearly necessary and only in a small portion of their areas. See id. at 731.

Exempting the Act's projects from MEPA's requirements in all but the extreme cases would be the quickest, easiest, and least expensive way of resolving the difficulties MEPA poses. The difficulty, however, is making the requisite prejudgment about the relative merits of environmental protection and housing equity, given the deep-rooted and insoluble tension between the two values.

[285] See supra note 112.

[286] A useful analogue to this is the rule governing so-called "disfavored claims" in the Federal Rules of Civil Procedure. For example, when a plaintiff alleges fraud or mistake, "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b).

Another such category of claims are those based on civil rights statutes. Complaints in these cases "must do more than state simple conclusions; they must at least outline the facts constituting the alleged violation." Fisher v. Flynn, 598 F.2d 663, 665 (1st Cir. 1979). This return to fact pleading is justified in civil rights cases by the same concerns about frivolous appeals:

> "In recent years there has been an increasingly large volume of cases brought under the Civil Rights Acts. A substantial number of these cases are frivolous . . . ; they all cause defendants—public officials, policemen and citizens alike—considerable expense [and] vexation . . . . It is an important public policy to weed out the frivolous and insubstantial cases . . . ."

Kauffman v. Moss, 420 F.2d 1270, 1276 n.15 (3d. Cir.) (quoting Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968)), cert. denied, 400 U.S. 846 (1970).

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requirement would allow expeditious disposal of meritless cases "at an early stage in the litigation,"[287] through a motion to dismiss[288] or a motion for summary judgment.[289] In the extreme cases, moreover, there should be a credible threat of sanctions against the appealing locality. Alternatively, or additionally, when the HAC wins on appeal, it should be entitled to recover attorneys' fees for the cost of defending itself.[290]

In sum, increases in the level of suburban heterogeneity and the amount of suburban affordable housing under the Massachusetts zoning appeals regime have been slowly realized and incremental. The suburbs still are, to a disturbing extent, monolithic and exclusionary; there still is an urgent need for more affordable housing. And the political obstacles still seem insoluble. Nonetheless, the Act has made substantial progress over a twenty-one year period. Considering the extreme difficulties confronting *any* attempt at suburban inclusion—the allure of localism, the growing political strength of exclusionary suburbs, the cynicism about what is now derisively called "social engineering"—this balanced and measured way of addressing the issue offers a feasible method of resolving the pervasive problems generated by suburban fragmentation and exclusion. With the modifications suggested above, the Massachusetts anti-snob zoning regime can stand as a model to other states, demonstrating that a cautious and moderate approach can indeed help resolve a seemingly intractable problem.

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[287] Kauffman, 420 F.2d at 1276 n.15.

[288] See Mass. R. Civ. P. 12(b).

[289] See Mass. R. Civ. P. 56.

[290] Considering that these appeals not only impose costs on the developer but also drain the public treasury and divert the attention of HAC members, this is an especially appealing possibility.

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