

Western New England Law Review

Volume 22 22 (2000-2001)

Issue 2 SYMPOSIUM - *Increasing Affordable Housing and Regional Housing Opportunity in Three New England States and New Jersey: Comparative Perspectives on the Occasion of the Thirtieth Anniversary of the Massachusetts Comprehensive Permit Law*

Article 3

1-1-2001

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Recommended Citation

Werner Lohe, *COMMAND AND CONTROL TO LOCAL CONTROL: THE ENVIRONMENTAL AGENDA AND THE COMPREHENSIVE PERMIT LAW*, 22 W. New Eng. L. Rev. 355 (2001), <http://digitalcommons.law.wne.edu/lawreview/vol22/iss2/3>

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COMMAND AND CONTROL TO LOCAL CONTROL: THE ENVIRONMENTAL AGENDA AND THE COMPREHENSIVE PERMIT LAW

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The Massachusetts Comprehensive Permit Law¹ has changed very little since it was enacted in 1969, but there has been an evolution in the way it is perceived and used. Thirty years ago, the law was seen as a weapon to fight exclusion and racism, and it was generally referred to as the Anti-Snob Zoning Act. Today, though no one would argue that these problems have been solved, the law is more commonly called the Comprehensive Permit Law, and the emphasis has shifted to what is less controversial—the ongoing affordable housing crisis. Though I suspect that the reasons for this shift and its results have both good and bad aspects, this comment focuses on the positive changes, which sometimes go unrecognized.

Thirty years ago, strident opposition to affordable housing in the suburbs was typically seen as explicit racism or, at best, economic discrimination. Housing advocates tended to portray the local opposition as the enemy and to measure the success of the Massachusetts law in terms of how much housing had been bulldozed past that opposition. In the past fifteen years, however, we have come to recognize that both the reasons for opposition to affordable housing and the measures of our success are more complicated.

First, we have become aware that for most proposed development—affordable housing or otherwise—there are legitimate neighborhood concerns that must be addressed. Second, under certain circumstances, any of us may become an opponent of development. If we have an acre or two of woods near where we live or if our city apartment looks out over a vacant lot, we would normally prefer things to remain the same. It is not necessarily that we do not want to see affordable housing, but more simply that we would

* Werner Lohe is Chairman of the Massachusetts Housing Appeals Committee. These remarks, representing his personal views, were first presented as a speech at this Housing Symposium.

1. MASS. GEN. LAWS ch. 40B, §§ 20-23 (1998).

rather not see *any* change—we would prefer not to see the clubhouse of a country club or even another house just like ours. Because of this tendency, we must learn to expect and accept opposition and controversy. The question is not whether there is controversy, but whether there is a fair, public process for evaluating and efficiently working through legitimate local concerns. The Comprehensive Permit Law provides this process.

There has also been a change in how we view our track record. People in Massachusetts are proud of how much affordable housing has been built, though we wish we had built more. We are also proud of the high quality of the housing that has been built. And because of that quality (and for other reasons as well), there are more towns in which people no longer fear affordable housing, but rather have come to see it as something their town needs. That is, they have come to view the Comprehensive Permit Law as a tool they can use to improve their community, rather than as a weapon to be wielded against them. This is not true everywhere, of course, but each town in which this change has taken place represents an important victory.

An even more important change in the comprehensive permit system is part of a larger historical trend. Our heritage in New England is one of local autonomy—it dates to the Puritans and their congregational churches and town meetings. But our history—from the Civil War in the nineteenth century to the federal income tax, the New Deal, the interstate highway system, and the Great Society in the twentieth century—is one of federalism, that is, of increasing centralized control. This has been true at the state level as well, with the creation of the Massachusetts Commission Against Discrimination in 1946, the state Sanitary Code in 1962, and a model state special education law in 1972.

Thirty years ago, when the Comprehensive Permit Law was passed, we were still primarily in that mode of centralized control, yet a counter-trend was beginning to develop. In particular, there was considerable activity in the areas of both affordable housing and the environment.

There were significant new affordable housing initiatives. The United States Department of Housing and Urban Development was created in 1965.² The Massachusetts Housing Finance Agency

2. See NATHAN S. BETNUN, HOUSING FINANCE AGENCIES: A COMPARISON BETWEEN STATES AND HUD 31 (1976).

was created in 1966.³ Rent control was enacted in the Boston area from 1969 to 1971. At the same time, the modern environmental movement was beginning. State and federal environmental agencies were being formed. In 1970, the federal Environmental Protection Agency was founded.⁴ In 1972, local conservation commissions took on their current, powerful role in enforcing the Massachusetts Wetlands Protection Act.⁵

Most of the changes were still based on the model of centralized control—what in the environmental movement is called the “command and control” model. That is, activists and government officials assumed that decision-makers in Boston or Washington needed to take control in areas that had been relatively unregulated in order to impose improvements on local communities.

But there was also a counter-trend. For example, the Massachusetts Home Rule Amendment took effect in 1966, allowing all functions not specifically reserved for the legislature to reside at the municipal level.⁶ Also, although the Wetlands Protection Act centralized rulemaking in what is now the Department of Environmental Protection, fact-finding was placed in the hands of local conservation commissions.

The evolution away from command and control has continued in both the environmental and the affordable-housing sectors. In the field of environmental regulation it has been a move to more market-based or incentive-based regulation,⁷ and in housing it has been a move toward more community-generated housing initiatives;⁸ for example, there is the Department of Housing and Community Development’s Local Initiative Program⁹ and the work done by Habitat for Humanity.

The enactment of the Comprehensive Permit Law in 1969 was part of this counter-trend. In fact, one very important reason for

3. An Act Establishing the Massachusetts Housing Finance Agency, 1966 Mass. Acts 708, 711.

4. See Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform*, 10 YALE J. ON REG. 369, 431 n.356 (1993) (noting creation of EPA).

5. See Cymie Payne, *Local Regulation of Natural Resources: Efficiency, Effectiveness, and Fairness of Wetlands Permitting in Massachusetts*, 28 ENVTL. LAW 519, 532-34 (1998).

6. See MASS. CONST. amend. art. LXXXIX, § 6.

7. See Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103 (1998).

8. There has always been community-based housing in big cities, but increasingly small cities and towns—including the suburbs—are developing their own initiatives.

9. MASS. REGS. CODE tit. 760, § 45.00 (1996).

the success of the Housing Appeals Committee has been that the law *anticipated* the move away from command and control. Instead of setting up a centralized, statewide bureaucracy, as the New Jersey courts did later,¹⁰ a decentralized system was created. A significant amount of local control was built into the process by placing the initial responsibility for reviewing development proposals in the hands of local zoning boards of appeal, not the state. This was probably not done out of any appreciation for local control, but rather because the model of using a local board was familiar from existing zoning and subdivision control law. Nevertheless, it is significant that this approach was taken and not a more centralized approach, as might have been expected from civil rights and affordable-housing advocates.

The degree of control left in local hands under the Comprehensive Permit Law was not particularly apparent at first. In the beginning, towns focused on the power of the state Housing Appeals Committee to overrule local decisions, and vigorously opposed the law. Opposition is less strident today, but most people still fail to recognize that a series of decisions by the Committee, beginning in the mid-1970s, reinforced the importance of local control. The most significant of these is *Harbor Glen Associates v. Board of Appeals (Hingham)*.¹¹

In Hingham in the 1970s, a 750-acre parcel of land became available that had been a naval ammunition depot. The town did a comprehensive study and plan, and used that to rezone the area, including both multi-family housing and affordable housing. In 1980, a developer requested a comprehensive permit to build housing in an area zoned for an office park. The Housing Appeals Committee unequivocally upheld the local planning process and denied the permit.

Almost ten years later, in *KSM Trust v. Pembroke Zoning Board of Appeals*,¹² the Committee described standards for how it reviews a master plan in relation to affordable housing. Essentially, it asks three questions: "First, is the plan bona fide?" Specifically,

10. See *S. Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*]; *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*].

11. No. 80-06 (Mass. Housing App. Committee Aug. 20, 1982), available at <http://www.nellco.org/Databases/Licensed/SocialLawLibrary/HousingAppealsCommittee.htm> [hereinafter *Nellco*].

12. No. 91-02 (Mass. Housing App. Committee Nov. 18, 1991), available at *Nellco*, *supra* note 11.

“was it legitimately adopted” and “does it continue to function as a viable” town-planning tool? Second, does the plan restrict or encourage affordable housing? “Third, has it been implemented in the area of the site?”¹³ Together, *Hingham* and *Pembroke* indicate that if towns take control of their own planning processes in a meaningful way and put affordable housing on their agendas their local autonomy will be respected.

There is another way in which the comprehensive permit process has always had the potential for increased local control. That is, if the municipality takes some initiative and manages the process well, it can shape a more creative housing proposal than otherwise might be built under “as-of-right” zoning. For example, if a developer owns a 20-acre parcel that can be developed as of right with 20 single-family houses, that does not mean that what should be built with a comprehensive permit is a subdivision of 60 smaller houses on 15,000 square foot lots. If the town approaches the process carefully, it may be possible to put 20 single-family houses on 15,000 square foot lots, cluster another 20 townhouse condominiums and 10 apartments on 5 acres next to them, perhaps build a soccer field in one corner for the town, and even set aside a five-acre wooded area as public open space.

The Housing Appeals Committee has also addressed the question of local control in its recent decision in *Stuborn Ltd. Partnership v. Barnstable Board of Appeals*,¹⁴ which involved the Federal Home Loan Bank (“FHLB”) of Boston’s New England Fund (“NEF”). The NEF is a relatively new affordable-housing program, which is very much market driven, with little of the centralized oversight that has been typical of traditional subsidy programs. In other words, the FHLB has abandoned the command and control model. The Committee noted that this has the potential to be very positive both for affordable housing and for towns. On one hand, it places more of a burden on the zoning board of appeals when reviewing an application. Far more importantly, however, it creates an opportunity for the town itself to shape the housing development architecturally and programmatically, rather than having it shaped by someone in Boston.

Just as important as the question of local control is the rela-

13. *Id.* at 6-7. In the *Pembroke* case, the town lost, partly because it could not find a copy of its own plan, and when it did, the plan actually supported the developer’s position.

14. No. 98-01 (Mass. Housing App. Committee Nov. 18, 1991), *available at* Nellco, *supra* note 11.

tionship of the Comprehensive Permit Law to the environmental movement. In *The Ecology of Commerce: A Declaration of Sustainability*,¹⁵ Paul Hawken presents an idea in the context of economics. He argues that for all its apparent complexity, our basic economy is still quite primitive—he compares it to a piece of land that has been slashed and burned. All that grow are weeds and saplings—plants that put a high premium on growth and little on stability. It is an environment with little diversity. Hawken suggests that we need to encourage our economy to evolve into an “old growth forest,” where the premium is on subtlety, strength, and information exchange—an environment with diversity and stability. From a housing perspective, since we instituted zoning in the 1920s, redlining in the 1930s, and urban renewal in the 1960s, we have been developing housing in a slash and burn environment. It is no wonder we have little diversity—architectural, environmental, or social.

On its face, the Massachusetts Comprehensive Permit Law is clearly about increasing diversity but only in one sense. It has two equally important purposes. The first is simply to increase the supply of affordable housing. The second, but equally important, purpose is to create economic diversity by bringing affordable housing to communities which do not have their share—that is to suburban and, to a lesser extent, rural communities.

Professor Florence Roisman of Indiana University School of Law-Indianapolis has addressed the relationship between race and the Massachusetts Comprehensive Permit Law.¹⁶ As she correctly points out, the statute grew in part out of the desire to bring about racial diversity,¹⁷ but the statute does not explicitly address race in any way. One might say that race has been a hidden agenda of the law for thirty years, and Professor Roisman has argued persuasively that that agenda ought to be brought to the surface.¹⁸

Similarly, environmental diversity is not addressed explicitly in

15. PAUL HAWKEN, *THE ECOLOGY OF COMMERCE: A DECLARATION OF SUSTAINABILITY* (1993).

16. Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. (forthcoming 2001).

17. *Id.* (manuscript at 8-9).

18. It is important to acknowledge that a shift to more local control is likely to make achieving racial diversity more difficult. The *Zeitgeist* seems not to favor affirmative action, and many towns are more concerned about giving preference to local residents than about encouraging racial diversity. Similarly, we need to ensure that the cost of educating children and the so-called “tax revolt” do not lead to exclusion of families in favor of “empty-nesters” and older people.

the statute. In fact, if anything, affordable housing is set in opposition to environmental issues. That is, the statute explicitly permits the weighing of local environmental concerns against the need for affordable housing, permitting some environmental degradation. Historically, however, the Housing Appeals Committee has not done that. A review of its cases, at least during the past ten years, shows that the proposals submitted have been such that the Committee has not had to issue decisions in which it accepts degradation of the environment.¹⁹ Affordable-housing advocates have used the law to build quality housing despite local opposition, not to build second-rate housing that is bad for local communities or the environment.

Despite this history, it is increasingly important that we be explicit about making the environmental agenda part of the affordable-housing agenda. Both affordable-housing advocates and environmentalists believe in diversity. Just as housing advocates are building more varied, mixed-income, ownership and rental housing instead of the cookie-cutter public housing that was built in the 1950s and 1960s, environmentalists want to move beyond the uniform, similarly priced "McMansion" subdivisions and the suburban sprawl that are the result of the 1950s "as-of-right" Euclidean²⁰ zoning.

The particular part of the environmental movement most relevant to housing advocates is the "smart growth" movement.²¹

19. See *Ipswich Hous. Auth. v. Ipswich Zoning Bd. of Appeals*, No. 91-01, at 5, 9, 10 (Mass. Housing App. Committee June 14, 1993) (upholding town's choice of septic system instead of sewer, and requiring monitoring wells), *available at* Nellco, *supra* note 11, *aff'd* No. 93-1622 (Essex Super. Ct. May 25, 1995); *Woodland Heights P'ship v. Bourne Zoning Bd. of Appeals*, No. 91-06, at 10, 13, 14 (Mass. Housing App. Committee June 14, 1993) (finding septic systems did not degrade public water supply and environmental improvement through disposal of contaminated material), *available at* Nellco, *supra* note 11; *KSM Trust v. Pembroke Zoning Bd. of Appeals*, No. 91-02, at 18-20 (Mass. Housing App. Committee Nov. 18, 1991) (considering the inappropriateness of application of drinking water standards to septic system in vicinity of wetlands and a tidal river), *available at* Nellco, *supra* note 11; *Oxford Hous. Auth. v. Oxford Zoning Bd. of Appeals*, No. 90-12, at 9, 13 (Mass. Housing App. Committee Nov. 18, 1991) (requiring monitoring wells in septic system design and improvement of storm water drainage), *available at* Nellco, *supra* note 11; *G.P. Affordable Homes Corp. v. Falmouth Bd. of Appeals*, No. 89-24, at 12, 33, 37 (Mass. Housing App. Committee Nov. 12, 1991) (permitting septic system installation in salt water pond overlay district where the town had "fail[ed] to do anything about the [existing] continuing environmental damage"), *available at* Nellco, *supra* note 11.

20. Euclidean zoning, zoning by specific and uniform geographical division, derives its name from the basic zoning ordinance upheld in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

21. Smart growth is development that is intended to serve economy, community,

There are a number of variations—from simple anti-sprawl activism to New Urbanism²²—but whatever it is called, growth management and sustainable development are among the most important and visible segments of the environmental movement today. The Comprehensive Permit Law can be an important tool to encourage smart growth because it provides a locally controlled mechanism that is an alternative to traditional subdivision development.

Ideally, smart growth should begin with comprehensive planning. Then, *local* affordable-housing advocates, together with *local* environmentalists, need to use comprehensive permits as creatively as possible. With comprehensive permits they can build dense village centers drawing on New Urbanist concepts; integrate housing and transportation; refine traffic calming techniques, including new ideas like community streets;²³ build more in-fill housing; and explore the potential of new models like co-housing.²⁴ Every one of these is prohibited or, at least, discouraged by traditional zoning. The Comprehensive Permit Law and other mechanisms like it, however, can give towns the flexibility essential for diversity, and can help them to build the most desirable kind of affordable housing—housing shaped by individual towns to meet their individual needs.

and the environment, creating communities in which people have increased choice and a higher quality of life. See *About Smart Growth*, <http://www.smartgrowth.org/information/aboutsg/html> (citing GEOFF ANDERSEN, INTERNATIONAL CITY/COUNTY MGMT. ASS'N, *WHY SMART GROWTH: A PRIMER* (1998)).

22. This land use philosophy is attained by forming “neighborhoods of higher than traditional density. Homes are on small lots [and] [t]here are . . . commercial centers and gathering places mixed in with . . . residential use.” Patrick K. Hetrick, *Of “Private Governments” and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 *CAMPBELL L. REV.* 1, 96 n.373 (1999). Among the leaders of this movement is the Congress for the New Urbanism. See *Congress for the New Urbanism*, at <http://www.cnu.org> (last visited Jan. 10, 2001).

23. Community streets use architectural elements to create open space shared by pedestrians, bicyclists, and motor vehicles, enhancing social interaction and neighborhood livability. See Eran Ben-Joseph, *Changing the Residential Street Scene*, 61 *J. AM. PLAN. ASS'N* 504 (1995); Werner Lohe, *Community Streets*, *BROOKLINE TAB*, Dec. 12, 1995, at 29, http://www.townonline.com/brookline/commres/coreyfarm/sr-cfna_streets.html; Traffic Calming, Auto-Restricted Zones and Other Traffic Management Techniques (National Bicycling and Walking Study Federal Highway Administration Case Study No. Jan. 1994).

24. Co-housing involves small, inter-generational, custom designed neighborhoods with privately owned residences sharing extensive common facilities. See KATHRYN McCAMANT & CHARLES DURRETT, *COHOUSING: A CONTEMPORARY APPROACH TO HOUSING OURSELVES* (1998); Thomas Grillo, *N. Cambridge Cohousing to Break Ground*, *BOSTON GLOBE*, Mar. 4, 2000, at E-1; *Canadian Cohousing Network*, at <http://www.cohousing.ca> (last visited Jan. 10, 2001).

An affordable-housing development in Weston, Massachusetts exemplifies how this can work in practice. Weston is ten miles west of Boston. It has the highest median family income in the state—\$108,751.²⁵ In a beautiful part of town with rolling pastures, woods, and stone fences, there are a number of medium sized parcels of land. Several were owned by a couple in their seventies and eighties who had lived in town their whole lives. They were committed to affordable housing and also wanted to preserve open space. One 10-acre parcel was zoned for acre-and-a-half lots and was worth \$2,500,000. Six houses could be built as of right.

With the full cooperation of the town, this lot is being developed with 18 detached condominiums, 6 of which will be affordable. The plans for the development, which is called Dickson Meadows, are beautiful. The design is environmentally sensitive within the site, and it is also sensitive to the character of the surrounding area, preserving the feel of the rural location with a large open space in the center, which the architect calls the “sheep meadow.” The development would not be possible without a comprehensive permit.

Just as important as the environmental diversity made possible by the Comprehensive Permit Law, however, is a detail tucked away in the plan for this housing. There will be enormous demand for the affordable units, therefore, the buyers will be chosen by lottery. There will be three lottery pools: some buyers will come from a statewide pool and some from a small affirmative action pool, but most buyers will come from a local preference pool. Usually, local preference is for people who already live in town. But since Weston consists of mostly single-family homes, the number of people living in apartments who want to move is limited. Therefore, town employees have been added to that pool. But the town has also added families of all those who attend Weston Public Schools. The reason for this is that Weston is part of the Metropolitan Council for Educational Opportunity, Inc. (“METCO”), a program created in 1963 to voluntarily address the racial imbalance in the public schools in the Boston area. As a result, 7% of the Weston school population is comprised of inner city students of color. Therefore, Weston is hoping that black, Latino, and Southeast Asian families will have the opportunity to move into this neighborhood.

Dickson Meadows reminds us that the Comprehensive Permit Law has its roots in the civil rights movement, and it shows us that

25. See *Summary of Income Characteristics in 1989*, <http://www.umass.edu/miser/dataop/data.htm#GeneralProfilesorReports/topical2.xls>.

this law can be used to encourage all sorts of diversity—economic, racial, architectural, and environmental.