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SYMPOSIUM

RURAL LOW-INCOME HOUSING AND MASSACHUSETTS CHAPTER 40B: A PERSPECTIVE FROM THE ZONING BOARD OF APPEALS

Eric J. Gouvin*

ABSTRACT

The Massachusetts Low and Moderate Income Housing Act ("Act") was enacted in 1969 to promote the construction of low-income housing in restrictively zoned Massachusetts communities. It seeks to achieve its goal by providing a builder's remedy which, in effect, overrides local zoning ordinances. The local Zoning Board of Appeals ("ZBA"), in deciding whether to issue a Comprehensive Permit under the Act, must evaluate the local and regional need for low- to moderate-income housing and weigh that need against local concerns over health, safety, design, and open space conservation. This Article examines the difficulty of applying the Act in rural towns. First, it focuses on the role that the Act asks ZBAs to play in the approval process. Next it examines two issues arising in the application of the Act to rural communities: the determination of the "region" when there is no obvious city/suburb relationship, and the assessment of the need for low- to moderate-income housing in the region and the locality. The Article discusses how different results may be obtained if "need" is informed by an "in-place" approach to housing policy as opposed to a "mobility relief" approach. The

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Article concludes that public discussion about the Act's goals and the extent to which non-discriminatory local ordinances should receive deference deserve to be part of the public dialogue on housing policy.

I. PREFACE

Although it is somewhat unusual to start a law review article with a preface, in this case one is necessary. Unlike the other contributors to this symposium issue, I am not an expert on housing policy. Some of the participants in this symposium have devoted their professional lives to the problem of finding ways to provide decent housing to low-income families, know all the twists and turns of federal and state housing policy, and can refer to the various housing programs by their short-hand titles. I am not one of those people.

Nevertheless, I believe I have something to add to this examination of the Massachusetts Low and Moderate Income Housing Act¹ ("Act"). I served as a member of the Zoning Board of Appeals in the rural town of Gill (1998 population: 1584) during a period when a Comprehensive Permit under the Act was considered and denied. In the interest of full disclosure, and to provide some context for the comments contained in this Article, I am providing this Preface to fill in some of the details of my involvement in that permit process² and to offer my experience, though anecdotal, as something of a case study in the application of the Act to a rural community. I seek the reader's indulgence to allow me to provide this Preface without being bound by traditional law review conventions requiring footnotes for every assertion. The rest of the Article will adopt the more traditional law review approach, and will perhaps be more intelligible for having the context of this Preface.

I served as a member of the Town of Gill Zoning Board of Appeals ("Gill ZBA") from 1992 through 1999, during which time the Gill ZBA considered an application from the Franklin County Regional Housing Authority ("FCRHA") for a Comprehensive

². See Ronald K.L. Collins, A Letter on Scholarly Ethics, 45 J. LEGAL EDUC. 139, 141-42 (1995) (advocating more complete disclosure of potential conflicts of interest in scholarly writing); cf. ASS'N OF AM. LAW SCH., STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES, in 2000 HANDBOOK 89, 92 ("If views expressed in an article were also espoused in the course of representation of a client or in consulting, this should be acknowledged.").
Permit under the Act to build low-income housing. The FCRHA's application had a long and tortured history. Prior to February 7, 1989, the FCRHA notified the Town of Gill Board of Selectmen of its intent to construct low-income housing in Gill. This initial notification began the approval process for the project. On February 7, 1989, the Gill Board of Selectmen and the FCRHA entered into an "Agreement to Cooperate in the Development of Chapter 667/705 Housing" ("Agreement"). The Agreement contemplated the development of 20 units of housing for elders, 6 units of family housing, and 1 duplex to house 8 elders with special needs. The Agreement also stated that the applicant would "abide by EOCD [Executive Office for Communities and Development] cost guidelines, design standards, and development procedures."³

On June 20, 1990, the FCRHA took title to the parcel of land in Gill where it intended to build. In December 1992, the FCRHA began the process of obtaining approval from the Town of Gill Conservation Commission. The proceedings with the Conservation Commission concluded on April 22, 1994, when the Commission issued an Order of Conditions affecting the project.

In the meantime, the FCRHA met with groups of Gill residents to explain the proposed project. The FCRHA met informally with the Gill ZBA on July 29, 1993, to give a general overview of the original project. At this meeting, the FCRHA distributed materials from the Executive Office of Communities and Development regarding the role of the ZBA in the Comprehensive Permit process. The materials sent mixed messages about the significance of the ZBA's role, but one thing was clear: a permit denial by the ZBA would almost certainly be futile.⁴ The FCRHA gave me, and I believe the other ZBA members, the distinct impression that our role in the process was to merely rubber stamp their proposal unless some truly egregious life threatening safety issue was present on the face of the application. After that meeting I fully anticipated that the approval of the application would be routine and uneventful.⁵

4. See EXECUTIVE OFFICE FOR CMTYS. & DEV., GUIDELINES FOR LOCAL REVIEW OF COMPREHENSIVE PERMITS 19 (June 1990) (discussing why it is better for a local ZBA to approve a Comprehensive Permit with conditions rather than to deny it outright, and making the stark observation that "[t]he Housing Appeal Committee has upheld outright denials of applications for comprehensive permits in only a few exceptional cases").
5. I would venture to say that most rural ZBAs consisting of citizen volunteers will throw up their hands, rely on the representations of the applicant, and basically
On May 9, 1995, the Town of Gill received the FCRRA’s formal Comprehensive Permit application ("application") pursuant to chapter 40B, sections 20 through 23 of the Massachusetts General Laws. Between the time of the informal community meetings and the formal submission of the application, the FCRRA changed several features of the original project. In the application, the FCRRA requested a Comprehensive Permit for the construction of 36 low-income housing units. The Gill Board of Selectmen decided to oppose the project and retained town counsel to prepare their case against the application. The Gill ZBA retained its own independent legal counsel in order to get unbiased legal advice and to avoid a conflict of interest with the town’s position.

After due notice, and following a site visit, the Gill ZBA convened a public hearing on June 15, 1995, in accordance with chapter 40B, section 21, of the Massachusetts General Laws. The public hearing was continued for additional sessions held on August 17, 1995, October 4, 1995, November 6, 1995, and December 4, 1995. During these hearings, the Gill ZBA heard a great deal of evidence indicating serious health and safety issues associated with the project as proposed, including a dangerous water supply problem. At the December 4, 1995, session of the hearing, the Board requested that counsel for the FCRRA and counsel for the Board of

rubber stamp the applicant’s proposal. This is especially likely since much of the guidance they receive from official sources warns in not-so-veiled terms that outright denial is not a viable option. The Gill ZBA received guidance on the Comprehensive Permit process from various official sources. See id.; LandUse, Inc., Nineteen Common Questions on Comprehensive Permits 2 (1987) ("8. Can the ZBA simply deny a Comprehensive Permit? No. If you deny, you must state the reasons, and they must be meaningful. As a point of fact, less than 3% of all applications are formally denied."); Massachusetts Housing Partnership, Questions and Answers About the Comprehensive Permit Process (n.d., circa 1988) ("A community’s position would carry more weight under appeal, however, if it approves a project with conditions rather than denying a permit."). Developers can always appeal conditions they consider "uneconomic" to the Housing Appeals Committee ("HAC"), the sole arbiter of such matters. Id. In trying to assess the possible economic impact of some of the conditions necessary to address health and safety issues raised by the project, we requested financial information such as a pro forma budget and funding details to ascertain whether our conditions were uneconomic and therefore futile. The developer told us that there were no pro forma budgets and that the determination of "uneconomic" conditions was made by the HAC on a case-by-case basis. Cf. id. ("Uneconomic" is evaluated differently by the HAC depending on the guidelines of the housing subsidy program being used.").

6. For example, the number of low-income family units was originally 6 but had been increased to 8 by the time the application was submitted. Additionally, in the original proposal only elderly special needs clients supervised by full-time, on-premise mental health professionals were eligible. In the final application the "supervision" and "elderly" requirements had been eliminated.
Selectmen submit proposed findings of fact by January 31, 1996. After receiving alternative proposed findings of fact from the parties on January 31, 1996, the evidentiary portion of the public hearing was terminated.

After the close of the evidentiary portion of the public hearing, the Gill ZBA met twice to discuss the application. At the first meeting, on February 4, 1996, the Gill ZBA discussed the health, safety, and design issues raised during the public hearing process, and began to discuss the appropriateness of imposing conditions on the Comprehensive Permit. At the second meeting, on February 14, 1996, the Gill ZBA continued its discussions, but concluded that the conditions necessary to correct the deficiencies in the site would likely be deemed “uneconomic” and would, therefore, trigger the right to appeal under the Act.\(^7\) After an extended discussion, the Gill ZBA unanimously decided to deny the application. As required by law,\(^8\) the Gill ZBA prepared an opinion setting forth its findings of fact and its reasons for denying the application. I authored that opinion for the Gill ZBA. This Article is informed by my experience in grappling with the problems of applying the Act to this specific project.

The FCRHA appealed the denial of the permit to the Housing Appeals Committee ("HAC"), as is its right under the Act.\(^9\) At some point in the spring of 1996, Mary Padula, then head of the Executive Office of Communities and Development ("EOCD"), the agency that then contained the HAC, came to Gill to help resolve the matter. She apparently had read the opinion denying the permit. While visiting the proposed construction site with representatives from the FCRHA, the Gill Board of Selectmen, and the Gill ZBA, Ms. Padula reportedly suggested that the parties should "make a deal." She indicated that the EOCD would be satisfied if the town permitted 12 units of elderly housing without any low-income or special needs units. The town agreed in principle. Later, the number of elderly housing units was raised to 14.

After the visit from Ms. Padula, the FCRHA and the ZBA began a series of meetings to work out the terms of the Comprehensive Permit that would be issued in exchange for an acceptable resolution of the HAC appeal. By late 1996 the ZBA and the

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8. See Bailey v. Bd. of Appeals (Holden), 345 N.E.2d 367, 370 & n.6 (Mass. 1976) (noting the requirement that local zoning boards of appeal must put their reasons for their decisions in writing).
9. § 22.
FCRHA had reached terms, which included a comprehensive conservation easement in favor of the town that both sides could live with. In early 1997, the Comprehensive Permit negotiated between the ZBA and the FCRHA was blessed by the HAC. Construction began shortly thereafter. The project, known as Stoughton Place, was dedicated in the spring of 1999, over ten years after the town and the FCRHA executed the Agreement.  

In the end, the Town of Gill got a very nice elderly housing project with which the citizens were quite happy. At the dedication of the completed project it was hinted that playing ball with the EOCD can have many benefits—not only a nice housing project and other goodies that were part of the political deal, but also state funds for the purchase and installation of an elevator to make the second floor of the town hall handicap accessible.

In some ways, this example can be viewed as a good result. If one conceives of the chapter 40B process as merely a heavy-handed way to make towns and developers negotiate for a mutually acceptable project, then this is how things should work out in the end, even if the trip to the final outcome is a little bumpy. In other ways, however, the process did not work well.

Based on private conversations with people at the FCRHA, I am led to believe that the original Gill proposal was much larger than they had intended because of pressure from funding sources to develop mixed-use projects. Key personnel at the FCRHA have told me that elderly housing is what the FCRHA really wanted in Gill all along, but they had submitted the application requesting a mixed-use project under pressure from funding sources. The personnel felt they did not have much leeway for negotiation in the approval process because of these funding pressures. Perhaps they

10. This background material illustrates an important point: it took a long time to bring this project to fruition, and not because the town was dragging its feet. The FCRHA did not even submit a Comprehensive Permit application until more than 6 years after the town and the applicant signed the “Agreement to Cooperate in the Development of Chapter 667/705 Housing.” The actual application for the Comprehensive Permit was not received until almost 5 years after the FCRHA acquired the property, and more than 1 year after receiving approval from the Conservation Commission. This timetable is noteworthy because one of the justifications for the Comprehensive Permit process is to reduce the propensity of towns to drag out the approval process for these projects, but compared to the rest of the applicant’s timetable, the 8 months the ZBA took to conduct a series of public hearings, gather facts, and reach a decision is positively speedy.

11. See A Happy Ending in Gill, The Recorder (Greenfield, Mass.), June 18, 1999, at 12 (expressing the opinion that everything worked out for the best and that “towns can have a say in these types of projects”).
needed an official denial to provide some flexibility with their own project.

But even if the awkwardness of dealing with an agenda-driven funding source had been absent, the FCRHA would have had no real incentive to negotiate over the size and scope of the project because they knew they had an ace in the hole for appealing any denial or conditioned approval to the HAC. Of course, both the ZBA and the FCRHA knew that while the HAC had heard well over 100 appeals since its inception, it had upheld the outright denial of a permit in only a small handful of unusual situations. No opinion of the HAC has ever been overturned on appeal to the courts. Anyone advising a developer with that kind of back-up protection would be foolish to give up anything to the local ZBA.

Although the final result seems reasonable now, I have often wondered what would have happened if the Gill ZBA, instead of denying the application outright, had proposed during the application approval process that the FCRHA scrap its original plan and develop 14 units of elderly housing. Any reader considering this possibility realistically would, I suggest, have to conclude that such action by the ZBA would have been seen as an act of bad faith. The ZBA's credibility would have been in tatters, and on appeal it would have been very easy for the HAC to completely disregard local concerns and allow the developer to proceed on its original course. I worry when a statutory scheme creates perverse incentives for posturing and obstructionism.

I do not purport to be knowledgeable about every chapter 40B project in every town in the Commonwealth, but I am intimately familiar with this project in this little town. In the balance of this Article, I will discuss some of the difficulties I encountered as a ZBA member in a rural community trying to apply the Act to a real situation.

II. INTRODUCTION

In the 1960s the City of Boston undertook massive urban renewal plans and highway projects that cleared the city of many substandard dwelling units. Unfortunately, in the wake of these projects many of the former occupants of that substandard housing were left without a place to call home. At the same time these massive construction projects were dislocating the city's poor popu-

lation, Boston was also wrestling with the insidious problems of school segregation and racial inequality. In 1966, the Massachusetts General Court passed a law, commonly referred to as the Racial Imbalance Law\(^{13}\) that set the stage for the desegregation of Boston’s schools and ultimately for the painful public bloodletting that the process entailed.\(^{14}\)

In the midst of this brewing social upheaval, the state legislature in 1969 passed the Anti-Snob Zoning Act,\(^{15}\) a law designed to override local zoning restrictions on low-income housing projects. Although one can never say with exact precision what the legislature intended the Act to do, as some people saw it, the Act was the political payback to those suburban liberals who championed desegregation in Boston.\(^{16}\) In this view, the passage of the Act was intended, at least in part, to bring desegregation to affluent suburbs in the same way that desegregation had been forced on the City of

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14. The Racial Imbalance Law passed in 1966 required that school systems not permit racial imbalances within their schools. § 11. Failure to comply with this law eventually led to a court order requiring Boston to bus its schoolchildren in an attempt to desegregate the school system. That process was highly charged and socially wrenching. *See generally J. Anthony Lukas, Common Ground: A Turbulent Decade in the Lives of Three American Families* (1986) (providing 3 different perspectives on the Boston busing controversy of the 1970s).


16. The idea that the Anti-Snob Zoning Law was retribution for the Racial Imbalance Law was something of an open secret in the legislature during the summer of 1969. John Christopher Kennedy, Low-Income Housing and Zoning: Intergovernmental Conflict in Massachusetts, 75-76 (Mar. 1972) (unpublished A.B. honors thesis, Harvard University) (on file with author) (noting that use of the anti-snob zoning law as political retribution for the Racial Imbalance Law was an “open secret”). Indeed, the retributive nature of the anti-snob law was openly discussed in the press. *See Robert L. Turner, Low-Income Housing Advances, The Boston Globe, Aug. 1, 1969, at 2 (noting that “[t]he bill was approved by the votes of an unusual coalition of liberals and urban conservatives. Some of the latter said privately that they were repaying suburban legislators for their votes on the racial imbalance bill . . . .”); Robert L. Turner, Senate Votes Low-Cost Housing in Suburbs, The Boston Globe, Aug. 13, 1969 at 1, 12 (recounting the comments of Sen. Quinlan: “He noted that suburban legislators had found it easy to vote for the racial imbalance bill requiring a racial mixture in the schools of Boston, Springfield, New Bedford and other cities. Quinlan said one of the arguments for that bill was ‘you can’t love a man unless you know him.’ He said the same argument applies to the suburbs.”).
Boston.\textsuperscript{17} Political warfare aside, the Act was ostensibly intended to counteract the history of suburban opposition to low-income housing for illegitimate reasons.\textsuperscript{18}

Before engaging in an in-depth discussion of the Act, it may be worthwhile to describe its essential features.\textsuperscript{19} The Act was designed primarily to counteract two common strategies that had been employed by communities to make the construction of multi-unit or other high-density projects difficult, expensive, or even impossible. The first obstructionist tactic that towns had used was an approval run-around game in which a developer would have to seek separate approvals from many different local authorities. This was time-consuming and expensive and had the effect of discouraging projects.\textsuperscript{20} The Act eliminated that barrier by providing a streamlined local application process through which eligible developers of low- and moderate-income housing could apply for a single "Comprehensive Permit" from the local zoning board of appeals.\textsuperscript{21} The

\begin{itemize}
\item \textsuperscript{17} See \textit{James Breagy, Overriding the Suburbs: State Intervention for Housing Through the Massachusetts Appeals Process} 9 (1976) (noting the dynamic).
\item \textsuperscript{18} See \textit{Final Report of the Mass. Special Comm. on Low-Income Hous.}, H.R. Rep. No. 164-4040, 1st Sess., at 12-13 (1965) (noting that the discrimination in Massachusetts is primarily economic in nature: "It is thus clear from the above figures that the housing problem in the Commonwealth is primarily one of inadequate incomes."). The report went on to state, however, that racial discrimination played a role in the problem:
\begin{quote}
As a result of generally lower incomes and the effects of racial discrimination, the Commonwealth’s non-white families experience far greater problems in securing decent housing than do white families. . . . Because of the restrictions of choice imposed by racial discrimination, non-whites not only live in inferior housing, but must pay more for these inferior accommodations.
\end{quote}
\textit{Id. at 13. But see Cedar St. Assocs. v. Zoning Bd. of Appeals (Wellesley), No. 79-05, at 5-17} (Mass. Housing App. Committee Mar. 4, 1981) (stating that correcting economic, not racial or ethnic, prejudice was the goal of the statute, since the official study ordered by Senate Order 933 in 1967, found that discrimination was based on economic, not racial factors) \textit{available at} http://www.nellco.org/DatabasesLicensed/SocialLawLibrary/HousingAppealsCommittee.htm [hereinafter Nellco]; H.R. Rep. No. \textit{Report of the Joint Comm. on Urban Affairs Relative to Pub. Hous.}, H.R. No. 166-5000, 2d Sess., at 11-12 (Mass. 1970) (noting the illegitimate use of lengthy residency requirements by "high-income suburbs . . . to keep the poor and minority groups from moving in").
\item \textsuperscript{19} See \textit{infra} App. for the full text of this Act.
\item \textsuperscript{20} See \textit{Report of the Comm. on Urban Affairs}, H.R. Rep. No. 166-5429, 1st Sess., at 2 (Mass. 1969) (noting that "the process of obtaining local approval is so protracted as to discourage all but the most determined and well-financed builders") \textit{hereinafter Committee Report No. 5429}.
\end{itemize}
Act overrode local rules to the contrary, and granted to the local zoning board of appeals "the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application." This one-stop approach to local approvals was intended to make it easier for developers to build low-income housing in the face of local opposition to the projects.

The second tactic the Act aimed to counteract was exclusionary zoning and other regulatory barriers to low-income housing. The devices that fit under the rubric of "exclusionary zoning" are many, but the most common are large lot sizes and stringent building codes. The Act counters this tactic by requiring the zoning board of appeals to approve or disapprove the proposed housing project subject to "conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section." Although the section in which that language appears does not provide any criteria to help evaluate what types of conditions and requirements would be consistent with it, the appeals provision of the Act indicates that the local zoning board's conditions and requirements will survive review on appeal only if they are "consistent with local needs" and do not render the "operation of such housing uneconomic." The Act's definition of

22. Id. This section gives the zoning board of appeals authority over "local boards," defined in the Act as "any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen." § 20.


24. See COMMITTEE REPORT No. 5429, supra note 20, at 2 (noting that land for low-income housing is frequently unavailable "because of restrictive zoning controls or similar local regulations"); see also Mass. Dept' of Cmty. Affairs, Housing for Massachusetts: A Proposed State Housing Policy and Action Program 17 (Dec. 4, 1970) ("Many communities have specifically excluded all low-income housing by setting up restrictive zoning and building codes.").

25. See Anthony Downs, Reducing Regulatory Barriers to Affordable Housing Erected by Local Governments, in HOUSING MARKETS AND RESIDENTIAL MOBILITY 255, 257-59 (G. Thomas Kingsley & Margery Austin Turner eds., 1993) (providing a more extensive list of common regulatory hurdles that increase the cost of housing, such as lot size, density restrictions, building codes, historical area designations, environmental regulation of various kinds, and union employment rules).

26. § 21.

27. § 23. It should also be noted that in the case of an unconditional denial, the denial also must meet the "consistent with local needs" test. Id.
the key term "consistent with local needs" provides some guidance to local zoning boards:

requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.28

Synthesizing the various sections of the Act, therefore, reveals that the local zoning board of appeals is charged with 3 tasks in reviewing an application for a Comprehensive Permit: (1) it must assess the "need" for "low to moderate income housing" in the "region" where the project is to be located; (2) it must assess the strength of "local" concerns for health, safety, planning, and open space; and (3) it must balance those two assessments against each other in an appropriate fashion that does not render the project "uneconomic."29

Although this procedure may seem relatively straightforward, it is complicated by the fact that the key words in the definition of "consistent with local needs" are either narrowly defined statutory terms or open-ended undefined terms. For example, the terms "local" and "region" are not defined by the Act,30 although the term "low to moderate income housing" has a very specific statutory definition. The interplay of these terms makes the application of the Act to a given project a difficult exercise.31 The Act itself provides no guidance for the local ZBA to determine what the "region" is or how to assess the "need" for housing within the articulated region. These matters will be discussed later in this Article.

Probably the biggest innovation in the Act for overcoming ex-

28. § 20 (emphasis added).
29. This system is apparent from the language contained in chapter 40B, sections 20 and 23 of the Massachusetts General Laws defining the term "consistent with local needs," and providing the standard of review, respectively.
30. See infra notes 119-36 and accompanying text for a discussion of the interpretive problems raised by the terms "local" and "region."
clusionary zoning practices was the creation of a streamlined appeals process for developers aggrieved by local ZBA decisions. The unsuccessful applicant for a Comprehensive Permit is entitled to an appeal as a matter of right when a local ZBA denies a permit or approves a permit subject to conditions that render the project un-economic. The appeal is taken to the HAC, which consists of five members and sits in Boston under the auspices of the Department of Housing and Community Development ("DHCD"). The hearing at the HAC is de novo and is intended to provide an ostensibly neutral forum that is capable of interpreting the Act, subject to the guidance of the courts, and enforcing the Act to ensure that local ZBAs do not use the zoning power to prohibit housing. The HAC’s perspective on its role in the process has been articulated as follows:

Clearly the legislature did not want local powers limited arbitrarily so that subsidized housing would be built at any cost. Rather, that it established a specialized body, the Housing Appeals Committee, to review these cases de novo indicates its intention that local powers be carefully circumscribed by a process that would insure that each proposed subsidized housing project would be carefully examined on its own merits.

Local ZBAs know that their decisions will be reviewed by the HAC, and the lurking presence of the HAC should inform every

32. § 22.
33. MASS. GEN. LAWS ch. 23B, § 5A (1998). Three members are appointed by the Director of DHCD, 1 of whom shall be an employee of DHCD. The remaining 2 are appointed by the Governor for 1 year appointments; 1 shall be a member of a board of selectmen and the other a member of a city council or similar body. The members of the HAC serve without pay but do receive reimbursement for their expenses. Id.
34. See Stoneham Heights Ltd. P’ship v. Zoning Bd. of Appeals (Stoneham), No. 87-04, at 56 (Mass. Housing App. Committee Mar. 20, 1991) ("The Statute itself is not a model of clarity. Every section of it has required painstaking construction and interpretation over the years by the Committee. In that task we have been immensely aided by the doctrine of Cleary vs.[sic] Cardullo’s, Inc., 347 Mass. 337, at page 344, quoted in fn. 20 (page 368) of the Hanover decision. ‘The duty of statutory interpretation is for the courts. Nevertheless, particularly under an ambiguous statute . . . the details of [the] legislative policy, not spelt out in the statute, may appropriately be determined, at least in the first instance, by an agency [charged] with administration of the statute.’").
35. See Little Hios Hills Realty Trust v. Plymouth Zoning Bd. of Appeals, No. 92-02, at 6 (Mass. Housing App. Committee Sept. 23, 1993) ("This Committee’s role is to oversee local boards of appeals, and it may overturn local restrictions when they stand in the way of housing development . . . ."), available at Nellco, supra note 18.
ZBA action on a Comprehensive Permit. The only way a local ZBA decision will be respected on appeal to the HAC is if that decision is "consistent with local needs" as that term is defined in the Act.\textsuperscript{37} ZBAs also know that virtually the only way for an action to be regarded as "consistent with local needs" is for the town itself to satisfy the benchmarks I later refer to as the "mathematical safe harbors."\textsuperscript{38}

This Article looks at the implementation of the Act from the perspective of a ZBA member in a rural community. The sections that follow focus on two problems that arise in attempting to apply the Act to a specific housing project: first, the problem of understanding the role that the ZBA is supposed to play in the approval process, and second, the problem of providing a meaningful assessment of the regional need for low- to moderate-income housing. In order to provide some context for why these issues are especially awkward for ZBAs in rural communities, the next section gives an overview of the special problems of rural housing.

III. UNDERSTANDING RURAL HOUSING NEEDS

A survey of the housing literature ostensibly addressing the housing needs of the Commonwealth makes clear that most housing policy experts in Massachusetts do not understand that a significant portion of the state is rural in character. The paradigm that informs most thinking on housing in the state is that of poor inner city and rich suburb. This is the paradigm that informs the Act—it seeks to shift the burden of housing low-income citizens from the core cities to the surrounding and more affluent suburbs. It is hard to argue with this proposition in the abstract. It seems obvious that every metropolitan area is one functional unit and that the affluent suburbs that ring our hollowed-out cities ought to recognize their duty to provide the necessities for the metropolitan regions of which they are a part. The case becomes less compelling, however, when we look at the many towns, especially in the western part of the state, that are not part of any metropolitan area.

Historically, however, housing policymakers in Boston have not recognized the rural nature of many Massachusetts towns. An influential 1970 book analyzing poverty in the Commonwealth of

\begin{itemize}
\item \textsuperscript{37} \textit{Mass. Gen. Laws} ch. 40B, § 20.
\item \textsuperscript{38} See \textit{infra} notes 83-84 and accompanying text for an explanation of "mathematical safe harbors."
\end{itemize}
Massachusetts, *The State and the Poor*,\(^39\) is typical of the distorted view of where Massachusetts’ poorest citizens live. *The State and the Poor* consists of a collection of papers addressing poverty policy in Massachusetts. In a paper by David Birch and Eugene Saenger, ostensibly designed to identify where the state’s poor residents live,\(^40\) the authors concluded that the Commonwealth was “an extremely metropolitan state,” yet noted that while the “two areas with the highest concentration of poor were metropolitan, the next six areas” were rural.\(^41\) Nevertheless, the authors made no attempt to describe the rural poverty scene, apparently on the assumption that it would just be a matter of time before the rural areas were absorbed into the metropolitan areas and would “soon have to be considered quasi-metropolitan whether or not they are included in an SMSA [Standard Metropolitan Statistical Area].”\(^42\) Thirty years later, we now know the authors’ vision of Massachusetts’ demography was clearly wrong; even in the futuristic world of the year 2000 one would be hard pressed to call the hill towns of Franklin County or the Berkshires “quasi-metropolitan” under any circumstances.

Anyone can make a bad prediction about the future, but Birch and Saenger’s treatment (or lack of treatment) of the rural poverty problem is even more surprising in light of their own statistics, which show the number of poor families per hundred dropping over time in metropolitan areas and growing over time in rural areas.\(^43\) Despite their own data, which they themselves classify into “rural” and “urban” categories, they still do not seem to appreciate that Massachusetts really has rural areas. Throughout much of their paper they refer not to the rural poor, but rather to the “suburbanization” of the poor.\(^44\)

Another paper in *The State and the Poor* makes a similar mis-

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41. Id. at 29.
42. Id. at 36. The authors reveal a quite un-prescient view of the likely development of Massachusetts’ demography through the following extraordinary prediction: “As the population in Massachusetts and the Northeast increases, finding adequate living space in the dense metropolitan areas becomes more difficult. Growth thus takes place in the rural areas, which will soon have to be considered quasi-metropolitan whether or not they are included in an SMSA.” Id. at 35-36.
43. The essay reports the numbers of poor families per hundred families in metropolitan areas as: 1950 (20.2), 1960 (19.4), 1967 (18.1); and in rural areas as: 1950 (14.6), 1960 (17.3), 1967 (18.9). Id. at 36.
44. Id. at 37-40.
take when discussing the housing needs of the Commonwealth. That paper focused exclusively on the horrible conditions of urban housing and advocated public building efforts and rent subsidies to address the housing problem.\textsuperscript{45} There was no discussion of the possibility that the housing needs of the rural poor might be different from the housing needs of the urban poor.\textsuperscript{46}

In an attempt to update the Beer/Barringer book for the 1980's, Manuel Carballo and Mary Jo Bane edited a volume entitled \textit{The State and the Poor in the 1980's}.\textsuperscript{47} In the chapter entitled \textit{The Poor of Massachusetts} by Mary Jo Bane, after mentioning in passing that "[h]istorically racial minorities, Southerners, residents of rural areas, and the elderly have had incomes below the poverty line more often than other groups,"\textsuperscript{48} she never again brings up the rural/urban distinction, but instead talks about the entire state as if it were homogenous. The paper in this same collection addressing housing problems in the 1980s, makes a similar oversight.\textsuperscript{49}

Although policymakers in Boston may be blind to it, there really are poor country folk left in Massachusetts. Having lived for eight years in Franklin County, I do not require a scholarly citation to support that assertion. In a law review article, however, such a claim must have a footnote. Unfortunately, I could find no scholarly writing describing the drastic split between the urban and rural areas of Massachusetts. I suggest, however, that it is not unlike the split that exists in northern New England between the cities and rural areas in Vermont, New Hampshire, and Maine,\textsuperscript{50} or the split


\textsuperscript{46.} Experts on rural housing policy have long understood that rural and urban housing problems require different strategies. \textit{See} Carol B. Meeks, \textit{Rural Housing: Status and Issues} 1 (1988) (MIT Center for Real Estate Development, HP #19) ("Although rural areas share many of the problems of urban areas, they have some distinguishing characteristics that make urban-oriented approaches, delivery systems and programs inappropriate.").

\textsuperscript{47.} \textit{The State and the Poor in the 1980's} (Manuel Carballo & Mary Jo Bane eds., 1984) (updating \textit{The State and the Poor}, supra note 39).

\textsuperscript{48.} Mary Jo Bane, \textit{The Poor in Massachusetts}, in \textit{The State and the Poor in the 1980's}, supra note 47, at 1.

\textsuperscript{49.} John M. Yinger, \textit{State Housing Policy and the Poor}, in \textit{The State and the Poor in the 1980's}, supra note 47, at 171 (analyzing problems of low-income housing, especially "conditions in the private housing market," "conditions of existing public housing," displacement by condominium conversion or rent increases, and "discrimination against poor minority households"). Although the discussion of the inadequacies of the private market could apply to rural areas, the discussion does not explicitly address the special needs of the rural poor.

\textsuperscript{50.} \textit{See} A.E. Luloff & Mark Nord, \textit{The Forgotten of Northern New England}, in
between upstate New York and the New York City metropolitan area. Despite the lack of scholarly study, recent journalistic accounts of rural poverty in the Commonwealth lend support to the assertion that there is in fact substantial rural poverty in western Massachusetts, and that it is different from the poverty encountered in urban areas.

In November, 1998, the Greenfield Recorder published an exceptional series entitled “Living on the Brink.” The Recorder devoted its front page for an entire week, along with two, three, or four full inside pages, to stories describing the poverty of western Massachusetts. The articles explored a range of topics, including the extent of poverty in Franklin County, the reluctance of low-income elders to seek assistance, the plight of the “working poor,” the need for fuel assistance, and the threat of welfare dependency. The Boston Globe followed with a long Sunday Magazine article recognizing the economic distress of western Massachusetts. More recently, a University of Massachusetts study

FORGOTTEN PLACES: UNEVEN DEVELOPMENT IN RURAL AMERICA 125, 125-39 (Thomas A. Lyson & William W. Falk eds., 1993) (describing the vast discrepancies between the urban and rural areas of Vermont, New Hampshire, and Maine).


52. Richie Davis, 'Silent' Poverty Burdens Thousands, THE RECORDER (Greenfield, Mass.), Nov. 16, 1998, at 1 (noting that Franklin County has the state's lowest per capita income and that 11% of the county's residents live below the official poverty line); Richie Davis, A Wealth of Ideas About 'Poverty' Confuse the Issue, THE RECORDER (Greenfield, Mass.), Nov. 16, 1998, at 6 (noting that the official federal poverty statistics likely undercount the actual number of Franklin County residents that cannot afford to meet the basic expense of living, and suggesting that by using a more appropriate figure for the costs of basic living, Franklin County's poverty rate would actually be three times higher than the official rate).

53. Richie Davis, Set Budget Forces Choices, THE RECORDER (Greenfield, Mass.), Nov. 17, 1998, at 6 (reporting on senior citizens' attitudes toward accepting charity, and on giving information to the government).


55. Nicole Cusano, $1M Yearly Not Enough to Warm Area's Needy, THE RECORDER (Greenfield, Mass.), Nov. 20, 1998, at 6 (noting the need for more fuel oil and heating assistance).

56. Richie Davis, Poor Policy Keeps People Poor, THE RECORDER (Greenfield, Mass.), Nov. 21, 1998, at 1 (examining whether existing poor programs help people emerge from poverty).

documented what most residents of western Massachusetts already knew: the economic prosperity in Massachusetts is not shared equally between the western and eastern sections of the state. To make matters worse, there is a perception that state policy further hobbles the efforts of western Massachusetts towns to overcome the steep economic hurdles they face.

It is not enough, however, merely to recognize that the rural poor exist. Policymakers must also appreciate that the rural poor and the urban poor are different demographic groups with different attributes and needs. For example, the rural poor are more likely than the urban poor to be employed, more likely to be members of married couple families, and more likely to have some assets (although a negative income), while they are less likely than the urban poor to be children, or to be members of a minority.

Some statistics show that on a percentage basis, rural residents are more likely to be poor than residents of urban areas.

Despite the higher level of poverty in rural areas, poor rural residents are less likely to avail themselves of government assistance programs. The reasons for that failure are many, but a
well-designed public assistance program ought to anticipate as many of those reasons as possible and attempt to counteract the likely obstacles preventing the rural poor from receiving the assistance to which they are entitled. In order to ensure the effectiveness of its public assistance policy, Massachusetts should take into account the fact that there are many rural communities in the state and tailor its policies to take into account the attitudes and norms of the rural poor.

The next question, obviously, must be: "what are the attributes of the rural poor?" In her excellent anthropological study, the late Janet Fitchen identified several characteristics of the rural poor, including:

- Concern about stigma: in small communities, poor people may be reluctant to receive public assistance due to the stigma attached to being on welfare.65

63. JANET M. FITCHEN, POVERTY IN RURAL AMERICA: A CASE STUDY 174 (1981) (opining that the rural poor tend to under-utilize poverty programs for the following reasons: lack of information about the programs, lack of a phone or car to make contact with the agency, failure to recognize that they are poor, resignation to the problem, fear and unease about the encounter with the government agency, viewing the agency as potentially meddlesome and coercive, and the stigma of turning to others for help which means essentially admitting personal failure); cf. WILLIAM M. EPSTEIN, WELFARE IN AMERICA: HOW SOCIAL SCIENCE FAILS THE POOR 184 (1997) (noting that social service agencies have been criticized for "administering an illegitimate social control," "failing to fulfill the conditions of citizenship for recipients," and "stigmatizing or asserting the undeservingness of recipient populations").

64. FITCHEN, supra note 63 (containing an anthropological study of poverty in rural areas and giving a composite picture through a description of the fictional community of "Chestnut Valley").

65. Id. at 72.

Among the low-income rural families, there is clearly a stigma attached to being on welfare. Families who are receiving or have received assistance are sensitive about it and do not talk about it unless there is a particular problem. . . . [E]ven on the school bus, children occasionally taunt each other about being on welfare, repeating derogatory comments and allegations they have heard at home. Adults openly discuss the welfare status of their neighbors, frequently exaggerating the amount another family receives and criticizing the way it is being spent.

Id.; see also Cornelia Butler Flora, The New Poor in Midwestern Farming Communities, in RURAL POVERTY IN AMERICA, supra note 51, at 201, 205 (reporting that the 1980s farm crisis in the Midwest pushed many rural families into poverty, but that many of them did not take advantage of government relief programs in order to avoid the stigma of asking for a handout). See generally CHAIM I. WAXMAN, THE STIGMA OF POVERTY: A CRITIQUE OF POVERTY THEORIES AND POLICIES 69-92 (2d ed. 1983) (discussing the
• Concern about government power: a second frequently encoun­tered attribute of the rural poor is a distrust of government officials, and a suspicion that acceptance of government assistance will bring with it unacceptable government control over individual and family actions.66

• Concern about personal liberty: a related concern often expressed by the rural poor is that accepting government assistance limits the ability of individuals to cope with their own situation by restricting their options.67

• Concern about self-sufficiency: the rural poor, like rural people generally, subscribe to the traditional value of the individual family providing for its own needs,68 and often harbor the concern that government assistance contributes to the break-down of important institutions.69

In the housing setting, these attitudes and values contribute to a preference among the rural poor for privately owned housing over rental housing, regardless of whether the landlord is the government or a private owner.70 The rural poor may sometimes control their housing costs by living either in a house owned by the family for generations, or in a modest house (or trailer) that was

66. Fitchen, supra note 63, at 72-73 (noting that a particularly strong objection to being on welfare is its potential control over individual and family actions). "People fear . . . that 'the welfare' (meaning the official personnel of the department of social services) will take away their house or land, will force them to sell their cars, will dictate how they must spend their money, and may even take away their children." Id. at 73.

67. Id. (reporting on the observed attitude that being on welfare is viewed as undesirable particularly because it decreases the "flexibility of individuals to cope with their own situation," by restricting their options (i.e., their ability to fix up an old car instead of being forced to sell it, or the ability to take back a wandering husband instead of holding him legally liable for back support payments)).

68. Id. (noting the self-sufficiency ethic).

69. See Nathan Glazer, The Limits of Social Policy 1-10 (1988) (arguing that substituting the government for the traditional sources of support for the poor (i.e., family, neighborhood, church, and ethnic group) weakens the connection of the individual to those groups, encourages dependence on the government, creates a welfare culture, and discourages self-sufficiency).

bought cheaply and paid off. Unlike the middle class, who may prefer to own their own homes for investment purposes or for social status, the goals with respect to housing among the rural poor are: (1) to provide shelter, (2) to minimize cash outlay, (3) provide future housing security, and (4) to maintain flexibility to accommodate changes in living arrangements and available cash. Professor Fitchen's book does a very nice job of developing these ideas in greater detail.

Given the tendency of the rural poor to be skeptical of government assistance generally, and further given the strategies for dealing with rural housing that have evolved over the years, it should be obvious that the best possible housing policy in rural areas is not necessarily going to be the construction of new government-assisted rental units. Furthermore, given the Act's bias in favor of the construction of new housing units for rental to low-income people, it is easy to see that the contemplated government response might not be the best fit for rural communities. Although construction of new government-assisted rental housing may be appropriate in some areas, especially in urban regions, the housing needs of rural communities may require a different approach. Viewed from this policy perspective, one can anticipate problems using the Act to address rural housing needs.

In 1969, when the Act was adopted, construction of new government units was the standard response to the housing problem. Yet, even at that time, commentators recognized problems with the conventional wisdom of dealing with the housing problem through government-assisted housing construction. Specifically, existing

71. Fitchen, supra note 63, at 77.
72. Id. at 96.
73. Rural housing issues may have more to do with the high cost of heating oil, or the need for low-interest home improvement loans, for example, than with the provision of new rental units which the target population might not be willing to move into. For a real life example, consider the case of Greenfield, county seat of Franklin County. According to the Greenfield Housing Authority, Greenfield is experiencing a shortage of housing for people with children under age six not because Greenfield is trying to exclude low-income people and not because there is no appropriate housing stock, but rather because there are only "a limited number of certified apartments where lead paint—a child health hazard—has been removed." Richie Davis, Housing Crunch Persists, The Recorder (Greenfield, Mass.), Nov. 18, 1998, at 6. A legitimate (and cost-effective) housing strategy ought to include assistance for lead paint abatement to make more units available.
75. See League of Women Voters of Boston, "Alternative Methods to Increase
programs did not address the pressing needs of rural areas, failed to promote homeownership, de-emphasized rehabilitation of existing units, and failed to take advantage of existing housing stock through tenant-based assistance.76 To be fair, over the years the federal government has implemented some programs specifically targeted at rural housing problems, including loan programs to promote homeownership, repair and weatherization.77 The Farmers Home Administration (FmHA) has also had some success in developing new and rehabilitating existing housing units.78 Unfortunately, during the Reagan administration, resources for rural housing problems were reallocated and the FmHA programs suffered.79

IV. THE ROLE OF THE ZONING BOARD OF APPEALS UNDER THE ACT

Putting aside the background information about the special problems of rural housing for the moment, we now turn to an examination of the role of zoning boards of appeal under the Act. To enable the ZBA to properly discharge its duties under the Act, section 21 requires the ZBA to request input from such local officials and boards as are deemed necessary or helpful in making the decision on the application.80 The Act anticipates the ZBA's receipt of a great deal of evidence and testimony from the applicant, townspeople, interested parties, and experts. In addition, principles of general zoning law permit the ZBA to rely on its knowledge of local conditions in order to place an application and submitted evidence

the Supply of Low-Income Housing" (Mar. 1965) (describing the crisis in Boston's supply of low-income housing and expressing doubt that creating new public housing units would address the need but suggesting a range of alternative programs to help correct the problem).

76. Taggart III, supra note 74, at 141-43 (outlining these criticisms). At around the same time, Canada's housing program came under criticism in a comprehensive task force report on housing policy. See Michael Dennis et al., Programs in Search of A Policy 14-27 (Michael Dennis & Susan Fish eds., 1972) (criticizing Canadian housing policy for focusing on the production of housing units instead of on the larger goal of providing affordable housing for all Canadians through programs involving homeownership in rural areas and small towns, rehabilitation, and other policies).

77. See, e.g., Rural Housing Alliance, Low-income Housing Programs for Rural America (6th ed. 1978) (describing the programs that existed in 1978).

78. See Hous. Assistance Council, Rural Housing Goals and Gaps 14-15 (1977) (noting that during the fiscal years 1969-1975, the FmHA made loans that resulted in the creation of 733,002 units of housing).

79. See Arnold, supra note 70, at 191 (describing rural housing programs and their funding and political problems).

in an appropriate local and regional context.\textsuperscript{81}

The Act requires the ZBA to use this data to discern the important local concerns about health and safety, design, and open-space conservation raised by the Comprehensive Permit application. The ZBA may deny the request for a Comprehensive Permit if the local concerns outweigh the need for low- to moderate-income housing, or, more commonly, the ZBA may issue the permit subject to conditions designed to address the legitimate concerns of the townspeople. The Act states that conditions imposed on a permit are permissible as long as they do not render the project "uneconomic" and are "consistent with local needs."\textsuperscript{82} In practice, the acts of the local ZBA will be respected on appeal only when the town meets certain bright line tests relating to the number of low-income units already existing in the municipality that establish a safe harbor for "consistent with local needs."\textsuperscript{83} I call these bright line tests the "mathematical safe harbors."\textsuperscript{84}

\textsuperscript{81} See Gamache v. Town of Acushnet, 438 N.E.2d 82, 87 (Mass. App. Ct. 1982) ("Zoning is a local matter and courts assume a board of appeals is familiar with local conditions.").

\textsuperscript{82} § 23.

\textsuperscript{83} See § 20 (defining as "consistent with local needs" any requirement or regulation imposed by a zoning board of appeal in a city or town where: (1) more than 10% of the town's housing qualifies as low- or moderate-income housing, (2) 1.5% or more of the land zoned for residential, commercial, or industrial use is covered by low- or moderate-income housing, or (3) the issuance of the permit would result in the commencement of low- or moderate-income housing on more than .3% of non-publicly held land). What counts towards the 10% quota and how the total number of housing units existing is determined, has been refined/interpreted by the HAC. The statute states that housing unit information should be derived from the "housing units reported in the latest federal decennial census." § 20. Instead, in determining whether the town has met the required 10% safe harbor, the HAC typically uses the latest inventory of housing produced by the EOCD/DHCD. See MASS. REGS. CODE tit. 760, § 31.04 (1993) (stating in (l)(a) that the latest Executive Office of Communities and Development Subsidized Housing Inventory is presumed to represent an accurate count of low- and moderate-income housing, and in (l)(b) that the increase in new units ready for occupancy or under permit, or decrease in units since last census, would be considered. Towns should not expect to receive a literal application of the land area safe harbor.). See Robinwood Inc. v. Bd. of Appeals (Rockland), No. 72-03, at 8, 12 (Mass. Housing Appeals Committee Dec. 3, 1975) (overturning denial of Comprehensive Permit even though the total project exceeded the land area limits because the project was being developed over several calendar years so technically neither 10 acres nor .3% of the town's buildable land would be under construction in either year), available at Nellco, supra note 18.

\textsuperscript{84} Even the safe harbors are shrouded in uncertainty because the HAC insists on departing from the specific language of the Act when it believes such a departure serves the legislative intent of the Act. See Pioneer Home Sponsors, Inc. v. Northampton Bd. of Appeals, No. 74-01, at 5 (Mass. Housing Appeals Committee Apr. 1, 1975) ("In all of its decisions, beginning with its Hanover and Concord decisions, both of which were
In some sense, because of the important social concerns addressed by the Act and its nature as remedial legislation, one could argue that the authority of local ZBAs should be severely constrained.\textsuperscript{85} Given the stubborn problem of providing sufficient affordable housing, and the history of local resistance to such projects, one could argue that a presumption should exist in favor of approval and against either denial or conditional approval. The Act itself, however, does not contain such a presumption. The Massachusetts Supreme Judicial Court ("SJC") has stated that the Act does not require local zoning boards to automatically grant comprehensive permits to all developers of low- to moderate-income housing.\textsuperscript{86} The HAC concurs that there is no automatic obligation on the part of local ZBAs to approve all Comprehensive Permits.\textsuperscript{87}

On the other hand, the SJC has also said that the Act is intended to prevent towns from using their zoning ordinances to obstruct or exclude the construction of low-income housing projects.\textsuperscript{88} Finding the point on the continuum between automatic approval and obstruction is the challenge to the ZBA conducting the public hearing on the Comprehensive Permit. If the Act contained clear language directing towns to either build low-income housing them-

\textsuperscript{85} See Sheridan Dev. Co. v. Tewksbury Zoning Bd. of Appeals, No. 89-46, at 9 (Mass. Housing App. Committee Jan. 16, 1991) (overturning the ZBA's refusal to issue a comprehensive permit because it was not "consistent with local needs"), available at Nellco, supra note 18.

\textsuperscript{86} Bd. of Appeals (Hanover) v. Hous. Appeals Comm'n, 294 N.E.2d 393, 413 (Mass. 1973).

\textsuperscript{87} Hamlet Dev. Corp., No. 90-03, at 9-10 ("Clearly the legislature did not want local powers limited arbitrarily so that subsidized housing would be built at any cost. Rather, that it established a specialized body, the Housing Appeals Committee, to review these cases de novo indicates its intention that local powers be carefully circumscribed by a process that would insure that each proposed subsidized housing project would be carefully examined on its own merits."), available at Nellco, supra note 18.

\textsuperscript{88} Bd. of Appeals (Hanover), 294 N.E.2d at 406 ("[T]he Legislature's intent in passing c. 774 [40B] was to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing.").
selves or to make special accommodations for developers of low-income housing, the task of local zoning boards of appeal would be much simpler, and would involve virtually no discretion. But that is not what the Act says. The 1969 Urban Affairs committee that cobbled together the Act considered five different approaches to the exclusionary zoning problem before settling on the final language of the Act. 89 One alternative approach to the Act called for inserting a general exclusion for low- and moderate-income housing projects in the general exemption section of the zoning statute. 90 The approach of putting these projects in the same category as religious and educational facilities—which are exempt from the operation of zoning laws—did not garner sufficient political support.

One can only speculate about why the legislature did not exempt these projects completely, perhaps because they did not trust developers not to take advantage of the system, or perhaps because the lawmakers recognized that the communities and regions within the Commonwealth might vary considerably in their need for “low-to moderate-income housing.” Because communities and regions

89. The five bills under consideration presented a range of policy choices. (1) Senate Bill 1137, submitted by Beryl W. Cohen (Norfolk-Suffolk District), in conjunction with Lawrence D. Shubow, proposed to amend the Zoning Act (Ch. 40A) by declaring that local zoning ordinances or bylaws would be invalid if they did not permit multi-unit residential buildings on at least 15% of the area of the city or town. S. 1969-1137, at 1 (Mass. 1969). It did not require towns to approve such projects and it was not clear whether the projects had to be permitted as a matter of right or whether they could be permitted by special permit. See id. (2) Senate Bill 1141, submitted by Joseph J.C. DiCarlo (1st Suffolk District), proposed that every town and city with less than 2000 people per square mile as of 1969 be required to insert in their zoning bylaws mandatory provisions set out in the legislation specifying setbacks, footprint size, lot size, maximum height, parking and other details. S. 1969-1141, at 2-4 (Mass. 1969). Section 2 of the bill exempted from its application virtually the entire Boston metropolitan area. See id. at 4. Notable exceptions to the long list of exempt towns included, Cohasset, Manchester, Lincoln, Weston, and Concord. See id. This approach clearly seems geared toward forcing mobility relief on non-metropolitan Boston communities. (3) House Bill 2924, submitted by Martin A. Linsky (Brookline) for Beryl W. Cohen (Norfolk-Suffolk District), would have invalidated any zoning ordinance which purported to prohibit or limit the use of any land that was to be used for “any housing whether single family or multi-family which is sponsored by a local housing authority, a non-profit or limited dividend corporation, a cooperative, or condominium for low- or moderate-income families as defined under federal statute and the General Laws of the commonwealth.” H.R. 166-2924, at 1 (Mass. 1969). This was the exemption approach. (4) & (5) House Bills 3175 and 3603, submitted by James L. Grimaldi (Springfield), proposed to amend the Zoning Act to set density requirements for single-family homes. H.R. 166-3603, at 2 (Mass. 1969); H.R. 166-3175, at 2 (Mass. 1969).

within the Commonwealth vary so much, the legislature may have decided that a blanket policy decision from Beacon Hill was not appropriate, but instead that some local input was necessary to make the determination about placement of low-income housing. Nevertheless, the legislature must have known about the tendency of local governments to use their zoning power to exclude low-income housing, so they may have tried to fashion a "check and balance" mechanism to allow legitimate local input while providing a bulwark against the kinds of illegitimate opposition historically leveled against low-income housing projects. Viewed in this light, the legislature's plan allows local zoning boards to provide a check and balance mechanism that can serve the dual purposes of: (1) making the approval process easier and less costly for developers proposing to build needed projects, while (2) providing a method to short circuit proposed housing projects for which there is no need, or which create significant health, safety, planning, or open space problems that outweigh any need before scarce government resources are expended on construction costs.

Therefore, it appears that the local ZBA serves a gatekeeper function for new government-assisted construction of low-income housing. Determining whether a given locality needs a specific new government-assisted housing project for low- to moderate-income people is a fact-specific undertaking, and one that necessarily requires the fact-finder to exercise judgment. In the process con-


92. See Hamlet Dev. Corp., No. 90-03, at 8 ("In chapter 40B, in section 20, in defining the most critical term in the statute, 'consistent[ with local needs,' the legislature has required, in a very open-ended manner, the balancing of regional housing need against 'the need to protect ... health or safety .... In light of this, we believe that the statute must be read to permit the Board to review health and safety concerns in a similarly open-ended way."). available at Nellco, supra note 18; id. at 15 ("[W]here there is an issue of major public health or safety concern ... which is not likely to be dealt with in another forum, and particularly where the issue arises primarily because of the unanticipated nature of the subsidized housing development, it must be addressed [by the local board].").

93. Zoning boards of appeal are especially well suited to this check and balance function because they are not politically accountable to the citizens of the town. Zoning boards are not elected, but instead are appointed by the mayor or board of selectmen. Mass. Gen. Laws ch. 40A, § 12 (1998). Consequently, zoning boards do not have to worry about re-election and may therefore be more resistant to inappropriate public opinion about housing projects. The political pressure on the unelected zoning board will be felt much less keenly than the same pressure would be felt by an elected body.

94. See supra text accompanying notes 79-81 for a discussion of the process for
templated by the Act, a great deal turns on the extent of local need for low- to moderate-income housing. If the need is great, the town’s countervailing health and safety, design, or open space concerns must be especially heavy in order to justify conditions on, or denial of, the permit. Conversely, if the need for low- to moderate-income housing is slight, the denial or conditioning of the permit may survive without as great a showing on the other concerns.

Because the determination of the local need for low-income housing is by nature a highly fact-specific judgment by the local ZBA, and because so much turns on the correct assessment of local need, parties interested in the outcome of the Comprehensive Permit process are likely to second guess the ZBA. Opponents will take issue when ZBAs find a need, while proponents will object when they do not find a need. Given the extreme difficulty, if not impossibility, of establishing uncontestable methods for assessing local needs for low- to moderate-income housing and local concerns about health, safety, design and open space, the legislature provided some safe harbors in the Act to take a degree of uncertainty out of the process.

Specifically, when a municipality has met any one of the mathematical safe harbors, the decisions of its zoning board regarding the need for low- to moderate-income housing are entitled to respect as a matter of law as being “consistent with local needs.” Although a developer of low-income housing may appeal a decision made by a ZBA in a municipality meeting the mathematical safe harbors, the review will be limited to the reasonableness of the denial, or in the case of approval with conditions, the extent to which the conditions are uneconomic. For the developer to prevail on reviewing a comprehensive permit application. But cf. Hamlet Dev. Corp., No. 90-03, at 17 (stating that “as a factual matter the need for housing is great throughout the state,” suggesting that there is no question of the need for housing), available at Nellco, supra note 18.

96. See supra note 84 for a discussion of the statutory safe harbors.
98. Id. (providing that on appeal the HAC shall review denials to see if they were “reasonable and consistent with local needs,” and review conditional approvals to determine “whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs”); § 20 (defining “consistent with local needs” to include compliance with the mathematical safe harbors); cf. Coop. Alliance v. Zoning Bd. of Appeals (Tauton), No. 90-05, at 7-8 (Mass. Housing App. Committee Apr. 2, 1992) (stating that a developer challenging a condition placed upon a comprehensive permit must get through two steps: first the
review by the HAC a denial must be both unreasonable and inconsistent with local needs, or the imposed conditions must be both uneconomic and inconsistent with local needs by creating a rule of law that says compliance with the mathematical safe harbors counts as satisfaction of the requirement of consistency with local needs, the Act essentially takes ZBA actions in towns that meet the safe harbors out of the HAC appeal process.

While these mathematical safe harbors alleviate some uncertainty in the needs assessment process by drawing a bright line beyond which the decisions of local ZBAs are not to be questioned, the safe harbors themselves are not necessarily designed to serve as a litmus test for determining the “need” for low- to moderate-income housing. When a town falls short of the mathematical safe harbors, the Act provides no guidance for assessing the degree of need for the proposed housing.

While the Act sets up the mathematical safe harbors to create a rule of law in favor of a ZBA’s decisions, nowhere does the Act provide that failure to meet the mathematical safe harbors creates a rule of law against a ZBA’s decisions. When read closely, the Act reveals that the actions of a zoning board in a town that does not meet the mathematical safe harbors are not automatically invalid, but instead merely do not get the benefit of the rule of law that blesses decisions made by ZBAs in towns that do meet the safe harbors. Indeed, in Board of Appeals of Hanover v. Housing Appeals Commission the Massachusetts Supreme Judicial Court stated that the Act does not require local zoning boards to automatically grant comprehensive permits to all developers of low- to moderate-income housing, even when a town fails to meet these benchmarks.99

The natural temptation in situations where the safe harbors are not met is to flip the safe harbors on their heads and say that failure to meet them is determinative of “need.” The EOCD/DHCD has attempted to do that in its regulations, which state that failure to meet the mathematical safe harbors creates a “presumption that there is a substantial regional housing need which outweighs local concerns.”100 Though the language of the Act does not require that

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approach, one could argue that the negative pregnant is a defensible interpretation of the rule of law established by the Act. For legal authority in establishing this presumption, the EOCD/DHCD rests on the interpretation of the Act given by the Massachusetts Supreme Judicial Court in *Hanover.*

Language in the *Hanover* case supports the agency’s interpretation by referring at several points to the 10% test in the mathematical safe harbors as a town’s “minimum housing obligation” and by noting that failure to attain that “minimum housing obligation” would be “compelling evidence” of a need for housing. The use of the phrase “minimum housing obligation” is perhaps an unfortunate choice of words, since, even decades after the passage of the Act, such a commitment by municipalities in the Commonwealth is truly extraordinary. Yet the HAC has seized on that language to create the presumption against towns that fail to meet the mathematical safe harbors.

The HAC, with some support from the SJC, has turned the original rule of law in favor of town actions where the mathematical safe harbors have been met, into a presumption against town actions where the mathematical safe harbors have not been met.

101. 294 N.E.2d at 413. The Massachusetts regulation cites the *Hanover* case as support for the proposition that lack of compliance with the safe harbors creates a presumption against the town. § 31.07(1)(e). A close examination of the *Hanover* decision, however, reveals that neither the word “presumption” nor the word “presume” appears anywhere in the opinion. The *Hanover* court did say that failure to meet the mathematical standards would be “compelling evidence” of need, but that is not the same thing as a “presumption.” 294 N.E.2d at 413.

102. *Id.*

103. To a 21st century ear, the phrase “minimum housing obligation” comes across as a bit disingenuous. Quite to the contrary of the mathematical safe harbors being a “minimum housing obligation,” even thirty years after the enactment of the Act the provision of 10% of a town’s housing units as low-income is a truly exceptional event. Data compiled by the Department of Housing & Community Development shows that as of July 1, 1997, of the 351 municipalities in the Commonwealth only 23 (6.5%) had met that 10% mathematical safe harbor — and that includes market-rate units that are a part of mixed market-rate/subsidized projects approved under the Act. Most towns did not even come close to providing 5% of their total housing units in chapter 774 approved subsidized housing. Ironically, the vast majority of municipalities that meet the “minimum housing obligation” are central cities in metropolitan areas. These facts reinforce the inevitable conclusion that the legislature did not intend to mandate that every municipality eventually dedicate 10% of its housing to government-subsidized housing. If that had been the legislature’s desire, one would surmise that if twenty years after the enactment of the Act less than 5% of the Commonwealth’s town and cities met that standard, the legislature would have passed tougher, more direct requirements to alleviate the “crisis” in public housing. Yet when the legislature reviewed chapter 40B in 1987-1989, it did not change the formulation of the statutory mandate.
Thus, towns have fared poorly when denials or conditional approvals are appealed to the HAC. Since its inception, the HAC has found for the town on only a handful of occasions. The lopsided margin of victory for developers at the HAC stage gives towns the impression that the deck is stacked against them. Although a very heavily skewed record of wins and losses at a given point in time does not, as a theoretical matter, mean the hearing body is prejudiced against one side, one would expect with a fair hearing process that over time the outcomes would come closer to an even split.\textsuperscript{104} Despite some decisions that profess to give local control a meaningful role in the review process,\textsuperscript{105} the HAC's decisions are not tending toward an even split, and this split causes towns to question the fairness of the process.\textsuperscript{106}

An appeals process that is perceived to be unfair has serious implications for the prospect of voluntary compliance with the law. An intriguing line of research pioneered by Professor Tom Tyler has explored why people and institutions obey the law. Professor Tyler's research points to perceptions of fairness as being the most important factor in the voluntary respect for law.\textsuperscript{107} In response to a rhetorical question asking why experiencing unfair procedures might undermine compliance with the law, he answers his own question with a cogent distillation of his book:

The obligation to obey is based on trust of authorities. Only if people can trust authorities, rules, and institutions can they believe that their own long-term interests are served by loyalty toward the organization. In other words, the social contract is based on expectations about how authorities will act. If authorities

\textsuperscript{104} See George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1, 4-6 (1984) (articulating the hypothesis that because litigated cases are not a random sample, the win rates reveal nothing about underlying bias, but that over time if the win rates are known, the self-selection process should tend toward a 50\% win/lose ratio).


\textsuperscript{106} Cf. John M. Payne, Remedies for Affordable Housing: From Fair Share to Growth Share, 49 LAND USE L. & ZONING DIG. 3, 4 (1997) (noting that the formulaic “fair share” approach to housing in New Jersey has resulted in “inadvertently stiffening popular resistance to the Mount Laurel requirement because of the large and seemingly arbitrary fair share numbers and subtly stifling inquiry into some of the more creative solutions to our real housing problems”).

\textsuperscript{107} Tom R. Tyler, Why People Obey the Law 170-78 (1990) (discussing the psychology of legitimacy and the role of procedural fairness in establishing legitimacy).
ties violate these expectations, the social contract is disrupted. It is interesting that people appear to connect the obligations of authorities to issues of fair procedure, not to outcomes. It is being unfairly treated that disrupts the relationship of legitimacy to compliance, not receiving poor outcomes.\textsuperscript{108}

While Professor Tyler's work finds procedure to be more important than outcome in the perception of fairness, sometimes it is not easy to draw a clear line between procedural fairness and fairness of outcome. For example, when the outcomes almost always go one way, observers may reasonably suspect that the process by which those outcomes are achieved is biased and therefore unfair. Speaking as a former ZBA member, I can attest that given the HAC's track record in settling disputes between towns and developers, the Gill ZBA never seriously thought the town would ever get a fair hearing before the HAC. Indeed, when I drafted the opinion denying the Comprehensive Permit application, I did so with the understanding that my opinion should also serve as the first draft of the brief for the appeal from the HAC's decision; we were almost certain the decision would be in favor of the FCRHA. Of course, the HAC has never lost an appeal either, so we really felt our quest was quixotic.

As it has played out in practice, the Act, the regulations, and the court interpretations can make the ZBA's role seem like an empty exercise where only local approvals are respected, while local denials or conditional approvals are re-heard \textit{de novo} by a body that has a long record of apparently giving very little weight to the local concerns found by the ZBA. Given this environment, it is little wonder that towns and cities resist the Act and are suspicious of its operation. If things continue this way, we should expect towns to continue to bridle at the application of the Act.

If the Act has any hope of attaining the kind of legitimacy that will engender respect and voluntary compliance, it must give the ZBA responsibility for contributing meaningfully to the process. If the Act asks local ZBAs to play a meaningful role, it should also accord them some deference in appropriate cases. For instance, instead of creating a presumption that all actions of a local ZBA in a town that does not meet the safe harbor are invalid, the review process might instead raise the level of scrutiny only when there is reason to suspect that the design behind the local zoning ordinance is animated by an improper motive. The Act does not require the

\textsuperscript{108} \textit{Id.} at 172.
HAC to hold a de novo review, and the Committee can adopt other appeal procedures if it so chooses.

The HAC has apparently begun to respond to the potential crisis of legitimacy it could face if towns across the Commonwealth suspected its proceedings were always stacked against them. In his remarks in this symposium, Werner Lohe, Chairman of the HAC, brings news that the HAC really does want to respect the legitimate local planning concerns of municipalities.\(^{109}\) Somewhat unconvincingly, he cites to an early HAC decision as evidence that the HAC wants to respect local concerns. In *Harbor Glen Associates v. Board of Appeals (Hingham)*,\(^ {110}\) a developer wanted to develop low-income housing on land earmarked for an office park under the Town of Hingham's comprehensive plan.\(^ {111}\) Although Hingham had not satisfied the mathematical safe harbors, the HAC respected the town's otherwise non-discriminatory comprehensive plan and refused to allow the low-income housing developer to essentially rezone the property.\(^ {112}\) In the words of the HAC:

This case squarely presents the Housing Appeals Committee the issue of the weight to be given to a Master Plan that is in contravention of the land use sought by an applicant for a Comprehensive Permit. The handling of this issue by the Committee in previous cases indicates that there is no categorical answer. The Committee looks to legislative intent, both in Chapter 774 and in the zoning laws. In the process of weighing the housing need against valid planning objections, certainly a Master Plan is a valid planning factor that must be so weighed; but in our interpretation and administration of Chapter 774, it is no more than that. Where the Master Plan is totally unrealistic with respect to present land uses or reasonably potential future uses, where there is more than a suspicion that the Master Plan is simply a sophisticated maneuver to perpetuate precisely the abuses which Chapter 774 was designed to eliminate, where the Master Plan is simply an ancient planning exercise, ignored and gathering dust for years, and now dusted off to frustrate housing for which there is a clearly demonstrated need, the Master Plan will not prevail in


\(^{111}\) *Id.* at 7.

\(^{112}\) *Id.* at 17.
the weighing process.\textsuperscript{113}

If the HAC really considers \textit{Hingham} to be a statement of how much respect should be accorded to the local planning scheme, that should be great news for municipalities all across the state. Unfortunately, Mr. Lohe did not explain why in the almost twenty years since it was decided, the \textit{Hingham} decision has stood out as an atypical opinion of the HAC. More frequently, when the HAC has referred to \textit{Hingham}, it has classified the options presented to the developer by Hingham's Master Plan as being "unusually reasonable" as a way to distinguish \textit{Hingham} and limit its applicability.\textsuperscript{114}

Mr. Lohe also suggests that the more recent HAC decision in \textit{KSM Trust v. Zoning Board of Appeals (Pembroke)}\textsuperscript{115} indicates how the HAC really feels about the role of local planning in the comprehensive approval process.\textsuperscript{116} That opinion states that a comprehensive plan should be given "considerable weight" in reviewing a ZBA's action under a comprehensive permit application if it meets three requirements: (1) it must be bona fide; (2) it should not restrict affordable housing on its face; and (3) it must be implemented in the area of the project site.\textsuperscript{117} As Mr. Lohe points out, however, the town lost in the actual \textit{KSM Trust} case. Although the HAC apparently tries to signal towns as to what it is willing to respect as far as local planning concerns go, the oracular pronouncements, contained as they are in decisions that deliver outcomes against towns, often fall on deaf ears.

Read in the light offered by Mr. Lohe, these cases say that if towns really take control of their own planning processes and put affordable housing on their agendas, their local autonomy will be

\textsuperscript{113} \textit{Id.} at 12-13.

\textsuperscript{114} Silver Tree Ltd. P'ship v. Bd. of Appeals (Taunton), No. 86-19, at 37-38 (Mass. Housing App. Committee Oct. 19, 1988) ("This case is distinguishable from Harbor Glen. There the Plan offered the Developer an unusually reasonable alternative, which the Developer asked the Committee to ignore. In this case, given the existence of the housing need, the alternatives offered to the Developer bear scrutiny."), \textit{available at} Nellco, \textit{supra} note 18; Wilmington Arboretum Apts. Assocs. Ltd. P'ship v. Bd. of Appeals (Wilmington), No. 87-17, at 18 (Mass. Housing App. Committee June 20, 1990) ("This case is distinguishable from Harbor Glen. There the Plan offered the Developer an unusually reasonable alternative, which the Developer asked the Committee to ignore. In this case, given the existence of the housing need, the alternative offered to Arboretum Associates bears scrutiny."), \textit{available at} Nellco, \textit{supra} note 18.

\textsuperscript{115} No. 91-10 (Mass. Housing App. Committee Nov. 18, 1991), \textit{available at} Nellco, \textit{supra} note 18.

\textsuperscript{116} \textit{See} Lohe, \textit{supra} note 109.

\textsuperscript{117} \textit{KSM Trust}, No. 91-10, at 6-7 (listing these factors), \textit{available at} Nellco, \textit{supra} note 18.
respected. What these cases do not contemplate are towns like Gill, that have only skeletal town governments and may have trouble filling positions on the board of selectman, never mind charging a planning board or special task force with the huge task of creating a master plan to address housing issues for which few people in town even see the need. The Hingham and KSM Trust decisions leave few excuses for sophisticated and affluent towns to say that local concerns were not respected; the HAC has indicated what form of expression those local concerns need to take in order to pass muster. On the other hand, unsophisticated, poor towns like Gill and many other rural communities in the Commonwealth can not put together the kind of sophisticated master plan that will be respected by the HAC; they can not do this because they lack the resources to do so and they are not even aware that such an exercise is worth undertaking.

The cases, therefore, leave us with the question of what should be done with towns that do not have the kinds of master plans that earn the HAC’s respect. As the law stands now, as a matter of HAC regulation, actions (other than approvals) by towns without a master plan that pass muster and do not attain the protection of the mathematical safe harbors are essentially invalid. Knowing this, developers essentially only have to comply with the conditions that they agree to, knowing that to challenge conditions imposed by the ZBA, they merely need to appeal to the HAC and will likely receive a favorable hearing. This process can be disheartening for the members of the ZBA, who, after all, are citizen volunteers and who have probably sacrificed many an evening with their families to participate in long and detailed public hearings.

V. APPLYING THE ACT IN THE RURAL SETTING

Assuming for the sake of argument that the local ZBA does have a role to play in the Comprehensive Permit process that is more than mere window dressing, the first major task facing a local ZBA under the Act is to assess the “need” for low- to moderate-income housing in the region where the project is to be located.118 The assessment task before a zoning board is not at all straightforward. The most obvious problem is that zoning boards are given no guidance in determining what the appropriate region is, since the terms “local” and “regional” are not defined in the Act. Secondly,

the Act gives no guidance in determining when a town or city needs "low and moderate income housing" as that term is defined by the Act. This section examines these two problems in more detail.

A. Defining the Region

The Act requires the local ZBA to make a determination of housing needs within both the municipality where the project is to be located and the region where the municipality is located. The Act does not, however, provide any guidance to local zoning boards about how to determine the appropriate region for purposes of this assessment. One approach to the region definition problem has been articulated by the SJC. The SJC has recognized that the terms "local" and "regional" as used in the Act are imprecise, but, nevertheless, held that "in this context it is clear that 'local' need relates to the municipality directly concerned... while 'regional' need includes surrounding communities." The SJC's definition (disposed of in a footnote) is subject to at least two interpretations. The first interpretation is a narrow one, taking the language to mean that a region consists of—and is defined to mean—the municipality where the project is to be located and the communities surrounding it. This would result in relatively compact, geographically close groups of communities being considered regions.

The second interpretation is more expansive. One could argue that although given the (admittedly limited) opportunity in Bagley to provide a more specific definition of region, such as the Standard Metropolitan Statistical Area, or the county in which the town is located, or some other objective test, the SJC instead articulated a much more open-ended rule. The language from the case says region "includes surrounding communities," but it does not say what else might be included. A ZBA might legitimately ask how far beyond "surrounding" communities it should look and whether the region could cross a state line. If the expansive test governs the interpretation of the dicta in Bagley, the guidance the SJC sought to provide on the definition of "region" is of limited value to ZBAs trying to define the area within which they must make their housing needs assessment.

119. Id. (defining requirements and regulation imposed by the local ZBA as being "consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing") (emphasis added).
121. Id.
Because the definition in *Bagley* is not comprehensive, the law in Massachusetts remains unsettled, which invites other approaches to the region definition. For example, in the context of assessing "need," the agency charged with administering the Act (first the Department of Community Affairs, then the Executive Office of Communities and Development ("EOCD") and now the Department of Housing and Community Development ("DHCD")), uses a definition of region based on federal Metropolitan Statistical Areas ("MSAs"). For example, in the official Massachusetts definition of "low- to moderate-income housing," the relevant region is the MSA where the project is located. 122 The problem with using MSAs to define "region" is that not all Massachusetts towns are in MSAs. For example, as defined by the Bureau of the Census, the Metropolitan Statistical Areas in Massachusetts do not include Franklin County at all, and leave out substantial portions of Berkshire and Hampshire counties and smaller portions of Hampden and Worcester counties. 123 Even under the more expansive concept of New England County Metropolitan Areas ("NECMA"), which the Bureau of the Census defines on a basis more consistent with the methodology of the rest of the country, 124 Franklin County is still not included within any NECMA. 125 The definition of "region," therefore, continues to be a difficult problem for those parts of the Commonwealth that are not included in the MSAs.

One could turn to other states for guidance on the region definition issue. Unfortunately, the law of neighboring states provides little help in fleshing out the concept. New Hampshire law, for example, also requires that towns take regional needs into consideration when enacting land use restrictions. 126 The New Hampshire case law is not very helpful, however, on the issue of how to define

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123. CENSUS DATA BOOK, *supra* note 122, at xiii.

124. *Id.* at B-9.

125. *Id.* at D-3.

126. Britton v. Town of Chester, 595 A.2d 492, 495 (N.H. 1991) ("When an ordinance will have an impact beyond the boundaries of the municipality, the welfare of the entire affected region must be considered in determining the ordinance's validity.").
the relevant region. At a minimum, in New Hampshire the relevant region includes a city and its suburbs,127 but beyond that the definition is unclear.

Rhode Island law also offers little on the question of what Massachusetts means by “region” as that term is used in the Act. Although Rhode Island has a statute128 that is almost a verbatim replica of the Act, the key provision defining “consistent with local needs” does not have a reference to region, but instead talks about the need for local requirements to be consistent with state needs for low-income housing.129 The Rhode Island statute, therefore, sidesteps the problem by considering the entire state to be the relevant region. Massachusetts could have done the same thing, but the Act clearly does not say “the Commonwealth’s need,” but rather the region’s need. Indeed, “region” as used in the Act cannot mean the entire state. Martin Linsky, lead drafter of the Act, recalls that the regional concept was inserted into the Act to reassure municipal leaders that the housing needs assessment would be within the relevant metropolitan area and not essentially statewide.130

New Jersey, which has led the way on many housing issues, also fails to help Massachusetts define “region” in a way that is useful for the Act. Ten years after the famous case of Southern Burlington County NAACP v. Township of Mount Laurel,131 the New Jersey legislature passed its own Fair Housing Act,132 designed to set out a comprehensive statewide housing policy. In

127. One could reach this conclusion as a result of the Britton case, which involved a bedroom community of Manchester. Cf. id. at 493 (noting that the Town of Chester is a “bedroom community” of Manchester).


129. See id. § 45-53-3 (“‘Consistent with local needs’ means local zoning or land use ordinances, requirements, and regulations are considered consistent with local needs if they are reasonable in view of the state need for low and moderate income housing, considered with the number of low income persons in the city or town affected and the need to protect the health and safety of the occupants of the proposed housing or of the residence [sic] of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if the local zoning or land use ordinances, requirements, and regulations are applied as equally as possible to both subsidized and unsubsidized housing.”) (emphasis added).


131. 336 A.2d 713, 731-34 (N.J. 1975) (holding that municipalities in New Jersey have an obligation to provide their fair share of the regional need for safe, decent, and affordable housing).

an attempt to settle the issue of what constitutes a region for purposes of housing policy, the New Jersey Fair Housing Act provided a definition that works primarily at the county level and ties into the Standard Metropolitan Statistical Area system. In order to make the definition of the regions perfectly clear, the New Jersey Council on Affordable Housing spells out in its regulations what the various regions are. Such an approach would be helpful in Massachusetts, but that is clearly not what the Commonwealth has done.

When applying the Act to a given town in Massachusetts, the definition of “region” will likely have to be negotiated between the municipality and the developer. The narrow reading of Bagley may be appropriate in some cases while a more expansive reading may be appropriate in others. It seems clear, however, that there is no hard and fast legal rule that spells out what the region should be. Thus, a ZBA may have flexibility to define the region as it sees fit, provided, of course, that it can justify the characterization within the language of Bagley. In the FCRHA application to the Gill ZBA, for example, the applicant stipulated that the “region” at issue was Franklin County.

While ZBAs wrestle with the definition of “region” in order to carry out the task assigned to them under the Act, there exists a possibility that the HAC’s interpretations may dispose of a rigorous regional definition requirement entirely and judge the local need for subsidized housing against the backdrop of the need in the Commonwealth for low-income housing. Such an approach would be inconsistent with the language of the Act and the political

133. See N.J. STAT. ANN. § 52:27D-304(b) (West 1986 & Supp. 2000) (referring back to the Public Law which defines “housing region” to mean “a geographic area of no less than two nor more than four contiguous, whole counties which exhibit significant social, economic and income similarities, and which constitute to the greatest extent practicable the primary metropolitan statistical areas as last defined by the United States Census Bureau prior to the effective date of this act”).

134. See N.J. ADMIN. CODE tit. 5, 92-2.1 (1995) (defining six regions comprised of various counties as follows: (1) Northeast (Bergen; Hudson; Passaic); (2) Northwest (Essex; Morris; Sussex; Union); (3) West Central (Hunterdon; Middlesex; Somerset; Warren); (4) East Central (Monmouth; Ocean); (5) Southwest (Burlington; Camden; Gloucester; Mercer); and (6) South Southwest (Atlantic; Cape May; Cumberland; Salem)).

135. See Hamlet Dev. Corp. v. Hopedale Zoning Bd. of Appeals, No. 90-03, at 17 (Mass. Housing Appeals Committee Jan. 23, 1992) (“Assessing the extent of the regional need for housing is not difficult . . . . The issue has rarely been litigated before this Committee in part because as a factual matter the need for housing is great throughout the state.”), available at Nellco, supra note 18.
compromises that went into its passage, but would be consistent with the HAC's zealous quest to promote low-income housing.

B. Assessing the "Need for Low- to Moderate-Income Housing"

Assuming some workable definition of "region" may be arrived at by the parties to a particular Comprehensive Permit application, the ZBA faces another challenge. The ZBA's next task is to determine the need for low- to moderate-income housing in the region that has been identified. This task is more difficult to carry out than it first appears. The reason for the difficulty is that the term "low- and moderate-income housing" does not mean what most citizen ZBA members might intuitively think it means. Intuitively, the typical ZBA member probably believes that the needs assessment is an effort to find out if the town is in need of more "affordable housing," i.e., housing that is priced within the means of low-income residents, but that is not what the Act asks the ZBA to do. Instead, the ZBA is asked to assess the need for "low or moderate income housing," which under the Act has a special technical definition: "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization." This specific definition is prob-

136. Interview with Martin Linsky, supra note 130.
137. In various contexts, the federal government considers a housing unit "affordable" if the family living in it spends less than 30% of its income to do so. See Anthony Downs, Reducing Regulatory Barriers to Affordable Housing Erected by Local Governments, in Housing Markets and Residential Mobility 256, 256 (G. Thomas Kingsley & Margery Austin Turner eds., 1993) (noting the federal definition).
138. MASS. GEN. LAWS ch. 40B, § 20 (1998). In July, 1993, the Executive Office of Community Development issued a document entitled "Listing of Chapter 40B Low or Moderate Income Housing Programs" [hereinafter EOCD Listing]. The programs that the EOCD considered low- or moderate-income housing programs for purposes of the Act were: 1. State Programs: Chapter 689 (Special Needs Housing), Chapter 167 (Special Needs Housing), Chapter 705 (Family Low Income Housing), Chapter 667 (Elderly Low Income Housing), R-DAL (Rental Development Action Loan), SHARP (State Housing Assistance for Rental Production), TELLER (Tax Exempt Local Loans to Encourage Rental Housing), HIF (Housing Innovations Fund), HOP (Homeownership Opportunity Program), LIP (Local Initiative Program), Comprehensive Permit Projects, LIP Local Initiative Units, and Mass. Government Land Bank Residential Housing. 2. Federal Programs: HUD HOME Program (most uses), HUD Section 811 (Supportive Housing for Persons with Disabilities), Low Income Housing Tax Credit Program, 80/20 Rental Housing, HUD Section 202 (Supportive Housing for the Elderly), HUD Section 8 Moderate, Rehabilitation Single Room Occupancy (SRO) Program, FmHA Section 515, and the FHLB Affordable Housing Program. 3. Inactive Programs: Chapter 200 (Veterans' Housing), Chapter 13A Interest Reduction Subsidy
lematic for a ZBA because when the technical definition is read into the rest of the Act, the ZBA ends up being charged with assessing the regional need for new construction of government-sponsored low-income housing units—this is a very different task than just assessing whether housing costs are too high in the municipality for people of modest means to afford to live there. Therefore, the ZBA ends up being charged with the task of assessing the need for a specific kind of affordable housing—the statutorily defined “low-or moderate income housing” covered by the Act.

If this is the task confronting a ZBA, it raises additional questions: specifically, what does the Act mean by “need,” and when does a locality or region “need” more units of new government-sponsored low-income housing? Resolution of these questions is devilishly difficult, and people of good faith can reach different conclusions based on their understanding of the concept of need. There are two basic ways of looking at the meaning of need—the “in-place relief” approach and the “mobility relief” approach.139

Under the in-place relief approach to housing policy, new construction of low-income units and other government programs ought to be concentrated in the places where low-income people already live in order to build communities through the improvement of living and economic conditions.140 Mobility relief, on the other hand, recognizes that some poor neighborhoods are so eco-

139. See Scott A. Bollens, *Concentrated Poverty and Metropolitan Equity Strategies*, 8:2 STAN. L. & POL’Y REV. 11, 11-12 (1997) (defining the in-place relief and mobility relief approaches). This Article adopts the terms “in-place” relief and “mobility” relief, but notes the distinction between the two has been a theme in American housing policy since at least the 1960s, although the two approaches have been labeled with different catch phrases at different times. *Id.* at 12 (noting the terminology of the 1968 Report of the National Advisory Commission on Civil Disorders, which referred to the in-place approach as “enrichment” and the mobility approach as “integration”); cf. Marshall Kaplan, *American Neighborhood Policies: Mixed Results and Uneven Evaluations*, in THE FUTURE OF NATIONAL URBAN POLICY 210, 210-13 (Marshall Kaplan & Franklin James eds., 1990) (noting that the terminology “place” and “people” has been used to describe what this paper refers to as the “in-place” and “mobility” approaches); PRESIDENT’S COMMISSION FOR A NATIONAL AGENDA FOR THE EIGHTIES, A NATIONAL AGENDA FOR THE EIGHTIES 167-68 (1980) (describing in-place initiatives as “jobs-to-people” programs and mobility programs as “people-to-jobs” initiatives); Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 796-97 (1991) (employing the terms “enrichment” to mean in-place relief and “deconcentration” to mean mobility relief).

140. *See Bollens, supra* note 139, at 11-12.
nomically devastated that the only hope for true economic improvement for the residents who live there is to move them out of the poor neighborhood and into a different community where economic opportunities may be more plentiful. ¹⁴¹

Of course, it is possible for both in-place and mobility approaches to be employed simultaneously in a comprehensive state strategy to deal with housing problems,¹⁴² and it may be that the Act embraces both in-place and mobility approaches to housing policy. If that is the case, the assessment of need performed by the ZBA under the Act would be a wide-ranging exercise which examines not only the satisfaction of housing needs in the region, but the socio-economic make-up of the towns in the region as well. To gain an appreciation of just how wide-ranging the ZBA’s inquiry into need might be, it is useful to consider the need determination under in-place relief and mobility relief separately.

1. Assessing Need Under an In-Place Standard

In-place relief seems to be a goal of the Act, where the “region” is the appropriate “place” for relief. In fact, the statutory definition of “consistent with local needs” requires a ZBA to take only those actions on a Comprehensive Permit application which are “reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected. . . .”¹⁴³ The task of assessing local and regional needs and finding the balance between them falls to the ZBA. Under the in-place relief approach, the question of need would turn on the extent to which new construction of government-sponsored low-income housing units was part of an overall strategy to provide affordable housing to all citizens of the region. New construction would be needed if those new units helped satisfy an unmet regional demand for affordable housing. This approach to the meaning of need would recognize that the construction of new government-subsidized housing units is not an end in itself, but is rather a means of providing affordable housing to the residents of the relevant region.

¹⁴¹ See Schill, infra note 139, at 796-97 (setting out the “deconcentration” strategy, which for purposes of this Article is the same as mobility relief).
¹⁴² Bollens, supra note 139, at 12 (arguing that in-place and mobility strategies in a given region should be integrated into one comprehensive attack on the housing problem and that policy should not make an artificial choice between the two approaches as if they were mutually exclusive).
¹⁴³ Ch. 40B, § 20 (emphasis added).
Implicit in this approach is the understanding that there are many ways society may work toward the goal of providing affordable housing for everyone. Constructing new government-subsidized housing units (i.e., the only type of housing included in the Act's definition of "low- to moderate-income housing") is one policy tool available, but it is clearly not the only one. For instance, a town might have many quality low-rent apartments that were developed under government housing programs, though not technically considered low-or moderate-income housing by the agency charged with carrying out the Act. Those units might be sufficient to satisfy the demand for low-cost housing in the relevant locality and thereby lessen or even eliminate the need for the construction of new government-subsidized housing units. Similarly, and especially in rural areas, homeownership programs under the FHA, FMHA, or VA may assist citizens in meeting their costs of providing shelter. Yet, under the Act, it is not clear whether the local ZBA may consider these approaches when attempting to determine the regional "need" for low-to moderate-income housing. From the Housing Appeal Committee's point of view, these programs clearly do not count.

144. The EOCD (and one assumes the DHCD takes the same position) did not consider the following list of government housing programs to be "low or moderate income housing" under the Act: Mass. Rental Voucher Program (formerly Chapter 707 Program), Mass. Rental Voucher Program - Moderate Rehabilitation Program (project-based vouchers), Soft Second Loan Program, Mass. Small Cities Program (MSCP), MSCP Housing Development Support Program, CDAG (Community Development Action Grant), Housing using DMR/DMH operating subsidies, HUD Section 8 Rental Certificate Program; HUD Section 8 Project-Based Rental Certificate Program; HUD Section 8 Rental Voucher Program, HUD Section 8 Loan Management Set-Aside Program, HUD Section 8 Property Disposition Set-Aside Program, HUD Section 221(d)(2), HUD CDBG (Community Development Block Grant); HUD HoDAG (Housing Development Action Grant), HUD UDAG (Urban Development Action Grant), HUD HOME Program (Homeowner Rehabilitation, Rental Voucher), HUD HOPE (Home Ownership for People Everywhere), HUD Emergency Shelter Grants Program, Farmers Home Administration Section 502, or Military Housing. EOCD Listing, supra note 138.

145. Recently, the HAC has had second thoughts about the restrictive nature of the "low- to moderate-income" definition. In Hastings Village, Inc. v. Zoning Board of Appeals (Wellesley), the HAC displayed a willingness to "revisit and clarify" the jurisdictional requirements for low-to moderate-income housing projects under the Act. No. 95-05, at 5 (Mass. Housing App. Committee May 21, 1997) (mem.) available at Nellco, supra note 18. Although the HAC decided that the particular case before it did not qualify as "low to moderate income housing" under the Act, it stated that a project funded by the Federal Home Loan Bank of Boston under its New England Fund (NEF) could qualify if the project met requirements for income of tenants (not to exceed 80% of the median income in the relevant Metropolitan Statistical Area); at least 25% of the units in the project be set aside for families in the low- to moderate-income category;
Taken literally, the job of assessing the need for low- to moderate-income housing is a Herculean one, especially in light of the fact that local zoning boards are typically staffed by citizen volunteers with no formal training in land use practices, the law, or social science. Nevertheless, the Act seems to impose on them the task of assessing the need for the construction of new government-sponsored low-income housing units. To do this task properly the local ZBA would have to do extensive fieldwork in order to evaluate both the demand for and the supply of low-income housing. In the real world this simply does not happen—the ZBA has neither the skills nor the resources to conduct such fieldwork. Instead, the ZBA is forced to guess about the demand for and supply of low-income housing based on insufficient proxies such as income figures for the region and the existing number of government-subsidized low-income housing units.

a. Problems assessing demand for low-income housing.

Because the task of assessing demand for low-income housing is so difficult, applicants and ZBAs have resorted to an imperfect substitute for making a rough assessment of this crucial concept. In Gill, for example, the FCRHA presented the ZBA with statistics regarding income levels of residents there and in Franklin County.\textsuperscript{146} I understand this is a common approach to the issue. The applicant then drew a connection between the presence of low-income households in the region and the need for construction of new government-sponsored low-to moderate-income units.\textsuperscript{147} This kind of income data, however, is of limited value in determining the need for low- to moderate-income housing as defined by the Act. The income data alone cannot accurately tell a ZBA whether there is a demand for low-income housing or, if there is such a demand, whether the appropriate response is to build new government-sponsored low-income housing units. The logical link between income levels and the need for that particular kind of policy response is weak. The link is even weaker when one considers all of the deficiencies of using income figures as a measure of poverty at all.

For example, in Massachusetts the official definition of "low-
to moderate-income” is “income which does not exceed 80 percent of the median income for the relevant Metropolitan Statistical Area.” 148 But, as noted above, not all Massachusetts towns are in MSAs. 149 By setting the “low-to moderate-income” level by reference to the income in MSAs, the Commonwealth in effect overstates the “poor” of the rural areas, because one would assume that the cost of living is lower in rural areas than in urban areas and that in general there is a correlation between income levels and cost of living. Therefore, judging the relative wealth or poverty of Franklin County residents by reference to, say, the Worcester or Springfield MSA, for example, the data fails to take into account that it costs less to live in Franklin County.

There are other serious problems with using income levels as a measure of “poverty.” Such a measure does not, for example, take into account the fact that people move in and out of poverty. It fails to account for “life-cycle earning,” such as graduate students who are “poor” while in school, but who will go on to do just fine, or farmers who have a bad crop every now and then, or salespeople who have an occasional bad year. 150 People who have the occasional bad year are unlikely to move into government-sponsored, low-income housing. They may know that in other years they will not meet income qualification rules, or, more importantly, they may not think of themselves as “poor,” and therefore are unlikely to consider themselves appropriate candidates for the housing.

Income data gives an inaccurate picture of poverty for other reasons as well. If “poverty” is defined solely by reference to cash income, it may miss wealth data that is not reflected in income data, such as ownership of assets. Data concerning the assets owned by relatively low-income households is hard to come by, especially in rural areas where some of those low-income households may own their own homes, mobile homes, or farms. In addition, income data fails to pick up non-cash income such as in-kind transfers in the form of housing, food stamps, and Medicare/Medicaid. 151 It also misses crucial expenses that may make income data look better than it really is, such as local cost of living, medical expenses, and

149. See supra notes 122-125 and accompanying text for a discussion of the MSA and Massachusetts towns.
151. Id.
the needs of working parents. Income data might be a good starting point in making a determination about the size of the poor population and, therefore, the demand for low-to moderate-income housing; however, many other factors come into play in pushing a family into poverty, such as education level, family size, and types of employment opportunities, and those should be taken into account as well.

With only income data to go on, local ZBAs do not have enough information to draw any meaningful conclusions about low-income housing demand. Even if there exists, in general, a positive correlation between the presence of low-income residents and the need for new construction of government-subsidized housing units, special circumstances in specific areas may skew that typical relationship. Because of special income-related issues peculiar to farms, small businesses, boarding schools and colleges, and

152. See Panel on Poverty and Family Assistance, National Research Council, Measuring Poverty: A New Approach 2-7, 24-31 (Constance F. Citro & Robert T. Michael eds., 1995) (discussing the need to adjust the official poverty measure to reflect non-cash income, and special expenses and urging a reexamination of the standards of living included in the original poverty measure).

153. See generally Bradley R. Schiller, The Economics of Poverty and Discrimination 64-72, 91-102, 119-30 (5th ed. 1989) (discussing how it is possible to work hard and yet remain in poverty and how family size and educational attainment affects poverty rates).

154. A ZBA would be well suited for integrating these special circumstances because knowledge of the special circumstance comes from knowledge of the locality. Of course, zoning is primarily a local concern and zoning board members are presumed to be familiar with local conditions. Gamache v. Town of Acushnet, 438 N.E.2d 82, 87 (Mass. App. Ct. 1982).

155. A significant level of farming activity in a town should impact the kinds of conclusions one can draw from raw income data. Assuming most farmers own their farms, the income figures might not reveal much about the affordability of housing. Their income figures may be relatively low by virtue of non-cash expenses like depreciation of farm buildings and equipment. On paper these people appear poor because their taxable income is relatively low. In reality, they might not be so poor and their actual wealth might be substantial due to the value of their real estate holdings.

156. Small business owners may legitimately report low-income figures because of the way taxable income is calculated. For example, they may have non-cash expenses that reduce their income, or they may have cash expenses that provide a source of indirect compensation (such as through the payment of health and life insurance or through the payment of entertainment and travel expenses). Nevertheless, these small businesses may have significant “real” income.

157. Massachusetts is peppered with very small towns whose major employers are colleges or boarding schools. Often faculty members at these institutions are required by their employers to live on campus in school housing. The school pays modest salaries, especially to junior faculty members and interns, reflecting the fact that room and board is being provided by the school. The economic value of the room and board benefits does not show up in the income figures for faculty members because those
other special circumstances, a particular town's income data (especially in very small towns like Gill) may not accurately reflect the poverty level of the community. A local ZBA must have the flexibility to adjust town and county income figures to accommodate for known anomalies in order to more accurately assess the demand for low-income housing.

Nevertheless, despite all the shortcomings of using income as a proxy for need, as the process now works, the applicant, having set out this data, draws a link between the presence of residents with relatively low incomes in the town and region and the need for "low- to moderate-income housing" as defined by the statute. Such a link, however, is not compelled as a matter of logic. For example, if all the low-income residents already live in subsidized housing, the mere presence of low-income residents would not logically compel the construction of more "low- to moderate-income housing" units. Therefore, the mere presence of low-income households does not necessarily mean that new construction of government-assisted housing units will address any particular "need" of the low-income residents of the town or the county.

Even if most of the low-income residents of the county are not already housed in government-subsidized units, as the process now works, the applicant is not required to offer any evidence that the benefits are received as a condition of their employment, and are therefore not considered "income" for tax purposes. The mere fact that these faculty members earn modest salaries does not, however, mean that they are ill housed. In the case of college towns, students are sometimes included as residents in the income numbers. Of course, students have very little income, yet they are generally not an appropriate target group for low-income housing programs.

158. Examples of other special circumstances include a high incidence of communal living arrangements, underground economy activities, and non-cash transactions. Communal living arrangements could skew the income numbers in a way that makes reaching conclusions about housing affordability tricky, especially in small western Massachusetts towns. In addition, areas where a strong underground economy exists should not rely on income data as a measure of poverty. The size of the underground economy, broadly conceived of as income derived from illegal activities, may be large in Massachusetts' rural counties, given rumors that marijuana is one of the state's largest cash crops. Wholly apart from the illegal underground economy, some areas may support an active barter economy. See Bartering Service Started by UMass Workers Grows, BOSTON GLOBE, Dec. 31, 1994 (Metro), at 49; available at 1994 WL 6016028; Ross Grant, Valley of the Dollars, THE RECORDER (Greenfield, Mass), Jan. 23, 1999, at H1 (describing one community's system of using paper currency to swap services between members). While these bartered transactions are supposed to be declared as income, they probably are not reported to the full extent required. Finally, people at or near the poverty line may not fully report their cash income in order to maintain eligibility for government assistance or to avoid taxes. SCHANSBERG, supra note 152, at 7 (noting the potential for under-reporting of incomes).
target population will actually move into the new housing units if they are constructed. It seems logical that any meaningful assessment of whether the construction of new government-subsidized, low-income housing units will help satisfy an unmet need for affordable housing must take this into account. If the low-income residents in the target communities will not move into the newly constructed units because they live on the family farm, or their home is paid off and they want to keep the house in the family, or their employer provides them with housing, or they live in communal living arrangements, or they are philosophically opposed to government assistance, or they simply fear being stigmatized as residents of public housing, then a ZBA might be justified in concluding that there is no "need" for "low- to moderate-income housing" as defined by the Act. A ZBA might reach that conclusion even though it perceives a great demand for other policy options, such as fuel oil assistance, low-interest home improvement loans, or other programs that might alleviate the housing problems of the target populations. Though difficult to assess, under an in-place approach to "need," the likelihood that the proposed project will in fact alleviate the need of the target population in the region ought to be taken into account in determining the demand for additional construction of government sponsored "low to moderate income housing" units.

To an urban or suburban reader, this point may not seem worth making, but in the rural context the actual demand for low-to moderate-income housing can make a difference. In Franklin County, for example, low-income housing resources are frequently consumed not by residents of Franklin County, but by low-income residents from other regions. As discussed in the section on rural housing needs, constructing new units of rental housing is often not the best way to address rural housing problems. If newly constructed low-income housing units are not demanded by the rural residents in the region and therefore go to poor residents from outside the region, it is hard for a local ZBA operating under an

159. Moffitt, supra note 65, at 1033 ("[T]he decision to not participate in a welfare program despite a positive potential benefit can be successfully modeled as a utility-maximizing decision resulting from stigma.").

160. See Davis, supra note 73, at 6 (citing Paul Douglas, Executive Director of the Franklin County Regional Housing Authority, for the proposition that there is a squeeze for housing resources, in part, because low-income clients from other regions are transported to Franklin County to apply for subsidies when they become available).

161. See Stephanie Seguino & Sandra S. Butler, To Work or Not to Work: Is That the Right Question?, 56 REV. SOC. ECON. 190, 203-04 (1998) (discussing the results of a
"in-place" approach to housing problems to understand how the newly constructed units will in any way satisfy the needs of the low-income people of the region.

If the local ZBA is supposed to be assessing the need for the implementation of a particular housing policy in the region, it should have license to discuss the justifications for the subsidized housing policy. Under this approach, it would be appropriate for the local ZBA to discuss economic studies which demonstrate that the direct provision of housing is a poor instrument for improving the housing situation of participating families, and argue that government policy should move away from bricks and mortar projects and toward demand-oriented subsidies. On the other hand, the ZBA would have to consider that the need for low-income housing tends to rise in good economic times, and that the market has not been a reliable supplier of affordable housing in the past. The ZBA would debate whether one policy or another should prevail in the particular region and locality with which they are concerned. The case has never come up, but it would be interesting to see how a decision by a ZBA would fare if it took the need assess-

study in Maine on single mothers and their struggle to get off welfare, and noting that families might prefer to locate in safe rural communities even at the cost of reduced job prospects).

162. See Amy D. Crews, Do Housing Programs for Low-Income Households Improve Their Housing? 23 (1996) (Metropolitan Studies Program Series Occasional Paper No. 178) (concluding that after conducting a regression analysis controlling for differences in various types of housing assistance, "the participation value to households is large not because of the increase in housing consumption but because of the sizable increase in consumption of other goods and services. That is, the largest effect of housing programs is to provide more of other goods to participants. . . . A policy implication is that the direct public provision of housing is a poor instrument for improving the housing situation of participating families"; see also Hanan G. Jacoby, Self-Selection and the Redistributive Impact of In-Kind Transfers: An Econometric Analysis, 32 J. HUM. RESOURCES 233, 247 (1997) (concluding that providing assistance to the poor through low-quality goods in kind entails a large dead weight loss).

163. E.g., Michael H. Schill, Distressed Public Housing: Where Do We Go from Here?, 60 U. CHI. L. REV. 497, 498 (1993) (arguing in favor of demolishing rather than rehabilitating existing dilapidated public housing projects and replacing them with "demand-oriented subsidies such as housing vouchers").

164. See David T. Rodda, Rich Man, Poor Renter: A Study of the Relationship Between the Income Distribution and Low Cost Rental Housing 7-9 (1993) (unpublished Ph.D thesis, Harvard) (on file with Harvard University) (noting that as high incomes increase, demand for high-quality housing is stimulated and demand outstrips supply, which is satisfied by dipping into the medium-quality housing stock, which in turn, forces the middle-quality demanders into the low-quality stock and squeezes the low-quality stock because its supply is inelastic, resulting in increased rents for low-quality rental units).
ment seriously and considered the relative pros and cons of subsi­
dized housing. One suspects it would not fare well, because the
debate about subsidized housing ostensibly is more appropriate in
other parts of the government, such as the legislature.

It is unfortunate that the political debate has not been more
vigorous in the intervening years since the passage of the Act. In
1969, when the Act was adopted, construction of new government
units was the standard response to the housing problem. Since
the Act passed, federal housing policy has moved away from pro­
ject-based programs and increasingly relies on tenant-based
schemes to deal with housing problems. Yet the Act does not
admit to any changes in housing policy—its mechanism for assess­
ing “need” enshrines the approach that was au courant in 1969. In
the late 1980s, in the midst of rising political opposition to the Act,
the legislature did form a commission to re-examine the Act. The
results of that review were some suggestions for minor changes
to the law, including allowing towns to count market-rate units in
mixed-use chapter 774 projects toward their 10% safe harbor.
The commission never seriously considered taking a different tack
altogether, such as creating regional authorities that really would
conduct a meaningful needs assessment. Under a strong form of
the needs assessment, local ZBAs might be justified in taking on the
policy debate that the legislature did not deal with.

b. Problems assessing the supply of low-income housing

One would assume that an assessment of the need for new con­
struction of low- to moderate-income housing would entail an eval­
uation of both the demand and the supply of that commodity.
Under present procedures, however, local ZBAs are not given the
latitude to make a meaningful assessment of low-income housing

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165. See Taggart III, supra note 74, at 15-20 (1970) (summarizing the “evolu­
tion of the present effort” by describing the array of then available government housing
subsidy programs).

166. See Rodda, supra note 166, at 3-7 (noting that since the tenant-based pro­
grams were initiated in 1974 they have grown to represent one third of the public hous­
ing assistance resources currently in place, serving approximately 1.5 million
households).

167. See Peter B. Sleeper, State Leaders are Pressured to Reconsider ‘Antisnob’
some legislators had moved to repeal the Act in light of developer abuse of the law, but
the political realities weighed in favor of study rather than repeal).

168. See Andrew J. Dabilis, Panel Urges Changes to State Antisnob Law, Boston
dations of the chapter 774 study panel).
market supply conditions, especially supply in the form of existing privately owned unsubsidized housing. It is entirely possible that the local rental market provides sufficient rental units at sufficiently low rents to meet the demand for low- to moderate-income housing.  

If the low-income citizens of the relevant municipality and region are satisfied with the housing choices provided by the rental market, a ZBA ought to be justified in concluding that there is no "need" for additional construction of government-subsidized housing units that will only compete with the existing affordable housing stock. In this way, a ZBA plays a crucial role in the housing policy process by insuring that government resources are deployed to correct market failures  

169. As an example, in the case of the comprehensive permit application in the town of Gill, the applicant provided substantial market data with its application. Comprehensive Permit Application, supra note 4, at 10-11. The Application noted that the median monthly rental for rental units in the town of Gill was $411, which equals an annual rental of $4932. Id. Using household income of $15,000 as a benchmark for families in the low- to moderate-income range, the existing median market rent represents an expenditure of 32.88% of the $15,000 total. Of course, focusing on rental units is a bit misleading because many of the rural poor live in their own homes, perhaps the family farm or homestead, so the presence of rental units and their market rents does not tell the whole story. Nevertheless, in both percentage terms and dollar amount, the expenditure for market-priced housing compared quite favorably with the rents that could have been charged under the applicant's project. The applicant proposed to charge elderly tenants 30% of their adjusted gross income as rent, which, given current income eligibility rules, they could have resulted in annual rental charges of $5124 for a one person elderly household, or $5856 for a two person elderly household. Id. at 6. These dollar amounts exceeded the median market rent by $192 and $924, respectively. While the applicant planned to charge rent equal to 25% of adjusted gross income (plus utilities) to low-income families, the annual rental payments for the proposed units fell into the following range: $4270 for a family of 1, $4880 for a family of 2, $5490 for a family of 3, $6100 for a family of 4, $6481.25 for a family of 5, and $6862.50 for a family of 6. Id. Except for the rent charged to families consisting of 1 or 2 members, the median market rent was lower than the rents that the applicant could have charged in its proposed project — and that is without consideration of utilities cost. In addition, in the case of families consisting of 2 members, the market price exceeds the maximum charge proposed by the applicant by only $52 per year ($4.33 per month).

170. Frequently, the purpose of regulatory statutes is to correct market failures. See Thomas W. Dunfee & Frank F. Gibson, Legal Aspects of Government Regulation of Business 7-12 (3d ed. 1984) (discussing the purpose of trade regulation statutes); A. Lee Fritschler & Bernard H. Ross, Business Regulation and Government Decision-Making 41-42 (1980) (discussing two types of government regulations, each type having different purposes). Market failures are those situations that develop from time to time that tend to push our economy away from the result that would obtain under a purely competitive market system. Traditionally, economists have recognized 3 specific departures from perfect competition as "market failures": (1) imperfect information; (2) natural monopoly; and (3) externalities. See Robert E. Litan & William D. Nordhaus, Reforming Federal Regulation 36 (1983) for a general discussion of these market failures. Imperfect information is a market failure
private citizens.

If a ZBA is required to approve a project in a market where private suppliers of housing are satisfying market demand, it will create a distortion in the market. The new units will increase the total supply of low-rent units and thereby drive down market rents. This is fine if there is unmet demand, but if the demand is satisfied, the new units have the perverse effect of forcing private-sector landlords who are trying to serve the low-end market segment to lower their rents perhaps to levels that do not meet costs, or, more likely, to a level that makes it uneconomic for landlords to spend resources keeping the units well-repaired and maintained. Since deferred maintenance is an easy source of savings, landlords forced to compete against a subsidized-housing project will likely choose to let their units deteriorate. Of course, this fuels the cycle of deteriorating housing stock and unacceptable conditions for low-income renters. Therefore, in order to help minimize unintended consequences, local ZBAs ought to be able to consider the availability of unsubsidized, low-income housing in the rental market.

The HAC is unlikely to consider market units in the assessment of supply because private landlords are not legally required to provide housing at affordable rents. Therefore, although the Act because perfectly competitive markets require complete cost-free information to function. Without complete information, consumers may make inefficient decisions that will result in an inefficient mix of goods in the market. Natural monopolies are those businesses for which the laws of supply and demand permit but a single efficient producer. Externalities are the costs or benefits imposed on third parties as a side effect of a given transaction that are not reflected in prices.

171. This would not be the case if, as under earlier versions of federal housing law, a substandard unit would be eliminated for every government unit put on the market. Cf. Taggart III, supra note 74, at 26-28. However, that rule is no longer required.

172. Cf. Bruce Lindeman, Low Income Housing Subsidies and the Housing Market: An Economic Analysis 66 (1969) (Research Paper No. 50, Bureau of Business & Economic Research, School of Business Administration, Georgia State University) (refuting the argument that low-income housing subsidies do not compete with standard housing by demonstrating that when new public units are introduced to the market, households are drawn from the unsubsidized market into the subsidized market, which causes a disequilibrium in the unsubsidized market that leads to falling rentals and a decline in the unsubsidized housing stock).

173. See Berkshire E. Assoc's v. Bd. of Appeals (Huntington), No. 80-14, at 7 (Mass. Housing App. Committee June 1, 1982) ("We have, in a number of other decisions, indicated our interpretation of what the legislature intended to be counted toward the ten per cent of 'subsidized' housing with which a town was to be 'credited' toward its '774 quota.' We have held that the legislature intended to recognize a long-term subsidy commitment to 'permanent' housing which, because of the subsidy, would become available as decent, safe and sanitary housing to low or moderate income persons at rental levels they could afford. Under such an interpretation we do not count
does not prohibit the consideration of market conditions when determining "need," the HAC has not in the past permitted the consideration of affordable market rental units in the needs assessment. Instead, the HAC opinions appear to measure need strictly against the number of existing government-subsidized housing units in the relevant region. Specifically, the HAC only inquires whether a town has met the mathematical safe harbors contained in the Act.

Even if failure to attain the mathematical safe harbors is "compelling evidence" of need, a town's failure to meet the mathematical formulas should not end the inquiry regarding the "need" for the construction of new government-subsidized housing units. It is entirely possible that a ZBA in a town that meets the mathematical safe harbors could nevertheless find that a need still exists in that town for additional low-income housing.\(174\) Conversely, a zoning board in a town that does not attain the mathematical safe harbors might properly determine that in the town and the region within which the town is located, there is no need for the construction of new government-subsidized low-income housing units.

Yet the HAC clings to the mathematical safe harbors as the standard for the supply of low-income housing. The HAC employs the mathematical safe harbors in the needs assessment because it interprets the legislative intent behind those provisions as being to "recognize a long-term subsidy commitment to 'permanent'\(^{175}\) housing which, because of the subsidy, would become available as decent, safe and sanitary housing\(^{176}\) to low or moderate income per-


175. The HAC has refused to consider affordable market-priced units in the past based on the belief that market forces are fickle and can change quickly, thereby making the affordable units a mere mirage. Experience with government support of public housing, however, reveals that support is by no means "permanent." The subsidizing agency's obligation to fund the projects is contingent on legislative appropriations.

176. The HAC's comments indicate that they believe there exists a link between the "permanence" of the funding source and the quality of the housing stock, but experience with various forms of government-sponsored housing do not bear this out. Many government-sponsored housing projects in fact are far from "decent, safe and sanitary"
sons at rental levels they could afford."\textsuperscript{177}

Another argument that proponents raise against the inclusion of market-rate units is that the newly constructed government-sponsored units are of better quality than the market-rate units and therefore are preferable. The underlying premise seems to be that without the government units, the low- to moderate-income tenants in existing rental units will live in substandard conditions. This argument holds some intuitive appeal, but it has shortcomings. It fails to account for the fact that in the American experience with government-sponsored housing, after the initial shine of newness has worn off, the government-supported units are often revealed to be worse than the old. This is frequently true because: budget constraints in the design and construction phases force corner-cutting that results in poor durability, or the projects were inappropriately designed to house too many people in too small a space, or maintenance was not adequately provided for or for other reasons. The bold social engineering housing projects of the 1940s, 1950s, and 1960s, such as Cabrini-Green in Chicago, Marina Village in Bridgeport, and Columbia Point in Boston, illustrate this point.\textsuperscript{178} Granted, none of those were "774 projects," but the idea that this generation of government-housing bureaucrats is somehow immune to the mistakes of planning arrogance that befell their brethren in the past is a proposition that should engender a great deal of skepticism.

This section has discussed how the determination of need using an in-place approach to housing policy is much more complicated than merely examining income data and establishing the existing number of public-housing units in the region. In light of the incomplete picture of housing supply and demand supplied by raw-income figures and the typical submissions of housing developers, the ZBA ought to perform more analysis before reaching any conclu-

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\textsuperscript{177} Berkshire E. Assocs., No. 80-14, at 7, \textit{available at} Nellco, \textit{supra} note 18.

sions about "need" for new construction of low-to moderate-income housing. Certainly a ZBA would not be justified in finding a need just because an applicant for a comprehensive permit asserts the existence of a need. By the same token, attainment of the mathematical safe harbors provided in the Act\textsuperscript{179} should not be the benchmark for establishing lack of need. Instead need should be determined by focusing on the availability of affordable housing. If providing for the construction of additional government-subsidized housing units would satisfy an unmet regional demand for affordable housing, then a ZBA could find that a "need" exists for the proposed project.

To further explore the link between the creation of new low-income housing units and the satisfaction of local and regional needs for low-income housing, a ZBA might legitimately inquire into how existing government-assisted housing projects in the region have been rented up and to whom they have been leased.\textsuperscript{180} Under a notion of "need" informed by the in-place approach to housing, if the existing government-sponsored housing has been filled by tenants from outside the region, that should be an appropriate factor to consider in the determination of local and regional need.

2. Assessing Need Under a Mobility Relief Standard

Another way to view the concept of "need" is through the lens of a policy designed to help balance out the economic, social, ethnic, and racial make-up of regions in the Commonwealth by providing low-income citizens in one region with the opportunity to relocate to other regions in the Commonwealth where traditionally they have been excluded. If one views the Act as being designed to promote the development of housing options to encourage deconcentration of the Commonwealth's urban poor,\textsuperscript{181} then new low-to moderate-income housing units may be deemed "needed" if the town does not yet have its "fair share" of economically disadvan-

\textsuperscript{179} See \textit{supra} notes 83-84 and accompanying text for a discussion of the Act's mathematical safe harbors.

\textsuperscript{180} The use of waiting lists may be a useful index of pent-up demand for government-assisted low-income housing. See Bagley v. Illyrian Gardens, Inc., 546 N.E.2d 883, 887 (Mass. App. Ct. 1989) (using housing lists as evidence of regional need). In order to answer the more relevant question of what the \textit{regional} need for housing is, the composition of the waiting list ought to be scrutinized as well.

\textsuperscript{181} See Dorothy Altman, \textit{Anti Snob Law Produces Low Income Housing}, \textbf{PRAC. PLANNER}, Dec. 1976, at 31, 9 (terming the provision of housing mobility alternatives for urban poor and minorities an "unstated goal" of the Act).
taged citizens and racial and ethnic minorities, even if the new units would not be effective in addressing the housing needs of the existing residents of the region.\textsuperscript{182} Certainly the HAC has interpreted the Act in a way that requires every town to allow some low-income units.\textsuperscript{183} The requirement that a town permit the construction of low-income housing without regard to whether the region's housing needs will be addressed by the new constraints raises the possibility that "need" for purposes of the Act should be evaluated under a mobility relief approach to housing policy, in which the goal of the Act is to promote the development of more economically, socially, and ethnically diverse communities across the Commonwealth.\textsuperscript{184} Indeed, commentators have advocated mobility relief as a legitimate tool of housing policy on the theory that much of the problem with housing for the poor is inextricably tied with problems of racial discrimination.\textsuperscript{185}

\textsuperscript{182} Members of the legislature that enacted chapter 774 clearly saw mobility relief as part of the justification for the Act. See C.F. Flaherty, Jr., letter to the Editor, \textit{No Segregation by Credit Card}, \textit{Boston Globe}, Aug. 16, 1969 at 6 (letter from the state representative from the Third Middlesex District, Cambridge, discussing the passage of chapter 774 and noting "[i]t does . . . take exception to the suburbs exercising their zoning power in such a way as to discriminate against minorities. The strategy is essentially one of economic exclusion, but it is often accompanied by an unmistakable undertone of determination to keep socially 'undesirable' people out of the community. . . . This segregation by economic groups prevents minorities from moving into vast residential areas of our Commonwealth. It excludes them from entire towns. It confines the poor and racial and ethnic groups to our central cities. It frustrates the equal treatment of individuals guaranteed by the Constitution. It is building a system of apartheid — American style. It represents a residential version of the separate but unequal treatment already struck down by the Supreme Court").

\textsuperscript{183} The SJC and the HAC sometimes refer to the mathematical safe harbors as a town's "minimum housing obligation", suggesting that until a town achieves one or more of the safe harbors it is required to permit the construction of new low- to moderate-income housing, regardless of need in the region. See, e.g., Bd. of Appeals (Hano­ver) v. Hous. Appeals Comm., 294 N.E.2d 393, 413 (Mass. 1973); see also \textit{supra} notes 83-84 and accompanying text for a discussion of the mathematical safe harbors.

\textsuperscript{184} See \textit{Final Report of the Mass. Special Comm. On Low-Income Hous.}, \textit{supra} note 18, at 10 (noting that one of the goals of housing policy should be "to permit the development of balanced neighborhoods of diverse social, economic and ethnic groups.").

\textsuperscript{185} Some commentators on public housing believe that issues of racial justice are or should be at the core of housing policy, and they advocate the use of the law to break down the geographic segregation that can aggravate inequality. For these people, the goal of moving the inner-city poor into suburban and rural settings is a stated priority. See generally John Charles Boger, \textit{Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction}, 71 N.C. L. REV. 1573, 1573-79 (1993) (proposing a broad national "fair share" requirement for public housing to facilitate, among others things, integration); Justin D. Cummins, \textit{Recasting Fair Share: Toward Effective Housing Law and Principled Social Policy}, 14 LAW & INEQ. 339, 339-41 (1996) (urging a plan of "fair share" housing requirements to combat racial segregation); James J. Hartnett,
At an intuitive level, it would be easy to accept the premise that discrimination against racial minorities has contributed over the years to local opposition to low-income housing projects, which are likely to be perceived as housing for poor racial minorities, and has contributed to the racial segregation of the housing stock. On closer consideration, however, the phenomenon of racially segregated housing is not so easy to explain away. While certainly the government should adopt policies designed to eliminate racial prejudice and promote mutual understanding and respect, it is not at all clear that the mere existence of predominantly white communities reflects active discrimination against minorities. It might just reflect a preference for whites to live in predominantly white areas.\textsuperscript{186} The distinction may be subtle, but worth considering for at least a moment.

Attempts to integrate neighborhoods tend to show that whites will tolerate the incursion of minorities up to a certain point after which most whites will leave the neighborhood and it will become predominantly minority.\textsuperscript{187} Although empirical studies have not established a numerical value for the tipping point, the phenomenon has been widely observed.\textsuperscript{188} If the tipping point phenomenon is


\textsuperscript{186} See Richard F. Muth, \textit{The Causes of Housing Segregation}, in \textit{Issues in Housing Discrimination}, 3-9 (1985) ("Prejudice would imply that whites have an absolute aversion to living among blacks. However, whites may merely have an absolute preference for living among other whites. Whichever is the case, the housing market result would be the same — the development of segregated white and black residential areas."). But see Joe T. Darden, \textit{Choosing Neighbors and Neighborhoods: The Role of Race in Housing Preference}, in \textit{Divided Neighborhoods} 15, 22-37 (Gary A. Tobin ed., 1987) (assessing the "preference" theory of discrimination from the black perspective and concluding that African-Americans do not prefer neighborhoods that are racially homogenous but instead would prefer mixed-race communities).

\textsuperscript{187} It appears that black integration exhibits a typical "tipping point" phenomenon. The tipping point is a powerful explanatory tool based on the idea that most phenomena can be modeled mathematically with functions that have equilibria and that certain functions, such as the classic epidemic model, possess the characteristic of becoming very unstable after the equilibrium, or tipping point is exceeded. See Thomas C. Schelling, \textit{Micromotives and Macrobehavior} 137-66 (1978), for an accessible discussion of the tipping point concept in connection with neighborhood segregation; this chapter also provides a model of how neighborhoods become segregated by the aggregation of individual choices.

\textsuperscript{188} See Alexander Polikoff, \textit{Sustainable Integration or Inevitable Resegregation:}
real, the gains from minority migration to the suburbs promoted by laws like the Act will be fleeting, as the towns to which the target population moves eventually transform into new, suburban, minority neighborhoods.\textsuperscript{189}

More generally, the suburban zoning restrictions that were at the center of the "anti-snob" campaign when the Act was passed may be based on less pernicious motives than racial prejudice. It is more likely in many cases, that the restrictions were the result of a simple desire to maintain local property values by preventing the creation of lower-price buildings in the town. This move is not irrational, as it will maximize the value of the major investment that townspeople have made in their biggest asset, their home.\textsuperscript{190} This is, of course, one of the basic ideas behind classic zoning laws, which may deserve criticism in their own right, but not in this article. Local residents will continue to oppose government-assisted housing in their towns if that housing brings with it the fear of declining property values.

If mobility relief is recognized as a goal of the Act, it ought to be subject to periodic re-examination to make sure the political support for such a goal still exists. Experience has shown that mobility relief programs have not clearly demonstrated their value for improving the lot of inner-city minorities.\textsuperscript{191} From the point of view of racial and ethnic minorities, mobility relief may be counterproductive over the long run. Minority political impotence


\textsuperscript{189} See Diana Jean Schemo, \textit{Persistent Racial Segregation Mars Suburbs Green Dreams}, N.Y. Times, Mar. 17, 1994, at A1, available at LEXIS Newslibrary, Major Newspaper File (noting that although one third of the black population lives in the suburbs, the suburbs themselves have not become truly integrated, but rather have developed minority neighborhoods).

\textsuperscript{190} See Downs, supra note 25, at 268.

achieved through a majority diaspora of minority communities may be the most insidious form of discrimination against minority groups. Viewed in this light, desegregation is counterproductive since it tends to dilute political power of the minority group by making sure they always remain in minority status.

Therefore, in any public dialogue about the Act and what it is supposed to achieve, the participants ought to discuss whether the Act is designed to promote in-place relief where a given region takes care of its own poor residents or mobility relief or both. One suspects, after surveying the thirty year history of this law, that local ZBAs tend to apply an in-place standard, while the HAC uses a mobility standard. While the policy of mobility relief is politically and emotionally charged, it must be aired because across racial lines people of good will can and do have legitimately differing views on the effectiveness of mobility relief as a way to achieve a more just society, and, incidentally, to create decent housing.

CONCLUSION

Applying chapter 774 in rural communities can be awkward. The ZBA, as the central clearinghouse in the Comprehensive Permit process, faces some fundamental and unanswered questions about its role. The actual application of the Act raises sticky questions as well, such as “what is the region within which the need for low-income housing must be assessed?” and “what is need for purposes of the Act—an in-place kind of need or a mobility relief kind of need?” The answers to these questions can only be found in open debate about the direction of housing policy in the Commonwealth. People can and do have differing perspectives on the wisdom and viability of the various approaches to housing policy. A

192. See id. at 57-86 (arguing that lack of political power in minority communities must be remedied not by integration but rather through equalization remedies designed to enhance self-determination and empowerment in the minority community).

193. In fact, many people regard “successful” integration as that policy which maintains blacks in a numerical minority status. See John M. Goering, Introduction, in HOUSING DESEGREGATION AND FEDERAL POLICY, supra note 188, at 9, 12 (discussing and providing sources for the oft-repeated idea that racial stability depends on “a workable mechanism ensuring that whites will remain in a majority”). Of course, one should not underestimate the extent to which all government policies, including housing and tax policy, tend to institutionalize racism and promote segregation. See John A. Powell, HOW GOVERNMENT TAX AND HOUSING POLICIES HAVE RACIALLY SEGREGATED AMERICA, in TAXING AMERICA 80, 89-98 (Karen B. Brown & Mary Louise Fellows eds., 1996) (arguing that federal tax policy favoring home ownership, public housing policy, land use laws, and federal highway construction projects among other government programs have combined to a conscious effort to reinforce racial segregation).
debate that respects those differences of opinion while trying to move housing policy in the "right" direction (whatever that may be) would be most welcome by ZBA members, municipal leaders, and members of the municipal law bar.
APPENDIX
CHAPTER 40B. REGIONAL PLANNING
LOW AND MODERATE INCOME HOUSING

40B:20. Definitions.

Section 20. The following words, wherever used in this section and in sections twenty-one to twenty-three, inclusive, shall, unless a different meaning clearly appears from the context, have the following meanings:

"Low or moderate income housing", any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.

"Uneconomic", any condition brought about by any single factor or combination of factors 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 within the limitations set by the subsidizing agency of government on the size or character of the development or on the amount or nature of the subsidy or on the tenants, rentals and income permissible, and without substantially changing the rent levels and units sizes proposed by the public, nonprofit or limited dividend organizations.

"Consistent with local needs", requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent
or more of the total land area zoned for residential, commercial or industrial use or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year; provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, the metropolitan district commission or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs.

"Local Board", any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen.

40B:21. Low or moderate income housing; applications for approval of proposed construction; hearing; appeal.

Section 21. Any public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing may submit to the board of appeals, established under section twelve of chapter forty A, a single application to build such housing in lieu of separate applications to the applicable local boards. The board of appeals shall forthwith notify each such local board, as applicable, of the filing of such application by sending a copy thereof to such local boards for their recommendations and shall, within thirty days of the receipt of such application, hold a public hearing on the same. The board of appeals shall request the appearance at said hearing of such representatives of said local boards as are deemed necessary or helpful in making its decision upon such application and shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section. The board of appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards and shall have the authority to use the testimony of consultants. The board of appeals shall adopt rules, not inconsistent with the purposes of this chapter, for the conduct of its business pursuant to this chapter and
shall file a copy of said rules with the city or town clerk. The provi-
sions of section eleven of chapter forty A shall apply to all such
hearings. The board of appeals shall render a decision, based upon
a majority vote of said board, within forty days after the termina-
tion of the public hearing and, if favorable to the applicant, shall
forthwith issue a comprehensive permit or approval. If said hearing
is not convened or a decision is not rendered within the time al-
lowed, unless the time has been extended by mutual agreement be-
tween the board and the applicant, the application shall be deemed
to have been allowed and the comprehensive permit or approval
shall forthwith issue. Any person aggrieved by the issuance of a
comprehensive permit or approval may appeal to the court as pro-
vided in section seventeen of chapter forty A.

40B:22. Appeal to housing appeals committee; procedure;
judicial review.

Section 22. Whenever an application filed under the provisions
of section twenty-one is denied, or is granted with such conditions
and requirements as to make the building or operation of such
housing uneconomic, the applicant shall have the right to appeal to
the housing appeals committee in the department of housing and
community development for a review of the same. Such appeal
shall be taken within twenty days after the date of the notice of the
decision by the board of appeals by filing with said committee a
statement of the prior proceedings and the reasons upon which the
appeal is based. The committee shall forthwith notify the board of
appeals of the filing of such petition for review and the latter shall,
within ten days of the receipt of such notice, transmit a copy of its
decision and the reasons therefor to the committee. Such appeal
shall be heard by the committee within twenty days after receipt of
the applicant’s statement. A stenographic record of the proceed-
ings shall be kept and the committee shall render a written decision,
based upon a majority vote, stating its findings of fact, its conclu-
sions and the reasons therefor within thirty days after the termina-
tion of the hearing, unless such time shall have been extended by
mutual agreement between the committee and the applicant. Such
decision may be reviewed in the superior court in accordance with
the provisions of chapter thirty A.
40B:23. Hearing by housing appeals committee; issues; powers of disposition; orders; enforcement.

Section 23. The hearing by the housing appeals committee in the department of housing and community development shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and consistent with local needs and, in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs. If the committee finds, in the case of a denial, that the decision of the board of appeals was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant. If the committee finds, in the case of an approval with conditions and requirements imposed, that the decision of the board makes the building or operation of such housing uneconomic and is not consistent with local needs, it shall order such board to modify or remove any such condition or requirement so as to make the proposal no longer uneconomic and to issue any necessary permit or approval; provided, however, that the committee shall not issue any order that would permit the building or operation of such housing in accordance with standards less safe than the applicable building and site plan requirements of the federal Housing Administration or the Massachusetts Housing Finance Agency, whichever agency is financially assisting such housing. Decisions or conditions and requirements imposed by a board of appeals that are consistent with local needs shall not be vacated, modified or removed by the committee notwithstanding that such decisions or conditions and requirements have the effect of making the applicant’s proposal uneconomic.

The housing appeals committee or the petitioner shall have the power to enforce the orders of the committee at law or in equity in the superior court. The board of appeals shall carry out the order of the hearing appeals committee within thirty days of its entry and, upon failure to do so, the order of said committee shall, for all purposes, be deemed to be the action of said board, unless the petitioner consents to a different decision or order by such board.