

*This month we share commentaries from two land-use attorneys and a planning director in Massachusetts who commiserate over a few of the land-use statutory provisions that handicap communities in that state. Many states, including Massachusetts, still labor under the influence of the 1928 Standard City Planning and Zoning Enabling Act drafted by the U.S. Department of Commerce for a different era and different challenges. What's changed in the past 73 years?*

- *We have many more people consuming a much larger share of a finite and non-renewable resource base.*
- *We are a more mobile society, with two cars in the garage and more roads to open the former "hinterlands" to development.*
- *We have developed consumptive land-use patterns which are environmentally and socially destructive.*
- *We have a more politically active citizenry who want to be engaged in a meaningful way in shaping their community's future.*

*A survey conducted in 1997 by APA research staff found that only 11 states at that time had substantially updated their planning laws. Since then, both Tennessee (S.B. 3278 in 1998) and Wisconsin (A.B. 133 in 1999) have made substantial reforms. Although the Massachusetts Legisla-*

*ture has made a number of improvements to the state's planning and land-use laws, Russell, Witten, and Broadrick each point out the need for more reforms.*

*This month the American Planning Association rolls out the Growing Smart<sup>SM</sup> Legislative Guidebook: Model Statutes for Planning and the Management of Change. This project, the culmination of seven years of research and drafting, provides states such as Massachusetts with concrete options for statutory reform to meet the challenges of the 21st century. Those interested in addressing affordable housing issues might review Chapter 4 in the Guidebook.*

*The Growing Smart<sup>SM</sup> Legislative Guidebook, 2002 Edition (Stuart Meck, FAICP, General Editor) and companion User Manual can be ordered through the American Planning Association's Planners Book Service at (312) 786-6344; (312) 431-9985 (fax) or order online at [www.planning.org](http://www.planning.org) and click on Planners Book Service under APA Store. It also may be downloaded from APA's website, [www.planning.org](http://www.planning.org)*

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## Massachusetts Land-Use Laws— Time for a Change

By Joel S. Russell, Esq.

**S**ome states are further ahead than others in the "smart growth" movement. Unfortunately, Massachusetts is near the rear of the parade. Despite its reputation as a progressive state, the legal climate for planning and zoning in Massachusetts is not conducive to "smart growth." The state's antiquated land-use statutes needlessly restrict local efforts to protect the environment and guide growth and development in a sustainable and responsible manner. Local governments are frequently prevented from effectively implementing "smart growth" principles and controlling their own destiny.

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Joel Russell is a land-use lawyer and planning consultant with a national practice based in Northampton, Massachusetts.

This commentary discusses three of the most serious deficiencies in the Massachusetts land-use statutes and some of the practical problems they create.<sup>1</sup> These provisions share a strong bias in favor of private property rights and against effective community planning. Massachusetts courts have consistently reflected this same bias in their decisions.

- Weak master plans and no consistency requirement between plans and zoning regulations.
- "Zoning freezes" that allow property owners to thwart implementation of the community's plan.

1. The problems mentioned in this commentary are by no means the only problems found in the Massachusetts land-use statutes; however, the author has personal experience with these problems as a consulting planner and land-use attorney in Massachusetts.

# Commentary

- Divisions of land that escape local review and approval, commonly known as “Approval Not Required” land divisions.

## NO CONSISTENCY REQUIRED—WHY PLAN?

MASS. GEN. LAWS ANN. ch. 41, §81D purports to mandate that communities prepare a master plan (also called general plan or comprehensive plan in other states), and spells out what elements are required in the plan, but fails to mention any consequences if a plan is not adopted. While the statute requires that “[t]he comprehensive plan shall be internally consistent,” it does not require that the zoning regulations be consistent with and support the goals and objectives of the plan. The Standard Zoning Enabling Act provision that says zoning must be “in accordance with a comprehensive plan” does not appear in the Massachusetts statute. There is no real remedy for zoning actions taken in direct violation of master plans, although an adopted master plan is one of many factors a court may consider in reviewing the validity of a zoning action.

This creates an obvious problem for planners, made more difficult when combined with the provisions on zoning freezes. The lack of a “consistency requirement” means that the zoning regulation is the guiding law of the community and the master plan is largely irrelevant. In at least 14 other states, the consistency doctrine ties plans to one another and to the actions that implement them<sup>2</sup> “[T]he consistency doctrine is the expression of the idea that plans are documents that describe public policies that the community intends to implement and not simply a rhetorical expression of the community’s desires.”<sup>3</sup> If there is no statutory consequence for failing to plan—and no requirement that land-use regulations such as zoning be consistent with the plan—one wonders, “Why plan at all?”

## FREEZE THE ZONING: A RACE ENSUES

Revisions to a master plan may tip off a property owner that a community is considering zoning amendments, encouraging him to file an application to “freeze” the current zoning on his property and avoid the new development restrictions that might be in the pipeline. This undermines the community’s attempt to plan its future because the obvious hidden message to the planner is: “Don’t prepare a plan, just put in the zoning as quickly as possible, satisfy the minimum public notice requirements,

2. The following states have included a consistency requirement in their planning and land-use statutes: Arizona at AZ. REV. STAT. ANN. § 9-462.01(F) (West 1999); California at CAL. GOV’T CODE ANN. § 65350 (West 1997); Delaware at DEL. CODE ANN. tit. ix, § 2651(b) (West 1999); Florida at FLA. STAT. ANN. § 163.3167(2), (4) (West 1990); Kentucky at KY. REV. STAT. ANN. § 100.187 (Michie 1993); Maine at ME. REV. STAT. ANN. tit. 30-A, § 4352.2 (West 1996); Nebraska at NEB. REV. STAT. § 23-114.03 (1997); New Jersey at N.J. STAT. ANN. § 45-22.2-2 (Lexis 1999); New York at N.Y. TOWN LAW § 272-a (11)(a); Oregon at OR. REV. STAT. § 197.010(1)(d); Rhode Island at R.I. GEN. LAWS § 45-24-31(16) and § 45-24-34; South Carolina at S.C. tit. 6 ch. 29 § 6-29-720 (B); Washington at WASH. REV. CODE ANN. § 36.70A.040 (3) (West 1999); and Wisconsin at WIS. STAT. § 66.0295(3).

3. Lincoln, Robert, AICP, Implementing the Consistency Doctrine, MODERNIZING STATE PLANNING STATUTES—THE GROWING SMART WORKING PAPERS, VOL. 1, PAS REPORT NO. 462/463, American Planning Association.

and hope that most property owners don’t find out until after the zoning is adopted.”

While some other states have similarly ineffectual provisions for master plans, nothing compares to MASS. GEN. LAWS ANN. ch. 40A, §6—the infamous “zoning freeze” provision. Section 6 mandates an imbalance in favor of property owners by allowing for very early vesting of rights under preexisting zoning.<sup>4</sup> Even the specialized Land Court judges, who regularly interpret section 6, say that parts of section 6 are virtually incomprehensible. Section 6 is designed to protect property owners from injustices that may be caused by zoning changes, a laudable goal in principle. However, good planning requires a balance between protecting property rights and protecting public welfare.

Aside from their complexity and obscurity, these freeze provisions frustrate the community’s attempt to plan and make it impossible for Massachusetts municipalities to correct past zoning mistakes. As soon as it becomes clear that a community intends to change its zoning regulations to be consistent with its master plan, property owners rush to file development applications because section 6 allows them to protect their rights by “freezing” the existing zoning. Sometimes these property owners even feel obligated to propose development they otherwise would not have proposed, just to freeze their zoning. They file these applications in order to protect themselves against the very zoning changes called for in the master plan to accomplish the community’s goals.

4. Several states have “vesting” statutes intended to protect the legal status of rights obtained at various points in the development review process. Vesting statutes are laws that create criteria for determining when a landowner has achieved or acquired a right to develop his or her property in a particular manner, which cannot be abolished or restricted by regulatory provisions subsequently enacted. This is called a vested right because it is a right that has become fixed (“vested”) and cannot be eliminated or amended. There is a common thread through most existing vested statutes.

For the development rights to be vested, the government must have made a decision and the landowner must have, in good faith, relied, to his or her detriment, on that decision by making some improvement to the land or some other commitment of resources. A number of states have enacted vesting statutes that specify what sort of government decision, and what detrimental landowner actions made in reliance on that decision, trigger estoppel, as well as other issues concerning vesting of development rights.

As to the key issue in vested rights statutes—what permit or approval triggers—there are various approaches. Arizona, Colorado, and North Carolina statutes create a vested right from a development plan that is “site specific;” that is, a plan must have sufficient specific detail on the proposed development of the property, such as a subdivision plat, planned unit development, or development agreement. California relies upon the “tentative vesting map,” while Massachusetts creates a vested right from approval of “a definitive plan or a preliminary plan followed within seven months by a definitive plan,” and Pennsylvania vests the right to develop pursuant to an approved subdivision plat. Florida grants a right to complete a development regional impact pursuant to a final development order if development is proceeding in good faith. Kansas vests upon the recording of a plat for single-family residential development, and for all other development upon the issuance of all necessary permits if “substantial amounts of work have been completed” pursuant to the permits. Virginia grants a vested right when there is a significant affirmative governmental act, such as a rezoning, special use permit, variance, or plat or site plan approval, and the owner is in good faith reliance on that affirmative act makes significant expenditures or incurs significant obligations. GROWING SMART<sup>SM</sup> LEGISLATIVE GUIDEBOOK, 2002 Edition, Chapter 8.

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# Commentary

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As an example, during the fall of 1999, the Martha's Vineyard Town of West Tisbury proposed a temporary moratorium on building permits for new single-family houses in order to give the town some time to consider adopting growth control measures. In the first six weeks after the moratorium was proposed, the town granted the same number of building permits it had given out during the entire preceding year. Spurred by the proposed moratorium legislation, property owners filed applications just to ensure that they would not be subject to it. The moratorium was intended as a temporary measure to enable the town to buy time while it crafted new development regulations to control growth. Instead, the moratorium had the opposite effect, greatly accelerating growth. The West Tisbury Planning Board, knowing the way that section 6 undermines planning, had accurately predicted this response and recommended against adoption of the moratorium. This experience is typical whenever a moratorium or any type of downzoning is proposed in Massachusetts.<sup>5</sup>

## APPROVAL NOT REQUIRED (ANR)

The Massachusetts Subdivision Control Law<sup>6</sup> may well be the longest and most arcane subdivision statute in the nation. Massachusetts authorizes land to be subdivided to the horizon along an existing road, while maintaining the fiction that such developments are not subdivisions. The law defines "subdivision" in such a way that road frontage subdivisions simply are not subdivisions and cannot be subjected to planning board review. If the lots meet minimum frontage requirements in the zoning, the planning board has no choice, but to endorse such plans Approval Not Required.<sup>7</sup> If the sole purpose of subdivision review were to control road construction for new subdivisions (which was apparently its original purpose), this might make some sense. However, the creation of building lots determines the future of our communities—affecting the community's appearance, population density, and the location of curb cuts, necessary utilities, and services, among other things. Sprawl along existing roads has become a dominant and depressing feature of the landscape, causing aesthetic damage, drainage nightmares, and safety hazards from poorly sited driveway entrances.

Local governments legitimately feel powerless to control this insidious pattern of development. There is an absurd quality to the notion that the planning board must endorse the creation of lots that it knows do not satisfy applicable zoning or board of health standards and that directly contradict the community's goals as expressed in town plans. A subdivision statute should support, not undermine, municipal planning goals. It should encourage planners, neighbors, and developers to work together to protect what they value, develop what they need, maintain stable and diverse economies, and allow a fair return on land investments.

5. The Town of Framingham experienced a surge in apartment development in the mid-'70s, which was directly attributable to a proposed moratorium on apartments. It took nearly 20 years for the market to absorb all of those hurriedly planned and constructed apartments.

6. MASS. GEN. LAWS c 41 §§ 81K-81GG, the Subdivision Control Law.

7. MASS. GEN. LAWS c 41 § 81P

## POSSIBLE SOLUTIONS

The time has come for Massachusetts legislators to give the power back to local communities to implement their plans. The solutions to the problems listed above are not technically difficult to find. The problem in Massachusetts has been political—a combination of ignorance about these complex issues on the part of state legislators, the stranglehold of special interest lobbies on the state legislature, the sheer incomprehensibility of much of the statutory language, and a lack of leadership in both the executive and legislative branches on these important issues.

1. The solution to lack of a consistency requirement between planning and zoning is as obvious as the problem. More and more states now require that zoning must be consistent with an adopted master plan. In those states, master plans actually have teeth and local and state governments frequently pay attention to them. Massachusetts should do the same.
2. The solution for the "Approval Not Required" land division is equally simple. By amending the definition of "subdivision" so that it does not exclude land divisions on existing roads, these developments would become eligible for planning board review.
3. The zoning freeze/vested rights issue is more complicated. One solution is to allow the constitutional doctrine of due process to govern this issue and give municipalities more flexibility to set their own rules if they want to be more generous to property owners than the constitution requires. Alternatively, the state could offer some degree of protection to property owners beyond what is constitutionally required (as many other states do), without entirely undermining the planning process.<sup>8</sup>

The Town of Dover in New York State provides an example of how one community tailored a vested rights provision to suit its needs. The town adopted a new zoning law in 1999. There were a number of subdivision applications in the pipeline during the time the new zoning was under consideration. Members of the local governing body deliberated as to what was a fair cut-off point for applying the prior zoning to applications already under review. They did not want to encourage any new applications to be filed under the old zoning, but they wanted to be fair to those property owners who had acted in reliance on that zoning in preparing existing applications. They considered using one of the following four cut-off points for granting this protection: (1) plans that had final approval, (2) plans that had preliminary approval and for which a final application had been filed, (3) plans for which preliminary approval had been granted, and (4) plans for which a hearing had been held for preliminary approval but no decision had yet been made. They settled on the third alternative, which was a reasonable compromise under the circumstances that was fair to applicants and did not invite widespread circumvention of the new zoning law. The town was free to design rules that strike an appropriate balance between implementing a plan and protecting property rights.

8. See, Chapter 8, GROWING SMART<sup>SM</sup> LEGISLATIVE GUIDEBOOK, 2002 Edition for statutory approaches to vested rights.

## CONCLUSION

The current Massachusetts land-use statutory framework is highly dysfunctional. The confusion and conflict generated by this convoluted body of state law result in complex litigation that delays both municipalities and developers for months and years. Massachusetts law throws large and unnecessary obstacles in the paths of municipalities that want to protect

their environment, control sprawl, and build affordable housing. It ties their hands to such an extent that they cannot legislate effectively to implement the very master plans that are the key to their future. Consequently, such plans are rarely undertaken and even more rarely implemented. More often than not they produce the opposite of their intended results. A change is long overdue.

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## Affordable Housing—At What Price?

By Jon Witten

I heartedly concur with Joel Russell's observations of the Massachusetts land-use statutes. Meaningful land-use planning in Massachusetts is an oxymoron, a combination of Byzantine governmental relationships and historically limited leadership in the land-use field at the state level. I offer two additional problems to Joel's list of woes.

### PROBLEM #1: NO PLANS, NO VISION

First, and consistent with Joel's remarks, the lack of any meaningful planning requirement at the state, regional,<sup>1</sup> or local level has led to a chaotic battle between developers, environmental and housing advocates, and residents of the state's increasingly urban landscape. As regional and local governments have no formal opportunity to articulate priorities and plan for the future (a locally adopted comprehensive plan is all but meaningless in the court's eyes,<sup>2</sup> the issue du jour becomes the focal point and the priority of the moment. But as the legislatures of an increasing majority of states have learned, land-use and economic development planning must be done comprehensively.<sup>3</sup> Single-issue solutions always create other problems and often only cater to one vested interest group at the expense of the public-at-large.

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Jon Witten is president of Horsley and Witten, Inc. of Sandwich, Massachusetts, and an attorney. Mr. Witten is a *Land Use Law & Zoning Digest* reporter.

1. Two notable exceptions exist. The Martha Vineyard Commission and the Cape Cod Commission. These regional entities with regulatory review authority were created by the legislature (many members having summer homes on the Island or Cape Cod) after attention was called to the rapid destruction of both resources. Attempts to create regional regulatory authority elsewhere has failed, however, and the last three governors, reversing a national trend, have urged the elimination of county government.

2. "Neither the master plan itself nor the law requires that zoning be in strict accordance with a master plan." *Rando v. Town of North Attborough*, 44 Mass. App. Ct. 603, 612, 692 N.E.2d 544, 550 (1998).

3. See, for example, planning statutes in Vermont, California, Oregon, Florida, Maine, Rhode Island, Georgia, Washington, Maryland, South Carolina, and Tennessee. See also, Raymond Burby, et al., "Is State Mandated Planning Effective?" *LAND USE LAW & ZONING DIGEST* 45, no. 10 (October 1999).

Massachusetts' failure to mandate or even encourage meaningful comprehensive planning is overshadowed only by its lack of political courage and leadership exhibited by its retention of the "Anti-Snob Zoning Act" adopted in 1969 and unchanged since.<sup>4</sup>

### PROBLEM #2: NO PLANS + NO VISION = EXCLUSIONARY ZONING?

Whereas states that require or encourage comprehensive planning mandate that local governments develop programs and plans to ensure an adequate supply of affordable housing units,<sup>5</sup> Massachusetts stipulates that if a city or town does not have at least 10 percent of its housing stock set aside with a non-transferable subsidy, it is vulnerable to an application for a comprehensive permit under the Anti-Snob Zoning Act.<sup>6</sup>

The effects of the Anti-Snob Zoning Act are draconian enough to make any land-use planner cringe. Wrapped in the trimmings of promoting "affordable housing," this statute magically transforms historically undevelopable lands into "affordable housing" projects. The density of many of these projects is frighteningly reminiscent of those sponsored by the federal government in the 1960s (many of which were torn down in the 1990s).

In cities or towns that do not have at least 10 percent of their housing stock subsidized, the statute allows any developer who agrees to limit her profit to that set by a

4. Mass. Gen. Laws c. 40B, §§ 20-23.

5. For example, California Government Code § 65302(c) mandates that the local comprehensive plan include a "housing element" that reflects the legislature's goal that all local governments accept responsibility to adopt housing plans that contribute to the attainment of the state's housing goal. *Committee for Responsible Planning v. City of Indian Wells*, 209 Cal. App. 3d 1005 (1989). California has adopted a statewide housing goal; there is no articulated statewide housing goal in Massachusetts.

6. Mass. Gen. Laws Ann. c. 40B, §§ 20-23. "Comprehensive permit" in that one permit for all local approvals is theoretically obtainable from one board (the Board of Appeals). The title of the statute: "Anti-Snob Zoning Act" is a curious title in a state whose judiciary has regarded exclusionary zoning as generally consisting of one and two acre minimum lot sizes. See, for example, *Aronson v. Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964) and *Johnson v. Town of Edgartown*, 425 Mass. 117, 680 N.E.2d 37 (1997).

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subsidizing agency<sup>7</sup> to request a waiver from any and all locally adopted rules, regulations, or ordinances. Perhaps the most shocking aspect of the statute for anyone not accustomed to anarchy is the fact that the community has extremely limited ability to impose reasonable restrictions on such development regarding height, bulk, width, setbacks, density, or other traditional health, safety and/or aesthetic concerns. A project filed under this statute is transported to another place and time, one where locally adopted rules and regulations are suspended. The only rules are those negotiated between the local review board and the applicant. The role of the abutting property owner is reduced to nothing more than a dreaded “NIMBY,” made worse by his or her opposition to “affordable housing.”

What proponents of this statute refuse to admit, however, is that the abutters’ opposition is directed at a process where rules and regulations are callously tossed out the window—the beneficiaries being the land speculators and developers, not those in need of “affordable housing.” That this charade continues is an insult to the citizens—past, present and future—of the state whose constitution was the model for the Constitution of the United States.

One would suspect that the price a developer would have to pay for the suspension of local rules and regulations would be high, analogous to the price a developer must pay in late vesting states for entering into a development agreement. Needless to say, as noted in Joel’s commentary, Massachusetts is an early vesting state. The price a developer pays is shockingly low. At least 25 percent of the housing units must be set aside for rent or sale to those earning 80 percent of the median income of the region.<sup>8</sup> Recall, however, that the rules on density are cast aside. The 20-acre parcel that was zoned for 40 units originally is likely the recipient of 140-160 units with the density restrictions waived. Twenty-five percent of 160 is 40, leaving 120 units available for sale at market rates.

Adding insult to injury, the most popular subsidy programs require that the affordable units remain affordable for a period of at least 15 years.<sup>9</sup> On the 16th year, the lucky homeowner who purchased the unit, perhaps only the year before, for below market rates, can now sell the unit for a windfall. And the city loses an affordable housing unit, putting it further behind its Sisyphean quota.<sup>10</sup>

7. The two most popular home ownership subsidies (the New England Fund and the Housing Starts program) have established a limitation on profit to 20 percent of development costs. This profit allowance is significantly greater than the norm. A recent study by the research division of the National Association of Home Builders reports that the average annual profit earned by homebuilders is 6.35 percent. Ed Calderia, NAHB Research Center, “Moving to the Next Level of Profitability,” [www.nahbrc.org](http://www.nahbrc.org).

8. In the Boston metropolitan area, 80 percent of median income is \$56,000, hardly the cohort in need of subsidized housing.

9. The New England Fund was recognized by the Housing Appeals Committee as a valid subsidy program even though the “subsidy” is a mortgage loan granted by a private bank. The bank requires that the “affordable unit” remain affordable for at least 15 years.

10. The statute has been in place for 32 years, yet less than 30 of the state’s 351 communities have met the 10 percent quota.

Recognizing that cities and towns would likely rebel against such state-controlled mandates, the Massachusetts Legislature provided that any developer whose project was denied or approved with too many conditions could appeal to an administrative agency (the Housing Appeals Committee) for expedited relief. Through the promulgation of its own rules and regulations and 30 years of decisions, the HAC has repeatedly upheld and strengthened the statute. In decision after decision, the HAC has dismissed local offers of proof and/or concerns regarding the extent of affordable housing already existing within the community,<sup>11</sup> environmental impacts,<sup>12</sup> traffic congestion and emergency access,<sup>13</sup> drainage problems,<sup>14</sup> visual impacts and property devaluation,<sup>15</sup> school overcrowding,<sup>16</sup> inconsistency with a locally adopted plan,<sup>17</sup> and water pressure and supply limitations.<sup>18</sup> The HAC touts its respect for local planning and local planning issues but its decisions indicate otherwise. In a recent and particularly egregious decision, the HAC ruled that a condition placed on a previously approved subdivision plan precluding the further division of an approved lot must yield to a subsequent comprehensive permit application.<sup>19</sup>

The majority of states encourage local governments to provide affordable housing units in concert with other important land-use and economic needs and goals. That is, affordable housing is perceived as no more and no less important than the provision of clean water, efficient transportation systems, and a healthy ecosystem. These jurisdictions allow the provision of affordable housing through a creative and progressive system of plan consistency and plan implementation requirements. Ignoring this approach, Massachusetts has instead adopted the “cram down” mechanism of the Anti-Snob Zoning Act.

11. *Hadley West Associates v. Haverhill Board of Appeals*, (Mass. Housing Appeals Committee, No. 74-02, September 24, 1974).

12. *C.S.R. Management, Inc. v. Yarmouth Board of Appeals*, (Mass. Housing Appeals Committee, No. 95-01, September 5, 1995).

13. *Dexter Street LLC v. North Attleborough Board of Appeals*, (Mass. Housing Appeals Committee, No. 00-01, July 12, 2000).

14. *Spencer Livingstone Assoc. Ltd. Partnership v. Medfield Zoning Board of Appeals*, (Mass. Housing Appeals Committee, No. 90-01, June 12, 1991).

15. *Cedars Holdings, Inc. v. Dartmouth Board of Appeals*, (Mass. Housing Appeals Committee, No. 98-02, May 24, 1999).

16. *Woodcrest Village Associates v. Board of Appeals of Maynard*, (Mass. Housing Appeals Committee, No. 72-13, February 13, 1974).

17. *Planning Office for Urban Affairs v. North Andover Board of Appeals*, (Mass. Housing Appeals Committee, No. 74-03, May 5, 1975).

18. *Cooperative Alliance of Massachusetts v. Taunton Board of Appeals*, (Mass. Housing Appeals Committee, No. 90-05, April 2, 1992).

19. *Woodridge Realty Trust v. Ipswich Board of Appeals*, (Mass. Housing Appeals Committee, No. 00-04, June 28, 2001). The impact of this decision will be difficult to measure. All parcels set aside by a developer as “open space” within a standard subdivision, land presumably set aside as a “buffer” between abutting properties, lots that are “underdeveloped” and structures that could be built higher, wider and bigger are all likely targets of developers building under the statute.

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# Commentary

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This bitter pill could be palatable if the legislature and governor knew better than the state's 351 municipalities. But as Joel describes relative to the state's Zoning Act and as discussed above regarding the development of affordable housing, the Massachusetts land-use statutory framework is dysfunctional. Both statutes are also arbitrary. The sad truth regarding such dysfunction (I prefer to call it anarchy) is that it benefits a small group of land speculators to the detriment of the public-at-large.

In addition to promoting anarchy, the Anti-Snob Zoning Act is a model of arbitrary rule-making. The fact is, there are no rules under the statute; no predictability, no due process. It is hard to imagine a court supporting the statute today, even with the highly deferential standard granted legislative actions.

## CONCLUSION

The reform of the Massachusetts Zoning Act and Anti-Snob Zoning Act could come about in one of two ways. One possibility is that either or both will be challenged in court by newly emerging organizations disgusted by Massachusetts's arcane land-use and planning statutes and abdication of leadership at the state level.

A second possibility is that the legislature and/or governor will muster the political courage to fix Massachusetts's land-use laws, including those geared toward the creation of affordable housing. Clearly, seizing this opportunity before the courts fix—or void—the law is the preferred alternative.

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## My Two Cents

By Tom Broadrick

I recently had the opportunity to discuss zoning reform with council members of the Southeastern Regional Planning and Economic Development District, one of 13 regional planning agencies in Massachusetts. I had distributed another of Joel Russell's articles on zoning reform and found that the council members were very interested in the issue.

In a nutshell, we must do away with the Approval Not Required process. ANR under the Subdivision Control Law is a provision of Massachusetts land-use laws that causes problems for municipal planners like myself. ANR allows development of land that we simply cannot anticipate or plan for since we have no way of controlling access issues, water provision, fire and police services, and public safety through reasonable application of our local subdivision regulations. We need to get rid of it.

Zoning Freezes are another big problem. Before municipal planners can even muster support for a two-thirds vote at an annual town meeting to amend a zoning bylaw, we must advertise the content of the proposed change which simply signals the development community to file preliminary plans that "lock in" the current zoning prior to any votes on the new zoning that might benefit the community. We must change the "vesting rights" to something reasonable and fair to both the development community and to the municipalities.

In the community in which I am the planning director, we have a comprehensive plan adopted by the planning board, endorsed by the board of selectmen, and most important, it is the framework which guides the work of our local zoning bylaw implementation committee. The zoning bylaw is linked to the comprehensive plan and reflects the wishes of the citizens of our community. This linkage is called consistency. But most communities do not link their comprehensive plans to zoning; many planning boards fail to even adopt comprehensive plans, so they sit on the shelf gathering dust! How can a community know what type of zoning is

appropriate if no plan has been adopted based upon citizen's input? We must change the statutes to link zoning to the community's comprehensive plan and mandate that communities adopt plans.

Joel's article outlines the areas that many of my fellow municipal planners in Massachusetts want changed, but there is another statute in Massachusetts that must be addressed too. Jon Witten hits the proverbial nail right on the head when he says "No plans + No vision = Exclusionary Zoning?" The problem for municipal planners is this: Providing affordable housing is a good thing, but being forced to approve density bonuses for a paltry number of affordable units on land that is environmentally sensitive and unable to support a grid subdivision is a bad thing, period.

There is something we like to refer to as a "friendly 40B," what I think the law was set up to provide. A "friendly 40B" allows a developer to partner with the community for an affordable housing project on "good land" (not marginal or environmentally sensitive land) that both the community and the developer can feel confident and comfortable with. Too often marginal land that cannot be developed under present rules and regulations is brought before the zoning board of appeal under the threat of a 40B application in an attempt to scare planning boards and abutters into accepting the project and waiving current subdivision rules and regulations to the detriment of the community—allowing for the lesser of two evils. This is not planning. This is not doing the right thing for the community. This is not providing affordable housing. If a comprehensive plan is in place with a housing inventory, housing strategy, affordable housing committee, and an appropriate permitting process, then the "streamlining" that the 40B permitting allows can work. But this is rare and that is why the law needs to be changed. It just doesn't work very well.

The Massachusetts Chapter of the American Planning Association has not taken any official stance on the issues outlined above. But we are poised and ready to move forward with gathering support for zoning reform in Massachusetts and have placed it as a priority agenda item for the coming year.

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Tom Broadrick, AICP, is the planning director for the Town of Duxbury, Massachusetts, and President of the Massachusetts Chapter of the American Planning Association