

Dispelling the Myth of Home Rule

Local Power in Greater Boston

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3. Home Rule in Action: Land Use

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—Public official from Middleton

The powers and political concerns of the cities and towns in Massachusetts are defined in terms of the ability to administer and regulate a specific area of land—a subdivision of the state. A municipality’s boundaries define its legal jurisdiction, and the appeal of home rule focuses the community’s attention on issues within those boundaries. An examination of the legal structure that empowers or restricts a locality’s control over the physical manifestation of its “home” is, therefore, critical to an understanding of the extent of home rule that municipalities in the region possess.

Municipal power to regulate the use of land within local borders derives primarily from state statutes rather than the grant of home rule authority. Many officials nonetheless identified their land use powers as broad and important, and they specifically commented on the significance of their power to zone, a power largely controlled by a state statute known as Chapter 40A. A respondent from Concord pointed out that, even though zoning bylaws, like any other town bylaws, require the approval of the Attorney General, they have generally been approved with little trouble. Others noted that there is a wide range of land use by-laws and ordinances in the region, ranging from those permitting cluster developments (Lexington) to those preserving open space (Hopkinton) to those providing for planned residential conservation communities (Acton). A town official from Boxborough told us that the town has used its delegated land use powers to adopt strict protections for wetlands.

The municipal land use power is, however, more limited than that of the state. Unlike the broad constitutional grant of authority given the state, municipal land use power is restricted by the terms of the relevant state statutes. Not surprisingly, therefore, some officials painted a more mixed assessment of their land use powers. They portrayed their land use power as driven less by local planning judgments than by the fiscal pressures that they attributed to state control of their revenues and expenditures. Several officials commented that these external influences led them to pursue land use policies that reduced the number of children moving into their communities, given the educational costs they bring. Others said that concerns about state preemption led them to shy away

from strict environmental regulations that would preserve natural resources within municipal boundaries. Still others raised concerns about the scope of their legal power to regulate subdivisions or control growth. As an official from Medfield put it: “The only way to preserve open space is to acquire the property. There is no other way. Because of Massachusetts’ recognition of property rights, municipalities and the state are restricted in what they can do.” An official from Holliston even complained that the required Attorney General approval of by-laws made it difficult for towns to manage growth if they maintained the town meeting form of government. “To control sprawl . . . you need town meeting action, which can take time,” the official explained. “If we had more latitude from the state it would be faster. For example, we could allow town officials more latitude with zoning bylaws or shorten the time for state review.”

To provide a sense of the kind of authority municipalities have over land use policy, we discuss below three basic ingredients of the local land use power: the Zoning Act, which delegates the zoning power to localities; the Regional Planning Law, which mandates the accommodation of affordable housing developments; and the Community Preservation Act, which provides municipalities with financial resources to buy, develop, and allocate local property. A focus on these statutes will demonstrate that state law does more than simply empower localities to control the land within their boundaries. It also places significant limits on the independent local autonomy often associated with the term “home rule.” The Zoning Act authorizes local action, but it contains restrictions on the exercise of municipal power. The Regional Planning Law not only mandates the accommodation of affordable housing, but it does so without empowering localities to construct affordable housing on their own terms or enabling them to preserve affordable housing once it has been built. The Community Preservation Act empowers localities to raise money to protect and develop local property, but it has been criticized for internal inconsistencies and allocational inequalities that make it less than a simple grant of additional local authority.

ZONING

Zoning power in Massachusetts derives from the state constitution. Article 60 of the state constitution grants to the state legislature the power to “to limit buildings according to their use or construction to specified districts of cities and towns.” By enacting the Zoning Act—Chapter 40A of the General Laws—the state has delegated its zoning power to the state’s municipalities. Chapter 40A gives municipalities significant control over local zoning issues. The courts have reinforced the extent of this local power through broad interpretations of Chapter 40A. By focusing on the intended purpose of the legislation rather than on specific grants of power, they have given substantial deference to municipal zoning regulations when challenged by private parties. Many officials mentioned

the power to zone as one of the most significant aspects of their local authority. To be sure, this power, as many of those we interviewed noted, has been an obstacle to inter-local cooperation. Nevertheless, as a Bedford official observed, “towns feel they have gained some power over their own zoning and they don’t want to give it up to anyone.”

Characterization of Land Use Ordinances and Bylaws

Municipal regulations regarding land use usually take the form of zoning ordinances and by-laws. Before the passage of the Home Rule Amendment, the status of these ordinances and by-laws was relatively clear: municipal zoning was an exercise of the state power delegated to localities by Chapter 40A. As a result, any exercise of that power had to conform to the requirements outlined in Chapter 40A. There was no other source of authority. After the passage of the Home Rule Amendment, the legal foundation of a municipality’s powers over land use has become potentially broader. The Massachusetts Supreme Judicial Court has recognized land use regulations to be a part of a municipality’s general home rule authority, an authority that does not depend on power being specifically delegated by the state. It identified zoning regulations as “one of a city’s or town’s independent municipal powers included in article 89, section 6’s [the Home Rule Amendment’s] broad grant of powers to adopt ordinances or by-laws for the protection of the public health, safety, and general welfare.”¹

The court also noted, however, that a limitation in Section 6 of the Home Rule Amendment requires that the exercise of a municipality’s home rule powers conform to state statutes.² As a result, Chapter 40A regulates a municipality’s ability to pass land use regulations whenever the regulation is classified as a zoning ordinance or bylaw. The determination whether a specific by-law or ordinance is a “zoning regulation,” subject to the procedural requirements and limitations of Chapter 40A, or a general exercise of a locality’s police powers, authorized by the Home Rule Amendment, is therefore important. Unfortunately, the judicial interpretation of the line between the two has generated considerable uncertainty.³ This uncertainty—coupled with the concern that the state’s zoning enabling act occupies the field of land use policy and thus ousts seemingly complementary local authority—has led many municipalities to exercise caution by not relying on their home rule authority. Most municipalities stick with the requirements and restrictions of Chapter 40A. Some municipalities, such as Arlington, do not want to be restricted by the state act, but they prudently file a home rule petition to avoid the costly possibility that regulations will be challenged in court if they rely on their general home rule power as the justification for the enactment. The result is that land use power generally tends to be governed by the terms of Chapter 40A, although other measures, such as the Massachusetts Subdivision Control Law,⁴ are also significant.

Frustration of Land Use Planning Efforts

Chapter 40A and related statutes do not simply ensure that the exercise of local land use power will be upheld if challenged in court. As several respondents pointed out, they also play a substantial role in frustrating local land use planning. Indeed, the American Planning Association recently listed Massachusetts as one of the states with the most outdated land use laws, and the Zoning Reform Working Group of its local chapter concluded: “Although technically a ‘home-rule’ state, the statutes that govern planning and land use regulation are so restrictive to local authority as to make home rule more an illusion than a reality in Massachusetts.”⁵ The limitations manifest themselves in a variety of ways, from prohibitions in Chapter 40A against localities establishing maximum floor areas for houses⁶ (which communities might use to prohibit so-called McMansions) to provisions of the Subdivision Control Law (which insulate from local review all subdivisions fronting existing roads).⁷ We consider here, as examples, a few of the substantial limitations that Chapter 40A places on effective local land use planning.

One of the key obstacles that Chapter 40A presents is that it exempts certain land uses from local zoning. There are many such exemptions—dealing, for example, with the use of land for religious or educational purposes, child care facilities, the use of building materials, and the use of antennas (unless, that is, these regulations meet specified statutory exceptions).⁸ In addition, state property and that of its assignees is exempted from local zoning laws.⁹ This exemption for state property extends to the use of land by private entities as long as they are being employed by the state.¹⁰ In fact, state departments can grant exemptions to these private entities without considering alternatives, and the exemptions are usually decided through a narrow site-specific analysis. The site need not be the most ideal site in the municipality. Nor does it matter that there may be an alternative that can better satisfy the demands of all the parties involved. Thus the Department of Public Utilities, not the municipality, has the final authority to regulate the placement of transmission lines.¹¹ And it can exempt utility companies from zoning restrictions without considering alternate sites proposed by the locality.¹²

These exemptions undermine local efforts to create a master plan. Massachusetts cities and towns are required to prepare such a master plan, although no statutory provision makes such a plan enforceable in state court. Yet even if such a plan were accorded legal significance by the state, state statutory exemptions would ensure that the state agencies considering overrides of community zoning decisions would not have to conform to it. To be sure, Executive Order 385, issued by Governor Weld, requires “[a]ll agencies [to] promote, assist and discharge their duties with full consideration of local or regional growth management plans that have been formally accepted by the affected municipalities.”¹³

But this executive order simply requires “consideration” of local plans and applies only if a locality actually adopts a growth plan. The lack of a more powerful consistency requirement between a master plan and what is being implemented, whether by the locality or the state, has led one critic to wonder, “Why plan at all?”¹⁴

Other aspects of Chapter 40A frustrate local planning by limiting a municipality’s authority to change existing zoning. In recent years, state agencies and activists concerned with neighborhood design have criticized the usual pattern of zoning in the state’s towns and cities for promoting cookie-cutter style, conventional residential development. Some have even argued that current local zoning codes prevent fast-growing suburbs from acquiring the look and feel of the traditional New England towns that constitute one of the region’s greatest assets. Many towns have therefore begun to re-evaluate their zoning codes, and some of the officials we interviewed made positive references to their ability to experiment. But state law makes it difficult for a municipality to change its current zoning along innovative lines.

First of all, Chapter 40A imposes a super-majority voting requirement on municipalities that wish to change existing zoning laws. A two-thirds vote of the city or town council, or a two-thirds vote of a town meeting, is required before any zoning by-law or ordinance—or any amendment to an existing zoning by-law or ordinance—can take effect. A proposed by-law or ordinance that fails to meet this voting requirement cannot be considered again for two-years unless it is recommended in the final report of the Planning Board.¹⁵

Chapter 40A also makes it difficult in other ways for a town or city in the Boston region to revamp its land use policies. In order to ensure that property owners are adequately notified about potential zoning changes, Chapter 40A has set a strict timeline that must be followed before any zoning change can go into effect.¹⁶ This timeline provides property owners more than simply notice of local action. It also exempts them from the changes ultimately adopted by giving them a vested right to develop their land under the existing law. If property owners submit a definitive plan to the local planning board before the passage of new zoning regulations—even if they only submit a preliminary plan followed within seven months by a definitive plan—the plan is evaluated based upon the zoning laws in effect at the time of the submission and not the zoning regulations about to be passed.¹⁷ All states recognize the vested interests of property owners that result from reliance on current zoning plans. But this Massachusetts procedure protects a vested right very early in the planning process.

If all that Chapter 40A did was to protect the vested rights of developers who already intended to build, this procedure would still have a major impact on a municipality’s power to control land use. Chapter 40A, however, not only protects potential developers but creates potential developers. This occurs, for example, when a city or town declares a moratorium on apartment construction

so that it can refine or develop a plan for the community. From the perspective of landowners, a notice of such a moratorium can be seen as a threat to their property interests. The moratorium not only prohibits apartment development during its existence but may be a precursor to significant zoning changes affecting that type of development. In order to protect themselves from possible detrimental effects to their property interest, landowners thus submit a preliminary proposal for the development of apartments in order to “freeze” their vested rights according to the current zoning plan. Before the moratorium is even voted on, in other words, the municipality is flooded with development applications for the type of development that the municipality wants to use the moratorium to investigate.

This kind of surge in applications occurred in the town of Framingham in the 1970s, resulting in a wave of apartment development. It took nearly twenty years for the market to absorb all the apartments that were hurriedly planned and developed because of the proposed moratorium.¹⁸ To be sure, the protections of Chapter 40A properly seek to balance the power of the municipality to zone with the vested rights of property owners to develop according to their plans. Nevertheless, by allowing developers’ rights to vest simply with the submission of a preliminary plan, current zoning law increases the very kind of development that the municipality wants to regulate. In the end, not only are municipal planning attempts frustrated but the interest of developers may also be undermined. They are given an incentive to engage in defensive development even if they had no plans to build the development beforehand.

AFFORDABLE HOUSING

The affordable housing sections of the Regional Planning Law—Chapter 40B of the General Laws¹⁹—were enacted to combat the exclusionary local zoning practices that have precluded the construction of affordable housing. Massachusetts was the first state to enact legislation that required municipalities to open themselves up to affordable housing development. Not only did Massachusetts recognize the need for legislative action in this area before any other state, but Chapter 40B was a purely legislative effort made without judicial compulsion. Politically, then, Chapter 40B was a major step towards recognizing the need to remove the barriers that generate class-based spatial segregation in Massachusetts.

The impact of Chapter 40B on the affordable housing market is notable. Since its inception, 18,000 affordable housing units have been built pursuant to Chapter 40B procedures. Over 60 percent of the municipalities that had no affordable housing units at the time Chapter 40B passed have since had affordable housing constructed. Indeed, affordable housing has been built in 85 percent of all cities and towns in Massachusetts, compared to only 50 percent before the act was passed.²⁰ Of course, the 18,000 units of affordable housing produced

in the thirty years after the passage of Chapter 40B make up a very small percentage of all suburban development. And there is also no indication that Chapter 40B has led to any significant relocation of urban minorities into suburban communities.²¹ Nevertheless, Chapter 40B is widely considered a prime example of legislative innovation aimed at addressing inter-local inequalities.

Most municipal officials we interviewed applauded the goals of Chapter 40B. But almost all of them objected to its effect on local power. There was an early judicial challenge to Chapter 40B on the ground that it invaded local home rule authority. The Supreme Judicial Court rejected the challenge, concluding that although “the zoning power is one of a city’s or town’s independent municipal powers included [in Article 89, Section 6’s] broad grant of powers to adopt ordinances or by-laws for the protection of the public health, safety, and general welfare,” Chapter 40B falls within the “legislature’s supreme power in zoning”²² Despite the court’s ruling, Chapter 40B’s operation on a local level has continued to be the target of criticism for its disregard of local concerns. The general consensus was that the Act allocated too much power to developers without granting localities the resources or authority to act on their own.

How Chapter 40B Works

Chapter 40B provides an alternative zoning approval process when qualified developers propose the construction of affordable housing developments. Responding to the tactics that some localities had employed to exclude low and moderate income housing projects, Chapter 40B promotes the construction of these projects by making two important modifications to the usual zoning approval process. First, it replaces the previous procedural requirements that had forced developers to get permission from a number of local authorities with a single approval. Developers need only apply for a comprehensive permit from the local Zoning Board of Appeals.²³ Secondly, if the Zoning Board of Appeals denies the application or conditions its acceptance on “uneconomic” requirements, the developer can petition the Housing Appeals Committee, a state agency, for a local zoning override. If the Housing Appeals Committee determines that an override is appropriate, it can order a “builder’s remedy”—that is, direct the locality to issue the necessary approvals that would allow the development to proceed.²⁴

The Housing Appeals Committee’s review of a potential development attempts to strike a balance between a locality’s need for affordable housing and local objections to the project being built on the proposed site. One of the elements of this balance provides that if a municipality’s stock of low and moderate income housing is less than 10 percent of its housing units, this fact constitutes “compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal.”²⁵ The impact of the Housing Appeals Committee on local zoning decisions is evident in its rate of overturning them.

Since the enactment of Chapter 40B, only 18 local Zoning Board of Appeals decisions have been upheld by the Housing Appeals Committee, while 94 have been overruled. The majority of the other petitions were settled in a negotiation between the locality and the developer after the Housing Appeals Committee heard the appeal.²⁶ These negotiated settlements suggest a degree of cooperation between developers and localities. But the denial rate of the Housing Appeals Committee gives developers a considerable negotiating advantage in these settlement discussions.

How 40B Frustrates Local Efforts for Affordable Housing

To promote affordable housing in Massachusetts, it may well be necessary to give the Housing Appeals Committee final word over local zoning decisions. A number of officials indicated they had little incentive apart from the Chapter 40B mandate to permit affordable housing, particularly for families. As an official from Franklin explained, the costs associated with new residential development are so great that “we’re trying to keep people out of town.” There were, to be sure, contrary views. An official from Duxbury argued that “if we had the power and the state made a more generic goal, we would be able to address it.” Even if some mandate akin to the one now in place is needed to encourage communities to make affordable housing development possible, however, Chapter 40B’s current procedures can be understood to undermine local concerns in undesirable ways. Some of the concerns expressed by municipal officials related to the limited negotiating power that local governments have when private developers plan to construct developments that would qualify under Chapter 40B. Others related to the ways in which Chapter 40B impedes local efforts to make more affordable housing available.

Comments from an official from Somerville reflected the first set of concerns. She was critical of most localities for failing to develop affordable housing, but she was equally critical of the affordable housing provisions themselves for failing to take into account legitimate local concerns. She noted that dense Chapter 40B developments often require a significant amount of infrastructure—such as roads, utilities, and services. But because Chapter 40B rarely takes this need for infrastructure into account, private developers and the state essentially mandate the necessary infrastructure, whether or not the municipality has the resources to pay for it. A town official from Franklin complained about the town’s lack of negotiating power in the Chapter 40B process. Even though Franklin had instituted a building moratorium to consider resource allocation for local services, the official reported, developers used Chapter 40B to develop 100 units on five acres in town. The developers were able to increase the density of the development well over what would normally have been acceptable. Yet Franklin lacked the power to negotiate for a lower density even though, according to the official, the development is located in an unfavorable location without

adequate public transportation. Other municipal officials objected to the fact that, because the Housing Appeals Committee's review is limited to a specific site and a specific project, it need not consider whether there is a better alternate site or whether there is a better way to satisfy the desires of all the parties involved. As a result, the municipality has little power to influence the type of development being proposed so long as its housing is below the state statutory threshold. A town official from Middleton put his criticism bluntly: affordable housing "compromise[es] underlying zoning . . . [and] results in a flood on the school system and leave towns shaking in their boots."

A different set of concerns related to the charge that, as a number of town officials complained, aspects of Chapter 40B undermine local efforts to fulfill the general goal of producing inexpensive housing units for low and moderate income occupants. These concerns are particularly troubling. They suggest that towns and cities in the region are concerned about the effect of Chapter 40B on their home rule not because they object to its goals but because they are unduly limited in their power to achieve them. In fact, the comments that emphasized these limitations on local authority suggest that there are aspects of state policy that do less to promote affordable housing development throughout the state than to expand the discretion of private developers to build on their own terms.

This criticism arises in part from the fact that housing is not considered "affordable housing" in Massachusetts simply by ascertaining the affordability of the housing. Developers can qualify for the remedies provided in Chapter 40B only if the housing project is subsidized by federal or state grants.²⁷ Developers proposing inexpensive housing units without state or federal aid have to seek conventional local zoning approval. Existing inexpensive housing units that were not constructed with government subsidies also do not count toward satisfying the requirement that 10 percent of a municipality's housing units be affordable.²⁸

Several officials complained that the selective way in which Chapter 40B promotes affordable housing development unfairly penalizes local communities. Federal and state grants for affordable housing are generally offered to projects of substantial size. For this reason, Chapter 40B fails to protect, let alone encourage, small efforts to produce affordable housing. Besides, state and federal funding is limited and not always available. In recent years, available funding has in fact become increasingly rare. Critics contend that the affordability and availability of the units should be the focus, not whether the federal or state government is sponsoring the project. Under current rules, local communities' actual contribution to the state's affordable housing needs go unrecognized. A Melrose official observed that it is a "travesty . . . that Section 8 housing isn't counted in the affordable housing percentage for [Chapter] 40B."

The number of affordable units in any given project that Chapter 40B requires is also an important issue for localities. Most affordable housing developments are proposed and built by private developers seeking to make a profit.

The majority of these developments have been high-density apartment complexes or condominiums with only the minimum amount of units set aside for low- to moderate-income occupants. There are several reasons for this. Government subsidies that help developers with the purchase price or construction cost of the project itself are limited. Land prices in most areas needing affordable housing often exceed the cost established to qualify as affordable housing, and developers therefore rely on a higher density to make a profit. The same economic constraints compel developers to ensure that the upper limits of the affordable housing index make up as many units as possible, and that market-rate units are maximized as well. Local officials are resentful of such practices. These practices affect a community's character and place a strain on local resources and services while providing only the minimum number of affordable units for the community. Yet because such developments qualify under Chapter 40B, the municipality has little room for maneuver when the developments are proposed.

Preserving affordable housing within a locality once it has been built is also a major concern. An official in the town of Burlington complained that the system allowed developers to override local housing decisions, retain the minimum amount of affordable housing for twenty years, and then convert them to market rate condominiums to be sold at a substantial profit. As a result, the municipality not only loses the social benefits of the affordable units but also loses units that count towards their 10 percent requirement. A Somerville official expressed a similar concern that several affordable units were expiring, but, she added, the city has been successful in negotiating with the developers to find ways to convince them to preserve the status quo. Concerns such as these arise because affordable housing units that count towards a municipality's 10 percent requirement usually receive assistance from the state, and the typical state requirement set forth in its financing agreements with developers is that the developer must preserve the specified amount of affordable housing units for a minimum of twenty years. To the extent that developers can price their development to conform to market rates once that time limit expires, municipalities can be forced to accept large developments yet be hard pressed to increase or maintain their affordable housing stock over time.²⁹

Other aspects of Chapter 40B also play a role in making the preservation of affordable housing difficult for localities. An official from Medfield complained that the town had tried to do their own affordable housing project to get Chapter 40B credit without being subject to a large-scale private-developer-driven development. Upon going to the state to get the local housing initiative credited as a Chapter 40B project, "[the state] started setting rules and regulations; you have to do it the state way." In particular, the state forced the municipality to tie the resale appreciation price to the real estate market in the town rather than to income levels in Boston area, as Medfield had wanted. "What happened, not

only in Medfield but several towns,” the official continued, “[is that] a house that we sold at lottery in 1992 for \$90,000 is now reselling as an affordable unit for \$202,000. It’s difficult for people to qualify for mortgages, given the income levels and the asset levels that the state allows. They’ve in effect made affordable housing unaffordable.”

One indication of the minimal local role in the production of affordable housing the state permits is that, before recent changes to Chapter 40B were made in 1990, affordable housing sponsored or built through local initiative or grants did not even qualify as Chapter 40B affordable housing. Thus Chapter 40B originally gave local authorities no incentive to initiate affordable housing projects on their own without state or federal grants. Ironically, then, Chapter 40B penalized communities that attempted to exclude affordable housing units from being built in their community but did little to encourage or reward efforts by them to sponsor the very types of developments that Chapter 40B was enacted to support. Administrative changes adopted in 1990 now allow housing projects developed through “local housing initiatives” to qualify for the 10 percent requirement. If a municipality donates funds or land to developers, or initiates and facilitates the development process, all units within that project qualify as affordable housing.³⁰ These changes have convinced some localities to take a more proactive role in developing affordable housing. An official from Lincoln noted that the town willingly located a developer and donated land to it for the purpose of constructing affordable housing. It did so without any state involvement.

There are, however, two limitations on Chapter 40B’s encouragement for localities to take the initiative on affordable housing. First, Chapter 40B provides localities an incentive to act but no resources to enable them to do so. Officials from Peabody, Hull, and Gloucester expressed a desire to initiate more affordable housing development but said that they could proceed only if they received state financial assistance. Secondly, the 1990 change in Chapter 40B was administrative rather than statutory. It is not clear whether the Housing Appeals Committee will count all local initiatives as part of the 10 percent requirement. A town official from Burlington stated that the town recently made an agreement with a developer to swap town land with private land so that it could construct an affordable housing complex for seniors on the private land. The deal was to be accomplished without state or federal involvement, and the town planned to ensure that the complex continued to remain affordable. But the state informed the town that this project would not count towards its 10 percent requirement.

Other Ways State Law Limits Local Affordable Housing

While Chapter 40B generally focuses on limiting local land use control in order to promote the availability of affordable housing, some state statutes authorize localities to pursue affordable housing regulation on their own. Section 9 of Chapter 40A, for example, enables localities to “provide for special permits

authorizing increases in the permissible density of population or intensity of use in a proposed development” on the condition that the developer “provide . . . housing for persons of low or moderate income.” Some special acts, usually passed in response to home rule petitions, provide additional authority. But other provisions of state law—including the Home Rule Amendment itself—set forth significant obstacles to local efforts to ensure that housing is available for low and moderate income residents.

The state’s cities have sought to use their home rule power to pass ordinances designed to preserve or increase their stock of affordable housing. These efforts include attempts to establish rent control, regulate condominium conversions, and require developer set-asides of affordable units in new construction. The Supreme Judicial Court has ruled, however, that these measures are not within a locality’s home rule authority. As a result, virtually every significant local strategy for promoting affordable housing has to be based on carefully specified state enabling legislation rather than undertaken pursuant to broader independent home rule powers. Much of this enabling legislation is enacted as special legislation in response to home rule petitions from particular localities. Yet even when municipalities successfully obtain this legislative permission, the requirement that they seek permission erodes the strength of home rule authority while expanding the scope of state preemptive legislation. The scope of state legislation expands, and the category of local initiatives authorized by home rule authority contracts. The more this dynamic occurs, the more likely it becomes that the courts will strike down other kinds of local legislation on the ground that it lacks explicit state support.

Local efforts to ensure the existence of affordable housing provide many examples of this pattern. One year after the passage of the Home Rule Amendment, Brookline attempted to enact a rent control ordinance. The Supreme Judicial Court struck down the ordinance, holding that rent control was an enactment of “private or civil law governing civil relationships” prohibited by section 7 of the Home Rule Amendment.³¹ Absent an explicit delegation of power by the state, the court said, municipalities cannot engage in regulation of the landlord-tenant relationship. After that decision, the legislature responded by passing a state-wide enabling act allowing for local regulation of rents and evictions.³² When that act expired, some municipalities petitioned for, and were granted, special legislation to allow them to continue rent control. Municipalities, like Brookline, were thus eventually allowed to act in the manner that they had originally planned. But the result of this way of achieving their goal was to make clear that rent control was outside of local control, a point made not only by the court ruling but also by the subsequent passage of the enabling act.

Most municipalities initially based their condominium conversion laws on the state-enabling legislation that authorized rent control. This strategy ensured

that they had a state statute on which they could rely for authority. But it also meant that local efforts would be scrutinized by examining the enabling legislation rather than the municipalities' home rule power. The City of Cambridge was one of the municipalities that defended its condominium regulations in this way. At first this strategy protected the city from legal challenges. The Supreme Judicial Court found that requiring a permit prior to the removal of any rent controlled unit from the market was essential to the operation of the rent control enabling legislation and is "therefore conferred by implication in the rent control state."³³ Although Cambridge defended the ordinance as authorized by its home rule power, the court never assessed that claim because it found authority under the rent control statute. The fact that this was the way the courts affirmed Cambridge's legislation had a detrimental effect on a subsequent legal challenge to an amendment to the same ordinance. In the later case, Cambridge again relied on its implied authority from the rent control act, this time not even mentioning its home rule authority. The Supreme Judicial Court struck down the amendment because it extended the proposed regulation beyond the limits allowed by the statute. The court didn't consider whether the amendment was permissible under home rule because such a claim was not even advanced as an argument.³⁴

Rent control was abolished by a state-wide referendum in 1994.³⁵ Several municipalities thereafter petitioned for enabling statutes to allow them to enact local condominium control regulations like those previously based on rent control statutes. Again, the legislature was responsive in granting that power. But enabling statutes, along with the legacy of rent control, continue to limit the scope of municipal initiatives. In 1999, the Supreme Judicial Court struck down an amendment to expand Boston's condominium conversion laws to protect both current and prospective tenants. The court found that this extension of protections exceeded the scope of the state enabling statute, and it also found that it frustrated the repeal of the rent control act.³⁶ Boston's ability to regulate condominium conversion under its home rule authority was never evaluated. By then, this kind of legislation had been so integrally tied to rent control that the issue was treated as completely under the control of the state. Efforts by Newton and Fall River to regulate efforts by property owners to convert rental units to condominiums were also invalidated for lack of home rule authority under the state constitution.³⁷

Local attempts to create affordable housing by conditioning building permits on mandatory set-asides of affordable units have followed a similar pattern of court rejection and legislative adoption. When the city of Newton sought to mandate that certain developers promise to sell 10 percent of their units at below-market rental rates in order to get a building permit, the Supreme Judicial Court held that it was beyond their power to do so because the state had preempted the field by adopting the Zoning Act.³⁸ The court also found that the

local aldermen, acting as a zoning board, were “without power to make important policy decisions involved in committing a municipality to a program of housing for low income or elderly persons.”³⁹ As a result, the state responded by making the “important policy decision” of allowing municipalities to condition special permits granting density bonuses on certain conditions including affordable housing set-asides.⁴⁰ Once again, the limited scope of the enabling statute restricted municipal initiatives that deviated from its provisions. Recent proposals for state enabling legislation that would expand the scope of local inclusionary zoning power beyond that conferred in Chapter 40A have not been adopted by the state legislature.

THE COMMUNITY PRESERVATION ACT

The Community Preservation Act⁴¹ is state enabling legislation that allows localities that accept it through a local referendum to increase local property taxes for the purpose of promoting open space, historical preservation, or affordable housing. Municipalities participating in this program can also receive financial grants from the state to supplement the funds they receive from the increase in property taxes. The state allocates 80 percent of its grant allocation as matching funds to complement what the locality has raised; the remaining 20 percent is allocated according to a formula that takes into account factors such as equalized valuations per capita and population.⁴²

Although the Community Preservation Act was designed to promote affordable housing and historic preservation along with open space, it is generally known and utilized primarily as a vehicle for promoting open space.⁴³ In our interviews, most of the municipal officials referred to it as an open space initiative and failed to mention its other goals. A number of them expressed gratitude that the state provided them with this option. An official from Pembroke stated that it was “great that communities have the flexibility of adopting the Community Preservation Act. People would be happy to put a portion of their taxed into an open space fund.” A Peabody official stressed the importance of basing the Act on a local option rather than a mandate. “Many communities,” he said, “may not be able to afford this or may have already set aside sufficient resources.” On the other hand, one official we interviewed noted that the Act in some ways reflects the lack of independent home rule authority that the state grants its cities and towns. A town administrator from Middleton saw the Community Preservation Act as an “example of the state trying to deal with home rule issues.” He explained: “home rule authority . . . really existed, [then] cities and towns wouldn’t have to go through the charade of asking for a Community Preservation Act and then subsequently not adopt[ing] it. In my view, it’s a failure.”

The fact that the Community Preservation Act is a state law, rather than a local one, is important. It means that those aspects that are problematic from the perspective of local officials are beyond local power to change. Against this

background, the fact that the majority of comments regarding the operations of the Community Preservation Act were critical once again reflects the way that state laws both confer land use power and limit it in important ways. Some officials articulated their dissatisfaction with the formula the Act uses to distribute the state grants. Officials from Somerville and Weston expressed concern that the formula led to an unfair redistribution of funds between rich and poor municipalities. The funds distributed by the state come from a surcharge applied to registry of deed filings. The surcharge does not vary from locality to locality, and there is no indication that registry filings favor rich municipalities over poor ones. But the disbursement formula allocates 80 percent of those surcharges back to participating municipalities as a matching fund. As a result, even though a wealthy locality may not collect a significant amount for registry filings, it will receive a larger state distribution because the money is allocated in proportion to property tax rates. Perhaps the formula was designed to allocate more money to municipalities where open space and affordable housing are more expensive due to inflated property prices. Nevertheless, as an official from Weston observed, its effect is to take from poor communities and give to rich ones.

Others we interviewed expressed frustration with the competing goals facing municipalities when they consider protecting open space. One such conflict is between the need for open space and the need for revenue. According to a Wilmington official, revenue restrictions like Proposition 2½ “makes the town more reluctant to preserve open space in a way that would take it off their tax rolls.” An official from Melrose articulated this tension by explaining the city’s current struggle with this issue: “A condominium complex was recently proposed . . . [it] would bring . . . in \$1.2 million in taxes each year. That’s a huge amount for us. But there is a serious internal debate in Melrose about the trade-offs between revenue and controlling sprawl.”

As noted above, the passage of the Community Preservation Act offers municipalities a means to raise resources for the support of affordable housing initiatives as well as to preserve open space. Some officials expressed concerns about what they perceive as a conflict between these two goals. A locality that purchases and sets aside open space will, by doing so, eliminate from development land that might have been available for affordable housing. In fact, an official from Somerville noted, the Act is often used for the purpose of buying a specific parcel of land to avoid a potential affordable housing development. She noted that a referendum will sometimes be introduced and approved right after a controversial development has been proposed. A town administrator from Ashland illustrated this conflict when he said that it was often cheaper to “buy land and make it open space than to allow developers to build housing on it, have kids move into the housing and make the town expand its school system.” Although he was not specifically referring to the Community Preservation Act or to affordable housing, he nevertheless articulates the concerns of municipal

administrators faced with these options. The current legal structure promotes this kind of defensive use of the Community Preservation Act. Because municipalities lack control over the development of their community in other ways, they often feel compelled to rely on the Community Preservation Act to resist development. This defensive use of the Act undermines, rather than fosters, local attempts to prepare a well thought out master plan that incorporates state requirements along with local concerns. As a result, plans for open space may be adopted without a serious consideration of the need for it or of its impact on other interests of the community.

Another tension within the structure of the Community Preservation Act is between the referendum procedure the Act mandates⁴⁴ and its goal of helping localities develop affordable housing. The Act offers municipal governments the ability to develop and construct affordable housing units with their own resources and on their own terms. It thus offers another way to achieve Chapter 40B's objective of eroding exclusionary zoning practices. But many of these exclusionary practices have considerable local support. If so, it is counterproductive to give municipalities the resources to meet the affordable housing requirement only if it is passed in a referendum. Not surprisingly, it is hard for a municipal government to convince constituents to accept a tax increase to support projects that they do not want constructed in the first place. The town of Carlisle, governing through open town meetings, attempted to address its affordable housing issue on a number of occasions, but every time the issue came before the town meeting it was voted down. The same kind of local opposition occurred in Acton when the town wanted to convert an old vacant schoolhouse into affordable housing units. Parents rallied against the proposal because they did not want affordable housing close to the new schoolhouse.

The effect on efforts to build affordable housing is only one of the reasons why it matters that the Community Preservation Act requires referendum approval before a municipality can take advantage of its provisions. This structure prevents the municipal government itself from taking advantage of the Act. Once again, as with many other issues mentioned above (such as Proposition 2½ overrides), a state law disempowers elected local officials on an important policy issue by shifting the locus of decision making to the electorate. This allocation of power has significant consequences: as of May 2003, only 61 out of the 109 communities that have taken final action on the legislation enacted the Community Preservation Act.⁴⁵ Hull is one of the communities that failed to pass the act; one official thought this was because "citizens are not concerned with this issue."

LAND USE REGULATIONS AND LOCAL GOVERNMENT

The Community Preservation Act's allocation of power to the local electorate, rather than to elected municipal officials, may seem an appropriate way to define local control. But it would be a mistake to think that this structure gives the local

population the final say on land use matters. The state, after all, retains the power to make land use decisions. When the local electorate's wishes conflict with state policy, the state can—and does—override local decision making. The effect of the referendum structure is not to empower local constituents against state decisions. Its effect is to undermine the role of municipal officials. Yet even though a significant number of municipal land use decisions are made by the state or by local constituents, the municipal government is generally treated as responsible for local land policy. Whenever that policy runs contrary to the (often conflicting) interests of the state and the electorate, municipal officials take the blame.

This dynamic is evident for each of the municipal land use issues discussed above. The Zoning Act seems to grant municipalities broad latitude to control land use. But the state not only exempts itself from local zoning rules but disperses the zoning power to a wide range of different groups. Unlike the standard procedure used when other by-laws or ordinances are enacted, zoning laws can be considered only after the public has been notified and heard and only after the local zoning board issues a recommendation. Moreover, decisions to change zoning laws may be blocked by a minority of locally elected officials or even by the claims of private property owners asserting the generous vested rights state law grants them. This dispersal of authority makes it possible for individual constituents and the state to frustrate a proposed zoning law even before it has been voted on. It also undermines municipal officials' attempts to accomplish their planning goals while, at the same time, continuing to make them responsible for the lack of an adequate land use policy in the eyes of their electorate.

Chapter 40B imposes similar limitations on municipal government's ability to act. Enacted with the purpose of overcoming local exclusionary zoning techniques, Chapter 40B diverts power away from municipal governments but holds them accountable for the lack of results. Affordable housing projects are initiated by the private sector, and the requirements for these projects rely on obtaining state or federal grants. The local Zoning Board of Appeals has an opportunity to review the affordable housing application, but it is required to hold public hearings to gather the views of local constituents. Since there is often little local support for affordable housing in the communities that need it, the decisions of the zoning board often attempts to strike a compromise between the mandates of the state and the wishes of the constituents. Yet if the private developer has an issue with this compromise, it can appeal to the Housing Appeals Committee for review. In this review, the state agency can override any compromise. In the end, the state may well be frustrated with the locality because it sees it as trying to torpedo the affordable housing project. The private developer may well be frustrated with the zoning board for the same reason. And the constituents may well be frustrated because they feel their interests are being neglected. Even though the tension in this scenario can be described as being between the constituents of a

locality, the developer, and the state government, it is likely that all three of them will point to the municipal government as the root of their frustrations. This phenomenon reinforces the idea that more checks on municipal power are needed.

Finally, as we have seen, municipal governments have little power to preserve affordable housing once it has been built. Rent control has been abolished, and condominium conversion regulation requires the express permission of the state. Because most low and moderate income occupants rent rather than buy, localities thus do not have power to assist the people who most need the affordable housing. Even state subsidies for affordable housing require only that the units stay affordable for 20 years. When that time limit has elapsed, affordable housing can be, and often is, sold at market price. Municipalities, then, are penalized for not meeting the 10 percent requirement even though they are given little power to preserve their affordable housing stock once it has been built.

Efforts have been made to untie the hands of municipal governments on affordable housing issues. But these efforts have also been subjected to state-imposed restrictions. Although the Housing Appeals Committee now allows affordable housing developed with local assistance to qualify for the 10 percent requirement, municipalities have been given no resources to build the housing. The Community Preservation Act is an attempt to overcome this lack of resources by allowing municipalities to collect additional property tax that can be used to subsidize affordable housing developments. But a city or town can use the powers that the Act authorizes only if their constituents approve a tax increase through a local referendum. Because the root of municipal opposition to affordable housing often originates in the constituents themselves, it has been difficult for the municipalities that need affordable housing to convince their constituents to accept a tax increase to help build it. Once again, decision making power over the preservation and construction of affordable housing is allocated to the state or the local electorate, with the municipal government relegated to the status of a disempowered mediator between these two interests.