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## Democratizing the American Dream: The Role of a Regional Housing Legislature in the Production of Affordable Housing

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# DEMOCRATIZING THE AMERICAN DREAM: THE ROLE OF A REGIONAL HOUSING LEGISLATURE IN THE PRODUCTION OF AFFORDABLE HOUSING

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Thomas A. Brown\*

*Economic, ethnic and racial residential segregation are ubiquitous across United States metropolitan regions. As a result, the majority of affordable housing is located in central cities or inner-ring suburbs, generally in areas of highly concentrated poverty. Outer suburbs are often exempt from providing significant housing for the economically disadvantaged regional citizens. This should not be. If housing policy in metropolitan regions were established in a democratic fashion, the give-and-take of the political process would create strong incentives for regional cooperation in the creation of affordable housing. Drawing together scholarship in the fields of local government law, administrative law, and housing policy, this Note proposes the creation of a Regional Housing Legislature (RHL), a democratically elected body composed of representatives from each of the region's localities, charged with establishing a coherent regional affordable housing policy. The existence of the RHL will diminish the contentiousness of existing affordable housing solutions by providing democratic legitimacy and by giving each locality a meaningful voice in the development of regional affordable housing policy.*

## INTRODUCTION

The twin problems of affordable housing and racial and ethnic segregation are among the most severe issues faced by our society. In 1973, Anthony Downs wrote about the “un-American” implications of our society’s systematic exclusion of the poor from the suburbs, and the resulting highly concentrated poverty, uniformly observable in cities across the United States.<sup>1</sup> Today, scholars recognize that the economic segregation described by Downs has an even more insidious racial and ethnic element, in that many inner-city poor neighborhoods are almost entirely African American and Hispanic.<sup>2</sup>

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1. ANTHONY DOWNS, *OPENING UP THE SUBURBS* 1 (1973).

2. See, e.g., Florence Wagman Roisman, *Opening The Suburbs To Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65 (2001); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 77 (1993).

This segregation has clear distributional consequences. In the past few decades, the majority of unskilled jobs have moved to the suburbs, rendering them inaccessible to the inner-city poor.<sup>3</sup> Commuting by automobile is too expensive for such individuals; and public transportation often does not reach these job sites. Even when public transportation is available, it frequently takes an inordinately long time rendering it either a non-option or, at minimum, decreasing the number of hours for which the employee is paid.<sup>4</sup> Moreover, inner-city residents have minimal knowledge of job openings in the suburbs, or even which suburbs are likely to have jobs available.<sup>5</sup> Inner-city educational opportunities are likely to be substandard, further decreasing the possibility for lucrative job opportunities.

Economic, racial and ethnic segregation are perpetuated by the prevalent local governmental policy of exclusionary zoning.<sup>6</sup> United States localities generally have plenary authority over land use restrictions, subject only to Fourteenth Amendment limitations, and any limitations imposed by the state constitution or zoning enabling act.<sup>7</sup> Thus, municipalities can restrict multifamily development, create minimum lot and room sizes, establish a maximum number of bedrooms,<sup>8</sup> or require setbacks—and these are only some of the tools in the zoning arsenal.<sup>9</sup> These strategies increase the overall cost of purchasing (or renting) a home, and therefore effectively exclude the poor from the municipal boundaries. This results in a United States composed of two separate, non-interacting societies: minority areas with inferior schools, few jobs, and high crime; and safe white suburbs with expensive houses and high-quality public schools.<sup>10</sup>

A number of states have accepted the mission of opening up the suburbs. Existing solutions have generally fallen into one of three categories. First, state judiciaries began interpreting their constitutions and zoning enabling acts to place limits on municipalities'

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3. See Keith R. Ihlanfeldt & David L. Sjoquist, *The Spatial Mismatch Hypothesis*, 9 HOUSING POLICY DEBATE 849 (1998).

4. See *id.* at 878.

5. See *id.* at 879.

6. See Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 539–42 (1992).

7. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). But see David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003) (arguing that localities' control over land use is not as extensive as is generally believed).

8. More bedrooms mean more children and, therefore, more strain on the local school system.

9. See CHARLES M. HAAR, *SUBURBS UNDER SIEGE* 8 (1996).

10. See *id.* at 5.

zoning power.<sup>11</sup> Second, a number of states passed appeals statutes, which allowed affordable housing developers to appeal local denials of building permits to a state administrative agency.<sup>12</sup> Finally, other states explored mechanisms by which localities were required to produce a general plan to which their zoning ordinances would comport; this general plan would be subject to review by the state to ensure that it provided sufficient opportunity for the construction of affordable housing.<sup>13</sup> Thus far, none of these solutions has been successful in solving the affordable housing crisis.<sup>14</sup>

The root cause of the failure of existing affordable housing regimes, this Note suggests, is the lack of democratic accountability of the bodies charged with administering the programs. Simply put, cities and towns, and their residents, resent having affordable housing forced upon them without their consent. Rather than allowing the localities in a region to bargain for an optimal distribution of affordable housing, a solution is imposed by a state administrative agency or by a judge. In the end, no one benefits: municipalities resistant to affordable housing feel harassed by the state or the judiciary, and the housing may be postponed or cancelled as municipalities mount vigorous legal challenges and public relations campaigns against the housing.

The alternative set forth in this Note permits localities to set their own affordable housing destiny in a collaborative decision-making context. This Note proposes a Regional Housing Legislature (RHL), a limited regional government devoted to setting housing policy for a region. This Note draws from some of Professor Gerald Frug's ideas for a regional legislature patterned after the government of the European Union.<sup>15</sup> This proposal differs, in part, in that the RHL is not a general government; it is constrained in ways analogous to administrative agencies.<sup>16</sup> Nonetheless, the core characterization of the body as a legislature, and not an administrative body, is crucial, as it confers on the RHL the democratic legitimacy it is intended to have.<sup>17</sup> The RHL would be composed of representatives from each town in the region. Votes

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11. See *infra* Part I.A.

12. See *infra* Part I.B.

13. See *infra* Part I.C.

14. See *infra* Parts I.A–D

15. See Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1798–99 (2002); see also *infra* p. 53.

16. Like administrative agencies, the RHL's jurisdiction would be circumscribed to a particular subject matter.

17. Moreover, as a representative legislature, it is anticipated that state court judges will grant a great degree of deference to the RHL's rulings.

(and possibly representatives) would be apportioned on a one-person, one-vote basis.

Although the RHL is conceived as a legislature, it would function as a land use court of last resort as well.<sup>18</sup> As a legislature, the RHL would set housing policy for the region, focusing on meeting the regional need for affordable housing, and alleviating the impact or existence of economic and racial segregation. As a court, it would review challenges to municipalities' local housing policies for conformity with the policies set forth by the RHL.

This Note contends that the body established under this proposal would arrive at effective substantive rules for the creation of affordable housing. More importantly, the participatory nature of the process by which the rules are enacted would lead to a greater degree of acceptance of the rules themselves. At the same time, by adhering to the one-person, one-vote maxim, the populous inner cities could ensure that the end goal of more affordable housing always remains in sight.

Part I of this Note examines the three current models by which states currently address the problem of segregation and lack of affordable housing. It concludes that each of these models suffers from fundamental flaws that fatally impair their efficacy and/or democratic legitimacy. Part II extrapolates from these models some positive elements that may be adopted in a more structurally promising housing solution. Part III proposes a Regional Housing Legislature, describes its procedures, and argues that such an entity would solve many of the problems inherent in current approaches. Part IV concludes by examining broader implications of democratic regional affordable housing policy-making.

## I. FAILURE OF EXISTING MODELS

State judiciaries were the first governmental entities to address exclusionary zoning. With the exception of New Jersey's, most state courts adopted conservative, deferential analyses, rarely overturning local zoning decisions. However, in the wake of New Jersey's *Mt. Laurel* decisions,<sup>19</sup> some state legislatures entered the fray, en-

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18. In this, the RHL again resembles an administrative agency, in the sense that it violates strict separation of powers. See *infra* note 306.

19. *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975) [hereinafter *Mt. Laurel I*]; *S. Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) [hereinafter *Mt. Laurel II*]. See also *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986).

acting statutes designed to modify or supplant the common-law approach. These statutes, still in effect, generally take one of two forms. The first is the appeals statute permitting courts or state administrative agencies to review local government zoning action based on statutorily specified criteria. The second is the centralized planning approach, in which a state administrative agency affirmatively sets forth housing goals for municipalities, and approves or rejects the local comprehensive plans to which local zoning ordinances are required to conform.

None of these approaches successfully balances efficiency, local autonomy, and democratic legitimacy. Some, while respectful of local autonomy, are simply ineffective.<sup>20</sup> Others, while at least partially effective, are normative failures because they do not adequately address the issue of local autonomy.<sup>21</sup> Finally, these models each provide for judicial or technocratic oversight; none provides for democratic control of the affordable housing process.

#### A. Common-Law Judicial Review Model

1. *Overview*—In the absence of specific guidance from the state legislature, state courts confronting exclusionary zoning ordinances rely on the state constitution or on the state zoning enabling act. But these sources of law provide little guidance to all but the most activist of courts. The vague mandates of the state constitution or zoning enabling act are generally insufficient to offset the high degree of deference state courts grant to localities exercising their “legislative” zoning functions. Moreover, seeking judicial review is an inaccessible process for a low-income plaintiff, requiring access to adequate counsel and time. The odds against the plaintiff are even worse given that the defendant municipality has better access to legal advice and representation.

At least eight states have established a common-law tradition under which the state constitution or zoning enabling act are interpreted to place limits on municipalities who wish to engage in

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20. See, e.g., *infra* Parts II.B.1, III.C.

21. For instance, Montgomery County, Maryland, described *infra* Part I.D., has by all accounts an extremely effective affordable housing regime. It also has no local governments. Despite its surface appeal, such an approach cannot be the basis of a normative vision. A generalization of this model would lead to the sacrifice of the American ideal of an active citizenry, substituting a paternalistic, undemocratic central state government. Once again, there can be no dispute that such a system would be effective, but it would be only at enormous cost.

exclusionary zoning. These states fall along a continuum of judicial activism. Courts in Michigan, Virginia and Illinois are extremely deferential to local zoning ordinances, overturning them only on a high showing of unreasonableness.<sup>22</sup> New York, Pennsylvania, and California occupy a middle ground.<sup>23</sup> The New Hampshire Supreme Court has been quite critical of exclusionary zoning, but its enforcement ability is limited.<sup>24</sup> Finally, New Jersey courts have been the most critical of local exclusionary tactics.<sup>25</sup> It is instructive to compare Michigan, the least effective model, with middle-of-the-road New York, with activist New Jersey in order to fully appreciate the shortcomings of the common law judicial review model.

2. *Reasonableness Analysis: Michigan*—Michigan's state constitution requires that the exercise of the police power have a reasonable basis.<sup>26</sup> The Michigan Supreme Court has, on at least one occasion, used this provision to strike down a city ordinance banning mobile homes except in mobile home parks.<sup>27</sup> However, a plaintiff faces an uphill battle in arguing that a zoning ordinance is unreasonable. Under Michigan law, an ordinance is unreasonable only when it deprives the plaintiff of a constitutional right, such as due process, equal protection, or just compensation for the depri-

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22. See *Robinson Township v. Knoll*, 302 N.W.2d 146, 150 (Mich. 1980); *Bd. of County Supervisors of Fairfax County v. Carper*, 107 S.E.2d 390, 395 (Va. 1959); *Lakeland Bluff v. County of Will*, 252 N.E.2d 765, 769 (Ill. App. 1969) ("The presumption of validity which arises from enactment of a zoning ordinance can be overcome by clear and convincing evidence that the ordinance, as applied to the subject land, was arbitrary and unreasonable and without real or substantial relation to the public health, safety, morals and welfare.").

23. See *Berenson v. Town of New Castle* 341 N.E.2d 236, 242 (N.Y. 1975) (creating a two-part test: "whether the [zoning] board has provided a properly balanced and well ordered plan for the community," and whether the board gave "consideration . . . to regional needs and requirements"); *Surrick v. Township of Upper Providence*, 382 A.2d 105, 110-11 (Pa. 1977) (also adopting a two-part test, first considering "whether the community in question is a logical area for development and population growth," and second, determining the extent of any exclusionary result or purpose); *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 569 (Cal. 1980) (holding that zoning is a legislative, not administrative or adjudicative, act); *Arnel Dev. Co. v. City of Costa Mesa*, 178 Cal. Rptr. 723, 727-28 (Cal. Ct. App. 1981) (on remand, nonetheless overturning the exclusionary ordinance on the grounds that it took only the local, not the regional, welfare into account). California's judicial review approach has been supplemented by a statutory regime, discussed *infra* Part II.B.1.

24. See *Britton v. Town of Chester*, 595 A.2d 492, 495 (N.H. 1991) (holding that the state's zoning enabling act required municipalities to zone for their fair share of affordable housing). However, no subsequent decision has come down in New Hampshire applying this decision.

25. See *infra* Part I.A.4.

26. See *Robinson Township*, 302 N.W.2d at 149.

27. See *id.*

vation of property.<sup>28</sup> The plaintiff retains a rather high burden of making such a showing.<sup>29</sup>

In utilizing a “reasonableness” standard, Michigan courts have opted to rely on malleable, but deferential standards rather than more definitive rules. Not only does this approach leave much to the individual judge’s discretion, but the judiciary’s natural desire to avoid substituting its will for that of the legislature<sup>30</sup> renders judges reluctant to overturn zoning ordinances.

Generally, reasonableness analysis is insufficient to ameliorate the effects of exclusionary zoning.<sup>31</sup> Three fundamental defects inhere in this approach. First, the analysis is rendered nugatory if courts do not articulate the viewpoint from which reasonableness is to be judged. For example, if reasonableness is judged from the vantage of current local inhabitants, then almost any exclusionary measure will be perceived to be reasonable, since it will often be in the best economic interests of the residents of a well-to-do suburb to exclude the poor.

Second, even if reasonableness is judged from the vantage of the region as a whole, without a clear definition of housing need, judicial reasonableness analysis will be ineffective. As an example, suppose an inner city has more than enough affordable housing for area residents. Exurbs<sup>32</sup> might argue that no housing need exists, because all of the area’s residents can be affordably housed in the region. This argument overlooks the importance of to low-income residents of moving out of areas of concentrated poverty. It also fails to consider the hardship imposed on a central city’s treasury when a significant percentage of its residents are low-income, which starts a vicious cycle in which the city is unable to provide basic services, causing flight on the part of any resident who is able to exit.

It is clear, then, that the precise definition of “need” may be the single deciding factor in any attempt to deconcentrate poverty. Yet courts, given their case-by-case vantage point and minimal investigatory resources, are ill-suited to formulate such a precise

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28. See *Kropf v. City of Sterling Heights*, 215 N.W.2d 179, 186 (Mich. 1974).

29. *Id.*

30. See, e.g., *id.* at 188 (“It is not for this Court to second guess the local governing bodies in the absence of a showing that that body was arbitrary or capricious in its exclusion of other uses from a single-family residential district.”).

31. Cf. Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 61–68 (1993) (arguing that courts cannot effectively enforce a fair share standard).

32. I use the term “exurbs” throughout to designate suburbs beyond the inner ring. Inner-ring suburbs, by contrast, are often unable to exclude the poor. MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 164 (2002).



definition. Indeed, arriving at a definition of housing need seems a quintessential legislative function.

Finally, it is impossible to achieve significant reversal of exclusionary practices under a regime that requires location-by-location challenges. One developer's success means simply that that developer may create housing on a given site. The victory may not make it appreciably easier for the next affordable housing developer, who wishes to build on a separate site, which may raise a host of separate objections, such as availability of city infrastructure, traffic effects, health and safety design details. What is needed, instead, is a strict liability mechanism by which localities, at least by default, are required to provide for their fair share of regional housing need.

3. *Judicial Deference: New York*—New York courts have, at least rhetorically, been willing to move beyond a reasonableness approach in interpreting its state constitution to require localities to permit the building of affordable housing. However, the New York approach is still characterized by a great degree of judicial deference to local decision-making authority.<sup>33</sup> In *Berenson v. Town of New Castle*,<sup>34</sup> the New York Court of Appeals held that site-specific relief may be available<sup>35</sup> where a two-part test is satisfied: “whether the [zoning] board has provided a properly balanced and well ordered plan for the community,”<sup>36</sup> and whether the board gave “consideration . . . to regional needs and requirements.”<sup>37</sup> The Court cautioned, however, that “[z]oning . . . is essentially a legislative act,”<sup>38</sup> and noted that “[z]oning ordinances are susceptible to constitutional challenge only if ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.’”<sup>39</sup> Thus, the opinion makes it clear that the Court would be unwilling to act as a super-zoning board. The stan-

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33. Subsequent to the cases described in this Part, New York enacted legislation intended to address some of the issues described. See N.Y. TOWN LAW § 261-b (Consol. 2003); N.Y. VILLAGE LAW § 7-703 (Consol. 2003); N.Y. GENERAL CITY LAW § 81-d (Consol. 2003); see also Julie M. Solinski, *Affordable Housing Law In New York, New Jersey, And Connecticut: Lessons For Other States*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 36, 63-64 (Fall, 1998). However, the statute does not impose any requirements on municipalities; instead, it merely empowers them to zone for affordable housing, and has generally been ineffective.

34. 341 N.E.2d 236 (N.Y. 1975).

35. I.e., that a court may order a locality to permit a development to go forward, despite an adverse decision by the locality's zoning board.

36. *Berenson*, 341 N.E.2d at 242.

37. *Id.*

38. *Id.* at 243.

39. *Id.* at 240 (quoting *Village of Euclid*, 272 U.S. 365 at 395).

dard for holding a zoning enactment unconstitutional would be high, and the relief granted narrow.

On remand from the *Berenson* decision, the trial court found that the town of New Castle failed both prongs of the Court of Appeals' test, and ordered the town to rezone the land, and moreover to amend its zoning laws so as to permit the construction of at least 3,500 units of multi-family housing over the subsequent ten years.<sup>40</sup> On appeal, the Appellate Division upheld the rezoning order, but deleted the "fair share quota" provision requiring 3,500 new units.<sup>41</sup> In doing so, the court rejected a strict fair share requirement, holding that if, for instance, neighboring communities provided enough low- and moderate-income housing, New Castle would not also be required to do so.<sup>42</sup> Convinced that there was, in fact, an unmet need for low- and moderate-income housing, but unwilling to amend the zoning code by judicial fiat, the Appellate Division remanded the case to the Town Board to amend its ordinance and remedy the unconstitutionality.<sup>43</sup>

The *Berenson* line of cases has not been effective at promoting affordable housing.<sup>44</sup> The New York courts demand a high evidentiary showing. The plaintiff must first prove that the zoning ordinance is exclusionary. She must then present evidence to establish the precise regional need for affordable housing, how much of that need is unmet, and how much affordable housing the town's infrastructure can realistically support.<sup>45</sup> Even then, a New York court will not order specific numerical quotas.<sup>46</sup> Under the New York judicial view, zoning itself is a tool that is only of limited effectiveness in creating affordable housing in the absence of government subsidies;<sup>47</sup> thus judicial intervention in zoning issues may be ineffective and therefore unwarranted.<sup>48</sup>

Overall, the affordable housing situation in New York is one in which the judiciary continues to act with excessive restraint, calling

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40. See *Berenson v. Town of New Castle*, 415 N.Y.S.2d 669, 667 (N.Y.A.D. 1979) [hereinafter *Berenson II*].

41. See *id.* at 680.

42. See *id.* at 679.

43. *Id.*

44. See Solinski, *supra* note 33, at 40.

45. See *Berenson II*, 415 N.Y.S.2d at 677-78.

46. See *id.* at 678 ("[S]pecific, mandatory 'fair share' quota[s are] unsupported by case law and contrary to the public policy considerations embodied therein.")

47. See *Blitz v. Town of New Castle*, 463 N.Y.S.2d 832, 836 (N.Y.A.D. 1983); Kenneth Forton, Note, *Expanding the Effectiveness of the Massachusetts Comprehensive Permit Law by Eliminating its Subsidy Requirement*, 28 B.C. ENVTL. AFF. L. REV. 651, 679 (2001).

48. Cf. *Mt. Laurel II*, 456 A.2d at 442-50 (requiring municipalities to act affirmatively to create affordable housing if modifying their zoning ordinances proved insufficient).

instead on local legislatures to fix the problems. Given the lack of enforcement authority provided for in *Berenson II*, the Town Boards have little incentive to modify their zoning, even when it is directly challenged and held unconstitutional. The New York approach is thus paradigmatic of the limitations of judicial solutions in addressing affordable housing.

4. *Activist Approach: New Jersey*—The situation in New Jersey is quite different. In the face of a vague constitutional standard, the New Jersey Supreme Court, in a series of cases arising out of *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, adopted a “fair share” doctrine requiring developing suburban localities to zone so as to accommodate their fair share of affordable housing.<sup>49</sup> A vast literature has been devoted to analyzing the *Mt. Laurel* cases;<sup>50</sup> what follows is a brief summary.

Under the New Jersey constitution, the state Supreme Court has held that municipalities must not only affirmatively zone to meet their fair share of regional affordable housing needs, but must also actively encourage the building of affordable housing.<sup>51</sup> In *Mt. Laurel I*, low-income residents of the township of Mt. Laurel, New Jersey, sued the township. The residents attacked the entirety of its zoning code, alleging it to be exclusionary and therefore unconstitutional.<sup>52</sup> The trial court upheld the challenge and invalidated the entire zoning code.<sup>53</sup> On appeal, the New Jersey Supreme Court held that each municipality must meet its fair share of regional housing needs—even if it made more sense to locate such housing in the neighboring town.<sup>54</sup> With respect to a remedy, the Court vacated the invalidation of the zoning ordinance and expressed faith that Mt. Laurel would amend its zoning ordinance to conform to the Court’s opinion.<sup>55</sup>

Such faith proved premature. Eight years later, the N.A.A.C.P. brought suit against the township for failure to remedy its exclu-

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49. See *Mt. Laurel I*, 336 A.2d at 731–32.

50. See, e.g., Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623, 627–30 (1987) (hereinafter McDougall, *Litigation*); DAVID L. KIRP, JOHN P. DWYER, AND LARRY A. ROSENTHAL, *OUR TOWN* (1995); Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives*, 27 SETON HALL L. REV. 1268 (1997); Harold A. McDougall, *Regional Contribution Agreements: Compensation For Exclusionary Zoning*, 60 Temp. L.Q. 665 (1987) (hereinafter McDougall, *RCA*); HAAR, *supra* note 9.

51. See *Mt. Laurel I*, 336 A.2d at 724; *Mt. Laurel II*, 456 A.2d at 442–47; see also Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1130 (1995).

52. *Mt. Laurel I*, 336 A.2d at 716.

53. *Id.*

54. See *id.* at 732–33.

55. *Id.* at 734.

sionary policies. In the resulting decision, *Mt. Laurel II*, the New Jersey Supreme Court set forth definitive rules governing municipalities' obligations to provide for their fair share of affordable housing.<sup>56</sup> It established a judicial monitoring mechanism to ensure compliance, including three designated judges to hear all cases arising under *Mt. Laurel II*.<sup>57</sup> Moreover, the Court ordered that any developing municipality (that is, any municipality in a growth area designated by the state) not only remove barriers to affordable housing but actually act affirmatively to ensure a realistic possibility that affordable housing would be built. Such affirmative action might include requiring the use of state or federal subsidies in new housing (subsidies which themselves require that the units being built are affordable), or requiring developers to set aside a certain portion of their developments for low-income housing.<sup>58</sup>

The Court went even further by providing for a "builder's remedy." This would enable a judge to authorize construction of a high-density development even where that development was not permitted by the zoning ordinance, if at least twenty percent of the proposed development would be affordable, and if the locality was in violation of its obligation to provide for its fair share of housing.<sup>59</sup> Under this scheme, developers become proxies for the poor; they fight for the creation of low-income housing in return for a "density bonus," i.e., the right to develop more housing on less land, thereby increasing their profit margins.<sup>60</sup>

Because of New Jersey's elaborate judicial enforcement mechanism, detailed evidentiary requirements, and effective imposition of strict liability if a municipality does not meet its fair share requirements,<sup>61</sup> the *Mt. Laurel II* approach more closely resembles a rules-based administrative regime rather than standards-based judicial adjudication. Indeed, *Mt. Laurel II* was superseded by a statute creating an administrative regime. The *Mt. Laurel* approach addresses many of the concerns raised in the two preceding subsections. In particular, the imposition of rules, instead of standards, forces a locality to heed its duty to create affordable housing. Moreover, judicial deference to local legislative will is not a concern under the *Mt. Laurel* line of cases. Nonetheless, other

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56. *Mt. Laurel II*, 456 A.2d at 418–21.

57. *Id.*

58. *Id.* at 443.

59. *Id.* at 452.

60. See Forton, *supra* note 47, at 679 (discussing the density bonus).

61. See *Mt. Laurel II*, 456 A.2d at 418–19.

difficulties, common to all the judicial review models, are present in New Jersey. These concerns are expanded in the next section.

5. *Analysis*—Two fundamental difficulties are endemic to the common-law judicial review approach. First, it is difficult to effect sweeping change in a recalcitrant municipality under a case-by-case approach. Second, the judicial review model is fundamentally undemocratic, forcing judges to be proxies for a constituency that, were the region properly organized politically, should be able to speak for itself.

a. *Effectiveness*—The lack of effectiveness of judicially-created remedies for affordable housing may be traced to two causes. First, with the notable exception of the *Mt. Laurel* decisions, states that must rely on common-law adjudication are relegated to imprecise standards susceptible to interpretation and abuse by localities, rather than precise rules leaving no doubt as to the municipalities' obligations. Second, even where there are rules, reliance on private enforcement diminishes effectiveness by reducing the certainty of challenge.

Malleable standards severely reduce the effectiveness of an affordable housing proposal by failing to provide sufficient guidance to municipalities. This proposition is borne out by the necessity of *Mt. Laurel II* in the wake of local unwillingness to follow the dictates of *Mt. Laurel I*. So long as municipal officials are elected by the inhabitants of the municipality, rather than by residents of the region, there will be a strong incentive for them to act with only the municipality's narrow interest in mind.<sup>62</sup> Unchecked standards applied by a court (e.g., reasonableness) provide little certainty and are therefore unlikely to affect municipalities' actions *ex ante*. Moreover, solely *ex-post* application of standards in the courtroom cannot effect widescale change in the exclusionary practices of municipalities due to limitations on judicial resources, the amount of time the judicial process requires, and the limitations on the future effect of any decision given the highly fact-specific nature of land use litigation.

Judicially mandated rules, while more certain, are inappropriate for a common-law judicial review regime. The *Berenson* line of cases in New York exemplifies the discomfort judges have with such rules. Judges see rulemaking as a legislative or administrative function and are unwilling to engage in it. They are willing to pass on the reasonableness of any given ordinance, but less able to set forth

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62. Cf. Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 329–34 (1993) (describing a mechanism by which individuals outside a municipality may be given a voice in municipal elections).

definitive criteria, capable of mechanistic application, that will yield the correct answer. The New Jersey court is the exception that proves the rule. The *Mt. Laurel II* court effectively set up an administrative agency in judicial disguise. The “agency” employed three administrators (i.e., the *Mt. Laurel* judges) and the court established an administrative code to apply (i.e., the detailed remedies set forth in the opinion). This regime persisted until supplanted by a properly legislative solution, discussed *infra* Part I.C.

Furthermore, relying on private enforcement dilutes much of the deterrence value of any scheme designed to encourage the creation of affordable housing; the entities who have standing to sue will not always have interests aligned with those of the region. Ideally, the beneficiaries of the program (i.e., the poor inner city residents who would like to move to the suburbs) should be the program’s primary enforcers. With the possible exception of class action suits, it is unlikely that such individuals have the resources to challenge an exclusionary zoning ordinance. Moreover, the judicial doctrine of standing would need to be stretched in order to provide such individuals with the right to sue over facially exclusionary statutes. In particular, the injury that poor inner-city residents suffer as a result of the exclusionary ordinance may be indirect and therefore may not be susceptible to judicial enforcement, at least under federal concepts of standing.<sup>63</sup>

Developers would clearly have standing to challenge the ordinances. However, developers make poor proxies for disadvantaged residents of the inner city. First, the cost of litigation must figure prominently in developers’ calculus. In a world of high attorney’s fees and weak standards (resulting in uncertainty as to litigation outcome), it is relatively rare that a low-income development in the suburbs would provide a sufficient return to warrant challenging a zoning ordinance. Second, even where a developer does commence litigation, it is not improbable that a town would propose a settlement by which the town relaxes its zoning requirements in exchange for the developer creating luxury units instead of low-income units. Either way, the voice of the beneficiaries of this program is stifled, and the program goes unenforced.

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63. In federal courts, “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Allen v. Wright*, 468 U.S. 737, 751 (1984). In the exclusionary zoning scenario, it is the developer who is directly harmed (by not being permitted to build). If a state court adopts federal standards of standing, potential residents may not be permitted to sue if the court determines that resolution of the dispute will not provide them with housing, since a developer still needs to create the housing.

*b. Democratic Concerns*—Two questions are of interest here. First, to what extent does the common-law judicial enforcement model empower or disempower the residents of a local community? Second, to what extent does the model affect the empowerment of the regional residents?

Even to state the first question implies its answer. Clearly, judicial intervention into a decision made entirely by the elected representatives of a locality cannot empower the locality's residents. Quite the opposite; an unelected judge<sup>64</sup> interfering in local legislative actions seems the antithesis of democracy.

The question is more complex when the relevant population—the *demo*—is redefined to include the residents of the metropolitan area. The fundamental problem, after all, is that, by enacting exclusionary zoning ordinances, localities are imposing externalities on other localities, which may be undesirable in the view of a majority of the region's inhabitants. Still, democracy is a process, not a result. If the majority of a region's inhabitants are oppressed by a minority's actions, then the forum for airing their grievances should be in the legislature, not in the courts. Yet there is no such legislature, elected by and representing the residents of the metropolitan region, in most areas. What is needed is a forum in which the relevant *demos*, the regional residents upon whom local zoning decisions have their impact, may be heard.

Thus, the common-law judicial review model is unlikely to be effective, given the great deference granted to local legislative acts, and the vague standards courts must set forth. Even where, as in New Jersey, these difficulties are circumvented, private enforcement in the courts is unlikely to prove efficient. Finally, normatively speaking, if affordable housing is in some form supported by the majority of a region's population, it should be created through a democratic process and not by the undemocratic forces of the court. Therefore, one must look to other models for guidance.

### *B. Appeals Statute Model*

Appeals statutes adjust the pro-municipality balance inherent in the common-law judicial review model. In particular, they lower the cost of litigation by placing it in front of an administrative

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64. Some states elect their judges. However, the point remains that in no state is a judge supposed to act as a democratic representative.

agency. They also increase certainty by providing administratively-defined rules. Developers often find it easier to override local zoning ordinances in order to build affordable housing, as the appeals statutes often adjust the evidentiary standards needed to show that a municipality is acting in an exclusionary manner.

However, community opposition to such systems, which are perceived as incursions into the locality's home rule right to develop its own zoning scheme, diminish the scheme's effectiveness. Community opposition takes the form of litigation (increasing developers' building costs), as well as more informal hostility (reducing the chance that inner-city poor minorities will want to live in the neighborhood). Moreover, the scheme is paternalistic from the perspective of both the community residents and the intended beneficiaries. Appeals statutes operate on the assumption that dispersed affordable housing is uniformly in the interests of the inner-city poor, without giving them an opportunity to participate in this determination.<sup>65</sup>

Massachusetts,<sup>66</sup> Rhode Island,<sup>67</sup> and Connecticut<sup>68</sup> each have appeals statutes. Rhode Island and Connecticut derived their statutes from Massachusetts'. A brief description of Massachusetts' appeals statute, therefore, assists in understanding the overall approach.

1. *Massachusetts' Statute*—In 1969, the Massachusetts General Court enacted the Low and Moderate Income Housing Act,<sup>69</sup> oth-

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65. For example, a given inner-city African American community may feel strongly that its political power will be unacceptably diminished if its members are given incentives to move to the suburbs. Or a community may simply feel that a given suburb is racist, or far from available jobs, or otherwise unsuitable for habitation by its members, and that therefore resources should not be wasted building housing there. Inner-city community members may "vote with their feet" by refusing to move to inappropriate, newly built affordable housing—but their places will likely be taken by moderate-income local community members such as town employees. Developers, of course, do not care who moves into the newly-built housing; but from a policy perspective, those most in need of dispersed housing should be provided for first. This can only be accomplished by granting these communities political influence over the mechanism by which affordable housing is created, which cannot be accomplished in a traditional appeals statute regime.

66. See MASS. GEN. LAWS ch. 40B, §§ 20–23 (2000).

67. See R.I. GEN. LAWS §§ 45-53-1 to 45-53-8 (1999 & Supp. 2003).

68. See CONN. GEN. STAT. § 8-30g (2003).

69. Act of Aug. 23, 1969, ch. 774, 1969 Mass. Acts 712 (codified at MASS. GEN. LAWS ch. 40B, §§ 20–23 (2000)). See Stockman, *supra* note 6; JAMES BREAGY, CITIZENS HOUSING AND PLANNING ASSOCIATION OF METROPOLITAN BOSTON, OVERRIDING THE SUBURBS (1976); Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act*, 22 W. New Eng. L. Rev. 381 (2001); Forton, *supra* note 47; Note, *The Massachusetts Zoning Appeals Law*, 54 B.U. L. REV. 37 (1974).



erwise known as the Anti-Snob Zoning Act,<sup>70</sup> to address problems of urban decay exacerbated by rampant exclusionary zoning in Massachusetts.<sup>71</sup> The passage of the bill was seen as a political fluke, the result of an unlikely alliance between liberals and urban conservatives, the latter of whom were seeking political retribution for earlier legislation enacted primarily by suburban liberals.<sup>72</sup> Thus, the legislation is at the same time vague, due to its compromise nature, and sweeping, due to its support by urban backers. In its thirty year history, it has lent itself to both broad and narrow interpretations.

The Act aims to encourage the creation of “low and moderate income”<sup>73</sup> housing, which it defines as housing built with a federal or state subsidy.<sup>74</sup> The only entities eligible to create low-income housing are public agencies, limited dividend developers, and nonprofit agencies.<sup>75</sup> The Act eases the construction of affordable housing in two ways. First, on the local level, it simplifies the permit process, which often requires a developer to appear before multiple local boards for various permits. The Act provides that any eligible developer who wishes to build low or moderate income housing need only present a single, comprehensive permit application to the local zoning board of appeals. The board must hold a public hearing within thirty days and consult with the other relevant local boards. It then has the power to issue a comprehensive permit, attaching conditions if appropriate. The *issuance* of a comprehensive permit is subject to immediate judicial review.<sup>76</sup>

70. See Krefetz, *supra* note 69, at 381 n.3 and accompanying text.

71. See Stockman, *supra* note 6, at 547–48.

72. See *id.* at 548–50.

73. MASS. GEN. LAWS ch. 40B § 20 (2000).

74. Stockman, *supra* note 6, at 548–50. See also Forton, *supra* note 47, at 679 (critiquing the subsidy requirement).

75. MASS. GEN. LAWS ch. 40B § 21 (2000). The term “limited dividend developer” is interpreted broadly as:

[A]ny applicant which proposes to sponsor housing under M.G.L. c. 40B; and is not a public agency; and is eligible to receive a subsidy from a state or federal agency after a comprehensive permit has been issued and which, unless otherwise governed by a federal act or regulation, agrees to limit the dividend on the invested equity to no more than that allowed by the applicable statute or regulations governing the pertinent housing program.

760 MASS. REGS. tit. 760 § 30.02 (2002). Thus, any private developer could qualify as a limited dividend developer for a given project. Indeed, between 1970 and 1999, 60% of the units created under the statute were built by limited dividend developers. DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, CHAPTER 40B: WHAT DO THE NUMBERS SHOW?, at <http://www.state.ma.us/dhcd/Ch40B/Data.htm> (on file with the University of Michigan Journal of Law Reform) [hereinafter CHAPTER 40B].

76. MASS. GEN. LAWS ch. 40B § 21 (2000).

The second provision of the Act addresses the situation where a local board denies the permit, or attaches conditions that render it “uneconomic” for the developer.<sup>77</sup> In this instance, the developer has the right to appeal to a Housing Appeals Committee (HAC), a unit of the state Department of Housing and Community Development. The statute provides that the Housing Appeals Committee will review the findings of the local board, and then arrive at its own decision by majority vote.<sup>78</sup> In arriving at its decision, the Housing Appeals Committee reviews the zoning board decision for reasonableness and consistency with local needs.<sup>79</sup> Ordinances are consistent with local needs:

[I]f they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.<sup>80</sup>

This standards-based approach is clarified by a number of administrative rules.<sup>81</sup>

One rule of import, provided by the statute itself, is the safe harbor provision for municipalities that meet the goal of 10% affordable housing. The Massachusetts Act immunizes municipalities that meet their 10% goal by providing that zoning ordinances enacted by such municipalities are, by definition, consistent with local needs.<sup>82</sup> The superiority of this simple rules-based approach is evident when compared with the judicial approach, with its uncertainty about what constitutes a “reasonable” zoning ordinance. The perhaps overly-simplistic 10% heuristic also differs

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77. See MASS. GEN. LAWS ch. 40B § 22 (2000).

78. *Id.* In 1973, the Massachusetts Supreme Judicial Court confirmed the constitutionality of the Act. *Bd. of Appeals v. Housing Appeals Comm.*, 294 N.E.2d 393, 407–10 (Mass. 1973).

79. MASS. GEN. LAWS ch. 40B § 23 (2002).

80. MASS. GEN. LAWS ch. 40B § 20 (2002).

81. See MASS. REGS. CODE tit. 760, ch. 31 (2002).

82. See MASS. GEN. LAWS ch. 40B § 20 (2002). Also exempted are municipalities for whom 1.5% of the total land area zoned for residential use is filled with affordable housing. Ordinances precluding developments that would cover more than the greater of .3% of the land area of a municipality, or ten acres, are also “consistent with local needs.” *Id.*

sharply from the New Jersey approach, wherein an administrative agency is charged with ascertaining each town's fair share of housing after conducting surveys of existing housing stock and projected population growth.<sup>83</sup>

Early effectiveness of the Act was limited.<sup>84</sup> In response, in 1982, Governor Edward J. King promulgated Executive Order 215, withholding state and federal funds from communities deemed to be engaging in exclusionary zoning.<sup>85</sup> In addition, the state legislature and the Department of Housing and Community Development created incentive programs designed to encourage the creation of more politically and economically palatable mixed-income housing. The first such program, State Housing Assistance for Rental Production (SHARP),<sup>86</sup> was established in 1983 to provide low-interest loans to developers who agree to permanently reserve one quarter of the units developed for low-income tenants.<sup>87</sup> Second, under the Tax-Exempt Loans to Encourage Rental Housing (TELLER) program,<sup>88</sup> local housing authorities may issue tax-free bonds to finance developments in which either 20% of the units are rented to households with incomes less than half the area median; or alternatively, 40% of the units are rented to households with incomes less than 60% of the area median. Restrictions under TELLER are eliminated after fifteen years.<sup>89</sup>

Finally, under the Homeownership Opportunity Program (HOP),<sup>90</sup> established in 1986, 30% of units must be set aside for low- or moderate-income purchasers. The units are subject to strict resale controls, which must remain in place for at least 40 years, to ensure that the units remain affordable. The program provides low-interest loans and guarantees to developers, low down payment mortgages to potential homeowners, and grants to localities.<sup>91</sup> Both affordable units and market rate units in eligible developments count toward the municipality's 10% goal.<sup>92</sup>

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83. See *infra* Part I.C.1.; see also Sam Stonefield, *Affordable Housing in Suburbia: the Importance but Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323, 340 (2001).

84. Stockman, *supra* note 6, at 554.

85. *Id.*

86. *Codified in* MASS. GEN. LAWS ch. 23B, §§ 25–27 (2000).

87. Stockman, *supra* note 6, at 556.

88. See MASS. REGS. CODE tit. 760, ch. 21 (2002).

89. Stockman, *supra* note 6, at 556.

90. MASS. REGS. CODE tit. 760, ch. 20 (2002).

91. Stockman, *supra* note 6, at 555.

92. MASS. REGS. CODE tit. 760, § 20.05 (2002).

HOP, in particular, proved quite successful, and provoked an intense backlash on the part of many Massachusetts municipalities.<sup>93</sup> A year after the creation of HOP, 24 bills attacking the Act were introduced into the state legislature.<sup>94</sup> In response, in 1989, the Department of Housing and Community Development (DHCD) created a new program under the Act: the Local Initiative Program (LIP).<sup>95</sup> The new program was a response to widespread criticism that the subsidy requirement undercounted a town's affordable housing stock by not including developments unsubsidized by the state or local government. As a result, LIP greatly expanded the definition of affordable housing. The newly-enacted regulations provided that technical assistance provided by the DHCD would count as the subsidy required under the Act.<sup>96</sup> LIP also provided for use requirements that, for rental units, limited monthly rent to 30% of the income of a household earning 80% of the area's median income.<sup>97</sup> For units for sale, the price must be such that, for a 30-year mortgage with a 5% down payment, monthly mortgage payments do not exceed 30% of the income of a household earning 80% of the area's median income.<sup>98</sup> All rental units in a development are counted as affordable if 25% of them are affordable.<sup>99</sup> The LIP program also requires affirmative marketing to minorities, with the goal of achieving a minority occupancy rate equal to the percentage of income-eligible minority households in the region.<sup>100</sup>

LIP afforded local communities greater control over the affordable housing produced in their borders in two ways. First, a project cannot be a LIP project unless it is so designated by the town's chief elected official.<sup>101</sup> Thus, a developer who wishes to create low-income housing against the wishes of the town still needs to seek a state or federal subsidy to invoke the appeals process. Developers are thereby encouraged to work with, instead of against, towns.

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93. Krefetz, *supra* note 69, at 406–07.

94. *Id.* at 407–08.

95. See MASS. REGS. CODE tit. 760, ch. 45 (2002).

96. See MASS. REGS. CODE tit. 760 ch. 45.03 (2002) (“[T]he Department shall thereafter count the units [created under the LIP program] on The Subsidized Housing Inventory . . .”).

97. MASS. REGS. CODE tit. 760, § 45.03(5) (2002).

98. MASS. REGS. CODE tit. 760, § 45.03(4) (2002).

99. MASS. REGS. CODE tit. 760, § 45.07(3) (2002).

100. DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, LOCAL INITIATIVE PROGRAM: UNITS ONLY APPLICATION 4 (Aug. 2002), available at [http://www.state.ma.us/dhcd/components/private/LIP\\_App.doc](http://www.state.ma.us/dhcd/components/private/LIP_App.doc) (on file with the University of Michigan Journal of Law Reform) [hereinafter LIP APPLICATION].

101. MASS. REGS. CODE tit. 760, §§ 45.03–45.05 (2002).

Second, localities are entitled to grant a preference for local residents in up to 70% of the units in a given LIP project.<sup>102</sup>

2. *Analysis*—The statutory appeals process may be evaluated based on three criteria: its effectiveness, community support, and its democratic legitimacy.

*a. Effectiveness*—There is a wealth of data regarding the affordable housing built in response to the statutes in Massachusetts. According to the Massachusetts Department of Housing and Community Development, the appeals process has led to the creation of 25,000 units in 172 cities and towns.<sup>103</sup> The Department credits the creation of at least some of the 94,379 additional units created between 1970 and 1999 with the background effect of the statute, even if the comprehensive permit process was not directly used.<sup>104</sup> In addition, the Department notes that 53% of the decisions of the local zoning boards of appeals were the products of compromise between the town and the developer—that is, the board granted the permit subject to conditions.<sup>105</sup>

Scholarly analysis supports Massachusetts' claims that its statute has been at least modestly successful.<sup>106</sup> One study found that, whereas roughly half of Massachusetts municipalities had no affordable housing when the statute went into effect, by 1997 only 15% had no such housing.<sup>107</sup> By October of 2001, that number had dropped to 43 municipalities, or 12%.<sup>108</sup> The comprehensive permit process was used directly in over 60% of the towns that had no affordable housing in 1969 but do now. It is reasonable to conclude that the process helped spur at least some of the construction in the remaining 40% of the towns by making them

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102. LIP APPLICATION, *supra* note 100, at 5. Many localities are interested in affordable housing to the extent it will allow their teachers and town employees to remain in the town. See Krefetz, *supra* note 69, at 412; see also MICHAEL N. DANIELSON, THE POLITICS OF EXCLUSION 112 (1976) (explaining that a primary motivation for the creation of inclusionary zoning ordinances in Montgomery County, Maryland and Fairfax County, Virginia was to create housing for county employees).

103. CHAPTER 40B, *supra* note 75.

104. See *id.* (noting that between 1970 and 1999, the affordable housing inventory rose from 85,621 units to approximately 205,000 units; of those 119,379 units, approximately 25,000 were created directly through the comprehensive permit process, leaving 94,379 units created with the statute in the background).

105. *Id.*

106. Stonefield, *supra* note 83. See Krefetz, *supra* note 69.

107. Krefetz, *supra* note 69, at 393.

108. See DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT, CH. 40B SUBSIDIZED HOUSING INVENTORY THROUGH OCTOBER 1, 2001 (April 24, 2002), available at <http://www.state.ma.us/dhcd/components/hac/HsInvRev.pdf> (on file with the University of Michigan Journal of Law Reform) [hereinafter HOUSING INVENTORY].

more receptive to such housing.<sup>109</sup> Only 4 communities in 1972 had between 7 and 10% low and moderate income housing;<sup>110</sup> in 2001, 72 communities had over 7%, 27 of which had met the state goal of at least 10%.<sup>111</sup> Town sentiment toward affordable housing, too, may have changed, if only slightly. Town officials have begun to accept the necessity of affordable housing, if only to house town employees and young local families who are now priced out.<sup>112</sup>

The statute has become steadily more influential with time, although a recent trend toward smaller developments has become apparent. In the 1970s, local zoning boards denied over 40% of comprehensive permit applications; in the 1990s, that number was down to 20%. In the 1970s, the Housing Appeals Committee overturned 45% of the local zoning decisions; by the 1990s, it was overturning only 25%. Moreover, the number of cases resolved by stipulation in the Housing Appeals Committee has increased from 13% to 38%.<sup>113</sup> Finally, "acceptable" affordable housing for the elderly constituted approximately half of the comprehensive permit applications in the 1970s, while only 15% in the 1990s; whereas housing for families constituted 40% of the applications in the 1970s, and 75% in the 1990s.<sup>114</sup> The size of the proposed projects has dramatically decreased: over half of the projects proposed in the 1970s had 100 or more units, whereas more than half of the projects proposed in the 1990s had fewer than 50 units.<sup>115</sup>

Professor Sharon Perlman Krefetz explains these data by describing a process of mutual adaptation between the state and the communities.<sup>116</sup> On the local community side, it quickly became obvious that a developer whose permit was denied would, in most cases, be able to reverse the denial by appealing to the Housing Appeals Committee. From this perspective, the statute's effect is one of top-down control. Nonetheless, local boards found they had some bargaining power in their ability to impose conditions that the developer might accept rather than go through the time and

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109. Krefetz, *supra* note 69, at 394.

110. *Id.*

111. See HOUSING INVENTORY, *supra* note 108. Moreover, only 44 communities possessed at least 7% in 1997, indicating that quite a few communities approached the goal in the past six years. See Krefetz, *supra* note 69, at 394.

112. See Krefetz, *supra* note 69, at 412; Stonefield, *supra* note 83, at 347 n.83. In the 1990s, affordable housing was "sold" as a way to allow young families to remain in Massachusetts, and thus a way to attract industry. See Krefetz, *supra* note 69, at 405-06.

113. Krefetz, *supra* note 69, at 401.

114. *Id.*

115. *Id.* at 402.

116. See *id.* at 402-15.

expense of appealing to the Housing Appeals Committee, but that would also render the development more acceptable to town residents.<sup>117</sup> At the same time, practical experience revealed to the Housing Appeals Committee that overturning local zoning boards often did not mean that the proposed development was actually built. Some communities engaged in extensive litigation, engaging in a legal war of attrition until it no longer made economic sense for the developer to proceed. The Housing Appeals Committee responded by placing more emphasis on negotiated compromise solutions than on outright decisions in favor of one or the other party.<sup>118</sup>

The decrease in the size of affordable housing projects is a mixed blessing. On the one hand, smaller projects are generally more acceptable to the local community, and blend in better with their surroundings. On the other hand, smaller developments mean fewer affordable units. On average, LIP programs (which account for the majority of units produced under the statute in recent years) produce only 6–8 affordable units per development. Moreover, the units produced are less affordable than was previously the case. This is true since units produced under the LIP program (the majority of units created under the statute in recent years) do not receive any monetary subsidy. Indeed, 90% of the units produced under LIP have been for single-family homes.<sup>119</sup> Finally, despite the requirement of an affirmative marketing plan to minorities, little such marketing has actually taken place, and LIP thus has proven to be an ineffective tool in creating the housing opportunities necessary to open the suburbs to low-income inner-city minorities.<sup>120</sup>

Because of the Massachusetts' statute's failure to ameliorate racial segregation, some commentators have expressed concern that the statute may do more harm than good.<sup>121</sup> Most data indicates that affordable housing created under the statute overwhelmingly benefits moderate-income whites.<sup>122</sup> Some of the subsidies involved could have been used, instead, to create affordable housing for

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117. See *id.* at 403.

118. See *id.* at 403–04.

119. See *id.* at 410–11; see also Stonefield, *supra* note 83, at 335 (arguing that market-based programs with no subsidies will create housing affordable only to moderate-income individuals).

120. See Krefetz, *supra* note 69, at 410–11. No studies have analyzed the composition, racial or otherwise, of housing created under the Massachusetts, Rhode Island, or Connecticut statutes. See Stonefield, *supra* note 83, at 351. However, limited data suggests that the main beneficiaries of these programs are white town employees. See *id.* at 349.

121. See Roisman, *supra* note 2.

122. See *id.* at 74–75.

more needy minorities in the central city instead of moderate-income suburban whites.<sup>123</sup> To the extent the statute served to spirit away moderate-income whites to the suburb while leaving behind low-income blacks, the statute may have exacerbated rather than ameliorated segregation.<sup>124</sup>

The Connecticut statute (which operates in a similar manner to Massachusetts') achieved more modest results in terms of the creation of affordable housing than its Massachusetts counterpart, though much of this may be explained by the state of the housing market since the time the Connecticut statute was enacted.<sup>125</sup> Moreover, only superficial progress was made in Connecticut toward rendering low-income housing more palatable to local communities.<sup>126</sup> The failure to achieve local support in Connecticut proved fatal.

*b. Local Autonomy*—Both the Connecticut and Massachusetts statutes have been plagued, since the beginning, with community opposition. In 1987, ironically in response to an initiative designed to make it easier for young white suburban-bred families to remain in the suburbs, a spike in comprehensive permit applications under the Massachusetts Act led to an enormous backlash against the statute. Local officials felt as if developers were “shoving. . . housing down their throats” by proposing large-scale developments with only the statutory minimum number of affordable units.<sup>127</sup> That year, 24 separate bills attacking the statute were introduced into the Massachusetts Legislature. It was in response to this opposition that the LIP regulations were promulgated,<sup>128</sup> severely weakening the Massachusetts statute by allowing relatively expensive, small, single-family developments to qualify as affordable housing.<sup>129</sup> As of this writing, the Massachusetts Act remains under fire: at the beginning of the 2003 legislative session, more than 60 bills to repeal, rewrite, or otherwise modify the statute were on the agenda.<sup>130</sup>

In Connecticut, political opposition succeeded in diluting the statute as well. Following a Connecticut Supreme Court decision

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123. *See id.* at 83–84.

124. *See id.* at 84.

125. *See* Terry J. Tondro, *Connecticut's Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. 115, 131–32 (2001).

126. *See id.* at 133–35.

127. Krefetz, *supra* note 69, at 407.

128. *See id.* at 408.

129. *See* discussion *supra* note 119, and accompanying text.

130. Anthony Flint, *Romney Faces Tussle on Affordable Housing*, BOSTON GLOBE, Dec. 30, 2002, at A1.



that fundamentally altered the meaning of the statute,<sup>131</sup> a commission was formed to evaluate amendments to the statute.<sup>132</sup> Although the legislature enacted amendments in 2000 that undid one particularly damaging aspect of the Connecticut Supreme Court's decision,<sup>133</sup> it did so at the expense of some of Act's effectiveness. In particular, developers must now set aside more units of housing for individuals who met stricter standards of poverty than before. Although the units that are created will be more affordable, it will now be less profitable for developers to create affordable units. Overall, fewer affordable units will be created, especially in the absence of governmental subsidies.<sup>134</sup>

Even before the amendments to the Connecticut statute, community opposition on a local level severely impaired its effectiveness.<sup>135</sup> For instance, some towns refused to extend necessary infrastructure, such as sewer lines, to new developments. Other towns would use their power of eminent domain to condemn sites on which affordable housing was to be built.<sup>136</sup> The approach of at least one of the architects of the statute was to try to figure out "how to limit a town's ability to block affordable housing proposals" with these tactics.<sup>137</sup>

The inherently confrontational nature of the state override statute represents a fundamental flaw in this approach. Without community support, housing simply cannot be economically built on a large scale. Even where developers succeed in building over the local community's objections, the local climate is unlikely to prove hospitable to inner-city minorities looking for affordable housing closer to jobs. If affordable housing that truly meets the needs of the region is to be built, it needs to be with local community support, not against local communities' wills.

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131. See Christian Activities Council, *Congregational v. Town Council of Glatsonbury*, 735 A.2d 231, 249 (Conn. 1999) (concluding "that the need for affordable housing is to be addressed on a local [not regional] basis" under the Connecticut appeals statute); see also Tondro, *supra* note 125, at 137-52.

132. See Tondro, *supra* note 125, at 152-58.

133. The Supreme Court had held that courts would review zoning board decisions based on a deferential "sufficient evidence" standard, instead of the usual "preponderance of the evidence" standard; and that the need to be analyzed was the town's own need, not the regional need. The legislature reversed the first holding, but left the second holding in place. See *id.* at 157-58.

134. See *id.* at 161-62.

135. See generally Peter J. Vodola, *Connecticut's Affordable Housing Appeals Procedure Law in Practice*, 29 CONN. L. REV. 1235 (1997) (arguing the effectiveness of Connecticut's Act has been tempered by widespread local opposition).

136. See Tondro, *supra* note 125, at 158-59.

137. *Id.* at 158. Professor Tondro was the co-chair of the subcommittee that recommended the original version of the Connecticut Act. See *id.* at 115-16.

c. *Democratic Legitimacy*—Even more than in the case of common-law adjudication, the intended beneficiaries of the housing program are not given a voice in the process under an appeals statute regime. Developers must act as proxies for those in need of housing in a state-override regime. In a judicial review system, the judge acts as a buffer against the self-interest of the developer, and is in a position to substitute her judgment for what is best for the regional inhabitants for that of the developer. This is less true in a state override system, where a developer need merely ensure that the locality has less than 10% affordable housing (in Massachusetts), and that the planned development is eligible under the statute and administrative regulations. The pernicious nature of this approach is best demonstrated in the cases where the developer will *not* choose to build. For instance, to the extent they are permitted, developers will build the smallest permissible percentage of *moderate* income housing, with the remainder of the units sold or rented at market rates. Worse, under a system such as LIP, developers can be “bought off” by town officials, who can eliminate years of litigation and delay, if they will agree to abide by town-dictated restrictions, such as the creation of only single-family homes. In this situation, no judge is ever even involved, and the voice of the low-income would-be residents is completely lost.

Moreover, the lack of an enforceable minority marketing requirement makes the override tool an ineffective one in the fight against segregation. Of course, as noted earlier, if a community is fundamentally opposed to a development, then no amount of marketing is likely to convince an inner-city minority family to move in. Nonetheless, even where a locality supports a development the builders are unlikely to go out of their way to market it to inner-city families. Nor is the locality likely to press the issue. Thus, from a marketing perspective, those most in need of the housing once again do not have their interests represented.

In many ways, a state override tool is more effective than the judicial review system. The numbers bear this out: significant numbers of new units have been created in states with override tools.<sup>138</sup> Nonetheless, the affordable housing built in Massachusetts, and Connecticut, has not had a significant impact on concentrated poverty.<sup>139</sup> More is needed. The low-income residents must be

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138. See Stonefield, *supra* note 83, at 328–29. However, of the new units created, only a small percentage have been affordable. *Id.* at 329.

139. See Tondro, *supra* note 125, at 131–36; Stonefield, *supra* note 83, at 341–49 (evaluating state override tools in Massachusetts, New Jersey, Connecticut, and Rhode Island).

welcomed; this will come only with community support for the project. Moreover, the low-income community must be represented at the table where the decisions are made.<sup>140</sup>

### C. Centralized Planning Model

States with centralized planning go one step further. Rather than leaving local zoning intact except where a developer chooses to challenge it, these schemes subject local zoning to state oversight. In the paradigmatic case, a state agency is responsible for evaluating a local comprehensive plan to ensure that it meets state guidelines with respect to a number of factors, of which adequate affordable housing is one. Localities are free to enact their own zoning ordinances, but the ordinances must conform to the state-approved comprehensive plan.

New Jersey,<sup>141</sup> California,<sup>142</sup> Oregon,<sup>143</sup> Rhode Island,<sup>144</sup> Florida,<sup>145</sup> Washington,<sup>146</sup> and Connecticut<sup>147</sup> each have elements of a centralized planning model. California's regime and Connecticut's pilot program are unique, and are considered in Part II. The representative approaches of New Jersey and Oregon are evaluated below.

1. *New Jersey's Fair Housing Act*—New Jersey's Fair Housing Act,<sup>148</sup> passed as a legislative response to *Mt Laurel II*, aims to encourage municipalities to draft their zoning ordinances in an inclusionary manner without resorting to adversarial proceedings. It does so by

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140. African American urban families do not always agree with the agenda of creating housing in the suburbs. See Stonefield, *supra* note 83, at 348. Were they represented in the decision-making process, one of two results might ensue. First, they may, feeling thus empowered, change their minds and decide that the benefits of desegregation outweigh their objections. Second, they may influence the distribution of affordable housing created in the suburbs so as to take their concerns into account.

141. See *infra* Part I.C.1.

142. See *infra* Part II.B.1.

143. See *infra* Part I.C.2.

144. See R.I. GEN. LAWS § 45-22.2-13(a) (1999 & Supp. 2002); see also JOHN M. DE GROVE, *PLANNING AND GROWTH MANAGEMENT IN THE STATES* 85–98 (1992).

145. See FLA. STAT. ch. 163.3161–163.3215 (2002); see also Charles E. Connerly & Marc Smith, *Developing a Fair Share Housing Policy for Florida*, 12 J. LAND USE & ENVTL. L. 63, 68–69 (1996).

146. See WASH. REV. CODE ch. 36.70A (2003); see also Jennifer M. Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 376 (1995).

147. See *infra* Part II.B.2.

148. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 2001 & Supp. 2003). See McDougall, *Litigation*, *supra* note 50, at 635–42. The statute's constitutionality was confirmed in *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621, 634 (1986).

turning the builder's remedy stick into a carrot: zoning ordinances of municipalities that comply with the provisions of the statute will enjoy a presumption of validity.<sup>149</sup> In so doing, the legislature consciously changed the atmosphere of fair housing issues in New Jersey from one of pervasive battles between towns against builders, suburbanites against urban dwellers, and the rich against the poor, into one in which rational planning would take the front seat.<sup>150</sup>

In order to gain the presumption of validity for its zoning ordinances, a municipality must submit a zoning ordinance containing a "housing element" to the Council on Affordable Housing (COAH).<sup>151</sup> It may then request that COAH grant a substantive certification of its ordinance.<sup>152</sup> During the certification process, interested parties have an opportunity to object.<sup>153</sup> COAH attempts to mediate any objections; if it is unable to, parties may request an administrative hearing.<sup>154</sup> The council will grant substantive certification if there are no objections (or objections are overruled on appeal), and the council finds the municipality's housing element satisfactory in view of the standards set forth in the statute and by regulation.<sup>155</sup> In making its determination, the council considers whether the ordinance facilitates the creation of the municipality's fair share of regional housing.<sup>156</sup>

A party wishing to challenge the zoning practice of a municipality possessing substantive certification faces an uphill battle. The parties to such a dispute must first submit to COAH-sponsored mediation.<sup>157</sup> If mediation fails, the case may go before an administrative law judge<sup>158</sup> and, if necessary, to trial.<sup>159</sup> In all cases, the zoning ordinance enjoys a strong presumption of validity.<sup>160</sup> Thus, there is a strong incentive for parties to object at the initial stage, where a municipality first seeks certification of its zoning ordinance, rather than to seek a builder's remedy by filing litigation after the municipality has been certified.

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149. N.J. STAT. ANN. § 52:27D-317(a) (West 2001 & Supp. 2003).

150. See N.J. STAT. ANN. § 52:27D-303 (West 2001 & Supp. 2003).

151. N.J. STAT. ANN. § 52:27D-316(b) (West 2001 & Supp. 2003). See also N.J. STAT. ANN. § 52:27D-305 (West 2001 & Supp. 2003) (creating COAH).

152. N.J. STAT. ANN. § 52:27D-313 (West 2001 & Supp. 2003).

153. N.J. STAT. ANN. § 52:27D-314 (West 2001 & Supp. 2003).

154. N.J. STAT. ANN. § 52:27D-315 (West 2001 & Supp. 2003).

155. See N.J. STAT. ANN. § 52:27D-314 (West 2001 & Supp. 2003).

156. See N.J. STAT. ANN. § 52:27D-307(c)(1) (West 2001 & Supp. 2003).

157. N.J. STAT. ANN. § 52:27D-316(b) (West 2001 & Supp. 2003). But see N.J. STAT. ANN. § 52:27D-318 (2001 & Supp. 2003).

158. N.J. STAT. ANN. § 52:27D-315(c) (West 2001 & Supp. 2003).

159. N.J. STAT. ANN. § 52:27D-316(b) (West 2001 & Supp. 2003).

160. N.J. STAT. ANN. § 52:27D-317(a) (West 2001 & Supp. 2003).

The New Jersey scheme is, in reality, a combination of all three approaches addressed in this Note. The background threat of the builder's remedy retains aspects of the judicial review scheme; the highly intricate procedures to be followed in the event of a judicial challenge, set forth by *Mt. Laurel II*, evoke the Massachusetts appeals statute. At the same time, COAH's central role in approving development plans (and the relative rarity with which the builder's remedy is now to be invoked) places New Jersey's current system squarely within the centralized planning category.

One additional feature, regional contribution agreements (RCAs), is central to the statute. Under this system, suburbs may purchase the right to transfer up to 50% of their fair share of affordable housing to another municipality (typically an inner city, which already possesses a surfeit of affordable housing).<sup>161</sup> Municipalities may pass the cost on to developers by requiring a payment in lieu of the construction of affordable housing from the developers.<sup>162</sup> This system has been widely criticized. The amount of remuneration taken away by the inner city is likely to be insufficient, resulting from an inequality in bargaining power between the city and the suburb.<sup>163</sup> On the flip side, there is no restriction on how the receiving city uses the funds. It might divert the money it receives from regional contribution agreements to high-end housing, creating a system of gentrification that will displace the indigent individuals the statute was designed to help.<sup>164</sup> Finally, to the extent that RCAs cause inner cities to retain high percentages of a region's affordable housing, the regional contribution agreement scheme fails to address the social ills that result from concentrated poverty.<sup>165</sup> Moreover, such a system fails to address pressing issues of racial segregation.<sup>166</sup>

Partially addressing some of these concerns, the New Jersey Supreme Court recently considered a case in which developers, under a town ordinance, made payments to the town's affordable housing fund rather than actually setting aside affordable housing.<sup>167</sup> The payments were to contribute partially to the town's Regional Contribution Agreement payments, and partially to reha-

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161. See N.J. STAT. ANN. § 52:27D-312 (West 2001 & Supp. 2003).

162. See, e.g., *Bi-County Dev. of Clinton, Inc. v. High Bridge*, 805 A.2d 433 (N.J. 2002).

163. McDougall, *Litigation*, *supra* note 50, at 682-83.

164. *Id.* at 683.

165. See, e.g., Ihlanfeldt & Sjoquist, *supra* note 3.

166. See Roisman, *supra* note 2.

167. See *Bi-County Dev. of Clinton Inc. v. High Bridge*, 805 A.2d 433 (N.J. 2002); Note, *Refining Municipal Obligations Under Mount Laurel, the New Jersey Supreme Court Hints at a New Conception of Regional Responsibility*, 116 HARV. L. REV. 1541 (2003) [hereinafter Note, *Refining Municipal Obligations*].

bilitating other housing.<sup>168</sup> The Court refused to grant developers who make in-lieu payments the same right to demand services, in this case the right to connect to a neighboring municipality's sewer system, as it would a developer who had actually created the housing.<sup>169</sup> The Court thus portended a sort of second-class status for payments in lieu of the actual creation of affordable housing.<sup>170</sup>

2. *Oregon*—Oregon municipalities are required to establish comprehensive land-use plans and submit them to the Land Conservation and Development Commission (LCDC) for review and approval.<sup>171</sup> However, the statute specifies little in the way of specific housing policies.<sup>172</sup> Instead, the specifics were left to the LCDC to develop. The Commission arrived at nineteen different state-wide goals.<sup>173</sup> Goal 10, the housing goal, provides that “plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households. . . .”<sup>174</sup> The vagueness of this standard left housing advocates initially with little room for enthusiasm.<sup>175</sup>

However, in its first review interpreting Goal 10, the LCDC broadly interpreted the requirement to provide affordable housing. In an early decision, the LCDC held that local planning must take into account *regional* goals, not just the needs of the locality.<sup>176</sup> It explicitly referred to the *Mt. Laurel* decisions, while stopping short of requiring a strict fair share model.<sup>177</sup>

168. *Bi-County*, 805 A.2d at 449.

169. *Id.* (“[W]e decline to elevate Bi-County's status to equal that of Samaritan, a non-profit builder of low income housing whose entire project could have failed without access to water and sewer capacity from a neighboring municipality.”).

170. Note, *Refining Municipal Obligations*, *supra* note 167, at 1545–46 (arguing that the Court was skeptical about whether affordable housing fees would be as effective as mandatory set-asides in the creation of affordable housing).

171. See OR. REV. STAT. §§ 197.005–.850 (2001); Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 73 (2001).

172. Span, *supra* note 171, at 73.

173. See OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, OREGON'S 19 STATEWIDE PLANNING GOALS AND GUIDELINES, available at <http://www.lcd.state.or.us/goalhtml/goals.html> (on file with the University of Michigan Journal of Law Reform).

174. See OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, GOAL 10, available at <http://www.lcd.state.or.us/goalpdfs/goal10.pdf> (on file with the University of Michigan Journal of Law Reform).

175. See Span, *supra* note 171, at 74 n.320.

176. See Terry D. Morgan, *Exclusionary Zoning: Remedies Under Oregon's Land Use Planning Program*, 14 ENVTL. L. 779, 783 (1984).

177. See *id.*

The LCDC also promulgated a Metropolitan Housing Rule for the Portland area.<sup>178</sup> The rule has two components.<sup>179</sup> First, each municipality and county in the area must adopt a comprehensive plan permitting at least 50% of new housing to be multi-family or attached single family units.<sup>180</sup> Second, minimum density requirements are set forth for new construction within the metropolitan area.<sup>181</sup>

The Oregon system does not provide any incentives for developers of low-income housing, *per se*. Instead, the regime aims at increasing affordability uniformly.<sup>182</sup> Outside the Portland area, the LCDC requires “soft fair share” apportionment, *i.e.*, it requires that municipalities attempt to provide, in their comprehensive plans, for the housing that approximates their fair share of housing<sup>183</sup> for their region, without specifying exactly the fair share numbers.<sup>184</sup> Inside the Portland area, the LCDC promulgates specific numerical targets for municipalities.<sup>185</sup>

In 1979, the Oregon legislature transferred the responsibility for hearing challenges to local decisions from the LCDC to a three-member board called the Land Use Board of Appeals (LUBA).<sup>186</sup> The LCDC continues to “acknowledge,” or certify, local plans to ensure their constituency with regional goals. LUBA has jurisdiction over appeals from local individualized decisions, and limits its review to the question of whether the decision was in accordance with the local comprehensive plan.<sup>187</sup> LUBA has been well-received as more expert, more efficient, and faster than the courts.<sup>188</sup>

Oregon’s approach is almost entirely centralized with an administrative agency. Although localities initially draft their comprehensive plans, the plans are subject to scrutiny by the LCDC, which ascertains the degree to which the plan matches the planning goals it has set forth. In the Portland area, the freedom of the localities is even more curtailed, with specific housing numbers mandated by the LCDC. The courts have almost no role to play.

178. OR. ADMIN. R. §§ 660-007-0000 to 60-007-0060 (2001).

179. *See* Span, *supra* note 171, at 75–76.

180. OR. ADMIN. R. 660-007-0030 (2001).

181. OR. ADMIN. R. 660-007-0035 (2001).

182. *See* Span, *supra* note 171, at 76.

183. Note that the fair share requirement is of housing generally, not of affordable housing specifically.

184. OR. REV. STAT. §§ 197.312, 197.475–.490 (2001).

185. *See id.*

186. OR. REV. STAT. §§ 197.805–.860 (2001).

187. OR. REV. STAT. § 197.015(10) (2001). *See also* Span, *supra* note 171, at 77 n.337.

188. *See* Span, *supra* note 171, at 77.

Structurally, then, the Oregon system represents an extreme, administratively-centered position.

3. *Analysis*—Extensive empirical data is available for New Jersey and Oregon. One New Jersey study<sup>189</sup> identified three goals central to the *Mt. Laurel* litigation: increasing housing opportunities for low- and moderate-income households; providing housing opportunities in the suburbs for poor urbanites who had previously been excluded from the suburbs; and ameliorating racial and ethnic segregation by allowing blacks and Latinos to move to white suburbs.<sup>190</sup> With respect to the first goal, the study found that the New Jersey Fair Housing Act did, generally speaking, increase the amount of low- and moderate-income housing in the state. Moreover, the category of households with the greatest amount of need (minority, female-headed, single-parent, and young households) represented a significant proportion of the families taking advantage of housing created under the Act. The study noted, however, that large households, and very low-income households, seemed to be underrepresented in the population applying for and occupying the newly-created housing.<sup>191</sup>

Regarding the second goal, the New Jersey study concluded that very few urban residents were actually moving into the suburbs. Only 15% of the suburban households were occupied by individuals who had previously lived in an urban area.<sup>192</sup> Thus, although housing is being created, the inhabitants are generally not those who were formerly barred by exclusionary zoning.

Related to this finding is the study's conclusion with respect to the third goal: The New Jersey Act did not bring about desegregation. Indeed, only 5% of blacks in housing created under the Act (Affordable Housing Management Service,<sup>193</sup> or AHMS, housing) moved from the city to the suburbs, while 21% moved from the suburbs to the cities. Similarly, only 2% of Latinos in AHMS housing moved from the cities to the suburbs. Overall, only 7% of the households moved from the city to the suburbs.<sup>194</sup> The result is that 81% of the AHMS households in the suburbs are occupied by whites, while 85% of the AHMS households in the cities are occupied by blacks and Latinos. One explanation for this phenomenon

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189. See Wish & Eisdorfer, *supra* note 50.

190. *Id.* at 1301–02.

191. *Id.* at 1301.

192. *Id.* at 1302.

193. The Affordable Housing Management Service is a New Jersey state agency created under the Fair Housing Act to administer housing created under the Act. *Id.* at 1281.

194. *Id.* at 1302.



is that black households tend to apply for housing at uniformly high rates throughout the state, whereas white households only apply for housing in suburban areas.<sup>195</sup> Whites, in other words, are willing to apply for AHMS housing only when they will not have to move to an urban (and predominantly minority) neighborhood, while blacks are willing to live in a majority-white or majority-minority area. Moreover, in regions that include New Jersey's largest cities, the highest numbers of minorities, and the greatest number of applicants for AHMS housing, there were the fewest suburban housing opportunities. In regions where there were fewer applicants and fewer minorities, there were more suburban housing opportunities.<sup>196</sup> Thus, whatever the benefits of the scheme in terms of creating raw housing, it does not serve to ameliorate racial segregation.

Similarly mixed results are found in a study of Oregon. The study concluded that, the LCDC had considerable impact on zoning ordinances in the Portland metropolitan area. For instance, the amount of land zoned for multi-family dwellings in the Portland metropolitan area quadrupled between 1977–1982, from 7.2% to 27%. With only 10% additional land zoned residential during this timeframe, the total number of housing units increased by 150%.<sup>197</sup> Furthermore, overall density increased (on paper), with the average lot size decreasing from 12,800 square feet to 8,280 square feet.<sup>198</sup>

However, the actual density of units built on the newly zoned lots did not increase as much as was hoped. First, single-family units only covered 66% of the land zoned for single-family uses, as opposed to 90% coverage for multi-family units.<sup>199</sup> Second, outside the Portland area (and, thus, outside the ambit of the Metropolitan Housing Rule<sup>200</sup>), very low percentages of new housing were multi-family housing, and housing covered a much lower percentage of land area allowed under zoning ordinances than in the Portland area.<sup>201</sup> Even in the Portland area, it is not clear that the Housing Rule was uniquely responsible for the high levels of multi-family development. Development patterns in the late 1980s (after the Housing Rule was promulgated) resembled those in the early 1970s (before the Housing Rule), implying that market factors may

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195. *Id.* at 1303.

196. *Id.* at 1304.

197. Span, *supra* note 171, at 78.

198. *Id.*

199. *Id.* at 78–79.

200. See *supra* Part I.C.2.

201. Span, *supra* note 171, at 79.

have had more impact than regulatory factors.<sup>202</sup> Overall, the LCDC appears to have had some positive effect in the construction of at least moderate-income, multi-family housing in the Portland region. With respect to housing for low-income individuals,<sup>203</sup> and with respect to housing outside the Portland metropolitan area, the numbers are less clear.<sup>204</sup>

Some of the failures of the New Jersey and Oregon approaches may be explained by structural elements in the programs themselves. First, the New Jersey scheme, in particular, suffers from the fatal flaw of regional contribution agreements. Regional contribution agreements are easy to blame. They permit more affordable housing to be created in the central cities, albeit with some degree of compensation from the suburbs. If the New Jersey study is accurate in its hypothesis that blacks apply for affordable housing wherever it is available, whereas whites apply for affordable housing only in the suburbs,<sup>205</sup> then the more affordable housing built in the central cities, the more segregation will occur.

Second, the top-down nature of planning in New Jersey, Oregon, and most of the other centralized-planning states, is also likely to decrease its effectiveness because localities are not treated as partners in the process. The failure to involve a locality in the creation of its own affordable housing leads to greatly reduced effectiveness in desegregation, if not in the actual creation of affordable housing. For instance, a locality will not affirmatively market its affordable housing to urban residents; it will do its best to fill the housing with "acceptable" locals. Moreover, for those minority urbanites who are made aware of the housing, few are likely choose to move to an unwelcoming municipality with a tiny minority population. Finally, a determined municipality might fight affordable housing in its midst through legal tactics such as by seizing of the property through eminent domain. Creating affordable housing despite community opposition is therefore unlikely to be effective.

In terms of creating new housing, centralized planning schemes are as effective as, or more effective than, either of the other two approaches examined in this Note. They may be particularly

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202. *Id.* at 79–80.

203. No data is available breaking down the housing attributable to the LCDC according to the income level of the residents. Thus, we do not know how much low-income housing compared to moderate-income housing has been created. *See id.* at 78.

204. *See id.* at 81–82.

205. *See Wish & Eisdorfer, supra* note 50, at 1303.

effective at setting norms.<sup>206</sup> They are not particularly effective at getting inner city residents to move to the newly-created housing in the suburbs. Individual factors, such as regional contribution agreements, may decrease their effectiveness at certain goals, such as desegregation. Moreover, these approaches exhibit a fundamental lack of community support, and thus of democratic legitimization.<sup>207</sup>

#### *D. Regional Governments: Montgomery County, Maryland*

Without state prompting, Montgomery County, Maryland<sup>208</sup> has enacted what may be the most successful program to create affordable housing in the country.<sup>209</sup> Under the Montgomery County ordinance,<sup>210</sup> all developments with 50 or more units must contain at least 15% moderately priced units.<sup>211</sup> Montgomery County provides a density bonus, permitting the development of one market unit for each moderately-priced unit, even where this would otherwise conflict with the zoning ordinance. Economic feasibility may also be provided by state or federal subsidies. Moderate-income families must be given priority to inhabit the moderately-priced units. Moderately-priced units for sale generally may not be resold at a higher price for five years; and the rent may not be raised on a moderately-priced rental for five years. Moreover, housing authorities are given an option to purchase moderately-priced units, thus opening up the suburbs to low-income residents as well.<sup>212</sup>

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206. That is, they are able to set rules instead of standards. By contrast, the common law model, for the most part, allowed only for vague standards. Under appeals statute regimes, a heuristic (e.g., Massachusetts' 10% rule) is employed, for lack of an administrative apparatus to determine hard fair share numbers. Centralized planning regimes are not, however, immune from the possibility of creating imprecise norms, as was the case in Oregon outside the Portland area.

207. An exploration of the central planning model's democratic implications will be explored *infra* Part II.B.3.

208. Most Maryland residents do not live in municipalities. Thus, Montgomery County is the smallest unit of local government for virtually all of its inhabitants. DAVID RUSK, *INSIDE GAME OUTSIDE GAME* 184-85 (1999) [hereinafter *INSIDE/OUTSIDE*].

209. *See id.* at 183-84.

210. MONTGOMERY COUNTY, MD., CODE ch. 25A (2003), available at [http://www.amlegal.com/nxt/gateway.dll/Maryland/Montgomery%20County/Montgomery%20County%20Code/part00004/chapter00052.htm?f=templates\\$fn=altmain-nf.htm\\$q=Chapter%2025A\\$X=Simple#LPHIT1](http://www.amlegal.com/nxt/gateway.dll/Maryland/Montgomery%20County/Montgomery%20County%20Code/part00004/chapter00052.htm?f=templates$fn=altmain-nf.htm$q=Chapter%2025A$X=Simple#LPHIT1) (on file with the University of Michigan Journal of Law Reform).

211. *Id.* § 25A-5(c)(3). *See also* HERBERT M. FRANKLIN ET AL., *IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS* 140 (Appendix to Part IV) (1974).

212. *See id.* at 140-41.

By all accounts, Montgomery County's program has been successful. Between 1974 and 1997, 10,110 affordable units were created, including 7,305 units for sale and 2,805 units for rental. More than 1,500 of these units were purchased and converted into public housing.<sup>213</sup> Moreover, by the nature of the program, housing is spread throughout the county, not just in lower-income areas. One study determined that property values of neighboring higher-priced units were not adversely affected by the proximity of low- and moderate-income housing<sup>214</sup>—perhaps partially due to the uniform distribution of the housing.<sup>215</sup> Purchasers of the affordable housing were 41% white, 22% black, 28% Asian, and 7% Hispanic.<sup>216</sup> Moreover, 80% of the inhabitants of the public housing (which is mixed with market rate units) are black.<sup>217</sup> Thus, the Montgomery County legislation successfully achieves significant racial and socioeconomic integration—unlike any of the other programs studied in this Note.<sup>218</sup>

One could draw the conclusion from the Montgomery County experience that local governments inhibit the construction of affordable housing; if there are no municipalities (as in Montgomery County) then there will be no resistance to the creation of affordable housing. Indeed, David Rusk, an enthusiastic supporter of the Montgomery County initiative,<sup>219</sup> argued:

A broad-based government is not generally as afflicted with the "Not-in-My-Backyard" syndrome as is a narrow-based government. A broad-based government can carry out zoning policies and capital outlay plans that encourage the private market to bring more mixed-income neighborhoods into being. Within its wide jurisdiction a broad-based government is able to scatter public housing projects and implement rent subsidy programs across a variety of neighborhoods. It is, in effect, able to follow strategies of dispersion of low-income groups. . . . [A] highly fragmented metro area has little ability

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213. *INSIDE/OUTSIDE*, *supra* note 208, at 191.

214. *Id.*

215. That is, if affordable housing is created simultaneously everywhere in a region, housing prices should not be affected because residents cannot flee somewhere else.

216. *INSIDE/OUTSIDE*, *supra* note 208, at 191.

217. Roisman, *supra* note 2, at 79.

218. *See id.* at 78–79.

219. *See INSIDE/OUTSIDE*, *supra* note 208, at 178–200.

to agree on socially controversial policies, absent powerful compulsion by state or federal law.<sup>220</sup>

Rusk's observations are supported on both ends. For instance, in Connecticut, negotiation between local governments failed to produce a fair-share agreement; and the agreement it did produce could not be adequately enforced. By contrast, Montgomery County was able to effectively disperse its poor, in particular its poor minorities, throughout the jurisdiction.

It may be, however, that what allowed Montgomery County to pass the ordinance was not the county's governmental reach *per se*, but rather its democratic support. The Montgomery County ordinance owes its existence first, to a persistent council member, and second, to the influence of coalition politics.<sup>221</sup> Business, civic, religious, and housing groups came together to support the bill.<sup>222</sup> One council member took on the bill's passage as his "personal crusade."<sup>223</sup> In short, representative democracy, in which the greatest good for the greatest number in the region held sway over policy decisions, set the stage for the bill's passage.

To the extent that a similarly situated democratic minority in a highly fragmented metropolitan area<sup>224</sup> would be incapable of enacting an ordinance such as Montgomery County's, Rusk is undoubtedly correct that Montgomery County's form of government is superior. However, one need not draw the conclusion that an all-powerful regional government must displace all local control. There does need to be a body to represent the will of the region's inhabitants as a whole. That body, however, can operate in concert with local governments, rather than replacing them.

## II. PROMISING ELEMENTS

Despite the shortcomings inherent in each of the models presented above, significant promise exists. First, the appeals statute model and the centralized planning model each have inherent strengths and weaknesses. It is possible to take the strongest elements from these approaches and fix their weaknesses. Second,

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220. DAVID RUSK, *CITIES WITHOUT SUBURBS* 86 (1993).

221. See *INSIDE/OUTSIDE*, *supra* note 208, at 186-90 (describing the events leading to the passage of the Montgomery County ordinance).

222. *Id.* at 189.

223. *Id.*

224. I.e., a metropolitan area with numerous autonomous localities.

two states, Connecticut and California, have undertaken to add a degree of local representation to otherwise centralized-planning models.<sup>225</sup> Although neither of these approaches can be termed a success, they resolve some of the theoretical problems inherent in the appeals statute and centralized planning approach. By extracting the successful elements from each of the regimes studied thus far, adding the local representation exhibited by California and Connecticut, and rendering the system more democratic, one may arrive at a successful solution.

*A. Expert Agencies Effectively Ascertain Credible Fair Share Numbers*

Only a centralized, expert regional agency can accomplish the task of arriving at a statistically accurate picture of the housing need of a region. The variables involved in such a calculation are extremely varied and complex.<sup>226</sup> Localities lack the resources, the access to data, the expertise, and the incentive to undertake a regional housing needs assessment on their own. By contrast, COAH in New Jersey, and LCDC in Oregon, are expert agencies adept at allocating a region's fair share of affordable housing, as well as dividing the region's share among its constituent municipalities. In California, a state agency determines statewide housing need and approves the determinations of regional need arrived at by regional councils of government.<sup>227</sup> Such an expert determination of housing need is vital not only for technocratic purposes; it also functions as a legitimizing tool. A major complaint levied against the Massachusetts appeals statute is that the 10% threshold<sup>228</sup> is too coarse a standard, and does not accurately measure when a locality is or is not providing enough affordable housing. A technically accurate standard is the only way to respond to such a charge.

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225. The Connecticut scheme described is entirely independent of its appeals statute approach. See *infra* Part II.B.1.

226. For a graphic demonstration of this proposition, see Regional Housing Needs Assessment Calculator for Southern California, available at <http://api.ucla.edu/rhna/RegionalHousingNeedsAssessment/FinalNumbers/Main.cfm> (on file with the University of Michigan Journal of Law Reform).

227. CAL. GOV'T CODE § 65584(a) (West 1997 & Supp. 2003). See also *infra* Part II.B.1.

228. See discussion *supra* p. 31.

### B. Representative Regional Entities Acquire Local Support

At least two states, Connecticut and California, have addressed the affordable housing issue by delegating the responsibility for creating affordable housing to regional organizations in which the localities are represented. Neither of these states' programs have been particularly successful, either because of the modesty of the goals set (in the case of Connecticut) or because of the lack of enforcement power vested in the regional organizations (in both instances). Nonetheless, the basic idea of involving the localities collectively in decisions that affect them collectively is an essential step.

1. *California*—California's statutory scheme involves a combination of the three forms of inclusionary zoning enforcement detailed in this Note.<sup>229</sup> California provides for centralized review of zoning ordinances, and a judicial enforcement mechanism, applying both common law and statutory appeals-like provisions. California's implementation of these elements is weak and ineffective. Nonetheless, California's structural approach contains unique elements that may be borrowed by a successful approach.

Under California law, all localities must adopt a general plan containing a number of mandatory elements, including a housing element.<sup>230</sup> Zoning ordinances must be consistent with the general plan.<sup>231</sup> The housing element must meet local needs for all income levels, and must include provisions for rental housing, factory-built housing, and mobile homes.<sup>232</sup> A community's "local needs" are to be assessed as a portion of the regional need for housing.<sup>233</sup> The regional need, and each locality's fair share, is initially determined by a regional council of governments established by the localities themselves.<sup>234</sup> The determination of the regional need is subject to

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229. See McDougall, *Litigation*, *supra* note 50, at 643–45; Nico Calavita et al., *Inclusionary Housing in California and New Jersey*, 8 HOUSING POL'Y DEBATE 109, 117–18 (1997).

230. CAL. GOV'T CODE § 65300 (West 1997 & Supp. 2003) (requiring the adoption of a general plan); CAL. GOV'T CODE § 65302(c) (West 1997 & Supp. 2003) (requiring that the plan include a housing element); CAL. GOV'T CODE tit. 7 div. 1 ch. 3 art. 10.6 (West 1997 & Supp. 2003) (setting forth the requirements of the housing element).

231. CAL. GOV'T CODE § 65860(a) (West 1997 & Supp. 2003).

232. CAL. GOV'T CODE § 65583 (West 1997 & Supp. 2003).

233. CAL. GOV'T CODE § 65583(a)(1) (West 1997 & Supp. 2003); CAL. GOV'T CODE § 65584 (West 1997 & Supp. 2003).

234. CAL. GOV'T CODE § 65584(a) (West 1997 & Supp. 2003); CAL. GOV'T CODE § 65582(b) (West 1997 & Supp. 2003) (defining "council of governments"); CAL. GOV'T CODE § 6500 *et seq.* (West 1997 & Supp. 2003) (establishing the authority of localities to create "joint power authorities").

approval of and modification by the state Department of Housing and Community Development.<sup>235</sup> The allocation of local needs is only subject to state “advice.” The council of governments may directly allocate fair share housing to cities and counties, or it may allocate housing shares to subregions, which would then allocate the housing to cities and counties.<sup>236</sup> Each locality is required to have a state agency certify that the housing elements of their comprehensive plan meets the locality’s regionally-assessed housing need.<sup>237</sup>

Significantly, the statute does not set forth the methodology by which localities are to be allocated their fair share, although the methodology used must be made public.<sup>238</sup> Different councils of governments arrive at different criteria for distributing the fair share burden. For instance, the Association of Bay Area Governments (ABAG), the council of governments for the San Francisco Bay Area, defines a locality’s fair share of housing as the average of that locality’s needs, the needs of its county, and the needs of its region.<sup>239</sup> The Southern California Association of Governments (SCAG) takes into account four factors projected over seven years: household growth, vacancy need,<sup>240</sup> replacement need,<sup>241</sup> and a “fair share adjustment.”<sup>242</sup> All numbers are calculated on a local level; only the last factor is intended to spread the burden of low-income housing across the region.<sup>243</sup> Localities have separate goals for housing for each of four categories of individuals: very low-, low-, moderate-, and above-moderate income.<sup>244</sup>

Although the California approach provides an effective mechanism for the identification of fair share burdens, it is ineffective in enforcing its requirements.<sup>245</sup> First, because the statute does not require the locality to build housing, or even to act affirmatively to encourage housing to be built, judicial review focuses on whether

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235. CAL. GOV’T CODE § 65584(a) (West 1997 & Supp. 2003).

236. *Id.*

237. CAL. GOV’T CODE § 65585(b) (West 1997 & Supp. 2003).

238. CAL. GOV’T CODE § 65584(a) (West 1997 & Supp. 2003).

239. *See* Field, *supra* note 31, at 42.

240. I.e., additional units needed to maintain an “ideal” vacancy rate.

241. I.e., number of units projected to be demolished or converted to non-housing use.

242. SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS, REGIONAL HOUSING NEEDS ASSESSMENT: METHODOLOGY 2–3 (2000), available at <http://api.ucla.edu/rhna/RegionalHousingNeedsAssessment/RHNABackground/RhnaPolicy/PDF1MethodologyFinal.pdf> (on file with the University of Michigan Journal of Law Reform).

243. *See id.* at 3.

244. *See id.* at 2.

245. *See* Field, *supra* note 31, at 70 (“The courts have failed to comprehensively and effectively enforce the fair share statutes.”); Calavita et al., *supra* note 229, at 117–18.



the housing element is in technical conformity with the law, rather than whether affordable housing is getting built.<sup>246</sup> Second, and more significantly, neither the councils of governments nor the Department of Housing and Community Development play any role in enforcing the statute. All enforcement is through the judicial system. Thus, although localities under the law must submit a general plan, and the general plan must include a housing element, and the housing element must conform to the Regional Housing Needs Assessment promulgated by the local council of governments and be certified by the Department of Housing and Community Development, none of these requirements may be enforced except by a private party, such as in a suit for a builder's remedy.<sup>247</sup>

California provides two mechanisms to challenge local zoning. First, under California law local zoning boards may not refuse permission to build low income housing except under specific, enumerated conditions.<sup>248</sup> A developer may appeal a zoning denial, in which case (as in Connecticut) the locality has the burden of proof to show that those conditions are met.<sup>249</sup> Second, California allows developers (or, indeed, low-income individuals, or other interested parties) to facially challenge a locality's zoning ordinance by seeking a writ of mandate to order the locality to meet its statutory duties.<sup>250</sup> As in New Jersey, if a locality's plan is found to be in compliance with the statutory scheme by the Department of Housing and Community Development, the plan will enjoy a presumption of validity in court.<sup>251</sup> If a court finds the plan's housing element not to be in compliance with the statute, the court may order compliance within 120 days.<sup>252</sup> In its order, the court may also suspend the right of the locality to issue building permits or to amend its zoning ordinances or grant zoning variances.<sup>253</sup> Thus, the California judiciary appears to have an impressive arsenal at its disposal to enforce compliance with the housing element requirement.

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246. See Calavita et al., *supra* note 229, at 118.

247. See Brian Augusta, *Building Housing from the Ground Up*, 39 SANTA CLARA L. REV. 503, 513-14 (1999).

248. CAL. GOV'T CODE § 65589.5(d) (West 1997 & Supp. 2003).

249. CAL. GOV'T CODE § 65589.6 (West 1997 & Supp. 2003).

250. See CAL. GOV'T CODE § 65751 (West 1997 & Supp. 2003); CAL. CIV. PROC. CODE § 1085 (West 1980 & Supp. 2003).

251. CAL. GOV'T CODE § 65589.3 (West 1997 & Supp. 2003).

252. CAL. GOV'T CODE § 65754(a) (West 1997 & Supp. 2003).

253. CAL. GOV'T CODE § 65755(a) (West 1997 & Supp. 2003).

Nonetheless, the California statute has proven a disappointment.<sup>254</sup> First, in some cases, localities manipulated data and methodologies in order to appear to be in compliance while producing little affordable housing.<sup>255</sup> Second, although localities are required to identify sites suitable to support development, the statute's requirements in this area are vague enough that localities may submit a plan that appears to be in conformity to the statute, while in reality leaving no sites available for development.<sup>256</sup> Third, although low-income individuals themselves are able to sue under the California system, their low level of access to representation means that they could only sporadically influence local policy through litigation.<sup>257</sup> Fourth, developers are reluctant to bring suit because of high legal costs and fear of souring relations with a locality in which they may wish to later to business.<sup>258</sup> Fifth, a sizeable number of California municipalities are simply not in conformance with the law.<sup>259</sup> Sixth, compliance with the statute is not necessarily a good statistical indicator of housing construction.<sup>260</sup>

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254. See PAUL G. LEWIS, CALIFORNIA'S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE 64 (2003), available at [http://www.ppic.org/content/pubs/R\\_203PLR.pdf](http://www.ppic.org/content/pubs/R_203PLR.pdf) (on file with the University of Michigan Journal of Law Reform).

255. See McDougall, *Litigation*, *supra* note 50, at 644–45 (“In some cases, suburban municipalities met the letter of the law in their planning and implementation procedures, but used data selectively and took advantage of the ambiguities in data projections in order to avoid their obligations for lower-income housing.”). In 1990, the statute was amended to require, *inter alia*, that localities report more data about the assumptions and methodologies they employ. 1990 Cal. Stat. ch. 1441 (S.B. 2274) § 4 (codified as amended at CAL. GOV'T CODE § 65584 (West 1997 & Supp. 2003)).

256. See Augusta, *supra* note 247, at 542–43.

257. Field, *supra* note 31, at 50–52.

258. *Id.* at 52–53. This is another restatement of the question of democratic legitimacy.

259. As of April 2, 2003, only 57.9% of California municipalities had adopted housing elements that were certified, as required, by the state Department of Housing and Community Development. 15.8% of municipalities had adopted non-compliant housing elements; 18.2% of localities had not adopted housing elements at all (or were in the process of doing so); 6.4% of municipalities' housing elements were being reviewed by the state; and 1.7% of municipalities had taken advantage of SANDAG's self-certification procedure. See discussion *infra* note 376, and accompanying text. See also CAL. DEP'T OF HOUS. AND CMTY. DEV., HOUSING ELEMENT COMPLIANCE REPORT (Apr. 2, 2003), available at <http://www.hcd.ca.gov/hpd/hrc/plan/he/status.pdf> (on file with the University of Michigan Journal of Law Reform).

260. See LEWIS, *supra* note 254, at 68–69 (“Compliance status . . . was not a good predictor of the rate of subsequent new housing development in [certain] cities. . . . Rather, housing market and demographic factors outweigh compliance status in contributing to variations in growth rates.”). Nonetheless, compliance with the housing element requirement may increase the production of *affordable* units at the expense of market rate units. *Id.* at 69 (“Indeed, when examining the proportion of all units constructed from 1991 through 2000 that were in multifamily developments—most likely to be affordable—we do find that multifamily construction tends to displace a significant portion of single-family construction in cities with compliant housing elements.”).

The most fundamental barrier to the effectiveness of the statute, however, lies in its reliance on courts for enforcement. California courts do not delve below the text of the locality's ordinance, and are unwilling to assess the contents or practical impact of a locality's housing element. They employ a "substantial compliance" standard which in practice means "facial compliance." That is, the decision is whether the housing element contains each of the components in the statute, and not whether the housing element actually attempts to meet any of the statute's goals.<sup>261</sup> Courts are also unwilling to consider extrinsic evidence as to the actual effect of the housing element; they analyze the text of the element, and nothing more.<sup>262</sup> In other words, the California statute has not succeeded in reversing the intrinsic conservatism and deference to local legislatures that is characteristic of courts, as shown in Part I.A.<sup>263</sup>

2. *Connecticut*—In its Regional Fair Housing Compact Pilot Program,<sup>264</sup> Connecticut established a program encouraging localities to come together regionally to develop a fair share housing strategy through negotiation rather than through state mandate.<sup>265</sup> In 1990, the Capitol Region Council of Governments (representing the Hartford region) and the Greater Bridgeport Regional Planning Agency were chosen to participate in the program.<sup>266</sup> The Act calls for negotiation between a mediator, a state representative, representatives from the regional planning agency, and representatives from each municipality.<sup>267</sup> Thus, in a manner similar to California's statute, Connecticut hoped to allow localities to resolve

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261. Field, *supra* note 31, at 54 ("[C]ourts are unwilling to evaluate the substance of localities' housing elements. Instead, they limit themselves to reviewing facial compliance with the housing element law."). See also, e.g., *Buena Vista Gardens v. City of San Diego Planning Dep't*, 220 Cal. Rptr. 732, 739 (1985) (finding a city's housing element in "substantial compliance" with a statute requiring cities to "assist" in the development of housing to meet the needs of low- and moderate-income households," despite the skeletal nature of the assistance allegedly provided).

262. Field, *supra* note 31, at 57. See also *Camp v. Mendocino County Bd. of Supervisors*, 176 Cal. Rptr. 620, 635 (1981).

263. Indeed, the courts themselves recognize this limitation. One court opined that it:

[C]annot and should not involve itself in detailed analysis of whether the elements of the plan are adequate to achieve its purpose. To do so would involve the court in the writing of the plan. That issue is one for determination by the political process and not by the judicial process.

*Bownds v. City of Glendale*, 170 Cal. Rptr. 342, 347 (1981).

264. CONN. GEN. STAT. § 8-386 (2003).

265. *Id.* See also Connerly & Smith, *supra* note 145, at 89.

266. Connerly & Smith, *supra* note 145, at 89.

267. CONN. GEN. STAT. § 8-386 (2003).

their region's affordable housing issues through mediation rather than through state mandates.

Three significant structural elements were present in the Connecticut system. First, municipalities were not proportionally represented; instead, one representative per municipality was provided for.<sup>268</sup> Second, only municipalities, regions, and the state were to be represented. Citizens' groups, such as housing advocacy groups, had no formal voice, though they could observe and speak at a separate public forum.<sup>269</sup> Third, the council was to operate by consensus.<sup>270</sup> The final document was to be adopted unanimously. Thus, each municipality had a veto power, since each could derail the negotiations by threatening to leave.<sup>271</sup> As a result, the central city's voice was more likely to be softened in the debate than if a majority-voting rule had been instituted, with votes allocated on the basis of population.<sup>272</sup>

The resolutions adopted in the two Connecticut regions were weak. In the Capitol region, localities agreed to meet 25% of their *local* shortfall of affordable housing over the next five years, except Hartford which was to meet only 12.5%. Moreover, although they were not permitted to exclude non-residents from the affordable housing, they were permitted to grant preference to local residents.<sup>273</sup> Indeed, the Hartford representative conceded this approach from the beginning, saying "If each community would take care of its own residents, Hartford's burden would be eased."<sup>274</sup> The compact was, nonetheless, relatively effective at creating housing. Four thousand fifty-five new housing opportunities were created between July 1, 1989 and March 31, 1994, 86% of which were created in Hartford's suburbs, and 75% of which were available to low- and very low-income households.<sup>275</sup> At the end of

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268. See CONN. GEN. STAT. § 8-386 (2003).

269. See Connerly & Smith, *supra* note 145, at 91.

270. CONN. GEN. STAT. § 8-386 (2003). See also Connerly & Smith, *supra* note 145, at 90.

271. See LAWRENCE SUSSKIND & SUSAN L. PODZIBA, AFFORDABLE HOUSING MEDIATION 7 (1990).

272. Moreover, the consequences of a breakdown in negotiations were not clear. Thus, it was in the central city's benefit to arrive at some agreement rather than none at all, while this might have been less true for the suburban municipalities. See *id.* at 14. Nonetheless, there was some fear that, if negotiations broke down, the state would intervene and impose its own requirements. Connerly & Smith, *supra* note 145, at 90. There were further impediments to reaching an agreement: professional negotiators were hired, see CONN. GEN. STAT. § 8-386 (2003), and money was set aside for municipalities that were part of an agreed-upon compact, see Connerly & Smith, *supra* note 145, at 91.

273. SUSSKIND & PODZIBA, *supra* note 271, at 8-9.

274. *Id.* at 7.

275. Connerly & Smith, *supra* note 145, at 92.

five years, sixteen towns had achieved 75% or more of their minimum goals under the compact; five towns achieved between 50–75% of their goals; and five towns achieved fewer than 50% of their goals.<sup>276</sup> The mere fact that the localities were involved in the process of goal-setting seems to have caused at least some of them to adopt the goal of fair housing as their own, to a greater extent than might be the case if a fair housing requirement were imposed on them from the outside, despite the weakness of the initial agreement.<sup>277</sup>

Although the results of the Bridgeport negotiations were somewhat different, the tenor of the negotiations was similar. The representative from Bridgeport did not possess a great deal of bargaining power.<sup>278</sup> Moreover, four of the six participants in the Bridgeport negotiations were overtly hostile to the creation of any affordable housing in their localities, suggesting instead that all affordable housing should be located in Bridgeport.<sup>279</sup> Nonetheless, with little debate or consideration of alternative possible solutions, the participants agreed on a fair share formula tied to local population.<sup>280</sup> The formula allocated each municipality a number of points equal to 10% of its population. The city or town was required to reach the required number of points by either creating housing, modifying zoning ordinances, or engaging in a variety of other pro-affordable housing actions.<sup>281</sup> This end result was better for Bridgeport than the Hartford solution (in which responsibility for creating housing was tied to local needs) would have been.<sup>282</sup> Moreover, municipalities were anxious to ensure that their past efforts toward creating affordable housing were counted toward their credit limit; this, too, proved favorable to Bridgeport.<sup>283</sup>

Although no subsequent data is available for Bridgeport, Hartford's later experience is less than promising. After the initial five-year trial was over, the Capitol Region's towns, in a second round of negotiations, voted to replace the prior compact's specific goals

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276. Tondro, *supra* note 125, at 136.

277. *Cf. id.* at 115–36 (describing Connecticut's lack of success with its state-imposed appeals statute).

278. SUSSKIND & PODZIBA, *supra* note 271, at 33.

279. *See id.* at 28–29.

280. *Id.* at 30. The Bridgeport negotiations were attended solely by political figures; no planners were present. If housing experts had been included in the negotiations, it is possible that a formula more closely tied with regional need would have been developed. *Id.* at 32–33.

281. *Id.* at 30.

282. SUSSKIND & PODZIBA, *supra* note 271, at 32.

283. *Id.* at 32–33.

with a new five-year Regional Housing Policy. The new policy is much less specific, and more standards-oriented, than the original compact. It presents eleven strategies for the creation of a broad range of housing; only one strategy addresses land use policy. The others refer to transportation, job creation, use of governmental subsidies, etc. In particular, the document fails to call for communities to ease entry barriers to affordable housing.<sup>284</sup>

The distinct difference in result between the first and second set of negotiations is difficult to explain. One study demonstrates that many local officials were dismayed when their good faith attempts to create housing pursuant to the compact did not exempt them from housing created under Connecticut's builder's remedy;<sup>285</sup> perhaps such sentiments led to communities wishing to weaken their compact requirements (since they would be required to build housing under the appeals statute in any event). At the same time, some localities profess to have voluntarily created affordable housing *only* in response to the compact, and not in response to pressure generated by Connecticut's appeals statute.<sup>286</sup> The state of the housing market was quite different in 1997, when the compact was renewed, than it had been five years earlier; perhaps lower housing prices made communities feel less of a need to create affordable housing, or other economic factors influenced their change of heart.<sup>287</sup> The compact certainly generated more good will toward the creation of affordable housing than did the appeals statute.<sup>288</sup> Whatever the reason for the greatly weakened second-round agreement, it is clear that localities must feel empowered by the compact process for it to be effective. Thus, failure to provide for localities who were making good faith efforts toward meeting their compact goals was likely a major factor in souring localities on the prospect of a strong, effective compact.

3. *Analysis*—If the thesis of this Note is that a regional legislature representative of local interests should make the decisions that most fundamentally affect the regional construction of housing, then California and Connecticut should serve as pristine examples. Instead, they have fared worse than many of the other approaches considered in this Note. The reason can be traced to two factors: lack of democratic legitimacy (in the case of

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284. Tondro, *supra* note 125, at 136–37.

285. See Vodola, *supra* note 135, at 1267.

286. See *id.* at 1278.

287. See *id.* at 1283.

288. See *id.* at 1282.

Connecticut), and lack of enforcement power (particularly in the case of California).

The Connecticut pilot program, although promising in its emphasis on local negotiation, stacked the deck against the populous central city by requiring unanimous voting rather than representation according to population.<sup>289</sup> Thus, although a regional fair-share allocation was proposed in the Hartford area, the idea had no chance of success.<sup>290</sup> The only concession Hartford won was a reduction in its required housing production, from 25% of its shortfall to 12.5%.<sup>291</sup> If any one of the suburban municipalities had vetoed the compact, the only concrete consequence would have been a return to the status quo—a situation clearly contrary to Hartford's interest.<sup>292</sup> Thus, Hartford was disadvantaged both by its under-representation (possessing 12.8% of the population in the region<sup>293</sup> but only 3.1% of the representatives in the negotiation,<sup>294</sup> and subject to veto by any of the other communities) and by the background legal rules (a breakdown in negotiations would, at least in the short term, be to Hartford's detriment).

By contrast, some regions in California do represent localities on a one-person, one-vote basis.<sup>295</sup> Where California primarily fails is in enforcing the requirements set forth by the councils of governments. Additionally, the fact that California's councils of governments have a limited jurisdiction means that a set of municipalities are always "losers"—they perennially have housing "forced" on them, and have no bargaining chips because the only issue on the table is housing. Moreover, the voluntary nature of California's councils of governments prevents them from imposing performance-based requirements.<sup>296</sup> A fuller comparison of Cali-

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289. See SUSSKIND & PODZIBA, *supra* note 271, at 11–12.

290. See *id.* at 16.

291. *Id.* at 17. If it was subject to the 25% requirement, it would have produced 50% of all new housing required by the compact. *Id.*

292. It is true that many local officials believed that the state would impose its own solution if negotiations broke down. See Michael Wheeler, *Regional Consensus on Affordable Housing: Yes in My Backyard?* 12 J. PLAN. EDUC. & RESEARCH 139, 142 (1993). However, Hartford was no more assured than any other municipality that the state-imposed solution would be to its benefit.

293. See UNITED STATES BUREAU OF THE CENSUS, 1990 CENSUS (in 1990, Hartford's population was 139,739; the population of the metropolitan area was 1,085,895).

294. See SUSSKIND & PODZIBA, *supra* note 271, at 6 (twenty-nine communities were in attendance, plus three state agencies).

295. In particular, the councils of governments representing the Los Angeles and San Diego areas possess proportional voting schemes. See *infra* Part III.C.

296. That is, there is no mechanism by which California's councils of governments may require that a certain number of affordable units be built. All they may do is require that localities zone for affordable housing, in the hope that private developers will take advantage of the opportunity to create the housing.

fornia's approach will be deferred until after this Note's proposal is set forth in more detail.<sup>297</sup>

Enforcement proved problematic in Connecticut as well. In the first Hartford compact, localities were enthusiastic about creating the agreed-to affordable housing, but few actually met their goals. Many of the localities that did meet their goals did so only because of the Connecticut appeals statute.<sup>298</sup> Under the second compact, there were hardly any standards that could be enforced. Neither of the two compacts, nor state law, provided any consequences if localities failed to conform to their agreement.<sup>299</sup>

Despite their shortcomings, the benefits of California's and Connecticut's emphasis on giving localities influence in their affordable housing creation are evident when compared to the contrasting approaches studied thus far. In Massachusetts, localities who have not reached the 10% threshold have, effectively, no control over the affordable housing created within their boundaries. If a developer wishes to create a project, it is difficult for the municipality to intervene. In New Jersey and Oregon (in the Portland area), municipalities may plan for affordable housing to a greater extent, but the amount of housing they are to create is dictated by the state, with no possibility for bargaining. This lack of control negatively impacts the extent to which localities can be expected to embrace the affordable housing ideal. The shortcomings inherent in a state-centric approach are summarized by the comments of one Connecticut official regarding the compact, quoted in Peter J. Vodola's study:

Although it was a regional compact, it was clear right from the start that it was voluntary and was not being shoved down people's throats. . . . In New England, where you have the classic home rule system, it's always more successful to use a cooperative manner than an edict manner. That's where the hair goes up on the back and people say, 'Wait a minute—we know what's best for our town.'<sup>300</sup>

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297. See *infra* Part III.C.

298. See Vodola, *supra* note 135, at 1267–68.

299. Cf. SUSSKIND & PODZIBA, *supra* note 271, at 10 (each municipality was “accountable” to the others, but there is no indication that the meaning of this accountability was spelled out).

300. Telephone interview by Peter J. Vodola with Kenith Leslie, Town Planner, Town of Glastonbury, quoted in Vodola, *supra* note 135, at 1281.



Another Connecticut town official noted, "I'm sure all the municipalities would rather construct affordable housing at their own pace rather than having Big Brother watching, ready to bash you on the head if you don't conform."<sup>301</sup>

Centralized planning both on a regional level (as in California and Connecticut) and on a state-wide level (as in New Jersey and Oregon) is more respectful of local autonomy than any implementation of an appeals statute. This is so primarily because, under a centralized planning regime, site-specific decisions are generally still reserved for the local community. The locality is typically required to submit a plan for approval by the central agency, and then conform its zoning ordinances to the plan. This process nonetheless leaves leeway as to the site of the required affordable housing. By contrast, in an appeals statute regime, a municipality that has not yet reached its quota may have its zoning ordinance overridden by a developer, even though it has zoned for affordable housing. Centralized planning allows for a rational planning process and local autonomy while ensuring that housing is truly created.

There are important practical reasons for which communities must be involved in the creation of their local affordable housing. Some of these have already been noted. For instance, if a goal of the housing program is to encourage urban minorities to move to the suburbs, the suburbs will need to be seen as welcoming and inviting. Furthermore, if communities are involved in the affordable housing process, they are more apt to follow the spirit of the law.<sup>302</sup> Resistance on the state level should also dissipate, eliminating the constant struggle, as in Massachusetts, to preserve the law's continued existence.

The Connecticut compact, and California's system of councils of government, have the right idea. If representation were proportionate to population, and if voting were by majority rather than by consensus, and if the decisions of the regional entity could be reliably and effectively enforced, democratic participation in the negotiations could take root. Coalitions across central city and inner suburbs could be built. Interest groups could be amassed

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301. Telephone interview by Peter J. Vodola with Kimberly Ricci, Town Planner, Town of Rocky Hill, *quoted in* Vodola, *supra* note 135, at 1282.

302. For example, they are less likely to engage in tactics such as zoning their multifamily housing in areas "totally surrounded by industrially zoned land, virtually isolated from residential uses, [with] no present access to other parts of the community, no water or sewer connections nearby, . . . in the path of a proposed high speed railroad line, and . . . subject to possible flooding," *Mt. Laurel II*, 456 A.2d at 462, or seizing by eminent domain land for which an affordable housing project has been proposed, *see* Tondro, *supra* note 125, at 159.

throughout a region.<sup>303</sup> What is important to note is that the concept of inter-municipality negotiation is not fundamentally at fault; what is to be blamed is the structure in which the negotiations have heretofore taken place. One may achieve the equivalent of Rusk's—or of Montgomery County's—metropolitan government without losing the local democratic benefits inherent in relatively autonomous municipalities.

### *C. Appeals Statutes Provide Effective Enforcement Mechanisms*

While California and Connecticut produced regimes that were acceptable to localities, the goals were poorly enforced. In developing a more effective framework, close attention should be paid to the particularly efficient Massachusetts model. Despite its shortcomings, the Massachusetts appeals statute demonstrates that where there is a determined developer and a municipality with less than its fair share of affordable housing, the developer will likely get affordable housing built.

The effectiveness of the Massachusetts model is traceable to two attributes: the ease with which local zoning ordinances may be challenged and the relative certainty attending the rules by which challenges are judged. The statute creates a fast-track system for affordable housing developers to get the required permits and traverse the appeals process, and makes it clear when an appeal will or will not be successful. These qualities are, in the main, shared by New Jersey's approach, where specific rules promulgated by COAH make it evident whether a municipality's ordinances are or are not compliant, and where the builder's remedy remains the ultimate stick to encourage compliance.

The lessons of this Part, taken as a whole, show that the appeals statute approach in conjunction with a centralized planning approach is more promising than either standing alone. State-centric planning, as in Oregon, is too disrespectful of local autonomy. Regional planning as in Connecticut's compact system and California is too unenforceable. Straight appeals statutes are too intrusive. Instead, low-cost, private administrative enforcement is vital, as in

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303. The idea here would be that an interest group that is a minority in every municipality could add its numbers throughout the region and have a voice in negotiations proportionate to their numbers in the region.

New Jersey and Massachusetts.<sup>304</sup> Local representation is needed, as in Connecticut and California. Legislative bodies with proportional representation, rather than technocratic state entities, should make policy decisions. Moreover, the adjudicative body must not be the state or some quasi-neutral body; otherwise the benefits of autonomy are lost. Instead, the forum in which complaints of the failure of a locality to adhere to agreed-upon housing goals may be heard must be the same forum where those same goals are agreed upon. This is the basic structure of this Note's proposal.

### III. THE REGIONAL HOUSING LEGISLATURE

#### A. Proposal

Following the lessons of Part II, this proposal combines the successful elements of the existing centralized planning and appeals statute regimes. At the same time, it adds an element of representative democracy mixed with respect for local autonomy. In broad terms, this Note proposes the creation of a Regional Housing Legislature (RHL) composed of representatives from each of the region's cities and towns, apportioned on a one-person, one-vote model. The RHL would set regional housing policy and would issue certifications of compliance for municipalities in the region. In that capacity, it would assume many, if not all, of the functions of COAH in New Jersey.<sup>305</sup> In order to avoid the problem of non-enforcement faced by California, the RHL would supplant the courts, acting as the tribunal to enforce its own mandates.<sup>306</sup> An appeals mechanism would be established as well; the RHL would assume the function of the Massachusetts Zoning Board of Appeals. As it would be inefficient to require the RHL to hear all cases arising under its mandates *en banc*, a lower tribunal would

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304. Indeed, New Jersey's and Massachusetts' approaches share the particularly effective, but intrusive, builder's remedy.

305. It may, however, be useful to have a non-political "expert" agency arrive at fair share numbers. See *infra* Part III.D.6.

306. Thus, the scheme quite self-consciously violates the separation of powers—as is typical for administrative agencies. More precisely, it embraces "separation of functions" in lieu of "separation of powers" by combining executive, legislative, and judicial powers in a single entity, but in a limited functional scope (i.e., limited to those functions relevant to the administration of affordable housing). See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577–78 (1984); see also Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998).

also be established. The combination of these elements will produce a democratically responsive body capable of arriving at a effective yet minimally obtrusive substantive housing policy.

1. *Composition and Election*—The RHL's representatives are elected on a town-by-town basis. Each town may elect a number of representatives determined by the town's population.<sup>307</sup> The members of the RHL may be elected from at-large districts, or under a winner-takes-all system, or may be nominated directly by the town council.<sup>308</sup> The vital features of the RHL are twofold. First, every city and town in the region must feel as if its voice can be heard on the RHL.<sup>309</sup> The legitimacy of the RHL depends upon its decisions being seen as consented to, in process if not in substance, by each of the towns.<sup>310</sup> Second, the body must be democratically representative. By granting the central city and inner-ring suburbs combined voting power that can override the exurbs, despite the greater number of exurbs in a given region, this prevalent form of minority rule may be eliminated.

This proposal draws from Professor Gerald Frug's proposal for a regional legislature. Professor Frug embraces a two-tier solution,<sup>311</sup> but rejects the notion that, in so doing, it is necessary to allocate certain functions to the local government and others to the regional government.<sup>312</sup> Instead, a regional legislature should be created to effect a "confluence of local and regional interests."<sup>313</sup> The legislature is not a voluntary organization, but instead derives its power from the state legislature.<sup>314</sup> Yet it is structured so as to minimize the affront to local autonomy. To accomplish this, Professor Frug's proposal adapts ideas from the European Union's governing structure. Most relevant to the present Note, Professor Frug recommends that important decisions in the regional legislature be passed by a "qualified majority."<sup>315</sup> Three criteria must be met in order for a qualified majority to be achieved: It must garner

307. Alternative ways to structure the RHL are explored *infra* Part III.D.1.

308. This choice is discussed more fully in Part III.D.2.

309. The identity of the town's representatives is thus of vital importance. See *infra* Part III.D.1.

310. That is, even if a town opposes a particular regulation each town should have a vested interest in the efficacy of the RHL. That town should support the regulation to preserve its own ability to influence housing policy for the region.

311. I.e., retaining local governments and adding a regional government as opposed to simply consolidating local governments into a single regional entity.

312. Frug, *supra* note 15, at 1788.

313. *Id.* at 1790.

314. *Id.* at 1792.

315. *Id.* at 1798–99.

a minimum number of votes; the votes must represent a minimum percentage of the regional population; and a minimum number of jurisdictions must support the measure.<sup>316</sup> While it is not clear that the third requirement would be constitutional in the context of a general government in the United States,<sup>317</sup> it may be feasible in the case of a limited-jurisdiction housing legislature. Professor Frug also suggests that the smallest town may be allocated one legislator, and other, larger towns be given a number of legislators proportional to their population as compared to the smallest town.<sup>318</sup> Alternatively, each city or town could have one representative, whose vote would be weighted according to his or her jurisdiction's population.<sup>319</sup>

In the RHL, as in Professor Frug's regional legislature, the representatives speak on behalf of their towns (or districts, *see infra* Part III.D.2.). Unlike the New Jersey model, the members comprising the RHL do not purport to act in the general interest of the region. It is hoped that the aggregate of their votes will *approximate* the general regional welfare—but it is not necessary that the RHL arrive at the “best” solution. It may be that only a disinterested state agency may discover the right answer from a utilitarian perspective. More important in the RHL is the inclusive process by which the answers are sought. Where neither city nor suburb are excluded from the decision-making process, any solution is more likely to be accepted, and legitimated, by the regional populace than a “good” solution imposed by a benevolent state agency.

The importance of proportional voting according to the one-person, one-vote standard cannot be overemphasized. First, the principle may be constitutionally required.<sup>320</sup> Second, there is little point in convening a regional housing legislature if the exurbs can simply outvote the central city. Yet, outside of California,<sup>321</sup> none of

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316. *Id.*

317. *Id.* at 1800.

318. *Id.* at 1801.

319. *Id.* at 1802.

320. Legislatures with general governmental powers must be apportioned according to one-person, one-vote. *See Reynolds v. Sims*, 377 U.S. 533, 575–76 (1964). However, given the RHL's limited scope of powers, the constitutional requirement may not be applicable to it. *See, e.g., Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973). *But see, e.g., Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 53–54 (1970). On the other hand, members of the RHL are envisioned to have broad authority to make compromises on issues that go beyond housing policy; this authority might make the RHL more like a general government. *See infra* Part III.D.1. At any rate, regardless of constitutional requirements, it is a crucial aspect of this proposal that the RHL be apportioned on a one-person, one-vote basis.

321. SCAG and SANDAG have proportional and weighted voting, respectively. *See infra* Part III.C.

the proposals studied thus far in this Note are founded on a one-person, one-vote system. Centralized planning systems such as New Jersey's operate on the assumption that housing policy is purely a technical issue, i.e., no one gets to vote. The Connecticut compact system permitted any town a veto, disadvantaging the central city when compared to a proportional voting scheme.<sup>322</sup>

The RHL's commitment to affordable housing without marginalizing the residents of the wealthier suburbs is guaranteed under this proposal by its proportional representation combined with its broadly-defined jurisdiction. To understand this point, it is useful to refer to the four types of municipalities identified by Myron Orfield: central cities, at-risk developed suburbs; developing communities; and affluent job centers.<sup>323</sup> According to Orfield, the central cities combined with the developed suburbs, the two types of municipalities most interested in affordable housing,<sup>324</sup> together constitute 44% of the population in the most populous metropolitan areas.<sup>325</sup> This is a sizeable voting bloc, but not quite a majority. Moreover, this coalition is not ironclad; there will be times, perhaps due to differences in political parties or ideologies, when inner suburbs may not agree with each other or with the inner city. These factors render it crucial to gather support from the developing suburbs—municipalities who are more interested in issues such as equity in school funding, infrastructure, and sprawl.<sup>326</sup> Potentially, job centers might join the coalition, if their interests alleviating congestion and preserving open space, or improving the economic health of the region, and thus strengthening the workforce, may be met.<sup>327</sup> An RHL which permits bargaining for these other goods in exchange for housing concessions empowers those municipalities most concerned with a shortage of affordable housing to achieve their housing goals.

Despite the political give-and-take, and the presence of other issues on the table, the focus of the RHL on housing issues, and the sizeable voting bloc of jurisdictions interested in improving the housing situation will inexorably require that all municipalities create their fair share of affordable housing. There will be some flexibility—a town may successfully argue, for instance, that it is not in their regional interest for it to accept its housing fair share,

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322. See *infra* Part III.D.3.

323. See ORFIELD, *supra* note 31, at 162–72.

324. See *id.* at 164–67.

325. *Id.* at 162.

326. See *id.* at 168–71.

327. See *id.* at 171–72.

perhaps because of a town's inaccessibility to jobs, or a particular natural resource that development would impair. But in this rare situation, the RHL would likely demand other concessions from the municipality, such as monetary contributions or transit improvements. Indeed, it is not only the central city and inner suburbs who will enforce the fair share requirement on the outer suburbs. Outer suburbs themselves, in self-interest, will enforce the requirement on other outer suburbs. This self-policing will take place because suburbs concerned with the maintenance of their property values will be interested in ensuring that their neighbors create at least as much affordable housing as they themselves are required to create.<sup>328</sup>

2. *Functions*—To concretize this proposal, this Note examines more specifically the duties and functions of the RHL. These may be divided into three categories: the RHL's preliminary responsibilities; its day-to-day legislative functions; and its adjudicative and enforcement activities.

*a. Preliminary: Setting methodology*—The RHL's first task would be to arrive at criteria by which affordable housing is to be distributed throughout the region. This is a fundamentally political task—indeed, it is *the* fundamental purpose of the RHL.<sup>329</sup> It is expected that some form of fair share arrangement will be arrived at,<sup>330</sup> but details will vary according to the localities' preferences. For instance, a central city with a large amount of affordable housing may agree to take on more than its fair share of housing in exchange, for instance, for promises by other towns to support funding for a reverse commuting public transportation program.<sup>331</sup> Alternatively, it is possible that the RHL will abandon a fair share model entirely and focus its resources on reinvesting in the central city.<sup>332</sup>

The importance of the determination of the methodology required to ascertain housing allotments in each municipality is underscored by the attention given this subject by many of the

328. See *infra* Part III.D.10.

329. Thus, unlike the arguably ministerial task of collecting data and arriving at specific fair share allocations per municipality, this task cannot be delegated to an administrative agency. See *infra* Part III.D.6. Arguably, this authority might be imputed to the RHL itself; thus, the RHL begins to look more like a general legislature and less like an agency.

330. Indeed, in creating the RHL, the state legislature should probably make absolute fair share apportionment the background rule. See *infra* Part III.D.3.

331. There is the danger here of repeating the mistake of New Jersey's regional contribution agreements. See *infra* Part III.D.4. Note also that the RHL representatives must be authorized to commit the town on more issues than simply land use planning. See *infra* Part III.D.1.

332. See *infra* Part III.D.4.

states studied in this Note. California's statute requires regional councils of governments to provide each city and county with the methodology used.<sup>333</sup> Florida's statute requires municipalities who do not use the state's fair share numbers to at least use its prescribed methodology in arriving at fair share amounts.<sup>334</sup> In New Jersey, COAH itself ascertains a level of regional housing need, and adopts "criteria" by which municipalities are to determine their own fair share of the regional need.<sup>335</sup> In each of these states, an administrative agency reserves to itself the policy task of determining the mechanism by which fair share determinations are to be made.

This allocation of responsibility is misguided. The important decision about the proper methodology to use must be made by a politically responsive legislative body, not by an insulated technocratic agency. Methodology is a political decision. For instance, one must decide whether the goal will be to meet the projected housing need four years down the line, or fifteen years. One must decide which population's needs are counted; for instance, is the projected need for luxury housing to be counted or not?<sup>336</sup> Unaccountable state agencies are ill-suited to make these policy decisions.

This is not to argue that the RHL will not also need an unbiased agency to conduct highly technical tasks.<sup>337</sup> But on the policy aspects of the methodology, the RHL must have the final word.

*b. Day-To-Day: Certification; Considering New Strategies; Adjusting Goals and Methodology; Reporting*—The RHL's legislative task is not complete when it arrives at a fair share methodology. It must meet regularly to perform a number of functions. Its most frequent task

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333. CAL. GOV'T CODE § 65584(a) (2003).

334. See FLA. STAT. ANN. § 163.3177(6)(f)(2) (West 2003).

335. See N.J. STAT. ANN. § 52:27D-307(c)(1) (West 2003). But if the municipality seeks to have its housing element certified by COAH, then the municipality's determination of its fair share is subject to review by COAH. See N.J. STAT. ANN. § 52:27D-314(a) (West 2003).

336. Even this decision has a mixed technical and policy component. The creation of luxury housing has a salutary effect on the availability of low-income housing, through the operation of "filtering." See, e.g., WALLACE F. SMITH, FILTERING AND NEIGHBORHOOD CHANGE 17-33 (1964). Obviously, the creation of low-income housing has a more direct effect, but this generally requires governmental subsidies. See Janet Stearns, *The Low-Income Housing Tax Credit: A Poor Solution to the Housing Crisis*, 6 YALE L. & POL'Y REV. 203, 206-07 (1988). The creation of moderate-income housing may not require subsidies and may still have a more direct positive effect on the availability of low-income housing. An expert agency could advise the RHL of these possibilities; but the final choice should be left to the legislature.

337. This requirement is explored more fully *infra* Part III.D.6.



will be the certification of municipal housing elements.<sup>338</sup> In New Jersey, the certification process is voluntary; if a municipality fails to have its comprehensive plan certified, a plaintiff asserting in court that a municipality engages in exclusionary zoning merely has a lower burden of proof.<sup>339</sup> This solution befits the RHL as well. Indeed, unlike in New Jersey, whether the RHL is called upon in advance to certify a municipality's comprehensive plan, or *ex post* to ascertain whether the municipality engages in exclusionary zoning, the same body will review the land use ordinances. Municipalities may choose to not have their ordinances scrutinized by the RHL,<sup>340</sup> but the lure of the builder's remedy will guarantee that, where it makes economic sense to build affordable housing, developers will bring suit; the municipality's housing policy will nonetheless be reviewed by the RHL.

Under this proposal, as in New Jersey, there is an opportunity for regional residents to challenge a municipality's certification. However, unlike in New Jersey, this proposal presents certification as a *legislative*, not quasi-judicial, task. Challengers' interests are represented, not by procedural process, but by democratic representation. They are relegated to lobbying and letter-writing; they are not guaranteed a hearing. The reason is that the certification process again represents an opportunity for negotiation in the RHL. Should the legislature desire to modify its pre-announced rules in order to accommodate special circumstances in a municipality (or to make a deal with a municipality), it can do so in the context of a certification decision.<sup>341</sup> If the RHL does change or

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338. There is no necessary requirement that municipalities enact comprehensive plans with housing elements. The RHL may review a locality's zoning ordinances, viewed as a whole, for compliance with RHL policy. Of course, the RHL's task is simplified if localities do enact comprehensive plans with housing elements; and the RHL may choose to impose such a requirement on localities.

339. See N.J. STAT. ANN. § 52:27D-317(a) (West 2003).

340. They may, for instance, feel strongly that home rule entitles them to control land use in the way they see fit. Or, they may feel no need to go through the process of certification if they are confident that their ordinance would pass muster.

341. Unlike under the federal Administrative Procedures Act (APA), which provides for two types of administrative lawmaking (rulemaking and adjudications, see 5 U.S.C. §§ 553, 554 (2000)), in the RHL there are three opportunities for lawmaking. First, most rules of general applicability will be set forth during regular legislative sessions. Second, the RHL provides for certification deliberations, which are analogous to licensing under the APA—forward-looking, like a rule, but dealing with facts applicable to an individual, like an adjudication. In the RHL, adjudicatory procedures could be used in the context of deciding whether or not to certify a municipality's housing element. But the RHL would retain full flexibility to engage in common law precedent-setting during certification proceedings—i.e., it is fully permissible for the RHL to arrive at new rules if a novel issue arises during certification proceedings. Cf. SEC v. Chenery Corp., 332 U.S. 194, 201–02 (1947) (approving the SEC's creation of a new rule in the context of an adjudication). However, during an appeal

waive the preexisting rules, however, it will be required to make the change explicit and public, so that it may serve as a precedent for the future. Because the RHL retains flexibility in the certification process, municipalities are further encouraged to undergo this process rather than risk a builder's remedy lawsuit later.<sup>342</sup>

Thus far, this proposal has relied on developers to actually create housing. In the absence of governmental subsidies, it is unlikely that developers will create low-income housing.<sup>343</sup> They may create moderate-income housing, which may or may not be beneficial to low-income individuals as the previous housing occupied by moderate-income individuals filters down into the low-income market.<sup>344</sup>

Moreover, merely adjusting land-use regulations may not provide sufficient market incentive for developers to produce sufficient low- or moderate-income housing to satisfy the needs of the region. This is exactly the situation faced by California.<sup>345</sup> It is therefore crucial that the RHL retain a wide range of flexibility. For instance, the RHL may be given jurisdiction over the state's public housing budget. In this case, the RHL could apportion the budget across the towns as appropriate, and require that public housing be built in some uniform manner across the state. Or, the RHL could require that localities adopt any of the panoply of inclusionary zoning ordinances,<sup>346</sup> as in Montgomery County, Maryland, so that, to the extent that any development occurs in the

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from a local zoning decision, particularly those involving a municipality whose housing element has been certified, the RHL will be much more limited in its ability to promulgate new rules. Formally, this might be accomplished through an application of *res judicata*, under the theory that, once the RHL has certified a municipality's housing element, it may not change its mind absent new evidence. Or it may simply be that *stare decisis* is given more weight during appeals (which are more "purely" adjudications) than it is during certification proceedings (which are forward-looking, and therefore have some of the qualities of rule-making, see 5 U.S.C. § 551(4) (2000) (including having "future effect" as one characteristic of a "rule")).

342. From a policy perspective, the certification process is better than the appeals process. Challenging a municipality's land use ordinance through an appeal to the RHL will incur significant transaction costs. This will change the calculus for developers (making it less likely that it will be worthwhile to build the project), and will often make it impossible for low-income individuals to mount a successful challenge. Moreover, certification leads to a greater amount of certainty than *ex post* challenges.

343. See, e.g., Stearns, *supra* note 336, at 206–07.

344. The creation of more moderate-income housing will decrease the cost of such housing, presumably allowing low-income individuals to move into some of the older housing. See SMITH, *supra* note 336, at 17–33. But see CHARLES L. LEVEN ET AL., NEIGHBORHOOD CHANGE: LESSONS IN THE DYNAMICS OF URBAN DECAY 37–47 (1976).

345. See LEWIS, *supra* note 254, at 68–69.

346. For example, permissive or compulsory set-asides.

cities and towns, affordable housing is also built. The RHL may simply require municipalities to create housing, after a realistic assessment of their ability to do so. Alternatively, the RHL could abandon supply-side production entirely, and simply tax its members, using the resulting revenue to issue vouchers to low-income individuals.

If the RHL undertakes to require affirmative steps of its municipalities, its flexibility—and that of the localities—is greatly enhanced. Affirmative steps may be defined broadly, and may include: conversion of market-rate housing to affordable rates; subsidies to poor families to enable them to afford market-rate housing; and traditional inclusionary zoning actions. Indeed, if affirmative steps were required, localities' zoning ordinances become irrelevant. The RHL might choose to entirely eliminate certification of zoning ordinances in favor of simply certifying a municipality based on whether or not it created the requisite amount of housing.<sup>347</sup>

Certifications will likely expire every few years; municipalities wishing to retain their certification will be required to present a new showing before the RHL. Because populations shift and housing needs change, fair share numbers will need to be constantly reevaluated and reformulated, and housing elements will need to be revised based on the new numbers. Moreover, in cases where the RHL requires affirmative steps on the part of the municipalities, the recertification process will involve a review of whether the municipalities have adhered to their obligations.

In addition to its certification task, the RHL would be responsible for constantly monitoring the success of its programs. On a regular basis, the RHL (or an administrative agency under the RHL's direction) would reassess housing need and progress toward housing goals. This assessment would have both an enforcement purpose<sup>348</sup> and a legislative purpose. The RHL would be required to revise its methodology or specific municipal goals where necessary, such as when it becomes obvious that a town's goal is too burdensome as compared to the benefits to regional residents.<sup>349</sup> In such a circumstance, the RHL might decrease the town's goal in

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347. See discussion of San Diego *infra* Part III.C.

348. See *infra* Part III.A.2.c.

349. Any unit of housing built will theoretically provide more housing to the region. But if the community in question is particularly remote, with no public transportation access and few jobs, then building significant amounts of affordable housing in such a community seems relatively pointless. In some circumstances, this may become obvious only after some period of time passes, for instance, if affordable housing is built but the only families who move in are from the local area.

exchange for an increased commitment to public transportation within the town, or possibly in exchange for monetary contributions.<sup>350</sup>

Finally, the RHL would be required to report regularly on the regional affordable housing situation. This requirement ensures that the RHL remains responsive to its constituents. RHL elections should not be like elections for the county register of probate, where the voter either votes on party lines, randomly, or not at all. Affordable housing is an issue that galvanizes many segments of the population, but popular participation cannot be ensured if the populace is not kept informed. In addition to (and perhaps spurred by) the regular reporting of the RHL, individual representatives should keep their constituents updated on their activities. A high degree of community education and involvement is particularly important given that the RHL's main constituency is the poor, a group that traditionally exhibits low degrees of voter turnout. The RHL's representatives must make an extra effort to educate their underprivileged constituents to ensure their participation in RHL politics, thereby preventing the RHL from losing sight of those it is charged to help.

In the wealthier suburbs, constant communication about the activities of the RHL is vital to dissipate distrust of the legislature. If constituents are kept informed that neighboring communities are satisfying their affordable housing requirements, the constituents will be less likely to resist when it comes time for housing to be built in their neighborhoods.

*c. Enforcement: The RHL as Tribunal*—As noted earlier, the RHL will also act as a tribunal to review allegations that a given municipality is engaging in exclusionary zoning or otherwise failing to abide by requirements of the RHL. Under this proposal (as in New Jersey), either developers or private individuals may challenge a zoning ordinance, though the mechanism differs for each.

Any resident of the region has standing to present a facial challenge to a municipality's zoning ordinances. In such an *ex post* challenge, unlike during certification proceedings, the individual has rights appurtenant to Anglo-American judicial proceedings, e.g., the right to present evidence and call witnesses. Moreover, the RHL is to be bound by its promulgated regulations; it may not change the rules in the middle of the game. An individual challenging the land use policy of a municipality whose comprehensive

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350. See *infra* Part III.D.4.

plan has been certified will face an increased burden of proof. The plaintiff may show that the comprehensive plan as certified is not actually in effect, perhaps due to lack of enforcement or large numbers of granted zoning variances that swallow the rule. A plaintiff may also attempt to show that a previous decision to certify a comprehensive plan was "clearly erroneous," in that the comprehensive plan does not comport with regulations promulgated by the RHL, and there was no explicit waiver by the RHL.<sup>351</sup> Finally, a plaintiff might argue that a given zoning ordinance does not comport with the certified comprehensive plan.

An individual plaintiff challenging a zoning ordinance or comprehensive plan of a municipality that has not sought certification would have an easier task. In such a situation, the RHL need merely ascertain whether the ordinance in question, or alternatively the locality's ordinance taken as a whole, "substantially impairs" compliance with the municipality's fair share allotment of affordable housing.

In either case, an individual plaintiff begins by presenting his or her argument to the local zoning board, taking advantage of whatever local procedures are available to do so. If no favorable response is forthcoming from the board, the plaintiff institutes an action in an Appeals Tribunal, which is a subset of the full RHL.<sup>352</sup> Failure to present an argument to the town first, however, where an opportunity was available, and where it would not have been futile to do so, would result in waiver of the argument.

The path a developer must take to challenge a zoning ordinance, either on its face or as applied to a given proposed development, tracks the Massachusetts appeals statute. First, the developer presents a comprehensive permit application to a local zoning board. The local zoning board may allow the development, disallow the development, or allow it with conditions. If it is disallowed or allowed with conditions, the developer will have the right to appeal the decision to the Appeals Tribunal. From here, the situation is much the same as in the individual suit, with the burden of proof varying depending on whether or not the municipality has been certified.

A public entity, akin to a special state prosecutor, may also bring an enforcement action. This procedure need only apply where the

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351. This will be quite difficult, since the same body established the certification in the first place. The test should probably not be phrased as "arbitrary and capricious," as under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (1996); the RHL would never call its own acts arbitrary and capricious.

352. See *infra* Part III.D.5.

RHL has issued an affirmative mandate for municipalities to create housing.<sup>353</sup> An administrative enforcement might have authority to fine a noncompliant municipality, and, with the funds collected, create the required amount of housing on its own. The adjudication would take place before the RHL, beginning at the appellate level. Thus, the municipality will be judged effectively by a jury of its peers, and the resolution should be legitimated as a result of this practice.

### B. Benefits

1. *Effectiveness*—The effectiveness of this proposal depends on a few factors: first, the accuracy of the RHL's assessment of regional need; second, the extent to which suburban representatives, and in particular panel members, internalize the need to build affordable housing in the suburbs; third, the degree to which local boards internalize the need to build the housing; and fourth the degree to which a central-city/inner-suburb coalition within the RHL is able to enforce the background goal of sufficient and diffuse affordable housing.

With respect to the determination of regional need for affordable housing, it is important that the RHL arrive at a methodology, and fair share numbers, that are generally accepted as reasonable. A heuristic, such as Massachusetts' exemption for towns at least 10% of whose housing stock is affordable, is unlikely to be acceptable because it is too imprecise, and will undoubtedly be unfair in specific instances. The best solution is to employ the services of a disinterested expert agency in an advisory capacity, as discussed *infra*, Part III.D.6.

With respect to the second requirement for effectiveness, it is expected that, under this proposal, suburban representatives will fully internalize the need to create affordable housing in the suburbs. In other words, suburbs will be "decentered"<sup>354</sup> to some extent, viewing their interests as intertwined with those of the region. First, from a purely practical perspective, suburbs will come

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353. Theoretically, a municipality could be "prosecuted" for failing to provide for sufficient affordable housing in its comprehensive plan. However, this would be a waste of resources, since the only remedy would be a conforming comprehensive plan. The builder's remedy in this situation serves the same function, by effectively invalidating the municipality's plan where a developer shows interest in creating affordable housing.

354. See Frug, *supra* note 62.

to understand that their failure to engage in good-faith negotiations regarding the facilitation of the creation of low-income housing will result in a decrease in their bargaining power in the RHL, the end result being their ultimate disempowerment. Moreover, from a self-interested perspective, suburban representatives will want to ensure that *other* suburbs need to bear an equal burden.<sup>355</sup> Second, the simple fact that the representatives meet on a regular basis and discuss affordable housing concerns is likely to raise awareness in the representatives. The proportional representation, and the resulting shift in the balance of power, is also likely to affect the representatives' thinking.

Local zoning boards will likewise internalize a regional consciousness as a result. As a practical matter, the zoning boards will act according to the dictates of the RHL because they will be reversed if they do not. More to the point, however, where towns feel they are a part of the affordable housing planning process, they are more likely to accept the requirements that they themselves helped devise. This is discussed more fully in the next sub-section.

Finally, the central-city/inner-suburb coalition<sup>356</sup> is essential to the success of this plan. That does not mean that the central city and inner suburbs must always be on the same side. Indeed, they ought not to be.<sup>357</sup> But generally speaking, the drive to create an adequate amount of affordable housing throughout the region will come from the central city and inner suburbs.

Thus, this proposal cures Connecticut's unambitious goal-setting by ensuring a meaningful voice for the central city and inner suburbs through proportional representation. It cures California's substandard enforcement by substituting an appeals statute regime for enforcement. The promise for improvement over New Jersey's experience lies in this proposal's emphasis on local autonomy by getting communities involved in the decision-making process.

2. *Democratic Legitimacy*—Two questions come into play when considering the extent to which this proposal adequately addresses democratic concerns. First, does the proposal advance local de-

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355. To the extent that fear of falling property values is a driving concern for resisting affordable housing, suburbs will be interested in ensuring that the burden is equally spread. If there is affordable housing everywhere, then property values will not be affected. *See infra* Part III.D.10.

356. *See* ORFIELD, *supra* note 323, at 162–72.

357. Otherwise this solution is no different from a straightforward regional legislature in which the minority outer suburbs have no voice. It is expected that the inner suburbs will have some interests in common with the outer suburbs, and some in common with the central city. The central city will likewise have some interests in common with the outer suburbs. *Cf.* THE FEDERALIST No. 10 (James Madison) (arguing that, in a large enough republic, majority factions will not form because there will be too wide a variety of interests).

mocracy by empowering local governments? Second, does the proposal empower the residents of the region as a whole?

The proposal is designed so that the answer to both questions is yes. Local governments are empowered by giving them a seat at the bargaining table at which affordable housing decisions are made.<sup>358</sup> It is true the “balance of autonomies” is shifted. Under current local government law, the central city has little autonomy, since externalities imposed upon it by the actions of the suburbs are beyond its control.<sup>359</sup> Outer suburbs have a larger degree of autonomy. Here, the degree of autonomy is allocated according to population: a larger town has a greater say in its own future, and by extension, the future of the region. However, residents of outer suburbs are by no means disenfranchised. They continue to have the right to provide for planning within their jurisdiction, provided that the plans comport with requirements of the RHL. They retain the right to form coalitions within the RHL to modify its rules. Power is shifted, but only to the extent that it is allocated in a more democratic manner.

Moreover, unlike most of the approaches reviewed in this Note, those citizens most directly affected by the affordable housing will have a democratically elected voice with which to air their concerns. Housing policies enacted by the RHL will have a degree of moral force absent from court pronouncements or administrative agency regulations. In enacting pro-affordable housing policies, the RHL can legitimately claim to be acting pursuant to a democratic mandate. This difference is key in reducing the extent to which exurbs will be able to invoke democratic values in positing reasons for resisting affordable housing mandates.<sup>360</sup>

### *C. California Revisited*

At this point, a more in-depth analysis of the regime in place in southern California is warranted. The foregoing proposal is in many ways quite analogous to the solution employed in California

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358. This statement assumes that the representatives to the RHL represent governments, not just their constituents. This is further explored *infra* Part III.D.1.

359. See David Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 401 (2001).

360. Outer suburbs may still argue that affordable housing is the city's problem, not theirs. Even this argument is rendered somewhat hollow by the regional nature of the RHL. It is, after all, *not* the city's problem, but the region's problem, of which the outer suburbs are a part.



for the past three decades. Unfortunately, the California approach has been widely criticized.<sup>361</sup> Indeed, a recent study found that municipalities whose housing elements were found to be compliant produced the same amount of housing as non-compliant municipalities.<sup>362</sup> Nonetheless, the California regime has many promising features, not the least of which is the potential for regional bodies with voting powers weighted in a democratic manner. This proposal has attempted to overcome the shortcomings of the southern California approach while retaining its uniquely democratic aspect.

Two of California's councils of governments have voting authority allocated according to population: the Southern California Association of Governments (SCAG) and the San Diego Association of Governments (SANDAG).<sup>363</sup> SCAG's governing body consists of a 70-member board; one member is elected for every 200,000 residents.<sup>364</sup> Thus, all fifteen members of the Los Angeles city council are members of SCAG, while smaller towns are required to elect a single representative to represent all of them.<sup>365</sup> Representatives are chosen by, and sit on, the city councils. SCAG, and the other councils of governments in California, establish a methodology for determining housing need, determine regional need (subject to state approval) and allocate fair share housing numbers to their constituent municipalities. There is a process by which municipalities' housing elements are certified, granting them a presumption of validity in subsequent litigation.<sup>366</sup>

This Note's proposal addresses the shortcomings inherent in the California scheme. First, as has been widely noted, enforcement in California is a major issue.<sup>367</sup> The primary enforcement "stick" in California is the threat of a builder's remedy, which would be heard in the state court system.<sup>368</sup> By contrast, the RHL (or its subsidiary appellate bodies) hears all matters concerning its own regulations. The RHL may be expected to be much less deferential to local legislatures than a court would be.<sup>369</sup> Moreover, the present

361. See, e.g., Field, *supra* note 31.

362. See LEWIS, *supra* note 254, at 68–69.

363. Telephone Interview with Rusty Selix, Executive Director, California Association of Councils of Government (April 10, 2003).

364. *Id.* Indeed, SCAG began with many fewer representatives; as the population of Southern California grew, the size of the board grew as well. *Id.*

365. *Id.*

366. See *supra* Part II.B.1.

367. See, e.g., Field, *supra* note 31, at 46–68.

368. See *supra* Part II.B.1.

369. This may be particularly true in California, where the councils of governments are merely voluntary organizations among municipalities, with no general legislative authority. See LEWIS, *supra* note 254, at 26. The cities and towns themselves have city councils entrusted with legislative powers. Cf. *Berenson*, 341 N.E.2d at 243 ("Zoning . . . is essentially a legislative

proposal provides for two mechanisms of enforcement beyond the builder's remedy. An individual citizen may sue to have certification revoked.<sup>370</sup> Alternatively, an administrative agency may bring an enforcement action against a municipality for failure to conform to affirmative requirements imposed by the RHL. Thus, the threat of meaningful sanctions is present independent of developer participation.

Second, under this proposal, the state has no role in determining a region's fair share or in certifying municipalities. A consistently contentious issue in California is how to allocate fair share housing when most municipalities feel that the total pie (mandated by the state) is too high.<sup>371</sup> If the RHL arrives at a measure of regional need on its own, it will be hard for noncompliant municipalities to justify their failure to comply by arguing to their fellow representative that the overall housing needs assessment is too high. Similarly, in California, a state agency determines whether municipalities have complied with the requirements of their Council of Governments. Under this Note's proposal, the RHL arrives at all certification decisions, as it is uniquely situated to interpret its own regulations and apply them to municipalities. Moreover, it is less of an affront to a municipality's local autonomy to have its certification denied by a body in which it has a voice, rather than by a state agency.

Third, the RHL, unlike the California COGs, is a mandatory organization. In California, the COGs have little leverage over members, who join of their own free will.<sup>372</sup> The RHL will be a

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art" and it entitled to deference). Courts are likely to view exercise of legislative power on the part of the localities more generously action by the councils of governments, which have no legislative authority.

370. In truth, this remedy still relies on the builder's remedy in the end. The citizen's remedy is merely to have certification revoked; even if successful, a developer would still need to attempt to build housing before there were any practical significance.

371. See LEWIS, *supra* note 254, at 26 ("The zero-sum quality of RHNA allocations puts COGs, which are constituted as cooperative organizations of local governments, in a difficult position. They are left to carry out a state mandate while still feeling pressure from their local government members who feel that their housing allocations are excessive.").

372. See *id.* ("[State] officials have said that the COG is the level at which intraregional disputes should be worked out, but given their weak political basis, most COGs have not been able to take a strong, autonomous approach. 'Without independent authority, regional agencies have little wherewithal to overcome fundamental conflicts between local and statewide interests. . . .' Or, as a senior planner for the Association of Bay Area Governments put it, 'from ABAG's perspective, the process has been a serious political liability for a voluntary membership organization. . . .' (internal citations omitted)); see also Frug, *supra* note 15, at 1792 ("To be effective, a regional legislature would have to have the power to ensure that its decisions, once made, will be followed by the region's cities and special purpose governments.").

creature of state law, and membership will be mandatory. The RHL will have the power to impose sanctions on non-cooperating municipalities.

Finally, the flexibility of the RHL, contrasted with the narrow functions granted to California's councils of governments, should help to ameliorate some of the stark power differentials inherent in the California scheme. In California, a sizeable number of municipalities are likely to be perennial losers. California COGs do not provide an opportunity to bargain for non-housing goods; thus, exurbs may have affordable housing imposed on them with no countervailing benefit for them.<sup>373</sup> By contrast, the RHL provides a forum to bargain for other goods in exchange for housing. For instance, exurbs may be able to work out a regional contribution agreement with more central cities. Alternatively, a town may be convinced to create more affordable housing in exchange for the central city's support for improved transit to that town.<sup>374</sup> The RHL's authoritative jurisdiction is housing, but it should also provide the forum for other inter-municipal agreements, where those agreements are made to further the RHL's general housing policy.<sup>375</sup>

An examination of the council of government approach in California is not complete without examining a relatively recent pilot program in San Diego.<sup>376</sup> Any municipality that is part of SANDAG may choose to self-certify its housing element if it meets the following criteria: it must provide for the housing needs of individuals of

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373. Telephone Interview with Rusty Selix, *supra* note 363. Bargaining in the opposite direction, i.e., where the central city agrees to allow some of its affordable housing to count toward suburbs' quotas, is the idea of regional contribution agreements. The California statute does provide for a limited form of such agreements, permitting the transfer of housing allocations from a county to a city, presumably in exchange for compensation. *See* CAL. GOV'T CODE § 65584(c)(5) (West 1997 & Supp. 2003) (providing for a reduction in a county's share of regional housing need if one or more cities in the county increase their shares to make up for the reduction).

374. For instance, the central city may sit on the governing board of the regional transportation agency. It may threaten to withhold its vote for improved service to a particular municipality unless that municipality agrees to create its fair share of affordable housing. To the extent that the city has few opportunities for leverage over its suburbs, state law might be modified to allow the central city more of a say about other regional issues, for instance, by increasing its representation on various special-purpose metropolitan area commissions.

375. *Cf.* ORFIELD, *supra* note 31, at 162-72 (arguing that all suburbs benefit from regionalism, but that different types of suburbs have different interests). The RHL must be flexible enough to provide some of the benefits of regionalism to suburbs who are not interested in affordable housing. Nonetheless, the RHL is not a regional government. Its limited focus allows it, for example, to violate separation of powers without creating excessive worries of tyranny. Moreover, its narrow charter permits it to focus more clearly on the pressing housing issues, getting sidetracked into other issues only when necessary to gain political support for housing initiatives.

376. *See* CAL. GOV'T CODE § 65585.1 (West 1997 & Supp. 2003).

all income levels; it must have been in compliance with its fair share goals as of the due date for the third revision of its housing element;<sup>377</sup> and subsequently, it must have affirmatively created as much low-income housing as possible, as determined by SANDAG.<sup>378</sup> SANDAG, in conjunction with the municipalities and an outside consultant, determines the maximum number of low-income units each jurisdiction can create given the realistic constraints on its resources.<sup>379</sup> Thus, San Diego has adopted a results-oriented approach; municipalities may self-certify if they have created (not just provided the possibility for creation) a certain number of units, determined by SANDAG, for low-income (not moderate-income) individuals. Self-certification is subject to challenge in court (presumably in the context of a builder's remedy suit); but the certification enjoys a rebuttable presumption of validity.<sup>380</sup>

The San Diego proposal responds to two common criticisms of California's affordable housing situation. First, as detailed by a recent report, simply providing for the creation of affordable housing through zoning is often insufficient to actually cause the housing to be created.<sup>381</sup> Second, municipalities would clearly prefer to self-certify than to submit their housing elements for approval by the state.

The RHL might adopt similarly affirmative results-based criteria. However, the RHL's approach would be much more flexible. San Diego's proposal required special state legislation, and the parameters of its pilot program are not easily expanded without returning to the state for permission. By contrast, an RHL would have a degree of autonomy that cannot be achieved by voluntary councils of governments created by inter-municipal compact. The RHL, as a legislature, would have the authority to adopt San Diego's proposal without returning to the state legislature for additional authority.

Furthermore, although the RHL would have the power to provide for self-certification, it seems unlikely that the RHL would exercise that power. Certification by the RHL is already one step closer to home than state certification, the default in California. It seems unlikely that the RHL would be willing to allow its municipalities to simply certify compliance with RHL rules. Moreover,

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377. California municipalities are required to periodically revise their housing elements. CAL. GOV'T CODE § 65588(b) (West 1997 & Supp. 2003).

378. CAL. GOV'T CODE § 65585.1(c) (West 1997 & Supp. 2003).

379. CAL. GOV'T CODE § 65585.1(a) (West 1997 & Supp. 2003).

380. CAL. GOV'T CODE § 65585.1(d)(2) (West 1997 & Supp. 2003).

381. See LEWIS, *supra* note 254, at 68-69.

policing by municipalities of each other is particularly important in the RHL context, since it is in each municipality's best interest to ensure that everyone else is creating his or her fair share of housing. Such monitoring is greatly facilitated when the RHL is provided the opportunity to examine its municipalities' housing elements in the context of certification proceedings—an opportunity lost if towns are allowed to self-certify.

#### *D. Issues and Concerns*

Up to here, this Note presented a unitary vision of how a regional legislature devoted to the creation of affordable housing might operate. This section explores further choices that must be made, and setting forth potential consequences arising out of those choices.

1. *Choosing Town Representatives*—The nature of the RHL in many ways depends on the identity of the representatives. For instance, during the Connecticut compact negotiations, some Connecticut towns sent their mayors, and others sent a town resident without authority to bind the town.<sup>382</sup> In Connecticut, mediators attempted to ameliorate the situation by requiring that representatives be addressed by first name with no title.<sup>383</sup> Clearly, this is a sub-optimal solution.

In determining who the town representatives should be, three competing factors come into play. First, the representatives should come with some authority to speak on behalf of the town. Second, they should have approximately equal weight within the town. Third, they should be representative of the town's populace, not only its government.

That the representatives must be able to speak on behalf of the town is self-evident. Less clear, however, is on what issues the representatives must have authority to speak. As described earlier, the RHL must be viewed as a forum in which issues other than housing are to be negotiated. A representative must be able to speak with some degree of authority about what promises her town will be able to make. Second, unless the authority of the representative is pre-designated, some towns will have greater bargaining ability than others, depending on the position of the town's representative within town government. Worse, under proper circumstances

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382. See Susskind & Podziba, *supra* note 271, at 20–21.

383. See *id.* at 13.

a given town could disrupt the negotiations within the RHL by sending a representative with little authority.

One option is to provide for directly-elected representatives. It is important that the representative have a direct relationship with his constituents; direct election of the representative by the town residents will maximize the degree to which the popular voice is heard. The election might carry with it a seat on the town council. Where representatives represent districts within a large town or central city,<sup>384</sup> the position should include membership on the city council for each district's representative.

A second, perhaps more practical, alternative might involve designating an existing official, such as the town planner, to serve on the RHL. By choosing this option, the RHL could be instantly established, without the need for prior elections. Assuming the designated official is popularly elected by town residents, the subsequent election might become a referendum on the official's performance on the RHL. This solution might require a single representative per town, with weighted voting, as described in the next section. Alternatively, direction might be taken from SCAG, which is composed of city councilors who are elected by the town and city councils themselves.<sup>385</sup> Since the city councilor who is ultimately chosen to be RHL representative is directly elected, the direct responsibility of the representative to her constituents is not compromised with this approach.

The size of the RHL presents additional considerations. For instance, consider a metropolitan region in which the smallest town has a population of 2,000 and the total population for the region is 3 million. If each town must have at least one representative, then there must be one representative per 2,000 residents, or 1,500 representatives.<sup>386</sup> A legislature composed of 1,500 representatives may be inefficient. If necessary, the size of the RHL might be limited by providing for fractional votes. Small, neighboring suburbs would agree to send a single representative; the town sending the representative would rotate every year. The representative would be entitled to cast fractional votes on behalf of each of the towns he represents. On most matters, the towns should be grouped so that

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384. See *infra* Part III.D.2.

385. Telephone Interview with Rusty Selix, *supra* note 363.

386. Indeed, it may be worse than these numbers suggest. Suppose the next largest town has 2,500 individuals. In order to adhere to principles of one-person, one-vote, there must now be one representative for every 500 residents; the smallest town would have four representatives and the next would have five. The total number of representatives for a metropolitan area with a population of 3 million is now 6,000.

their interests will coincide, and fractional voting will not be necessary. But a difference in opinion between the towns on any particular issue should be represented in the legislature.

2. *At-Large Districts vs. Winner-Takes-All vs. Appointment by Town Council*—Each municipality in the RHL should have voting power proportionate to its population. There are at least four ways to accomplish this.<sup>387</sup> First, larger municipalities may be divided into districts, with elections in each district on a winner-takes-all basis. Second, each locality may send one representative, with more populous cities' votes weighing more than smaller towns. Third, these possibilities may be combined by providing that each municipality elect a number of representatives proportionate to its population, without these representatives being elected from a given district.

In the abstract, the first approach is best suited for this proposal. It is important that the beneficiaries of the affordable housing have a direct voice on the RHL. In particular, it is important to divide the central city into districts in order to assure that the interests of the poor are directly represented. Since the urban poor do not vote in large numbers,<sup>388</sup> citywide at-large elections will primarily generate representatives of the middle classes. Single-member districts resolve this problem by ensuring that, even if voter turnout is low in the poor districts, at least these representatives owe their election to that constituency alone. Moreover, campaigns to organize and raise awareness among the urban poor are more likely to succeed where their votes directly matter.

There are two potential drawbacks. First, the central city's bargaining power may be diminished if it is factionalized. Second, district-wide voting is practically more difficult to establish. A system in which one representative is designated from each town and according voting power proportional to the town's population could be established quickly. The adequacy of this solution would depend on to what degree the central city delegates adequately represent the interests of the urban poor.<sup>389</sup>

3. *Background Rules, and Cost of Exit*—This Note's proposal is premised upon a carefully balanced negotiation among towns, wherein it is anticipated that coalitions will form among central

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387. See Frug, *supra* note 15, at 1801–05.

388. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE*, 162–63 (1988).

389. However, another benefit of the districting approach is that it is less susceptible to being "bought out" by regional contribution agreements, wherein the money is not spent in the inner city. See *infra* Part III.D.4.

city and inner suburbs, and among further suburbs. By providing for voting weighted by population, not only is democratic legitimacy preserved, but the central city is given a greater degree of bargaining power than it would have if each municipality were given only one vote. Still, its greater bargaining power would be useless unless the state establishes default rules, attaching a high cost to RHL inaction. One background rule might require each municipality to set aside an equal percentage of its developable land for affordable housing. A background rule may then be modified by negotiation in the RHL. The RHL may either modify the rule in specific cases, or it may amend the rule wholesale.

The equal-percentage rule exemplified above would provide strong incentives to negotiate. However, it may not be realistic to expect a state legislature to promulgate such a rule. One alternative might be to institute a program closely patterned on Massachusetts' chapter 40B appeals statute, the provisions of which are suspended for any municipality whose comprehensive plan is certified by the RHL. Since Massachusetts' 40B statute is universally despised among suburban municipalities, this would serve as an impetus for all municipalities to jumpstart the RHL.

The importance of setting a background rule is exemplified by the Connecticut compact experience. It will be recalled that, early on in the negotiation, Hartford suggested that, if other municipalities took care of their own local affordable housing shortfall, Hartford would take care of its own.<sup>390</sup> The suburbs were therefore relieved of the responsibility of addressing "Hartford's problem."<sup>391</sup> This seems like an enormous concession, one which undermines any potential dispersive effect of suburban affordable housing. Moreover, the fact that affordable housing was largely seen as "Hartford's problem" casts serious doubt on whether the representatives truly saw affordable housing as a regional issue. The Connecticut negotiations not only lacked democratic representation but, more importantly, they also lacked a definitive background rule that would get everyone motivated about reaching a lasting solution. Affordable housing was Hartford's problem because state law did not make it the suburbs' problem. Had the state said, "agree or be subject to a strict fair share standard," Hartford would not have needed to concede as much as it did.

4. *Regional Contribution Agreements*—Flexibility in the RHL is desirable to allow for meaningful negotiation. Representatives will

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390. SUSSKIND & PODZIBA, *supra* note 271, at 7.

391. *Id.*



have stronger bargaining power if they can offer deals tangentially related to housing.<sup>392</sup> But with flexibility comes the specter of New Jersey's regional contribution agreements (RCAs). What is to prevent a central city, mired in financial difficulty, from selling its "right" to require suburbs to build their fair share of affordable housing? Yet if it does so, one of the goals of this proposal, that of dispersing concentrated poverty, is eliminated. Instead, suburbs pay for the right to continue to exclude.

Some would argue that the RHL should be able to do exactly that. For instance, the RHL may decide that it is impractical to pursue a dispersal strategy, and that reinvestment in the central city is a better way to provide for the poor inner-city residents. In this case, the RHL may elect to allow payments from the suburbs in lieu of the actual creation of housing.

However, there is an enormous potential for abuse. The differential between the bargaining power of the city and the suburb is typically enormous. In New Jersey, cash-strapped inner cities often must accept RCA money, although they would much prefer to see housing built in the suburbs.<sup>393</sup> Indeed, the central cities may be tempted to settle for much less money than it would cost the suburbs to build the housing, simply because the incremental benefit to the cities of having suburbs build housing that may or may not relieve the city's own housing problems is dwarfed by the certain benefit of cash in hand.

This problem may be addressed in an RHL that employs districted representatives from the central city instead of at-large representatives. Suburbs would reach regional contribution agreements, not with the central city, but with the representatives from the transferee district. Thus, if suburb X wishes to transfer affordable housing to district Y of the central city, suburb X will reach an agreement with district Y, not with the central city. Payment becomes somewhat more tricky: it is unlikely that district Y has an independent treasury. However, the district need not accept payment personally. It may instead provide that payment be made to a local community housing organization committed to improving housing and community services in the district. Thus, the fact that the urban poor are directly represented in the RHL proves

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392. At least a tangential relationship should be required, however. It would be inappropriate for substantive town policies to be made, having nothing to do with housing, through negotiations conducted in the RHL. Otherwise the RHL becomes a general legislature, the merits of which are beyond the scope of this Note.

393. See McDougall, *RCA*, *supra* note 50, at 686-89.

advantageous in mitigating one of the more pernicious practical aspects of regional contribution agreements.

5. *Structuring the Appellate Level as a Microcosm of the RHL*—Given its likely size and numerous other responsibilities, the RHL could not possibly hear all appeals from all decisions of all local zoning boards. It would be advantageous to have an intermediate appellate tribunal, with the full RHL hearing appeals from that tribunal only on a discretionary basis. Constructing this tribunal is complicated, however, since the RHL is composed not of disinterested judges but rather of partisan advocates.

One possibility would be to constitute an appellate tribunal of impartial administrative law judges, who would review decisions of the local zoning boards on the basis of RHL regulations and decisions. The benefit of this approach is its evident simplicity. The downside is that, even in its judicial function, the RHL is intended to be a political body. While it may not fundamentally change the law when acting as a tribunal, it may interpret the law to the same extent a court would. This act of common-law interpretation is informed by the interests of represented communities. This interest-based decision-making is lost, at least at the appellate level, where the judges are not RHL representatives.

The second, more difficult approach is to attempt to constitute an appellate level that is a microcosm of the full RHL. One possible approach follows: When creating the RHL, the state legislature may divide the towns into subregions. Ideally, the subregions would be relatively economically homogenous—so that exurbs are generally grouped together, and inner ring suburbs are grouped together. It is permissible for a town to be part of more than one subregion; this could happen if a town's socioeconomic makeup fell between two different groups. Moreover, districts within a locality need not be placed within the same subregions, and subregions need not even be contiguous. The important point is that they exhibit some commonality as to their residents' preferences regarding affordable housing.

To amplify the point a bit further, one mechanical way to create the subregions would be as follows: Each district, 20% or more of whose housing stock is affordable, is to be grouped in one subregion. Those districts in which affordable housing represents more than 10% and less than 20% of the overall housing stock may be grouped in a separate subregion—and so on. This model presumes that towns with similar amounts of affordable housing have similar

preferences with respect to the extent to which affordable housing should be distributed through the region.

The appellate tribunal, then, could be constituted by choosing a random representative from each subregion to be part of the appellate panel. The only exception would be that a district's representative would not be permitted to hear an appeal arising out of his or her own district.<sup>394</sup> If five subregions are created, then the appellate panel would consist of five representatives, and would constitute an approximate microcosm of the full RHL.

*6. Arriving at Neutral Fair Share Numbers Without Sacrificing Political Accountability*—One important strength of COAH in New Jersey is its ability to reliably conduct studies and arrive at technically accurate numbers for the regional need for affordable housing. While, as noted earlier,<sup>395</sup> the determination of the methodology for ascertaining regional and local housing need is a political question, and should be conducted by the RHL itself, the technical, ministerial task of conducting the required surveys and arriving at hard numbers can, and probably should, be delegated to a neutral, expert administrative agency. This approach will free the RHL from being required to hold fact-finding hearings regarding the state of the housing market in the region. At the same time, it will reserve to the RHL the ability to make substantive policy choices. Finally, the RHL will not be bound to accept the administrative agency's numbers; and even if it accepts them in principle, it is free to allocate housing goals in a manner inconsistent with what would be suggested by the agency's numbers.

The administrative agency may also be of assistance to the RHL in arriving at a methodology. The fundamental policy questions are still political, but there are numerous complex variables that may enter into the decision of how much affordable housing a given region or municipality "needs." Thus, the RHL would likely call upon the administrative agency to conduct a preliminary study and present a proposed methodology for ascertaining regional and local affordable housing need. The RHL would have the right to question the authors of the report, and could adjust the methodology as it sees fit, or substitute its own. It would then ask the agency to determine actual housing need, using the RHL's methodology.

Another important question that will arise relates to the definition of affordability. This is clearly a policy issue that goes to the

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394. A district representative might, however, hear an appeal arising out of another district in the same municipality.

395. See *supra* Part III.A.2.a.

heart of the RHL's mandate. Too expansive a definition would lead to an unwarranted expansion in the RHL's power and a decrease in the amount of "truly" affordable housing created in the region. Too narrow a definition would lead to the marginalization of the RHL and, again, a decrease in the number of affordable units built, as it becomes unprofitable for developers to create such low-priced units.

The RHL should not be entitled to provide its own definition of affordability. The definition must come from the state to ensure statewide consistency and to prevent the RHL from defining away the term and thereby becoming a general land-use policy board.<sup>396</sup> However, there is no reason the state legislature may not provide a range or alternatives, such as: "An affordable unit shall be a unit for which a family earning *up to 80%* of the *regional or local* median income would spend no more than *up to 33%* of its annual income on rent (or mortgage payments, assuming a 30-year mortgage)." The RHL would then be entitled to choose a number in each of the italicized ranges, and would be entitled to decide whether the median income is to be measured on a regional or a local scale. This solution provides an acceptable amount of discretion on the part of the RHL to provide for the truly needy individuals in the region without allowing it to expand its jurisdiction without limit.

*7. Adversary Proceedings*—An important goal of this proposal is to have localities work together to reach a commonly acceptable solution to a regional problem, rather than having a solution imposed upon them from an outside source. An appeals statute's reliance on adversary proceedings seems to be at odds with this goal.

In order to further this goal of dispute resolution in a non-adversarial setting, the RHL might mandate mediation following any local denial of a permit to build affordable housing. This program might be patterned on the mediation provided by COAH prior to the institution of formal adjudicatory proceedings in New Jersey. The goal of the mediation would be to find a mechanism by which the development could go forward, with conditions that would satisfy the municipality but not render the development economically infeasible.

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396. There is nothing theoretically wrong with this; indeed, in Oregon, the LCDC is charged with regulating all housing decisions, not only decisions relating to affordable housing. But if the intent is to provide a narrow focus on ameliorating the affordable housing situation, it makes sense to require the RHL to stay focused by providing a definition of affordability.

It is important that the resulting agreement conform with the regional policies set forth by the RHL. For instance, an acceptable outcome would not be for the municipality to pay the developer whatever it might have earned in rent from the next five years, in exchange for the developer not proceeding with the construction. In order to prevent this contingency, a disinterested member of the RHL might be made a party to the mediation proceedings; all parties' consent must be obtained in order for the mediation to be deemed successful. Moreover, municipalities may be subject to strict liability if they do not create sufficient affordable housing; this would eliminate many opportunities for the sort of bribery described above.

8. *Racial Integration*—How to effect desegregation is a persistently difficult question, and clearly the proposal embodied in this Note cannot suffice to reverse the centuries of discrimination that have resulted in a highly segregated urban landscape. Race-conscious mechanisms are probably required, as few programs aimed solely at economic desegregation have achieved any measure of success at racial integration.<sup>397</sup>

That said, the structure of the RHL would represent a move in the right direction with respect to both economic and racial desegregation. If one of the causes of racial segregation is a lack of information available to inner city residents about housing and jobs in the suburbs, the RHL representatives, who are anticipated to be active members of their local communities, will fill important roles in bringing home the news of new opportunities. They may inform their constituents about a suburb that has agreed to proactively construct low-income housing. Or, they may report that, following mediation, a particular community has come to support a moderate-income project. In this way, the representative's would supplement any minority marketing programs the RHL might institute.

Moreover, as noted earlier, the very fact that community support is actively sought out in the production of low-income housing will be important in encouraging racial minorities to move into the sites. Evidence that the new community will be welcoming is crucial to desegregation. This evidence will more likely be forthcoming when the new community is included in the decision-making process.

9. *Administrative vs. Legislative Nature*—Up to this point, the description of the proposal has avoided a central structural question:

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397. See Roisman, *supra* note 2, at 95.

whether the RHL is an agency or a legislative body. It has many of the attributes of an agency—particularly its limited subject matter jurisdiction and its violation of separation of powers.<sup>398</sup> At the same time, it is a representative body with some authority to negotiate about matters not within its scope of concentration, so long as the matters are related to (or will have an effect on) housing. These attributes make the RHL look more like a regional legislature. When determining the level of deference and scope of review given by a court to RHL actions, the RHL's status might need to be clarified.

On the one hand, the RHL is a body with authority clearly circumscribed by its “organic statute”—like an agency. Thus, courts are needed to ascertain whether the RHL has exceeded the bounds of its authorization. Under this view, a court may defer to the RHL in the interpretation of its organic statute, and it may presume that RHL action is legitimate, while reserving to the court ultimate authority to interpret the RHL's organic statute. Additionally, if there is a state analog to the federal Administrative Procedures Act,<sup>399</sup> a court might be required to determine whether an RHL rule is “arbitrary and capricious.”<sup>400</sup> Of course, this should not represent an insurmountable burden, but it is still a higher burden than that imposed on legislatures.

On the other hand, the RHL may be analogized to a county or municipal government. Local governments, under modern statements of the law, are “creatures of the state,” and derive all of their authority from the state.<sup>401</sup> Indeed, local governments can only act where there is a specific state law authorizing them to act.<sup>402</sup> Under this view, the task courts undertake in reviewing RHL actions for consistency with its organic statute is no different in kind than the task they undertake in ascertaining whether state statutes conform with the state or federal constitution, or whether local governments have acted beyond the scope of their authority, or in contravention of a state statute. This is a highly deferential standard.<sup>403</sup>

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398. See *supra* note 306 and accompanying text.

399. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

400. 5 U.S.C. § 706(2)(A) (2000).

401. See, e.g., *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

402. See, e.g., 1 JOHN DILLON, MUNICIPAL CORPORATIONS § 237(89) (1911), reprinted in GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW 140-41 (3d ed. 2001).

403. See *supra* Part I.A.

On balance, the RHL bears more resemblance to a local legislature than to an agency. This is primarily due to its representative character. Courts defer to legislatures because they are democratic bodies, whereas courts, and agencies, are not. Courts may feel entitled to override agencies on appropriate matters, where the courts feel equally qualified. However, a court is rarely equally qualified as a representative body, since the body is presumed to speak with the legitimacy of the people.

Given this analysis, there should be no general right to appeal RHL-created *rules* to a court of general jurisdiction, just as one cannot appeal an amendment to the city code.<sup>404</sup> By contrast, RHL *judicial* decisions should be appealable to the state's highest court. The RHL is more severely constrained by its own precedents and prior enactments when it functions as an adjudicatory body; its decisions are therefore much more amenable to review by a neutral body. Moreover, in such a situation, constitutional due process issues may arise; the state supreme court and the United States Supreme Court must be given an opportunity to ensure that litigants are given a fair hearing before being deprived of substantive rights.<sup>405</sup>

10. *Middle-Class Flight*—Suburban residents often cite fear of falling property values as a primary reason for opposing the construction of affordable housing within their jurisdiction. An appeals statute regime exacerbates this fear; if a developer chooses to build a large affordable housing project in a particular town, the town's perception will be that the residents will all move to a neighboring town with less affordable housing. Moreover, a town in Massachusetts' affordable housing regime is confronted with a prisoner's dilemma with respect to whether it should try to meet the 10% requirement. If it does meet the requirement, it will be exempt from the statute, but it may fear that all its upper-middle class residents will have fled due to the high amount of affordable housing. If it does not meet the requirement, then it will be subject to the uncertainty of the builder's remedy. But, if all towns in Massachusetts somehow simultaneously created 10% affordable

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404. Certainly, would-be litigants are free to seek an injunction against those who would enforce RHL enactments to the same extent as they would seek to enjoin any other state or local action. For instance, one might sue on *ultra vires* grounds, claiming that the RHL acted beyond the scope of its authority under its enabling statute.

405. An interesting dilemma may arise relating to compulsory claims and counterclaims. If a developer has other related state-law claims against a municipality (or its zoning board), or, somehow, the zoning board has counterclaims against a municipality, the RHL is *not* the appropriate forum to litigate these disputes. The claims must be separately litigated in a state's regular courts.

housing, then all would be better off. There would be no middle-class flight because there would be nowhere in the metropolitan area to flee to. Thus, a prisoner's dilemma is presented: A town will create affordable housing, up to the 10% level, only if it can be assured that all other towns are doing the same.

A centralized planning regime is better in that the state can ensure widespread compliance. However, the disempowerment of the locality in such an approach means that each suburb must depend on the state to ensure that it and its neighbors are subject to exactly the same affordable housing requirements. Otherwise, even minute differences will result in middle class flight.

Under this Note's approach, suburbs police each other. The prisoner's dilemma is resolved, not by centralized intervention, but by the possibility of a binding, enforceable agreement among the suburbs. Given a proper background rule, the result will be a regulatory "race to the middle." Once the substantive standard is set, outer suburbs will be interested in protecting their property values by monitoring their neighbors to ensure that they create their appropriate share of affordable housing.

#### CONCLUSION

This Note has presented a structural approach to solving a very difficult problem. The vast literature devoted to proposals to encourage the creation of affordable housing, and critiques of those proposals, is a testament to the pressing nature of the problem to be solved. The various experiments described in Parts I and II provide evidence that there is at least some political will to solve it. Yet the scope of the attempts is woefully inadequate. Most of the statutes described in Part I were adopted over three decades ago. Very little real-world experimentation has happened since.<sup>406</sup>

In part, this failure of imagination has been a result of the political inertia that must be overcome in order to pass a major program through a state legislature. In a field as uncertain as the creation of affordable housing, where no one has discovered a sub-

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406. San Diego's pilot program and Connecticut's compact program are two exceptions.



stantive solution that is both politically palatable and actually works,<sup>407</sup> the inertia is fatal.

If regional housing legislatures, on this or another model, were established in metropolitan areas across the country, this Note asserts that we would see a great increase in the amount of experimentation in housing policy. Such bodies would be less subject to inertia for two reasons. First, since the housing legislature concentrates only on housing issues, it cannot be sidetracked by other legislative agendas. Second, even if a given housing legislature failed to pass a given proposal, the discussion might be sufficient to serve as an inspiration to another housing legislature. A proliferation of such bodies would lead to an explosion of practical ideas, cross-fertilization of those ideas, and a greater amount of experimentation overall.

There will always be debate as to whether our system of local government law should provide for the needs of the poor at the expense of the middle class, or vice versa. Luckily, the choice is not so stark. Working together, with bargaining power allocated according to population, but with no town's interests unheeded, municipalities should be able to address the regional need for affordable housing. This goal can be accomplished so that no one is, on the whole, worse off, if municipalities are given a forum within which they may negotiate, each from a position of strength. In this way, a regional housing legislature could effect meaningful change for the most disadvantaged members of society.

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407. Montgomery County's solution may fall into the latter category; but, given that it would entail the elimination of local governments, it would not be a serious option in most metropolitan areas.