

**REVISING MASSACHUSETTS' CHAPTER 40A:
GUIDING THE DEVELOPMENT OF THE
COMMONWEALTH UNDER THE PRINCIPLES OF
SMART GROWTH**

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ENVIRONMENTAL ADVOCACY
SOLO PROJECT: 23 APRIL 2003

With the sharp downturn in the economy and the Commonwealth's finances strained, Governor Romney's new administration is energetically looking for issues that can be resolved at little or no public expense. Because a revision of the Commonwealth's zoning laws will not cost any tax dollars, the fiscally strapped governor recently decided to focus a great amount of attention on the issue. Yet more importantly, amending the laws is an opportunity for the governor to put his muscle behind legislation that will guarantee a cleaner and more efficient Commonwealth. No longer should the Commonwealth's zoning laws tacitly endorse development that causes health problems for Bay Staters, decay within the urban areas, and the wasteful mismanagement of Massachusetts' natural resources and cities.

Other states, from New Jersey to Oregon, are taking a hard look at their zoning laws. This new focus is driven by the belief that the older statutes are to blame for one of nation's largest problems—sprawl. Some states, like Michigan, are reviewing their laws because of the daunting fiscal crisis. See Neal R. Peirce, *Smart Growth Still a Movement with Legs*, *The Seattle Times* B4 (Mar. 3, 2003) (reporting that Michigan is looking to find ways to save money by curbing expenses on new streets, sewer and water systems, and schools while developing brownfields). Many states originally based their zoning enabling statutes on The Standard State Zoning Enabling Act ("SZA") of 1926. See Amanda Siek, *Smart Cities: A Detailed Look at Land Use Planning Techniques that are Aimed at Promoting Both Energy and Environmental Conservation*, 7 *Alb. L. Envtl. Outlook* 45 (2002). See also Mark Bobrowski, *Handbook of Massachusetts Land Use and Planning Law* § 2.3 (1993). While other states amended or replaced these statutes with more progressive ones based on changing circumstances, the American Planning Association recently cited Massachusetts "as one of the 28 states with the most outdated state land-use laws." *Massachusetts Land Use Reform Act: Summaries of Amendment* at http://www.masszoningreform.org/massachusetts_land_use_reform_ac.htm (last

visited Mar. 10, 2003) [hereinafter Proposed Chapter 40A]. The Commonwealth's Zoning Act, Mass. Gen. L. ch. 40A ("Chapter 40A"), reflects the SZEAs intent to minimize crowding and congestion while spurring development. *Id.* at 48.

Zoning is a prong of the Commonwealth's police power. *See Bobrowski* at § 1.4. The Supreme Court first upheld a municipal government's ability to regulate zoning in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). It stated that zoning did not violate the Constitution if it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. Thus, a government's zoning laws reflect its concerns about the effect of development on its citizens, including how land should best be allotted, used, and preserved in the name of health, safety, and morality. The Court also held that zoning laws must have a "tangible benefit to the community." For example, the courts endorsed laws that sought to separate industrial plants and adult stores from residential neighborhoods and schools or to protect wildlife refuges and farmland. *See Bobrowski* at § 2.3 (citing *Sturges v. Town of Chilmark*, 380 Mass. 246, 256 (1980)).

What is the key flaw in the Commonwealth's zoning law?

Chapter 40A, however, aids developers who produce sprawl.¹ The law lacks any general purpose and has been severely limited by court interpretation because of the lack of direction by the Massachusetts Legislature (the "Legislature"). If there is an implicit purpose, it is one that reflects a rationale bent more towards development than conservation by assisting contractors in building sprawl-like projects and other ill-advised development. Moreover, Chapter 40A is full of loopholes that homebuilders associations are determined to protect. *See Anthony Flint, Romney Urged to Overhaul Zoning Law*, *The Boston Globe* B1 (Jan. 5, 2003) (noting that representatives of the Homebuilders Association of Massachusetts "are prepared to fight any

changes to the ‘protections’ in Chapter 40A.”). One of the most frustrating aspects of Chapter 40A for civic leaders is a loophole under Section 6 known as the “grandfather clause.” *See* Mass. Gen. Laws Ann. ch. 40A, § 6 (West 2002). This clause permits developers to lock in projects under current zoning ordinances and bylaws. Thus, civic leaders hesitate to change any zoning ordinances or bylaws for fear of creating a rush of filings that will only thwart their attempts to revamp town’s zoning plans. This clause inhibits not only change, but also progress.

Another problem with Chapter 40A is the absence of any section requiring a master plan. Subsequently, “there has never been a Massachusetts requirement that zoning be in accordance with a comprehensive or master plan.” Bobrowski at §12.13. Developers may then haphazardly build with no consideration for the municipality’s plan because of the court’s reluctance to enforce the plan without the requisite legislative intent. Granted, these are only two of the many problems pointed out by revision advocates. Nevertheless, they exemplify Chapter 40A’s failure to lend guidance and protection to local government’s operating under its guise.

What revisions, therefore, should the Governor support?

The Governor should ask the Legislature to pass amendments that reflect smart growth initiatives and planning. Smart growth is “development that serves the economy, community and environment. It supports economic development and jobs; it creates strong neighborhoods; and achieves healthy communities by providing a clean environment.” *Brownfields and Smart Growth: An MCLE Environmental Roundtable* 4 (MCLE, Inc. 2002) (submitted by Carl F. Dierker and Rona H. Gregory, U.S. Environmental Protection Agency (EPA)). Because of the current language of Chapter 40A, “[s]mart growth begins where 1920’s planning fails to limit urban sprawl and rural degradation.” James E. Holloway and Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the*

¹ Professor Bobrowski notes that “the [Massachusetts] Legislature has seen fit to promote the interests of the

Takings and Other Provisions, 9 Dick. J. Env. L. Pol. 421, 449 (2001).² Legislative amendments drafted using by smart growth principles could address many of the problems attacking not only the Greater Boston area, but also the rural areas of Massachusetts that are presently threatened by unabated expansion. See David C. Soule, *Managing Sprawl: New Directions for the Boston Region*, New England Environmental and Land Use Conference 2002, 645 (MCLE, Inc. 2002) (providing a slide presentation graphing the increases in population, housing costs, nonresidential commuters, drive-alone drivers and also decreases in open space).

Essentially, a smart growth approach to development provides instruction, guidance, and tools to civic leaders when coordinating the different land uses of a municipality—but this guidance is no longer limited to just development; it also endorses the need to build sustainable communities.³ See Joshua Wolfe, *The ABC's of Sustainable Communities: A Work in Progress* available at <http://www.asu.edu/caed/proceedings99/WOLFE/WOLFE.HTM> (last visited Mar. 10, 2003) (noting that pre-World War II development was either rural or in compacted communities; yet most “daily needs were accessible on foot or via transit.”). Under this form of legislation, the Commonwealth’s selectmen and zoning board members would have more control over the planning for their respective towns because the statutory powers would no longer be working against them. Thus, this legislation embraces Home Rule under Article 89 of the Declaration of Rights. Therefore, smart growth legislation would not only endorse Home Rule, but also be a check on civic leaders who act contrary to the Commonwealth’s guidelines.

development community by preserving various rights.” See Bobrowski at § 2.1.

² The professors noted that in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), the “Court recognized that changes in public circumstances justify new legitimate state interests that support exercises of police power authority to make new policies and legislation.” James E. Holloway and Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 Dick. J. Env. L. Pol. 421, 450 (2001)

³ Like the need for cars that lasted longer than three years and got greater gas mileage, towns should be designed to not only be greener, but able to accommodate its population and population growth.

Other states, notably Oregon, Washington, and Maryland, have instituted smart growth legislation and policies in response to rapid population growth within their borders. The purpose of Smart Growth legislation is to combat sprawl by creating laws that favor planned growth over unplanned growth. Professor Robert Freilich, a professor, lawyer, and expert on land use, found that smart growth “enhances a sense of community; protects investment in existing neighborhoods; provides a greater certainty in the development process; protects environmental quality; rewards developers with profitable products, financing and flexibility; decreases congestion by providing alternative modes of transportation; and makes efficient use of public money.” Robert H. Freilich, *From Sprawl to Smart Growth: Successful Legal, Planning, and Environmental Systems* 32 (American Bar Association 1999) (numbering omitted).

Because of the need to address these concerns and in an effort to accommodate the rise in population and protect agricultural lands, these states enacted guidelines for local planning. In Washington, for example, its legislature created a list of goals “exclusively for the purpose of guiding the development of comprehensive plans and development regulations.” Wash. Rev. Code § 36.70A.020 (2003).⁴ The legislature also required counties that exceeded a certain population or growth rate to automatically develop a countywide planning policy.⁵ See Wash. Rev. Code § 36.70A.040(2) (2003). The state legislature recognized the need to institute

⁴ Some of these planning goals include:

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
- (3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.
- (4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

Wash. Rev. Code § 36.70A.020 (2003).

planning policies for regional areas when population's densities reached certain ceilings. If a county remained under this ceiling, it did not have to comply with this section of the code, but could still opt in to the plan. Furthermore, the legislature vested the governor with the ability to appeal a county's plan as a check by the state to ensure plans were consistent with the regional smart growth considerations. *See* Wash. Rev. Code § 36.70A.210(6) (2003).

The Massachusetts Legislature will also want to avoid many of the pitfalls that other states encountered while experimenting with smart growth legislation. For one, amendments to Chapter 40A should avoid creating limits on construction for the sake of doing so. They are only temporary fixes to a greater problem. In the rural areas surrounding Washington, D.C. area, for example, laws restrict construction of houses to one per 10 acres or 25 acres. These limits effectively "accelerated the consumption of woods and fields and pushed developers outward in their search for homes and sites." Peter Whoriskey, *Density Limits Only Add to Sprawl; Large Lots Eat Up Area Countryside*, *The Washington Post* A1 (Mar. 9, 2003). Oregon experienced some of the same effects under similar laws, but was better able to deal with it because of regional planning and control, unlike the patchwork of governments that exist around the District. *Id.*

Why should Massachusetts chose smart growth legislation?

The Legislature should amend Chapter 40A to reflect smart growth policies for several important reasons. First, the Commonwealth already invested millions of dollars into its rapid transit and commuter rail systems, thereby creating the infrastructure necessary for smart growth. Second, the natural resources, forestlands, and agricultural fields are being swallowed up by unmitigated development. Third, the cities of the Commonwealth contain a wealth of property capable of redevelopment consistent with smart growth principles. Finally, but probably most

⁵ Distinguishing between the counties by population would be advantageous to Massachusetts because of the

importantly, the health and safety of many Bay Staters will be improved by reclaiming urban land, greater reliance on clean public transportation, and planning neighborhoods that permit residents to travel by walking.

The Commonwealth's investment in its subway, bus, and commuter rail system may become more significant if Chapter 40A endorsed greater development in the "zones" surrounding its stations and routes. In Maryland, for example, one community created "transit station-residential" zones. *See* Siek, Alb. L. Envtl. Outlook at 54-55. Development within these zones "is directed at stimulating multifamily housing for all economic levels within walking distance of transit stations and consumer services." Also, this law encourages and permits for other basic needs, like grocery stores, churches, and other personal services. *Id.* Promoting planning around "T stops" would naturally lead to positive cluster development. Governor Romney hinted of a similar plan for the Greater Boston area. Instead of concentrating on costly expansions to the commuter rail system, the Governor began courting the idea of concentrating on completing and developing transit systems in the more urban areas of Boston. *See* Anthony Flint, *Commuter Rail Expansion May Yield to Urban Transit*, Boston Globe A1 (Apr. 14, 2003). The Governor suggested that the expansion of the Greenbush line may be halted in favor of "urban transit projects, such as the completion of the Silver Line from Roxbury to Logan Airport ..., the extension of the Blue Line to Lynn, the Green Line to Medford, and the Urban Ring, a rail-and-bus service circumventing Boston."

The Urban Ring Project, for example, would cost \$2.8 billion, but the article noted that the Commonwealth such a project "would help people get around six communities including Boston and link the region's radiating subway and rail lines, [and] would also stimulate development along its route, on currently vacant parcels in Roxbury, Somerville, Everett, and

differences between eastern counties and western counties.

Chelsea.” *Id.* This project would effect hundreds of thousands of commuters whereas the Greenbush and Fall River projects would cost approximately \$100,000 per *new* rider. *Id.* The Urban Ring project and expansion of current urban transit lines would be much more consistent with smart growth principles than the commuter rail projects.

Massachusetts includes some of the most beautiful landscapes in the nation. From its rocky coastline, outer islands, and bays in the east to the Berkshires in the west, the Commonwealth’s laws should be committed to conserving them for future generations. While Chapter 40A, § 8C establishes conservation commissions, the zoning law should better define its role in protecting the Commonwealth’s lakes, forests, beaches, and other natural resources.⁶ Such preciseness of purpose would aid courts to determine the enforcement of master plans enacted by municipalities.

As Massachusetts is part of the infamous “rustbelt,” its cities are home to old factories, empty buildings, and vacant lots. This property, as the residents near the Zakim Bridge and Assembly Square can attest, is perfect for redevelopment. Redevelopment in these areas would be advantageous to city planners because they not only come with the necessary infrastructure (water, sewer, streets, etc.), but also the sites and surrounding areas would benefit environmentally from the inevitable clean up.⁷ Christine Todd Whitman, Administrator of the

⁶ For example, Wash. Rev. Code § 36.70A.020 (2003) states:

- (8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.
- (9) Open spaces and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreational facilities.
- (10) Environment. Protect the environment and enhance the state’s high quality of life, including air and water quality, and the availability of water.

⁷ President George W. Bush noted that

One of the best ways to arrest urban sprawl is to develop brownfields and make them productive pieces of land, where people can find work and employment. By one estimate, every one acre of redeveloped brownfields, we save 4.5 acres of open space.

EPA, noted that the development of brownfields, where infrastructure exists, “eliminate[s] the need to do so in valuable open spaces.” *Brownfields and Smart Growth* at 10.

Lastly, the health and safety of the Commonwealth’s citizens must be factored into the Legislature’s decision to revise Chapter 40A. Many of the pollution-creators of today did not exist or were less prevalent when the Legislature enacted the current laws. Today, there are more roads, millions of more cars on those roads, and greater populations. As Professors Holloway and Guy noted above, the states are capable of addressing changes in circumstances by revising these laws. Holloway and Guy, 9 Dick. J. Env. L. Pol. at 450. With the growing incidents of asthma among children, especially children in urban areas, and obesity among all citizens, localities must be given the tools to plan.

The Zoning Reform Working Group (“ZRWG”) drafted amendments to Chapter 40A they felt were necessary to give the Commonwealth’s cities and towns the appropriate tool to properly develop zoning ordinances and bylaws. *See Proposed Chapter 40A*. First, ZRWG revised Chapter 40A to include a purpose so that the courts can more easily interpret the intent of the Legislature. While it recognizes the exercise of home rule powers under Article 89, it also acknowledges the Commonwealth’s need “to ensure consistency in zoning and promote regional and statewide interests.” It then continues by outlining some specific purposes, including: (1) a plan adopted by the municipality; (2) providing diversity in housing choices; (3) maintaining orderly and sustainable growth; and (4) protecting public investment in transportation and other infrastructure. *Id.* Moreover, the Proposed Chapter 40A limits the grandfather clause in an effort to empower a municipality with a greater ability to amend its zoning ordinances and bylaws. *Id.* But even ZWRG’s plans do not go far enough. The time to create the blueprints for tomorrow’s world demands greater emphasis on smart growth.

Conclusion: Government must seize this opportunity to ensure a better environment for tomorrow

Historically, property has been a coveted commodity for Americans. The right to own it and do as one pleases on it has caused revolution and death. Though early zoning laws reflected the power of the state to regulate health, safety, and morality, it also embraced the mantra of development and growth—keep heading west; keep building higher.

Now, however, we have reached the Pacific and our tallest buildings touch the sky.

Governor Romney, with the help of Douglas Foy, must realize not only the special opportunity he has to change legislation, but also the lasting effects such changes could bring to the Commonwealth. Additionally, Governor Romney his unique position, as a successful businessperson, to quell the fears of the homebuilder community that stand in the way of this progressive and desperately needed legislation. To ignore such an opportunity would deny future generations the ability to live healthy lives and enjoy the beautiful natural wonders of the Commonwealth.

Finally, this issue was not born out the slow economy and the subsequent fiscal crisis the Commonwealth is currently experiencing. This sort of thinking and leadership should be the goal of any administration; the fiscal circumstances of today act only as another prong in justifying a commonsense law for the a better future.