SUBSIDIZED HOUSING IN THE SUBURBS: LEGISLATION OR LITIGATION?

by

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This thesis uses the state of Massachusetts and the Boston metropolitan area in particular to investigate the role of exclusionary zoning within the context of the current dimensions of the housing crisis for families of low and moderate income. The need for housing assistance in the state is given a numerical and geographical perspective. Need is categorized by families and elderly individuals and is differentiated according to metropolitan-rural and central city-suburban areas. Past and present efforts at meeting the need will be documented from the aspects again of quantity and location. The case will be made that in order to bridge the increasing gap between housing demand and supply in the subsidized market, new units must be built in the suburban rings of the state's metropolitan areas. This determination is based on two factors--where the residential land base exists and where the jobs, specifically the blue collar jobs, are moving.

In light of the need to build subsidized housing in the suburbs at an unprecedented rate, the constraining role of suburban zoning in terms of reducing available residential land and driving up its cost will be examined. There are numerous ways of increasing housing production in the state, but freeing up the land is necessarily first. Three arenas for confronting this problem will be discussed--the local government, the state legislature and the courts.

Two case studies of Boston suburbs involving local initiative will be presented: the town of Lexington and the city of Newton. Lexington was the first community in the state to create a subsidized housing zone, yet all subsequent efforts to "map" that zone have failed. Newton was confronted with a local non-profit organization, the Newton Community Development Foundation, which proposed a scattered site plan to be implemented in 10 neighborhoods simultaneously. The proposal was narrowly defeated and consequently NCDF has begun an appeals procedure under the Massachusetts Suburban Zoning
law, Chapter 774. It could be the first real "test" case since the bill was passed in 1969.

The negative results of these two case studies will be analyzed and a survey of recent actions of other towns in the Boston region will be presented. The results of all the zoning articles which came before suburban town meetings in 1971 combine to give local initiative in approving subsidized housing a failing mark. The suburbs have been and continue to be isolationists in the face of overwhelming regional housing need. In short, the decision-making process must be shifted to a different level, but political realities constrain major restructuring. What ought to be and what can be should be differentiated.

Recent developments in the courts offer some hope for involvement, although the Supreme Court has not heard a zoning case in over 40 years. In matters of zoning they defer to the expertise and wisdom of the legislatures. Nevertheless, a certain pattern is emerging involving the expanded use of the equal protection clause of the 14th Amendment. If the courts will hold that exclusionary zoning regulations which de facto discriminate against the poor are "suspect" and involve a "fundamental interest," thereby invoking the strict standards of review under the 14th Amendment, there appears to be a decent chance that they will be declared unconstitutional. The problem is getting these zoning regulations classified as "suspect" and the line of argumentation which develops this case will be explored.

The real battleground for zoning issues, however, is the state legislature; the state gave zoning powers to the cities and towns in the first place. The question is, can they take them back (or at least some of them...)? Massachusetts was the first state in the nation to pass a suburban zoning bill in 1969. It established an appeals process by which either the local board of appeals or a state Housing Appeals Committee could override local zoning and other codes for the purpose of building low or moderate income housing. The weaknesses in that bill, the activity since its passage, and recent amendments relating to it will be analyzed. Recommendations for possible future state action will conclude the thesis.

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INTRODUCTION

There are two basic approaches to the problem of social change and both are mutually dependent; one is short range and deals with institutions, structure and behaviour; the other is long range and operates on the level of motivations. In general, institutional changes will not necessarily alter the motivational foundations upon which such structures are built, nor will strategies of change on the deeper realm of motivations and attitudes succeed if the new emerging incentive structures which would reflect these changes are impinged upon or overpowered by the existing, firmly-entrenched institutions. In short, short and long range approaches to change must complement and reinforce one another.

In discussing the problem of building low and moderate income housing in the suburbs, the scope of this paper will be limited to the short range approach; the solutions investigated will deal with pragmatic political possibilities on the institutional level. But even if the courts and legislatures may change the rules of the game of excluding the poor and the nonwhite from the suburbs, they cannot alter people's belief, attitude and
motivation regarding the game itself. In other words, local zoning powers may be overruled in certain instances, or the two-thirds vote required for rezoning may be reduced to one-half, but the underlying issue of racial and class discrimination cannot be legislatively or judicially struck down. Nevertheless, the segregation patterns which reinforce these discriminatory motives can and must be changed. If structures are altered, behaviour must be affected, and if behavioural habits are shifted, perhaps the deeper motivations which they manifest might be touched.

However, there is no conclusive evidence that the forced integration in the South which resulted from the civil rights battles of the 1960's has altered fundamentally the attitudes of whites toward blacks, even where behavioural patterns were substantially changed (although it is probably too early to make such judgments). At any rate, there is a legitimate question whether these long range objectives of changing basic motivations can or will be attained at all. Racial and class discrimination has not been confined to any particular social group, geographic location, cultural heritage or historic time. The problem resides at the deepest level of human existence; whether it is called "class consciousness" or "original sin" it has been a relatively perpetual phenomenon.
Some writers point to an emerging "new culture" which shows hopeful signs of breaking with the racial fear and class consciousness of the present time in America (and the world). Whatever these signs are, there has been little substantial evidence to demonstrate how enduring or pervasive this apparent "classless" attitude is or will be. Nevertheless, racial and class discrimination, which manifest themselves in suburban housing patterns (as well as in a myriad of other places and events) must be directly addressed in the schools and in the churches and synagogues; at the same time, on the level of politics and law, certain strategies must be developed and implemented to overcome the institutional and structural segregation which has helped create a housing shortage for almost one-third of the state and the nation.

The civil rights battle of the 1970's is in the suburbs of the northern metropolitan areas; local zoning should replace school desegregation as the focal point of attack. But the civil rights fight of the 60's had numerous Supreme Court decisions and the Civil Rights Act of 1964 to support it; similar impetus and backing from the present administration or the Supreme Court for the new civil rights movement does not appear very likely, particularly in light of the President's statements that
he does not want "forced integration" of the suburbs and in view of the recent Court decision allowing California voters to exclude low income housing from their cities and town through local referendums (*James v. Valtierra*). Moreover, the issues surrounding zoning in the 70's are far more subtle and complex, and the political stakes much higher, than the issues which surrounded desegregation in the South during the 60's. These issues remain to be discussed in this paper, at least in the context of Massachusetts.

The first chapter will examine the housing shortage for low and moderate income households as it exists in the state. The interaction of supply and demand in the directly-subsidized housing market will provide the framework for discussion. Both supply and demand will be presented from the aspects of quantity and location. As the central focus of the paper is on the suburbs, the disparity between need and response will be emphasized particularly in the "growth" areas of the state.

The tremendous gap between housing demand and supply will be evinced both numerically and geographically. There are numerous reasons for this housing shortage, given the constraints both inside and outside the housing market; consequently, there are many steps which should
be taken on all governmental levels as well as in the private sector to dramatically increase output, eg., (uniform) state-wide building codes, a "systems" approach to the building industry, land banking, a state development corporation, etc. The immediate focus of this paper, however, is not how to increase production but where it should be located and how to get it there if the housing needs are to be met where they exist.

Obviously, housing must be built in both the central cities and the suburbs; it is not an "either-or" proposition. Thus far, almost all the low and moderate income units for families have been constructed in the metropolitan core areas, so a legitimate choice has not been available to the lower classes. There are many reasons advanced to justify building such housing in the suburbs, i.e., the fundamental worth and value of an integrative educational experience, the need for "balanced" or heterogeneous communities, the injustice and immorality of deliberately excluding the poor, etc., (as well as reasons not to build outside the central cities) but this paper will confine itself to two major arguments for opening up the suburbs to low and moderate income housing.

The first rationale is that the residential land base in the metropolitan areas exists in the suburbs; the second factor is that the jobs, particularly the blue-
collar jobs, are moving to the suburbs.

The geographic housing disparity between need and supply centers on the issue of local control of land-use decisions, specifically through the utilization of zoning ordinances. Zoning has been and is the most effective device for accomplishing racial and class segregation in the suburbs. The effect of local exclusionary zoning practices in terms of reducing the residential land capacity and driving up the cost of land will be pursued.

Chapters II and III will offer case studies of two Boston suburbs, Lexington and Newton, in their attempts to confront the subsidized housing issue. Chapter II covers Lexington's approach to the question over the course of the last three Annual Town Meetings. Lexington was the first community in the state to adopt a specific subsidized housing zone; the investigation centers on various efforts to "map" that zone. The major focus will be on a piece of town-owned property which was studied and proposed for subsidized housing by the Planning Board in 1971. A referendum vote again played a significant role in killing a housing development in the suburbs. Chapter III deals with the city of Newton and its response to a local non-profit organization, the Newton Community Development Foundation, which proposed subsidized housing on 10 scattered sites simultaneously. The city's rejection
and NCDF's subsequent appeal to the Massachusetts suburban zoning bill (Chapter 774) will be analyzed. NCDF could prove to be the first real "test" case for the state law since its adoption in 1969.

Chapter IV will analyze both case studies, the strengths and weaknesses of each approach and the reasons for their failures. A brief survey of zoning issues in all 1971 Annual Town Meetings in the Boston region will be included and local initiative will be exposed for what it isn't. Conclusions will be drawn concerning possible remedies on the regional level.

Chapter V will examine the role of the courts vis a vis exclusionary zoning. The legal strategy of bringing such zoning under the strict review standards of the equal protection clause of the 14th Amendment will be developed. Recent court decisions will be included to assess the possibilities in arguing for an extension of "suspect" classifications to include poverty and for "fundamental" rights to include the right to housing and the opportunity for social mobility. A discussion of the ramifications of any Court decision which might overturn zoning on such grounds will conclude the chapter.

Chapter VI will discuss state legislative action, specifically the "Snob Zoning Bill" passed in 1969, its impact, its weaknesses, and recent attempts to amend it
during the 1971 legislative session. Amendments to the state zoning enabling act will also be analyzed and other possibilities will be recommended. Final conclusions will be offered on future state action and the political realities which impinge upon short range solutions to the subsidized housing problem.
CHAPTER I
DIMENSIONS OF THE NEED FOR LOW AND MODERATE INCOME HOUSING IN MASSACHUSETTS

The housing market is fraught with inherent weaknesses and dependent on external forces to such a degree that its over-all operations almost defy analysis. Because housing is tied to land, is durable and is without close substitutes as a consumer good, local suppliers have a relatively captive and monopolistic market. This local regulation produces a grossly inefficient housing market which tends to be small, discretionary, numerous and cyclic. Moreover, the dependency on outside influences, such as the flow of mortgage credit to the housing sector and/or the individual, and the parallel demands intertwined with housing, such as local transportation, schools, public facilities and utilities, necessitate such all-encompassing responses to housing need per se that the interaction of supply and demand is severely weakened. The well-documented housing shortage in the country gives some evidence of that fact.

All the constraints which operate on the housing market cannot be analyzed in the paper, but one major factor will be the focus of the following discussion--
suburban zoning and its effect on the directly-subsidized housing market in Massachusetts. Demand and supply within this particular segment of the market will be investigated from the aspects of quantity and location. Zoning's effect on this interaction will be determined especially in regard to the geographic dimension of the housing market.

New housing starts in Massachusetts have been averaging around 30,000 a year since 1966; since new household formations have been averaging about 18,400 a year and housing losses have been averaging about 10,000 a year, housing starts have been barely keeping abreast of these two components of housing demand. However, the third major component of demand, households living in "substandard" conditions, has largely gone unanswered.

**Housing Demand - Numerically**

There are several components to this category of housing demand; they can be summarized as follows:

1) households living in substandard dwellings;
2) households living in overcrowded quarters;
3) households paying too high a proportion of their income for rent;
4) households living in housing unsuited to their special needs;
5) households living in an unsuitable environment;
6) households who cannot find housing in the communities where they would like to live.
Families and individuals living in any of the above categories comprise the demand in Massachusetts for some kind of housing assistance. Quantitative dimensions for each category are practically impossible to determine, given the definitional problems and lack of data surrounding each one. One fact is clear, however; the poor constitute a major proportion of all the categories mentioned.

Measuring numerical demand, therefore, will be based on income levels established by the Bureau of Labor Statistics in determining the actual cost of living in Massachusetts. Using the BLS figures as a basis, the Massachusetts Department of Community Affairs established a "working definition" of those in need of subsidized housing:

Families and individuals in need of housing assistance include those whose incomes are too low to enable them to compete effectively for housing in the private market. Families or individuals with incomes below the BLS 'lower' budget figure as in need of subsidized low-income housing; those with incomes between the 'lower' and the 'intermediate' budgets are in need of subsidized moderate-income housing.  

Based on projections from the 1960 Census and other statistics on the consumer price index, the rise in personal incomes, etc., the estimated number of households in need of housing assistance in the state in 1970 is over 50,000, almost one-third of all Massachusetts households.
About 60% of this need are families and 40% are elderly individuals (based on projections from the breakdown in 1960).

**Housing Demand - Geographically**

Population in Massachusetts has left the central cities and moved into the suburbs and the rural areas in the past decade. The metropolitan share of the state population actually decreased slightly from 84.5% in 1960 to 83.3% in 1967. During that same period the central cities' share of that metropolitan population decreased from 39.6% to 35.5%. Boston was the extreme example of this trend; in the past 20 years it has lost almost one-fifth of its population, so that its suburbs now contain close to 80% of the metropolitan population.

The poor have undergone a similar shift during the 1960's. From 1960 to 1967 the poor living in the metropolitan areas of the state decreased from 88.1% to 83.3%. The percentage of metropolitan poor living in the central cities also declined during that time span from 54.6% to 44.5%. In 1967, for the first time, the suburbs contained more poor than the central cities. In fact, almost half (46.3%-1967) the poor in the state now live in the suburbs.

The Boston metropolitan area clearly outranked all
other Massachusetts cities in number of poor in 1960. It contained almost half the state's poor; the central city contained 38% of the state's central city poor and the suburbs accounted for 70% of the state's suburban poor. Within the Boston SMSA, the suburbs contained 63% of the metropolitan poor,11 but because the density and population of Boston's inner suburban ring, which almost equal the population and density of the aggregated cities of the state, these central city-suburban distinctions in Boston can be misleading.

Until 1970 Census figures are released, updating the location of the poor cannot be discussed, except to predict that there will be more poor in the suburbs, less in the cities, and more in the rural areas. The increase of the poor in the suburbs, however, can be deceptive, as studies such as the Douglas Commission have shown, because the poor tend to congregate in the higher density, inner suburbs which have cheaper, older (and probably substandard) housing. Moreover, they tend to gather in certain "poverty pockets" in these higher density suburbs, not unlike the areas they left behind in the central cities. Nevertheless, there is an overall movement of the poor outside the central city, following the general exodus of the population to the suburbs.
The movement of nonwhites is also indicative of the location of subsidized housing demand, as minority groups statistically have higher percentages of poor than do whites. In 1960, nonwhites equalled 2.4% of the state's population but they accounted for 5.2% of the central cities population. In the suburbs they comprised .9% of the population. The Boston SMSA was the extreme example: the central city had a 9.8% nonwhite population while its high density suburbs had only a .68% nonwhite population and its low density suburbs .81%.

Based on figures of school-age population (not entirely accurate measures), there appears to be some indication that blacks have been moving into the suburbs at increasing rates during the past five years, as they have all across the country. The 1970 Census figures, however, do not substantiate such a pattern. Since 1960 the black population in metropolitan Boston has increased by 65%, but the greater proportion of that rise has been in the central city (67%) than in the suburbs (57%). In 1970 there were 105,000 blacks in the city of Boston and only 22,000 in its suburbs (compared to 2,078,000 whites in the suburbs). Of the 175,817 blacks living in the state in 1970, the city of Boston contained almost 60%, 10% more than it contained of the state's blacks in 1960. In other words, 34% of the
increased number of blacks in Massachusetts in the past ten years live in Boston. 14

The purpose of this paper is to focus on the subsidized housing need for low and moderate income families particularly in the Boston metropolitan area. Accordingly, the numerical and geographical dimensions of this housing need can be summarized as follows: if there are 500,000 households in need of housing assistance in the state, 60% of which are families, then there are 300,000 families in need. If 46.3% of the state's poor lived in the suburbs in 1967 (139,500 families) and Boston's suburbs contained 70% of the state's suburban poor in 1960 (and it would be a higher percentage in 1970), then there are about 97,000 families within the Boston suburbs in need of housing assistance, and about 42,000 families in Boston proper. Alternative methods of computing these statistics produce estimates of 89,500 families in the Boston suburbs and 52,700 in the city itself. Thus, a range between 90,000-100,000 families in the suburbs and 45,000-55,000 families in Boston itself will be acceptable for estimating subsidized housing need in the Boston SMSA.

Housing Supply - Numerically

The response to the demand for housing assistance
must come from either federal and state subsidized housing programs. To date, such programs have produced about 65,000 units of low and moderate income housing in the state (about 4% of the housing stock), 52,000 have rented to low income households and 13,000 to moderate income households; 48,500 units have been produced by the federal programs and 26,500 by the state programs; 48,000 units have rented to families and 17,000 to elderly individuals.\textsuperscript{15}

As of January 1, 1971, there were approximately 53,000 units for low and moderate income households in process, slightly more than half allocated for low income persons. Seventeen thousand are planned for the elderly and 36,000 for families. The federal programs account for 41,000 units and the state programs, including M.H.F.A. total 12,000 units.\textsuperscript{16} However, it is highly debatable that all these units "in the pipeline" will ever break ground; many have been there for years and others will never be acted upon for a variety of reasons, including the lack of funds to support this volume. Moreover, there is some "double-counting" between M.H.F.A., F.H.A. 236, and Rent Supplement units. Nevertheless, the total quantity, in the face of the overwhelming need, is minute, e.g., there are 36,000 family units planned whereas
the need has been estimated at approximately 300,000.

Housing Supply - Geographically

Low income family housing has been constructed in 26 cities across the state: 11 are in the Boston SMSA and account for more than one-half the state's units. Inside the Boston SMSA, only one city--Framingham--which had public housing for families built in the last 15 years, is in the ten-twenty mile outer sururban ring; thus, there were a total of only 828 units built outside the core area during that time period. Outside the Boston SMSA, only three towns in the state totalling 216 units, would be considered outside the central core of a metropolitan area--Clinton, Winchendon and Gloucester. Significantly, 16 of the 26 towns where low income housing was built lost population during the last decade. Even of the 21 cities where new low income family housing is in process, only 7 cities gained population during the 1960's.17 Obviously, the bulk of the low income housing is not going to the "growth" areas.

There are 20 cities in the state where federally-subsidized moderate income housing has been built in the last seven years; 11 of those cities are inside the Boston SMSA and contain over 10,000 of the 12,000 units built. However, less than 3,000 of those units were built outside the city of Boston. Only 8 of the 20 cities gained
population in the last ten years; only four cities within the SMSA lie within the 10-20 mile outer suburban ring around Boston, Stoughton, Framingham, and Peabody and only one city outside the SMSA in which moderate income housing was built could be considered suburban--Amherst. 18

Thus, as of January 1, 1970, there existed about 1800 units of low and moderate income housing for families living in suburban "growth" areas across the state and another 4040 were somewhere in the development process. (See Appendix 1) The outer ring of the Boston SMSA contained 1150 of these 1800 existing units and 3550 of the 4040 planned units. (See Appendix 2) Consequently, there are less than 500 units planned for families of low and moderate income in suburban areas outside the Boston SMSA (where almost 42,000 families are in need of housing assistance). Inside the Boston SMSA the 3550 units in process pale beside the 90,000-100,000 families in the suburban ring who need this housing. There is no question that the suburbs are simply not the locus of subsidized housing activity, anywhere in the state (not that the central cities are booming either).

The Residential Land Base

The numerical gap between subsidized housing demand and supply has been documented. In terms of location
there has been a relatively insignificant number of family units built or in process outside the metropolitan core areas. Yet, the evidence is substantial that population growth, and the poor, are moving into the suburbs. Notwithstanding such population patterns, the need to build subsidized housing in the suburbs can be substantiated on the basis from two major factors: the availability of residential land and the movement of jobs, particularly blue collar jobs.

The supply of vacant and available land for residential construction in the central cities is clearly inadequate and is becoming more so. Therefore, in order to build new housing in these areas, existing structures first must be removed and their inhabitants displaced. This process is costly, unpopular and time consuming; it has been going on for twenty years under the title "Urban Renewal" and has not been very successful in getting new housing built. In fact, it has demolished more than twice as much housing as it has built over that time period. Moreover, each urban renewal project has averaged six to nine years from initial planning to final occupancy.19 Not much housing gets built that way.

In 1967, the annual rate of construction of public housing, urban renewal housing, and interest-subsidy housing combined was less than 100,000 new units. At this rate, it would take
over thirty years to replace all the housing units in central cities that were inadequate as of 1960, even if all public efforts were focused solely upon those cities. 

From another perspective, the projected demand for housing simply requires too much total acreage for central cities to provide. If the Boston metropolitan area contains approximately 150,000 families in the Boston SMSA that need better housing and even if 80% of the units needed were to be built in the suburbs (which contain 80% of the metropolitan population), 30,000 families would still have to be housed in the central city. Assuming that all families would be housed at the high density of 40 units per acre, the land requirement in Boston would be 750 acres, an extraordinarily high figure. Furthermore, such land use cannot be taken in isolation; streets, community facilities and commercial facilities must be associated with new residential land development.

The Kaiser Commission reported that the use of central city land for residential purposes requires an additional 150% more land for related industrial, commercial and public uses. Therefore, another 1125 acres in Boston would be needed just to handle the new housing for low and moderate income households, without accounting for the projected construction of market-rate housing outside the special needs of the poor. In short, the suburbs
and outlying metropolitan areas are where the regional land base exists and this is where subsidized housing must be built if the volume of new housing is to even approach the scale on which the need has been registered. Indeed, the real "Operation Breakthrough" for subsidized housing is going to have to take place in these land-rich areas.

The Movement of Jobs

The second criterion for building in the suburbs is the increasing movement of jobs out of the central cities. In the last two decades 80% of the new jobs in large metropolitan areas across the country have been located in the suburbs. Moreover, the jobs which are moving out are blue collar jobs—retail trade, wholesale trade and manufacturing jobs. The central city is gradually becoming an elite service center, specializing in finance, insurance, real estate, law and government.

In Massachusetts the patterns have been similar. Between 1958-1968, in the Boston SMSA, the five cities losing the greatest number of manufacturing jobs were Boston, Somerville, Everett, Malden and Lynn, all in the metropolitan core. The cities receiving the greatest absolute gain in manufacturing jobs were Bedford, Burlington, Braintree, Framingham, Needham and North Andover, all of which are outside the 10-mile ring. As
of July 1968 there were 32 manufacturing firms which employ over 1000 or more persons located within the 10-20 mile suburban ring of Boston and only 16 in Boston itself.23

This dispersal pattern of the jobs which traditionally employ semi-skilled and unskilled persons is a fundamental reason why low and moderate income housing must accompany these new jobs in the suburbs. The inadequacy of public transportation in the face of the growing distances between the residences of the poor and the jobs which continue to decentralize only exacerbates the employment difficulties of the lower class. Yet, the suburbs which are attracting the tax-paying jobs are not encouraging construction of new low and moderate income housing (See Appendix 2). The geographical gap between the growth of population, new jobs and the existence of subsidized housing is widening.

The 30 suburbs in the Boston area which gained the most number of manufacturing jobs between 1958-1968 are all well below even their 10% quota of subsidized units. (established by Chapter 774--see Chapter VI) These 30 towns showed an increase of over 44,000 new manufacturing jobs,24 but by 1970 they had constructed only 1050 units of low and moderate income housing for families. They
were over 17,000 units shy of a 10% subsidized housing quota. (See Appendix 3)

In conclusion, the numerical and geographical disparity between subsidized housing need and supply in the state is clear. Moreover, the problem has a definite locus for the future: because of land availability and job accessibility new housing must be built in the suburbs. Thus far the suburbs collectively have remained impregnable. As long as they continue to have the authority, vested in them by the state, to control and restrict land-use and development within their borders, the regional housing need will not be solved.

**Suburban Zoning**

With the zoning power vested in each small municipality there is inevitable competition among them to see who can erect the highest zoning barriers or at least to avoid having the lowest. Guidance on a regional basis is lacking...

Large lot zoning has been a major tool in the suburban arsenal for restricting over-all growth as well as the influx of low or moderate income families. A study done in 1958 of 11 suburban towns around Boston reported that due to the increase in large lot zoning since the end of World War II, the amount of available buildable vacant land zoned in lots of 10,000 square feet or less was reduced to about 15% of the total land area of
these localities between 1946-1956. At the same time, such land zoned in lots exceeding one acre increased to 25% of that land area. Consequently, the dwelling unit capacity of available buildable vacant land zoned in single family residence lots was reduced from 95,000 to 58,000 homes. At that rate, the report estimated that all available land for building sites would be used in these communities by the 1990's.26

Large lot zoning also has an effect on the cost of housing specifically on the cost of land for housing. Land is the fastest rising element of all major housing costs27 and its cost is attributable to three factors: the price of raw land, the cost of land development and the amount of land used per unit of housing. The price of raw land has been rising at phenomenal rates in the last twenty years across the United States; in 1950 an acre of raw land cost $1,222; in 1960 it cost $2,591 and it increased to $5,475 by 1968. This rise represented an overall increase of about 356%, or an average annual increase of 19%.28 By comparison the Consumer Price Index rose less than 40% since 1950, or 2½% a year. Large lot zoning for one family districts in the suburbs plays a significant part in this rise in raw land prices.

If demand for housing is strong, the restriction on the
supply of housing sites imposed by such zoning will generally increase land costs. In the case of smaller lots and lots zoned for multi-family housing, the prices for these sites may also rise because the market demand for them is much stronger than the supply of land zoned for this use. Despite the tremendous rise in raw land costs, however, this element is not the single largest factor in the rise of site costs.

The critical factors for residential land costs, particularly in urban areas, are the costs of land improvements. Land development costs accounted for over 70% of the site costs in FHA one-family homes in 1966.29 The rise in the costs of land improvements stem in a large measure from suburban land use policies which require very strict development standards, such as high quality street, curb and sewer systems, etc., which serve to encourage production of high-valuation and high tax yield housing. In so doing, the community tries to shift a disproportionate amount of its municipal costs to the developer. Because the costs for utilities and other improvements may add such a significant amount to the cost of the land many buyers of moderate incomes, who could not carry such extra costs in their mortgage or rents, are excluded.
The third variable in residential land costs is the amount of land used per dwelling unit, which is directly related to zoning. The typical lot size in the United States increased from 7,558 square feet in 1950 to 11,281 square feet in 1968, an increase of almost 50%. The "need" to have houses built on more land with bigger room sizes and more amenities has been a large factor in raising the cost of new housing beyond the financial capacity of so many. Zoning and building regulations in low density single family suburbs only aggravate this problem.

Restrictive zoning practices, therefore, have succeeded in reducing the availability of residential land and raised its price such that any housing that can be built in the suburbs excludes all but the middle class (and even they are beginning to feel the squeeze). These practices thus far have fallen within the purposes of zoning, as worded in the state zoning enabling act, that is, to promote the "health, safety, convenience, morals or welfare" of each community's residents. Whether this promotion can continue to ignore the health and welfare and housing needs of persons outside each city of town's boundaries is the subject of the remaining chapters.
FOOTNOTES


6. Ibid., p. 39.

7. Ibid., p. 40.

8. Ibid., p. 36.


10. Ibid., p. 39.

11. Ibid., p. 32.

12. Ibid., p. 46.

13. Ibid., p. 48.


15. Massachusetts Department of Community Affairs, State and Federally Assisted Housing for Low and Moderate Income Families in Massachusetts, 1971.
16. Ibid.
17. Ibid.
18. Ibid.


23. Massachusetts Department of Commerce and Development, Massachusetts Manufacturing Firms Employing 1000 or More Persons, July 1, 1968.


CHAPTER II
THE LEXINGTON EXPERIENCE: THE MEAGHERVILLE PROPOSAL

This chapter will trace the chain of events, beginning in 1968, which led up to the 1971 Annual Town Meeting and the rejection of a proposal put forth by the Lexington Planning Board for the development of low and moderate income housing on a piece of town-owned land in the Meagherville area. The Town Meeting's passage of another subsidized housing proposal and its subsequent defeat in a referendum vote three weeks later will also be presented. The analysis and conclusions of this case study of local initiative will be developed in Chapter IV.

Lexington is a residential suburb of Boston, eleven miles to the northwest. Within its 16.5 square miles reside 31,628 people, 14.2% more than lived there in 1960. Ninety-nine percent of these residents are white and half of them earned less than $10,000 in 1968. The housing they live in is considered sound (except for 2%) and is generally comprised of one unit structures (89%). Only 1% live in apartments of three-or-more units per structure. In 1960 the median value of these one dwelling unit structures was $19,800 and the median rent for the
apartments was $109 per month; these figures are considerably higher than the Boston metropolitan area which had a median value of one dwelling unit structures of $15,900 and a median rent of $82 per month. Lexington gained over 3000 new jobs and over 500 new manufacturing jobs between 1958-1968; 40% of its work force in 1968 was employed in traditional blue collar jobs (manufacturing, wholesale or retail trade, transportation, commerce and utilities).

Chapter 215 of the General Acts of the Commonwealth of 1929 set forth the limited or representative town meeting type of government which is applicable to Lexington. Unlike the traditional town meeting type of government in which all residents could vote, towns in the Commonwealth over 6000 in population could accept a limited form of town meeting government in which only elected members could vote. Members are elected from precincts (plus a certain number of members-at-large) for three year terms; one-third of the members are elected each year. These members, 206 in Lexington, are the only ones who vote on town business (except the election of officers); among "town business" items is the regulation of the use of land and the construction of buildings. If the townspeople do not agree with decisions made by their elected representatives at the town meeting, a referendum may
be held in which 20% of the registered voters in the town
must vote and if a majority override the decision, it is
nullified.

In 1968 the Town of Lexington first developed an
"official" interest in the issue of providing subsidized
housing for low and moderate income families in the
community. An organization called the "Commission on
Suburban Responsibility" was created by the Board of
Selectmen; 15 members from various civic and public
organizations in the town were appointed to serve on it.
The Commission was to function in an investigatory or
exploratory manner vis a vis ways of overcoming prejudice
and discrimination in housing, employment and education
in the community; recommendations based on their findings
were to be made to the Board of Selectmen. It was the
first such public body created by a suburban community
in the Boston area.

As a result of the Commission's work, plus the
interest of the Board of Selectmen and the Planning
Board, the Town Meeting members, at their Annual Town
Meeting in March 1969 passed an article which charged
the Planning Board with studying the needs and possibili-
ties of providing "alternative methods of promoting the
availability of housing in Lexington for families of
moderate income, a concept which the Meeting hereby
endorses." During the remainder of that year the Planning Board prepared such a report, titled "Subsidized Housing Program for the Town of Lexington."

The Planning Board's Subsidized Housing Report

The Planning Board considered housing needs, available housing subsidies, and the best ways of implementing a housing program in the town. The report was influenced by the passage of Chapter 774 by the Massachusetts legislature late in that same year. Chapter 774 (See Chapter VI) made municipal rejection of subsidized housing subject to appeal to a state committee; furthermore, it established certain criteria for the minimum allotment of subsidized housing in every city and town in the state based on a dual formula of a percentage of the community's existing housing stock or residential land area. The Planning Board felt, in light of this new legislation, that it would be decidedly more advantageous in terms of location and design, for Lexington to adopt its own regulations to permit subsidized housing than have the state get involved, which might prove "detrimental" to the community. As one resident summed it up more bluntly: "Whether we pick the blacks or take the ones the state throws at us."
The Planning Board documented the need for subsidized apartment units in the greater Boston area and asserted that Lexington should do its share in meeting these needs. Moreover, they pointed out that a need existed within the community itself, as about 4% of the residents qualified for low income housing and 36% qualified for moderate income housing in 1968. In this regard, they recommended a housing program which proposed 950 subsidized units on 125 acres of land to be built over five years (the 950 units represent approximately 10% of the community's housing stock, the standard established by Chapter 774). The breakdown was as follows:

- 100 units existing housing for the elderly 10 acres
- 50 units proposed housing for the elderly 5 acres
- 200 units moderate-income housing-tax title lands 40 acres
- 100 units low income housing by Housing Authority 10 acres
- 500 units moderate income housing-private sites 60 acres

To implement this program the Planning Board recommended three measures to the 1970 Annual Town Meeting:

1) establish a new zoning district (RH district) which would permit subsidized housing at substantially higher density than in one-family dwelling districts, but under careful built-in development controls; 2) transfer to the Housing Authority some Town-owned land and rezone it for 50 units of elderly housing; and 3) provide for a study
of the Meagherville area (102 acres of Town-owned land) for the feasibility of housing, recreation and a school.

The 1970 Annual Town Meeting

The Town Meeting in March of that year adopted all three proposals of the Planning Board. A new RH zone was created (though not mapped). Lexington thereby became the first community in the state to create a special zone for subsidized housing. The zone was established specifically for the construction of housing for low and moderate income persons; the by-law stated that at least 40% of the units in a project would have to be government-subsidized. The zone would permit garden apartments and duplex-over-duplex dwellings up to four stories in height with a density up to 18 units per acre. Other standards were also included (See Appendix 4).

The general objective of the RH zone was to increase Lexington's subsidized housing stock to a total of 950 units, which equaled 10% of its total housing stock and thus met the requirements of Chapter 774. Ten thousand, three hundred dollars was also appropriated for the Meagherville study. After inviting consultants to submit proposals for such a preliminary study, the Planning Board chose Justin Gray Associates (JGA) of Cambridge. Thomas Griffin Associates was retained under separate contract to provide the engineering studies.
JGA's proposal to the Planning Board stated that input from the residents in terms of policy issues and technical aspects of development was a critical part of the planning process; consequently, their study began with four public meetings in June 1970. JGA initially designed the meetings to discuss how development should take place, at what density, how many units, for whom, what kind of layout, what kind of subsidy, etc. A questionnaire on these issues was prepared to tabulate the response of those attending the meetings, and slide and graphic presentations were made. The response from the residents, however, was not directed at the issues but involved much more basic questions, i.e., why have any subsidized housing at all, why develop the Meagherville land in the first place, why not, at least, begin by developing a town-wide strategy and not concentrating all efforts in the Meagherville area?

The residents who attended the first two meetings were not prepared to discuss in detail their ideas on the physical plan for the area. Two-thirds of those in attendance (of a total of 75 people) were residents of the adjacent neighborhood and their general sentiment indicated outright opposition to any housing on the Meagherville land. The tone of the discussions was hostile; their intent was a "show of force" against any
such program.

JGA and the Planning Board had met prior to the first meeting, had discussed the proposed presentation and its content and had hopes that positive contributions and insights could result from such public discussions. Neither the consultants nor the Board were prepared for the reaction they received. Several speakers indicated that they would have preferred to have specific site plans and development proposals presented to them, rather than having to make the choices themselves. JGA and the Board had, in fact, presumed exactly the opposite, that the citizens would have preferred to be involved in making decisions about whatever development was to take place from the outset, before those decisions could be gathered into a development proposal. However, part of prevailing attitude behind the reaction of the residents was a suspicion that the Board really did have a plan which they were keeping from them and that then the residents, in truth, had no influence on the decisions which the Board was or would be making.

The questionnaire which was handed out at the end of the first and second meetings was answered surprisingly by almost all in attendance, despite the objections of some that answering the questionnaire could be construed
as a favorable response to housing. One hundred and thirty-two used the questionnaire for some purpose; 27 simply recorded their opposition (23 of which indicated they were neighborhood residents) with such statements as: "Housing operated by non profit organizations has always deteriorated in about five years," "The area cannot support the decrease in property values," "Who sees that the homes are kept up?" "The land should not be made the scapegoat for such (subsidized) housing," and "Low income housing adds to pollution--build a school and park and forget those crummy tenements." (See Appendix 5.)

The largest number of neighborhood residents felt that if the housing were to be built it should be available only to Lexington residents, whereas most non-area residents felt it should be available to anyone from the metropolitan area. There was a preference from both neighborhood residents and non-residents that there should be a mixed level of incomes, with the majority being moderate income rather than low, that there should be smaller units at a low density and clustered to keep parts of the site open. One or two family houses were clearly preferred over multi-unit dwellings.

In light of the attitudes and responses of the residents at the first two meetings, the format for the
second round meetings was changed; the discussion of alternative financing, development and management possibilities was minimized as people had indicated an impatience with such "details" before more fundamental issues had been dealt with. At both of these workshops a position paper from the Board was distributed, answering the questions raised in the first meeting; then the Board and JGA assumed the role of a panel to spend more time participating in general discussion. Issues were handled more openly and honestly, among which were the questions of who would live in the proposed housing, whether government involvement in housing was desirable, whether home ownership was a possibility, and whether the negative reaction to subsidized housing was based on the assumption that it had to be apartments. Hostility was not as evident and the Planning Board again emphasized the preliminary nature of the discussions in terms of overall development planning in order to assuage suspicions to the contrary.

The results of the public meetings were not conclusive, but two facts became clear: the intense opposition to any proposal for housing on the Meagherville site by area residents and the need for more information by the residents before such meetings were held so that they
could have responded more constructively. According to JGA, public discussions probably were held too early in the process and preliminary investigations into alternative site plans, financing arrangements and development options should have been completed before any meetings were called. Soliciting such early resident participation was not as productive as originally assumed. Nevertheless, certain technical issues were uncovered which could then be reviewed, such as problems of increased traffic load (a major complaint), the physical characteristics of the land to support buildings, the costs to the Town for the development and its impact on the schools. The basic issue of whether or not Meagherville should be developed and if developed, whether there should be any subsidized housing constructed, were questions not within the scope of services which the consultants were to provide, as JGA was only charged with studying the feasibility of housing, recreation and school uses for that particular site.

Following the public meetings in June, JGA and Thomas Griffin Associates began analysis of the physical characteristics of the land in question. Preliminary conclusions were presented to the Town Meeting Members' Association at the end of June which indicated that the physical characteristics of the land would present no
barriers to the uses contemplated. In September, JGA ascertained from conversations with representatives of town agencies concerned with the site that no plans were underway to acquire the land exclusively for recreation or conservation purposes, nor would the development of subsidized housing require acceleration of school building plans.

The JGA Report

In October three site plan alternatives were submitted to the Planning Board, with the alternative being recommended by JGA consisting of 318 units on 31.8 acres of land, along with 32 acres for conservation, 16.5 acres for recreation and 13.5 acres for a future school site. (See Appendix 6) The unit mix recommended included 50 units for the elderly, 143 units of one-two bedrooms, and 125 units with three-four bedrooms. Slightly more than 60% of the units would be subsidized through rent subsidies or mortgage interest rate reductions allowing lower rents. There would also be possibilities to provide for home ownership under a flexible arrangement in which new residents could express their preference. JGA recommended that M.H.F.A. provide the financing. Thus, the suggestions made at the town meetings as to income mix, low density cluster development,
home ownership options and ability of Lexington residents to qualify for the subsidies were all incorporated in the JGA study.

The report covered the three major problem areas which had been raised earlier by the residents at the public hearings as follows: 1) the impact on the schools was evaluated in light of similar subsidized developments in other suburban towns. According to the report, the total development would add, at a maximum, 400-495 children among all grades; consequently, this number would not require additional expenditures for new schools not already programmed by the town. Thus, there would be no serious problem. 2) The traffic problem, the study concluded, could be handled in the area with recommended repaving and signalization of Reed Street. 3) The development costs to the Town were estimated to be $180,000 at the maximum. These costs, which did not include costs of making improvements on the site (which would be borne by the developer as part of the project financing), would be the costs of improvements to local access streets and the costs of on-site improvements (drainage, water, sewer and land preparation) related to the construction of the new school and public recreation area. These costs were included in the Lexington Comprehensive Plan,
however, as the Town Meeting in 1963 contemplated such recreation and school uses for the Meagherville area; thus, the real cost to the Town for the subsidized housing development would be about $50,000. The JGA study indicated that the Town could receive a payment from the developer for the land of $500 per unit or $159,000 for the 318 unit development, enough to cover the costs of the total development. Moreover, M.H.F.A. financed housing developments would pay full taxes to the Town, unlike public housing which makes payments in lieu of taxes.

JGA concluded their study by recommending that the Meagherville land be rezoned from single family residential to RH, the subsidized housing district, which would include the creative use of design controls as stipulated by the Town when the new zone was created at the 1970 Town Meeting. They further emphasized that the Town should move as expeditiously as possible in using this land for subsidized housing development because it represented an unusual opportunity to develop needed housing and could be the necessary first step in a subsequent town-wide plan for scattered-site subsidized housing. They suggested that further action on Meagherville not be postponed until such town-wide studies were completed, as this delaying process was unnecessary.
The residents were not overjoyed at hearing the JGA report and articles in the Lexington newspaper evinced that attitude. An attempt was made to circulate a petition to have an article placed on the Warrant of the Special Town Meeting in January 1971 to have Meagherville kept for conservation. The January meeting took no action on that request (but it did reject another subsidized housing proposal by the Trinity Covenant Church on land owned by them for 190 units; the measure was six votes shy of the necessary two-thirds).

The Planning Board Report on Meagherville

In February 1971 the Planning Board presented its recommendations for the 1971 Town Meeting. Based on the "Subsidized Housing Program" which it completed before the JGA study of the Meagherville area, the Board substantially modified the JGA recommendations. The Board reiterated its position that the number of subsidized units in any one development (within a circle of ½ mile radius) should not exceed 200; they then went on to recommend that the JGA figure of 318 units (of which only 200 would be subsidized) be reduced to 180 and the acreage for housing would be reduced correspondingly from 32 to about 23.5. The density within the RH zone would therefore be less than 8 dwelling units per acre (up to 18 d.u./acre are permitted in the RH zone). The board stated
that this policy was based on the desire to distribute small to moderate-sized mixed-income developments throughout the Town and avoid concentrating them in any one area.

The report also declared that the real need in Lexington was housing for elderly and young adults as the Lexington population was overbalanced in favor of families with school age children, and the excessive over-all demand for children-related services was leading to high expenditures and thereby jeopardizing their quality. Thus, it was their policy that subsidized housing should pay enough in taxes to cover the cost of town services, including schools. Accordingly, the Board recommended only 9 units (5%) which would have at least three bedrooms (compared to 125 units or almost 40% by the JGA study) and their projections for school age children totaled 55 (compared to 400-495 in the JGA study).

Despite the JGA study which indicated a need for larger bedroom units and the accompanying judgment that the schools would not be seriously affected, the Planning Board came to different conclusions. These conclusions in no way rejected the JGA study as a "poor" plan but rather were an attempt to gain political support for any housing whatsoever. The Planning Board had made overt statements to JGA that their intent was to use the consultants to produce a study recommending more units than
the number the Board desired to propose from the beginning. Thus, they would appear more favorable in the eyes of the residents by reducing the original plan. Consequently, they reduced the total units and changed the character of the unit sizes, thereby reducing the potential number of children so that they could demonstrate that the development would "pay for itself." The initial payment by the developer to the Town for the land, assessments and fees would be $75,000 and his annual payment to the Town in lieu of taxes at 20% of gross rents would be $80,000 (based on the Board's estimated rent structure); the initial cost to the Town for off-site improvements would be $85,000 (based on the Engineering estimates) and the annual cost of town services including education (based on an education cost of $1100 per student) would be $75,000: in short, the development would not be a tax burden on the Town.

The 180 units were divided into two sites, the Hickory Street site containing 78 dwelling units and the Myrtle Street site containing 102 dwelling units. The Planning Board decided to recommend rezoning to an RH zone for only one of the sites--the smaller Hickory Street site--at the 1971 Annual Town Meeting, in the hopes that the "moderate" plan would be politically palatable to the Town Meeting Members.
The 1971 Annual Town Meeting

The Meagherville issue came before the Annual Town Meeting on March 31. Erik Lund, the Chairman of the Planning Board made the proposal to rezone 9.8 acres of the total area for the construction of 78 low and moderate income housing units. He again mentioned that the JGA report concluded that the land could support over 300 units, but the Board felt that about 80 units at this time would be sufficient to begin a town-wide housing program. He then attempted to answer questions pertaining to the development before they arose, including the following: 1) the land is physically buildable for the recommended amount of housing; 2) there will be 23 acres of conservation land set aside in the Meagherville site which would adequately serve the conservation interests; 3) there would be no addition to the tax rate because the number of bedrooms per unit was small and school children were few. Moreover, the development would be financed by M.H.F.A. which would not come off the state tax rate but rather through the private sale of bonds; 4) the Town does own the land as a title search has been made; and 5) the concept of scattered sites throughout the town, although a good one, would not be feasible with town-owned land as there wasn't enough available acreage in this category, nor would it be
feasible only with private lands as the cost of $12,000-$15,000 per lot would be prohibitive.

Mr. Lund ended his presentation on a more general note, saying that the Town Meeting had charged the Planning Board to carry out such a study, that the residents of Lexington needed such housing, especially the elderly and those who work for the Town, that Meagherville was the only logical town-owned site and that if the town voted it down, in all likelihood that would end the Town's further involvement and participation in such housing developments. It would then be up to private developers and the state. He added a further statement alleging that the real issue for some was more fundamental than all the preceding, simply put, "We don't want blacks." Mr. Lund concluded by citing surveys and interviews which led him to believe that the blacks in Boston did not want to move to Lexington, contrary to the fears of those who felt that Lexington would be deluged with their applications.

The opposition raised the "traditional" arguments concerning the increased traffic, the drainage problems, and the school children overload. Two particular opponents argued at length; one showed slides of flow charts (which nobody could understand, including the interpreter) supposedly based on M.I.T. Professor Jay Forrester's book,
Urban Dynamics. These charts, based on the Forrester model, predicted disaster for any city which builds housing for low and moderate income families. Another opponent "proved" that there is no housing shortage and that people can avoid high rents in the Boston area, by presenting a slide of a section of the Boston Sunday Globe showing four or five advertisements for apartments in the $175-190 range around the region. He added that the motivation behind such housing schemes was power, that "bureaucratic empires are created to manage government housing," and that there is great profit to be made from such developments.

Two themes emerged through the arguments of the opposition: the first expressed a preference for reducing the tax burden on the poor and the elderly and thereby giving them greater buying capacity or at least the financial relief necessary to remain in their existing homes (thus assuming that the housing need is made up of poor people who live in "standard" homes in the suburbs who can't afford to maintain them). The second theme expressed outrage at the proponent's presentation which implied that all those opposed to subsidized housing in Meagherville were bigots ipso facto. The opponents felt that being placed in this position was, indeed, a "low blow" and, in fact, their opposition was based on
legitimate, pragmatic, objective, and technical grounds (such as have been mentioned).

After much debate, mostly in favor of the proposal, the vote was taken. The two-thirds approval was not even close, nor was even a simple majority received. The vote was 90 against and 86 in favor. (Analysis of the culmination of these events will be given in the next chapter).

The Centre Village Proposal

However, another proposal for RH zoning was introduced after the Meagherville defeat at the same Annual Town Meeting. This proposal was presented by Mr. Mark Moore, a local developer and resident of Lexington, who had owned the land in question, Centre Village, for several years. His presentation was thorough and low key; a site plan was shown as well as architectural sketches of the garden-type apartments proposed. Comparisons were made with conventional apartments in the area at every convenient point; the density (13 dwelling units per acre) was similar to other apartments; traffic patterns would be similar; the housing would be "high grade" like other such structures; and taxes would also be equivalent to conventional apartments.

Of the proposed 106 units, there would be no three bedroom units and school-age children would be minimal, perhaps ten, according to Mr. Moore. Thus, the taxes of
$54,000 would more than offset the cost of $10,000 for the education of the children (estimated at $1000/child) and leave $44,000 for the cost of municipal services. The project had already been approved by M.H.F.A. for a $1,818,000 mortgage subject to the conditions that the rezoning be granted and that the Lexington Housing Authority participate in the selection of 25% of the tenants whose low incomes qualified them for rent subsidies. The 25% low income people, according to Mr. Moore, would be mostly elderly and since the Housing Authority had a waiting list of over 100 elderly, there was a documented need for these units from local residents. The other families would be of moderate income and would "pay their own way;" nobody would be assisting in their rent payments. First priority would be given to Lexington residents.

The location of the site was close to the center of town, in a mixed commercial-residential area with a number of apartment structures in the vicinity and convenient to shopping and other public facilities. The land was suitable for development with no serious drainage problems or conservation issues. If the land were rezoned, Mr. Moore would donate to the town 3.8 acres of contiguous land for conservation purposes. Most importantly, there were few abutters to the property and
consequently, little neighborhood opposition. The neighbors did show up for the meeting to raise their objections, but their numbers were small. Again, the objection was made as to the proper subsidy needed which, it was argued, should be in the form of tax relief to the poor so they could remain in their own homes.

Supporters claimed that if Lexington was to have any RH zoning, then this development with a local builder and architect, a good plan and a good site, was probably the best they could expect. A roll call vote on the measure was moved and passed; it was the first time in recent memory that a roll call vote had been requested. Some objected strenuously to having their vote individually recorded claiming it was an affront to their integrity. Whether the effect of publicly recording each person's vote on the issue helped or hindered the housing was unclear, even from the point of view of those who voted for it.\textsuperscript{10} The roll was taken and the rezoning was passed 127-56 with 23 either absent or abstaining; the margin of victory was only 6 votes (the same margin which defeated the Clematis Brook proposal two months earlier).\textsuperscript{11} Thus, Lexington, it appeared, had taken its first tenuous step toward opening its borders to low and moderate income families (although most of the low income units in the Mark Moore proposal would be for the elderly).
However, a petition for a referendum was filed within the necessary five days and contained the required 3% of the registered voters in the town. The referendum was taken on May 3; 20% of the voters must vote and a majority of those voting can overturn the decision of the Town Meeting. Over half the town's voters turned out and rejected the housing proposal by a two-to-one margin. Thus, Centre Village became the third subsidized housing proposal to be turned down since the RH zone was created in Lexington; thus far, it has not been mapped.
FOOTNOTES

1. All of the above figures are taken from the Massachusetts Department of Commerce and Development, City and Town Monograph, Town of Lexington, revised June 1970.


7. Ibid.


11. All information on the 1971 Annual Town Meeting was gained by personal attendance at all relevant sessions.
Newton is both a city and a suburb; with a population of 91,066 it ranks as the 8th largest city in the state, yet it is one of the most important commuter suburbs of Boston. Despite its population and its proximity to Boston, Newton has the distinct appearance of a suburb due to its many parks, golf courses (5) and beautiful homes. Indeed, it calls itself the "Garden City" of Massachusetts. Instead of having one major business area, the city is broken up into fourteen small villages, each with its own center for commercial and business functions. Newton is wealthy and white; the median family income in 1968 was $13,000 and over 99% of the residents were white. The average cost of a house is $40,000 and the average monthly rental for an apartment is $200. Over 70% of the housing is single family homes. Along with its reputation for an excellent school system, Newton is recognized as a "liberal" community.

It's people are committed to social betterment and change. It bears few traces of parochial self-centeredness, but extends its interests to the entire Metropolitan Region.
Despite the general well-being of Newton residents, the city is not without its poor families and individuals and its substandard housing. In 1968, 16% of the population was earning less than $6000 per year (totalling over 4000 families). Over 1000 families were receiving some form of welfare assistance, and there were over 800 dwelling units classified as substandard. In response to this need the Newton Housing Authority, which was founded in 1958, has built a total of 226 units, but only for the elderly. Approximately 160 units in addition have been leased by the Housing Authority with two-thirds of those being occupied by the elderly. Thus, no subsidized housing has been built to date for families of low and moderate income, despite the documented need for such housing not only by Newton residents but also by municipal workers who cannot afford to live in the city.

In 1967 this housing need for low and moderate income families was first articulated publically by local fair housing groups. Early that year they applied pressure on the Board of Aldermen to establish a sub-committee to determine the shortage of this type of housing in Newton. Subsequently, a sub-committee was formed by the Board in March 1967 and made its report the following November. Essentially, it reported that there was a shortage of low
income housing in the city; specifically there was a need for about 200 low income housing units which should be provided in small numbers on scattered sites. It went on to recommend that the Board of Aldermen strike out the word "elderly" from the ordinances creating the Newton Housing Authority, and that the Board adopt the pending resolution to undertake a leased housing program.

**Newton Planning Department's 1968 Housing Study**

In July 1968 the Board of Aldermen directed the Newton Planning Department to augment and implement the 1967 subcommittee report by undertaking a comprehensive study of low and moderate housing needs with special emphasis on the evaluation of potential sites for housing development. The Planning Board study was completed in September 1968; it reaffirmed the early report that at least 200 units of low income family housing were needed. It also emphasized the need for a significant amount of housing for moderate income families which could be built by private nonprofit or limited dividend developers on scattered sites throughout the city, utilizing HUD's 221(d)(3), 235, and 236 programs. A total of 200 possible sites throughout all eight wards in the city were investigated and reviewed according to four levels of priority until 42 sites were selected as the most feasible for supporting low and moderate income housing developments.
The report also documented and discussed the existing dichotomy of community attitudes on such housing, specifically referring to the controversy over the sale in 1968 of the old Bowen School property to a private developer. During the course of that sale a considerable amount of concern was voiced in the community arguing that the property should be reserved for a low income housing development. Consequently, the developer agreed to make three units available to low income persons through the "Rent Supplement" program. Inherent in that controversy, the report stated, was the notion expressed by many that low income housing developments meant the influx of inner city blacks fleeing the ghetto. In response to those contentions and in an effort to define a broad community policy toward racial integration the Board of Aldermen passed a resolution encouraging new black residents of all incomes which the report reprinted. Despite this rhetoric, the report recognized the paradoxical situation, in that the community may recognize its housing responsibilities and sincerely desire to provide the housing in principle, but will oppose any land use decision to create housing on a specific site. In short, the political realities of site selection run counter to the basic "liberal" philosophy propagated. The Planning Board concluded that the community would
have to achieve a reconciliation of values on all levels before the stated housing goals could ever be met.

The Creation of NCDF

Partly as a response to the favorable political climate in 1968 and in recognition of the need for subsidized housing in Newton, twenty-four priests, ministers and rabbis of the Newton Clergy Association met in May 1968 as an ad hoc group to create an organization to provide for greater housing opportunity in the city. On May 9 the Newton Community Development Foundation was formed "to provide significant quantities of low and moderate income housing in Newton." In June an eighteen member Board of Directors was added, representing the whole spectrum of the community which was to determine NCDF's broad objectives and policies.

An initial decision was made to build between 500-700 units on 10-12 different sites scattered throughout the city as recommended by both the Aldermanic study and the Planning Board report. There were several reasons behind this decision. First, 500 units represented the parameters of defined need in the city; moreover, it was a large enough volume to make a significant breakthrough in the area of suburban exclusionary practices. Newton, it was believed, had an opportunity to really become a model for other suburbs regarding the subsidized housing
problem. The 500 units were of sufficient quantity to achieve economies of scale in construction which were necessary to keep the costs under the FHA restrictions. The possibility of building single family homes under the FHA 235 program was examined and ruled financially unfeasible due to the high cost of land in Newton and rising construction costs. Scattering the sites near each village in Newton would balance the provisions of community services as well as spread the responsibility throughout the city. No aldermen could say, "Why build in my ward?" In short, it was a pragmatic decision based on political and economic realities.

During 1969 NCDF developed their strategy, elicited support and started to raise money. In June of that year they hired an Executive Director, Marc Slotnick, an attorney, a housing expert, and a life long resident of Newton. The goal of NCDF was to raise $75,000 which was to be matched by the Permanent Charity Fund of Boston on a $1 for $3 basis. The $100,000 was risk money, needed to pay administrative costs, land acquisitions, engineering studies, designs, and legal costs.

NCDF had reason to be hopeful during this phase of its activity; the previous September the Mayor had met with the Board of Directors and had indicated his support. On April 9, 1969 the Newton Republican City Committee
approved the NCDF concept and made the following policy statement:

Non-profit corporations should be encouraged to investigate the opportunities under these programs, but these innovative programs are discouraged in Newton by the high cost of land. We therefore, recommend that the City of Newton lease for a long term appropriate city owned land for the express purpose of construction of low-moderate income housing.3

On May 7 the Newton Democratic City Committee made a similar policy statement on the need for low and moderate income housing and the principle of economic integration in housing. On May 5 the Board of Aldermen adopted a resolution which committed them (a) to withhold publicly owned land from other uses unless it is found to be unsuitable for public housing, and (b) to consider the suitability and desirability for public housing of privately owned land before making it available for other usage. Two days later a major conference on Newton's need for low and moderate income housing was held and almost 300 people of various income levels, occupations and age groups attended.

The turn-out was, indeed, encouraging and Chester Hartman, Assistant Professor of City Planning at Harvard, who addressed the group complimented the city. "To my knowledge," he said, "no other suburb yet seems to have been able to attract such a large number of people to a
conference like this with such apparent seriousness."

The following conclusions were reached by those in attendance:

1. Newton needs at least 400 housing units for low and moderate income families.

2. Such housing must be provided for those who live or work in Newton but a certain percentage should be reserved for residents of the core city.

3. The 15 year residency requirement established by the Newton Housing Authority for low income housing eligibility should be repealed. Some priority should be given to Newton residents but the housing should be open to others as well.

4. Developments should be small on scattered sites throughout the city.

5. The New housing should provide for a mixture of socioeconomic groups.

6. The Mayor and the Aldermen must lead the way.

7. The Newton Housing Authority should be more broadly represented, have a more qualified staff and move more rapidly than it has, especially on leased housing.

8. Public and private sectors should cooperate in developing the housing, e.g., the city should encourage private developers by making land easily available to them.

9. NCDF should be supported.

10. Newton's zoning laws and building code should be reviewed to assess their effect on new construction and rehabilitation.

11. A coordinating organization is necessary, especially to deal with citizen education.

12. Newton has an obligation to take immediate action to meet the critical need for low and moderate income housing.
As a result of the impetus provided by the conference, many individuals and organizations began to implement some of the recommendations. NCDF, encouraged by this publicly expressed support began moving ahead with their plans and their efforts to raise money at the same time. Throughout the Fall of 1969 and the Winter of 1970 they worked on site evaluations, negotiations and preliminary architectural and engineering studies.

The NCDF Plan

The NCDF proposal was completed on April 6, 1970; the plan called for 508 units on 10 sites scattered throughout the city, near each of the thirteen villages (the 14th village—Newton Lower Falls—was where the Redevelopment Authority was proposing 65-75 units).

The plan conformed to the FHA 236 program under which mortgage interest rates on construction are reduced down to 1%, which, in turn, enables lower rents to be charged. Working within the FHA cost limitations, however, necessitated land cost write-downs in order to achieve a moderate density scheme because FHA allowed for land costs of approximately $ .30/sq.ft. whereas land costs in Newton ran $ .50-$1.00/sq.ft. Thus, NCDF asked the city to donate 40% of the land amounting to 16.7 acres. Only 1.26 acres of the city's undeveloped, unused land was designated for future recreation use.
(totalling one-half of 1% of the total of 250.2 acres of such land); the remainder of the city-owned land was nondesignated. NCDF had negotiated privately for six sites comprising 24 acres.

The housing was to be two-story wood frame to blend in with the majority of Newton homes; it would be clustered in different patterns to relate to the land contours and neighborhood characteristics. The densities were planned at half those used for other apartment developments in Newton and all sites had over 40% of the land reserved for open space. The mix of one-two-three and four bedroom units were varied to match the school facilities in each neighborhood. After consulting with the Newton School Committee, NCDF determined that their plan would not necessitate overcrowding; no new schools or classrooms would have to be built as a result of the influx of families. Traffic likewise was projected and found to be minimally affected by the scattered site plan. Moreover, the developments would be existing on a fully tax paying basis.

NCDF had to apply for rezoning on all ten sites in order to build the type of housing they proposed; they were fully aware that requesting a change in the zoning ordinance would be a major battle. Rezoning involves specific sites in somebody's neighborhood and usually
signals the end of "liberal" rhetoric and the beginning of organized opposition. Newton has a strict zoning ordinance which requires that a majority of the Board of Aldermen approve any building in the city other than single or two-family residences. Furthermore, according to the state Zoning Enabling Act, two-thirds approval by the Board of Aldermen is required for any zoning change (and three-fourths if abutters oppose the housing). The zoning change required was that of "Residence D," which was a garden apartment (2½-3 stories) zone.

After NCDF had made its initial decision to build on scattered sites in 1968 the Massachusetts legislature passed what is commonly known as the "Anti-Snob Zoning Bill" (See Chapter VI). This bill permits private developers to appeal to a state appeals board to reverse a local rezoning denial if that community has less than 10% of its units as low-moderate income housing or less than 1½% of its total zoned land for such housing. Under this bill the zoning appeal may be used for construction starts of low-moderate income housing on 3/10 of 1% of the total land in the community per year. Applied to Newton, Chapter 774 requirements would call for 2500 units of low and moderate income housing (See Appendix 3). Newton had less than 20% of that figure. Thus, an eligible developer could appeal to the state under Chapter 774 if
his petition for rezoning were denied by the Newton Board of Appeals.

However, NCDF rejected this procedure as inappropriate and basically divisive for their purposes. They preferred to work with the city, not around it, in developing the housing, under the assumption that low-moderate income housing would be more acceptable if it resulted from the initiative of the community itself rather than being forced by state law. In essence, there was the implicit feeling that Newton was a progressive community and that an indigenous non-profit church group with broad-based local support could get results by moral suasion rather than law. Thus, NCDF decided to apply for rezoning under the old procedures.

NCDF had been soliciting community support throughout the planning process; not only had local civic and political groups endorsed the idea, but local residents were being reached by volunteer workers, through workshops, tours, audiovisual programs, newsletters and individual contacts. Furthermore, NCDF decided to hold meetings with all the legal abutters of the chosen properties before the public hearings were to be held in May. Even with the knowledge that some neighborhood opposition would inevitably emerge, all signs for NCDF were still positive before the sites were announced.
The Public Hearing

The sites were publicly announced on April 10, 1970 and the city suddenly got "up tight." The Aldermen's phones didn't stop ringing until August 24 (when the Board of Aldermen voted) and the sentiment expressed via telephone and letter was overwhelmingly in opposition to the NCDF plan. Two days after the sites were announced the abutters organized a city-wide group, the Newton Civic and Land Association, to lead the attack with literature, phone calls and letters. The Mayor, who had earlier given his verbal support for the program, declined to take a stand and said he would leave the matter to the city to decide. Five public hearings (on two sites each night) were held in the end of May. By this time the uprising was at its zenith. The "traditional" arguments were repeated over and over; briefly, they could be categorized as the following:

1. Outsiders would move into Newton, including large families, welfare cases and blacks from Boston.

2. Multi-family housing was not in keeping with the character of the city which developed from its predominance of single family residences.

3. Government-subsidized housing meant "cheap" housing, ugly projects and blighting influences on the neighborhood and the city.

4. Overburdening the school system with an influx of school children would raise costs and lower the educational standards of the community.
5. Taxes would increase with the additional municipal services and the residences of such housing would be unable to "pay their own way."

6. Traffic would be increased causing unwanted congestion and a danger to children.

7. Property values would decrease in the surrounding area and thus threaten the security of those who had bought homes in Newton.

8. Precious open space would be used up which the city could not afford because of the scarcity of remaining open land to be either left alone or used for recreation space at some later date.

9. NCDF was either a "do-gooder" outfit which lacked the status of a "professionally-oriented" group or it was a private group who stood to make a lot of money out of the deal rather than the city which properly should be carrying out the plan. Either way, NCDF was mistrusted.

The hostility at the public hearings was obvious; clergymen were suspect and were told to "stick to religion;" architects and builders were accused of being "phonies" and only after the profit; blacks who already lived in Newton and who claimed that their neighbor's property values had not decreased were attacked from a variety of personal reasons. As one lady whispered, "It took me twenty years to make it out of Dorchester and I'm not going to pay for these people to move in and ruin it." 7

NCDF countered one of the major arguments--who was going to live in the units--by emphasizing there would be different neighborhood tenant selection boards created
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and that the future occupants would have "Newton ties," e.g., that many who were displaced by the Mass. Pike extension a few years back would like to move back to the city if lower rents were available to them. But "Newton ties" was not specific enough for the opponents; they knew that publicly displaced persons from Boston had legitimate claims on this housing, and that meant blacks. As Marc Slotnick later concluded, "The key issue is race--they don't want blacks." 8

The public hearings indicated about a two to one opposition on all sites; the general objections have been mentioned above, but each site had its own particular problems, whether it was a noxious gas hazard, a proximity to City Hall (across the street), land reserved for recreation purposes or ecological reasons. It became obvious that not all the sites were "ideal" but were a compromise between which sites the city could offer and which sites NCDF was able to privately negotiate for. With 10 sites to discuss, it seemed that almost anyone opposed for any reason could "take their shot."

After the public hearings at the end of May, the zoning decision was left in the hands of the Board of Aldermen, first to be acted upon by the Land Use Committee and then by the full Board. In the meantime the Newton Planning Department (an executive department advising
the Mayor) released its recommendations. On June 19
the Planning Department recommended approval of eight
of the ten sites for subsidized housing; it cited data
which supported the evidence that there were sufficient
number of residents with incomes to qualify them for NCDF-
type housing in quantities several times the amount pro-
posed. The Department, however, recommended approval of
the actual NCDF plan on only four of the recommended
eight sites and proposed, moreover, that the zoning
change should be to a Private Residence zone (with a
variance), not Residence D. Townhouses can be built in
a PR zone by Aldermanic Action but the requirements of
this zone would mean greater square foot area per unit,
greater separation and set-back regulations, higher
parking ratios and thus less open space and greater con-
struction costs than NCDF proposed.

On June 22 the Planning Board (an independent
commission of private citizens appointed by the Mayor)
reported on its position; by a vote of 3–1 the Board
recommended approval of only four sites (one member
filed a minority report recommending denial of all sites).
In Newton the Planning Board has a relatively minor
advisory role compared to the Planning Department which
acts independent of it. It is usually limited to advis-
sory opinions on subdivision control and zoning changes
made in conjunction with the Land Use Committee of the Board of Aldermen. During July the Mayor held four sessions with the Aldermen, various outside persons and NCDF to discuss all the issues surrounding the plan. (In that same month *Newsweek* carried an article on NCDF reporting the reaction of Newtonites to the uproar over NCDF and how residents saw the ultimate hypocrisy of their own rhetoric. As one said, "liberalism stops at your own driveway.")

The Land Use Committee took its first vote on the NCDF proposal on July 30. It recommended a change to Residence D on only one site, a change to Private Residence zone on another, denial of two sites, no action on one site, and no recommendations on five sites (due to tie votes). It further recommended the use of two new sites. NCDF responded by issuing a statement indicating deep disappointment and urging the Aldermen to continue to work toward a solution both the Board of Aldermen and NCDF could accept. After June NCDF realized that all ten sites would never be approved, but they remained hopeful that they could arrive at a workable compromise in conjunction with the Land Use Committee.

On August 19 the Land Use Committee voted to endorse the NCDF concept and approved a compromise resolution (which had previously been accepted by NCDF) calling for
the construction of 325-375 units on seven sites, four of which were NCDF sites and three were new sites, all city-owned. The resolution also called for residency requirements for two-thirds of the units and recommended the placing of all these sites into a new "public residence" zone which would permit one or two-family houses, townhouses and garden apartments to be built either by the Newton Housing Authority or a limited dividend or non-profit corporation. The idea behind this new zone was not to open up the area for dense private development. NCDF accepted the Committee's action and declared that it was and still is economically feasible to build under the compromise plan.

The Board of Aldermen's Vote

On August 24 the full Board of Aldermen took action on the Land Use Committee's recommendations. The first votes came on the compromise package recommended by the Land Use Committee; after much debate it was passed 17-6, but that vote foreshadowed difficulties to come, as it was shy of the necessary three-fourths approval for any zoning changes. When the individual sites came up for rezoning all but one were defeated. In every instance a majority of the aldermen approved the site but the 18 votes could not be reached. The one site which passed was subsequently vetoed by the Mayor who claimed that
re-zoning of one site wasn't good sense in view of the fact that the basis of the NCDF proposal was a scattered site plan. After lengthy debate all the sites were then "chartered," meaning further discussion would be tabled until the next Board meeting. However, since the 90 day time limit (required by law during which a municipal body must take action following a public hearing) would have passed in the interim, the hearings would then be invalidated and new ones would become necessary, i.e. effectively killing the issue. The Waltham News-Tribune captured some of the flavor of the meeting:

As one listened in the heat, sweat and confusion of the aldermanic chamber in Newton's City Hall Monday night, he might have noticed that nobody was against low and moderate income housing.

All the aldermen present, or at least those who spoke, indicated they favored low and moderate income housing. It was just that they didn't like all or part of the plan before them.

One alderman seemed to want a pilot program. In effect, he told the clergymen and others sponsoring the Newton Community Development Foundation (NCDF), "I'm going to vote against you. But don't be discouraged."

Then there was the alderman that went on at length about how he didn't like THIS plan and he had some ideas about what he liked. And there was the alderman, reputedly a candidate for mayor the next time around, that said he knew other developers that would come right in if they got a zone change. The other developers were not named, needless to say.

And there was the alderman that said the board had unanimously approved a housing report three years ago that cited the need for low and moderate income housing. He indicated they should be consistent with their report. Then he voted against the NCDF units in his ward.
Thus, the Aldermen succeeded in delaying indefinitely any final action on the NCDF proposal. NCDF, however, was not totally discouraged in view of the fact that 17 of the 23 Aldermen favored their concept and at least a majority in every instance supported their sites. When their Board of Directors met September 8 it was decided to wait until the proposed "public residence" zone was acted upon in the hope that if the new zone were approved, they would then file new petitions on a revised group of sites. The "public residence" zone came before the Land Use Committee on September 21 but it was not in final form and was thus postponed a month. The following month it was also postponed. Throughout the ensuing months it became obvious to NCDF that the Board of Aldermen was not about to pass the "public residence" zone, that it was a delaying tactic to avoid confronting the real issue of specifying sites for housing which all the aldermen agreed in principle was needed.

The 774 Decision

In January 1971 the Board of Directors of NCDF met to discuss the situation. They were committed more than ever to building the housing in Newton; their support was increasing, but their options on the privately-owned sites were nearing the end of their terms without any concrete action to warrant extensions. Therefore, there
were three potential options open to them. The first alternative course of action was to refile a package of seven sites similar to the one proposed the previous August. This option was rejected as too risky, time consuming and without any evidence that it would succeed. The second option was a revised proposal containing a substantial portion of single home units which could be built under the HUD 235 and Turnkey III programs. This, it was claimed, would make the over-all proposal more attractive to the community, but after careful analysis it was rejected as economically unfeasible (as it had been two years earlier) due to federal cost restrictions and existing costs for construction and land in Newton.

The third option was the Chapter 774 ("Anti-Snob Zoning Bill") route which had previously been rejected. NCDF reluctantly accepted that alternative as the only viable one in the context of the roadblocks which they had encountered. Only private sites could be used under Chapter 774, so the proposal had to be revised to include only the six sites on which NCDF had options. Because of the financial realities of building and the fact that no city-owned land could be utilized, the densities on each site would have to be higher. Thus, new plans would have to be drawn. NCDF so informed the Mayor and Board of Aldermen by letter on January 22 (See Appendix 7). No
response came forth from either the Mayor or the Board (as of the end of April). Meanwhile, another hearing before the Land Use Committee on the "public residence" zone was held on April 12 and still no decision was reached. NCDF filed its petition with the Newton Board of Appeals requesting a comprehensive permit for its six sites on April 23. The new plan proposes 367 units on 23.95 acres. The housing would remain two-story town house designs, but the number of bedrooms per unit would be slightly increased over the original plan in order to make it financially feasible. NCDF filed an application for financing with M.H.F.A. According to the state law, the Board of Appeals has 30 days to set a hearing and 40 days to make a decision. If NCDF's application for a comprehensive permit is denied, they will appeal to the state Housing Appeals Committee as stipulated by Chapter 774; NCDF could become the first real "test" case since the law was passed in 1969.
FOOTNOTES


2. *Newton Planning Department, Sales Management Survey of Buying Power as reported in Low-Moderate Income Housing Study, September 1968, p. 16.*

3. as quoted in an NCDF print-out on December 1, 1969.

4. as reported by the League of Women Voters of Newton, *Conference on Newton's Need for Low and Moderate Income Housing, May 7, 1969. A Follow-up Report.*

5. words of Marc Slotnick, Executive Director of NCDF, to MIT graduate planning class in January 1971.

6. based on personal attendance at the public hearings.

7. based on conversation heard at the public hearing in Newtonville, Massachusetts.

8. Marc Slotnick, *op. cit.*


...the struggle between social justice and property rights involves altering the established practices of the organized building and real estate industries and touches upon the vested interests of a large and powerful middle class. Homes to these people are their prize possessions, and when they feel threatened by Negro infiltrations, they sometimes fight back with an arsenal ranging from public power to brickbats and bombs.¹

An analysis of the results of the Meagherville proposal in Lexington and the NCDF proposal in Newton could be carried out on several different levels but perhaps there is some middle ground which would prove useful for future policy decisions in this area. Indeed, there is a plethora of issues surrounding each case, but this analysis will attempt only to deal with those judged to be truly persuasive.

At first glance the Lexington and Newton cases appear to be circular; Newton was criticized for its scattered-site approach and Lexington was attacked because it did not have a town-wide scattered site approach. Lexington decided there was a shortage of subsidized housing in the community, so it selected the largest tract of town-owned land and proposed to begin its subsidized housing program
there. The idea was to approach the housing shortage one-site-at-a-time in incremental steps. Newton's housing proponents, on the other hand, decided that the best way of attacking the housing shortage problem was to build a significant number of units on scattered sites simultaneously so that opposition would be spread (and thus, weakened) and all villages would be effected rather than select one particular site as a beginning point (i.e. a "scapegoat"). In both cases, it suffices to say that the opposition (temporarily) carried the day, regardless of whether or not it was confined to one single neighborhood of abutters and "near-bys" or included ten such neighborhood groups.

**Lexington Analyzed**

Lexington approached the question of subsidized housing in a methodical manner. Over the course of three Annual Town Meetings the members first charged the Planning Board with recommending ways of providing low and moderate income housing, then responded to that study the following year by creating a subsidized housing zone and, at the same time, mandated a housing feasibility study for a specific town-owned area (Meagherville), and finally reacted the next year to the Planning Board's recommendations for housing based on that study (by defeating the proposal). The approach was rational, gradual,
and controlled; why was it killed?

There could be several explanations. One factor which first must be considered is the nature of the decision-making process in Lexington, that is, the representative town meeting form of government. For any rezoning proposal, according to the state zoning enabling act, a two-thirds vote, or about 125-140 town meeting members must favor the proposal. According to one experienced town meeting member\(^2\) there are 50-60 members opposed to any or all proposals for subsidized housing. This block of votes, according to him, comes from the "backbenchers" (those who tend to congregate there at town meetings) who live closer intown, work in town and tend to be tradesmen or merchants and are "less professional" than those who sit in the front. This block, therefore, almost amounts to the one-third-plus votes needed to defeat any rezoning proposal, so some inroads have to be made into this group in order to carry any zoning article. Yet, despite this perennial block of voters opposed to subsidized housing among the elected town meeting members, the composition of the Lexington Town Meeting, according to the same source,\(^3\) tends to be more liberal in general outlook, approach to change and monetary appropriations than the town itself. The representative town meeting form of government, therefore, cannot in itself be judged
a stumbling block to subsidized housing.

In the case of Meagherville, the "backbenchers" were not convinced by any of the proponents' arguments for subsidized housing. Moreover, the "traditional" opposition was increased by the Meagherville area residents who had ample time to organize and mount their attack. Since the March 1970 Annual Town Meeting appropriated the money to study Meagherville, through the public hearings held by Justin Gray Associates and the Planning Board in June, through JGA's final report issued in October, and through the Planning Board recommendations in February, the area residents had many opportunities to voice their opposition and build up their case; this they did successfully. According to three town meeting members a very good proposal (Clematis Brook) for subsidized housing was defeated at a special Town Meeting in January 1971 by a margin of less than ten votes largely because the Meagherville residents had voted against the proposal, although they lived nowhere near the site and were not among the "backbench" block. Implicit in their vote was the anticipated trade-off in March when Clematis Brook area residents were expected to vote with them to kill the Meagherville proposal.
The arguments raised against the subsidized housing plan of 80 units on the Meagherville land were not unlike the "shouted reasons" and "whispered reasons" which characterize the usual suburban reaction to such schemes. Even the Planning Board's strategy of using the Justin Gray Associates' report as a "scapegoat" was pierced. The Planning Board admitted to JGA that they (the Board) intended to reduce the number of units which JGA recommended to a more palatable number so that the Town Meeting might look more favorably upon such a moderate approach after being hit with the original plan. However, one town meeting member remarked that the Planning Board's reduction of the JGA recommendation from 300 units to 80 units was "like commuting a life sentence to twenty-five years...it was supposed to look good but, in fact, either way it was bad."8

The Meagherville proposal, according to many, "never had a chance;" not only did it fail to achieve a two-thirds vote but it failed to achieve even a majority. The question remains, how did Mark Moore's proposal (Centre Village) for 106 units pass the Town Meeting at the next session after Meagherville was defeated? There are several reasons: 1) there were fewer neighborhood abutters to raise objections to the Moore site; 2) Moore is a local builder, liked and respected, with a local
architect; 3) Moore's proposal, on land he had controlled for a number of years, emerged on relatively short notice with little publicity and public controversy; 4) there were fewer technical problems with the location of the site, i.e., it was in-town, close to shopping and other facilities, within a mixed commercial and residential area, close to a number of other apartments, and increased traffic would occur on the main street which could handle it; 5) there was no real conservation issue (which usually adds a significant number of opposition votes to such proposals); and 6) Mark Moore really did his homework; he personally contacted every one of the town meeting members and distributed material to them to explain his proposal in careful detail; moreover, he had several good friends among the "backbenchers" who voted with him for this one proposal. In short, there were a combination of small, but vital, factors which, in total, amounted to a two-thirds approval by a margin of only six votes. However, a petition for a referendum vote was filed within the five day limit; the vote was taken on May 3 and the Centre Village proposal was defeated by approximately 2 to 1.

Lexington was the first Boston suburb with an official committee on "suburban responsibility", and the last suburb
to create a subsidized housing zone but it has yet to zone any land for the construction of housing for low or moderate income families. The Town Meeting has publicly approved of the concept of building subsidized housing, yet all specific proposals have been defeated; if, indeed, the town meeting members are more liberal than the town at large (and the referendum vote gives credence to that proposition), then, as stated earlier, this form of government cannot be singled out. Nor can any particular aspect, flaw, or bad judgment in the process of confronting the subsidized housing question be identified as the major roadblock. One criterion can be emphasized, however, the state zoning enabling act, passed over 40 years ago, requires a two-thirds vote on any rezoning matter; this requirement has been the greatest single obstacle in preventing subsidized housing from being built in Lexington, as two of the last three proposals received well over a majority vote, but fell short of the necessary two-thirds. Only the Meagherville plan was short of a majority and that was by only four votes. Simple arithmetic evinces the disparity in such "democratic" decision-making processes. On the one hand it takes a 67% affirmative vote to rezone for subsidized housing construction, while, on the other hand such housing can be killed by only an 11% negative vote (a majority
of 20% of a town's voters by referendum). (See Chapter VI.) In one instance an overwhelming number must approve, in the other, a small minority can overturn. Consequently, such a clear mandate the decision-making process is faulty.

Tentative conclusions to the Lexington case can be summed up as follows:

1. A certain percentage of voting members will almost always oppose the construction of subsidized housing in Lexington; that percentage is close to one-third of the total voting membership.

2. In addition to that block, other opposition will assuredly be mounted by abutters and near'by residents depending on the site, and other interest groups, i.e., conservation committee, school committee, depending on the issue.

3. There is no one major argument articulated against subsidized housing, but the underlying motivation which predominates appears to be racial and class discrimination. (See page 93)

4. The two-thirds vote for rezoning appears to be the greatest hinderance to subsidized housing proposals.

5. The possibility of overturning any housing proposal which does pass through a referendum vote is also a crucial constraint (See Chapter V).

Newton Analyzed

Newton has a different form of government than Lexington (Mayor and Board of Aldermen) and its basic approach to subsidized housing was different (scattered site), but the arguments were the same and the results are, thus
far, identical. Newton possessed an indigenous, respectable, Church-related group with broad-based community support; it seemed to be the right kind of organization in the right kind of community at the right time, but it failed to win the necessary support.

The NCDF undertaking was far more ambitious than all three of the Lexington proposals combined, but its scale also increased its opposition. Moreover, the individual sites raised their own particular problems, along with the usual arguments about increased taxes, traffic, school overcrowding, absorption of necessary open space, threatened property value decreases and damage to the character of the community. Because NCDF was limited to sites for which it could negotiate as well as sites which the city was willing to contribute, the ten-site package was far from ideal. Nevertheless, the size of the NCDF proposal was not the predominant factor in its rejection, because four separate housing proposals on single sites were also turned down during the past two years. Likewise, its "moralizing" and "headline" approach was criticized for provoking controversy and unnecessary reaction, but again, this was not the fundamental weak link which broke the chain.
Despite all the outcry and the approach, NCDF and the Land Use Committee of the Board of Aldermen appeared to have reached an acceptable compromise of seven sites totalling about 350 units. Nevertheless, the Board of Aldermen, although approving the concept (of course), voted down all but one site for rezoning. Like Lexington, the goals were approved, but not the means to achieve them; also parallel was the seemingly insurmountable gap between obtaining a majority but failing to reach the necessary two-thirds approval. Several of the sites fell only one vote short of the two-thirds, and in every case a majority approved the rezoning. Thus, the major structural constraint in the whole process was the two-thirds requirement.

NCDF has decided to take the six sites on which it has options, draw up new plans, and go the Chapter 774 route. The first step is to the local Board of Appeals to request a comprehensive zoning permit and then, if necessary, to the state Board of Appeals. This process began on April 23, but whatever the outcome, the fact remains that the City of Newton failed to take the initiative itself to build housing for low and moderate income families despite public acknowledgement of the need. The reasons could be summarized as follows:
1. NCDF's scattered site plan enabled too much opposition to regroup.

2. The sites themselves had too many technical flaws which diminished the feasibility of the plan.

3. NCDF's approach was too "unsettling" and they attempted to confront the issue of racial fear directly instead of assuming a more "tacit" posture on the whole area of attitudes.

4. The political support necessitated by a two-thirds vote for rezoning was simply too much to attain.

5. Racial and class discrimination appeared to be the motivating force behind the opposition. (See below)

**Racial and Class Discrimination**

The most significant insight gained from attendance at both the Newton and Lexington hearings was the approach with which the vast majority of the opponents carefully and calculatingly attacked the subsidized housing proposals. In both communities the arguments were rational, articulate, pragmatic, technical and sophisticated; an altogether "proper" approach for white collar, educated, professional, middle class communities. Their kind of thinking and level of argumentation reminds one of some characterizations made of former Presidential Advisor McGeorge Bundy in a recent article:

*He's* terribly smart, *maybe* the speediest mind I've ever seen, *but* in a curious way it's a limited intelligence. There's something missing, a lack of depth, a lack of reflection.
There is no real philosophy. It's a mind that very seldom has a theory, but it has a given answer for a given problem...Mac was fascinated by operational problems, how to do it, how to plan it...instead of the reflective questions like "Where is that leading us?"

But what you also have is the inability to see the long-run consequences of a bad policy—and the long run is not so very long anymore...So the short run gets you applause, but it gets you into situations which very quickly come back to haunt you.10

This is precisely the kind of thinking which felt comfortable on the level of drainage and traffic problems but took offense at the implications made of racial prejudice or the appeal to "commitment" or "responsibility" vis a vis metropolitan needs or an integrated society. The opponents in both cases took strong objection to any moralizing, preaching, or philosophizing by the housing proponents; in Lexington it came from indirect remarks made by the Chairman of the Planning Board and in Newton the very identity of NCDF as a church-related group brought this unwanted level of argument into focus. In Newton, the racial issue was much closer to the surface as blacks spoke out at the hearings and asked all the racists to stand up and be counted. But in either instance there was a decidedly "up tight" atmosphere whenever the racial question was broached; the sudden tension in the hall took on a deafening aspect.
The opponents preferred to keep their arguments on the specific, the tangible and the technical so they could always oppose the details of any plans. This level of argumentation, in fact, only masked their real underlying motivations of racial and class discrimination. These motivations so predominate that they override any secondary reasons why specific plans in individual cities and towns are rejected. Such motivations exist in all classes, but in Newton and Lexington, it could be postulated that the most intense, discriminatory attitude came from the lower middle class who had more recently "made it" by moving into those two suburbs and were desperate to preserve the "prestige" which they had finally attained. More often than not, it was in their more moderate neighborhoods where the subsidized housing was being proposed. Some housing proposals try to move as quietly and quickly as possible in running the suburban gamut; others (like NCDF) try to confront the underlying motivations directly and bring them out in the open. Clearly, this latter strategy only serves to invoke more intense opposition, and Marc Slotnick admits that if he were to approach the issue again, he would create as few waves as possible.

Nevertheless, at this point in time there apparently is no well-defined answer to the question of dealing with
racial fear and economic discrimination. The questions keep reappearing: How do you deal with attitudes directly? Perhaps, they can only be dealt with in the classroom and in the church or synagogue, but should not be broached by housing developers. The housing strategy should be one of proposing the most technically solid and politically palatable plan as possible. The traditional argument re-emerges at this point, whether the price one pays in compromising his objectives is worth the achieving whatever is achieved, even if the alternative offers no results in the immediate future. This question will be explored in Chapter VI.

1971 Annual Town Meetings

Newton and Lexington are not alone in their stance against subsidized housing; their cases have been "writ large" across the Boston metropolitan area. In the course of all the Annual Town Meetings held this past March and April throughout the region at least eighteen communities confronted issues relating to apartments or subsidized housing developments or new zones to allow for such developments. At least 44 articles were in the offing to rezone for multiple housing; only one passed to create low income family housing (involving only 25-50 units in Randolph—the same town which turned down three articles to rezone to multi-family and had eight others withdrawn
"in the face of overwhelming opposition." ) (See Appendix 8) At least 28 articles were defeated and 12 were withdrawn in the face of opposition. Other negative steps were taken: land requested to be set aside for the development of low income housing in Wellesley was defeated; land originally zoned and currently being planned for apartment use was taken by eminent domain for a school or fire station in Framingham; restrictions were placed on apartment buildings in Natick and Marshfield, the latter increasing its square foot per apartment requirement from 2000 to 6000! Three elderly projects were approved and two new zones were created—an apartment zone in Bedford (although a specific site utilizing this zone was defeated) and a condominium zone in Lincoln. Wilmington defeated a new zone proposal. Thus, a maximum total of 50 units for low and moderate income families have been approved by 18 suburban communities which voted on the issue. In total, at least 48 articles related to the question of multi-family housing were to be voted on at the annual town meetings; only six received positive action. The issue did not even arise in the other towns. Such is the thrust of housing development in the suburbs in 1971.
Obviously, local initiative is not about to solve the housing crisis, specifically the housing shortage for families of moderate and low incomes, in the Boston metropolitan area or in the state. Given the fact that each community has control over its own land development decisions, the land needed to build the housing has not nor will become available. Zoning is the primary tool with which these municipalities can close their doors to overriding regional housing needs. Therefore, the question becomes: Can this tool be made responsive to such regional or metropolitan needs?

Regional Solutions

At first glance the logical answer to that question appears to be the creation of regional agencies with the authority to make decisions in matters of regional significance, such as the zoning of land for low and moderate income housing. However, there are a host of questions concerning which matters are of regional significance and which are of only local significance, especially in the area of land use controls. The answers to these questions and the corresponding implementation strategies, unfortunately, largely remain in the world of hypothesis as very little has been concretized in the area of regional decision-making powers.
Certain devices have been tried, including metropolitan government (Miami-Dade County, Jacksonville-Duval County and Nashville-Davidson County), voluntary councils of government (Detroit and Washington, D.C.), review of certain local land use decisions by a county authority (New York), a metropolitan board of zoning appeals (Indianapolis-Marion County), and a state board to review local zoning decisions (Ontario); some have been more successful than others in controlling land use actions, but none have been conclusive as yet. In short, the overall attempts across the country have been minimal and specific actions, such as mentioned above, suffer from insufficient transferability because of unique local situations. Unfortunately, it is outside the scope of this paper to examine these different attempts at metropolitan control of certain governmental functions.

Although the weaknesses and the insularity of local land use regulation in metropolitan areas have been well documented, and have been demonstrated in this paper in terms of making land available for subsidized housing, there can be no real resolution until there is a major restructuring of government in metropolitan areas. The present conglomeration of municipal, county, state, federal and ad hoc agencies, each with its own objectives and powers cannot hope to produce a comprehensive, yet
efficient planning and decision-making process to guide regional development. Moreover, the suspicion with which each level of government is regarded by the other makes cooperation very difficult. The basis of the mistrust by the localities of higher levels of government derives from a fundamental American belief in "home rule," that is, local government is best because it is closest to the people, and the people's right to self-determination, especially in the cherished area of property rights, should remain on the local level. Consequently, there would be immense political pressure opposing any transfer of zoning functions away from the individual cities and towns.

Further political difficulties arise from the fact that there are no functioning regional bodies at present with any real decision-making powers. Regional planning agencies often suffer because there is not a single governmental unit with jurisdiction coterminous with that of the planning agency; thus, they have not really proved effective in reviewing local decisions and have been relegated to the level of giving advise. Moreover, if they were to be given zoning control, they would have to be reconstituted into elected bodies conforming to the "one man, one vote" interpretation of the equal protection clause of the 14th Amendment because zoning is a legislative
function. Thus, opponents of such transfer of powers argue that regional planning boards should be given no zoning control until legitimate regional or metropolitan government is created with its own legislative powers and financing.

The reorganization of metropolitan government is a vast and complex undertaking, however, especially in light of the myriad vested interests which have developed over the years in the existing situation. One fact is clear: before land use patterns can be controlled from a regional level, the fundamental fiscal disparities which exist throughout metropolitan areas should be dealt with. For example, the tax base might be equalized throughout the region, the property tax could be either transformed into a land tax or abolished in favor of a graduated state income tax, and taxation of commercial and industrial real property could be taxed regionally and returned to local governments on the basis of need. Indeed, the fiscal box in which local communities find themselves, i.e., trying to satisfy the increasing demand for municipal services from a revenue source which is mainly generated from the local property tax, is a legitimate and increasing dilemma.
Land-use controls are the only devise available to the local community to gain some measure of control over their financial balance sheet. "Fiscal" zoning attempts to encourage forms of land development that minimize the need for services and maximize the ratio between taxes received and service costs. The need to accomplish these objectives too often proves irresistible, as recognized by the Douglas Commission:

Each locality becomes an orphan in the fiscal storm, and the efforts by individual localities to ignore the fiscal aspects of land use controls, while helpful in solving long term metropolitan housing problems, may have disastrous short term consequences for the local budget.¹²

Other reforms would also have to accompany fiscal matters in order to resolve intragovernmental and local-regional conflicts. Zoning, therefore, is only one piece of the metropolitan pie.

However, the subject of this thesis is not regional governmental restructuring, fiscal remedies, or other possible long range solutions. The crux of this thesis is to analyze the real, the immediate, and the pragmatic regarding the issue of suburban exclusion of subsidized housing. The metropolitan housing problem is no "long range" problem; the preceding documentation attests to its seriousness here and now and evinces the need to attack it with whatever tools are presently available.
In this regard, regional solutions are simply too far removed; there are no existing regional structures which lend themselves to smooth reception of a transfer of power from the local level, and even if there were, it is politically unrealistic to think that the basic tenet of "home rule" would be relinquished for this to happen, especially in the area of land use controls.

In sum, local initiative, based on case studies of Lexington and Newton, and further substantiated by town meeting action around the suburbs of Boston, has clearly ignored the overwhelming regional need for low and moderate income housing for families in the suburbs where the land and jobs are. Despite the variation of reasons, causes and motivations which might be derived from studying the debate of each zoning article in each community in the Boston SMSA, the results cannot be disputed. Regional government or existing planning agencies do not offer immediate relief in the face of the enormity of the problem. Therefore, proper action must come from two possible sources—the courts and/or the state legislature and they will be analyzed in the next two chapters (the role of the federal government is also critical but will not be examined here).
FOOTNOTES


3. Ibid.

   Erik Lund, Chairman of the Lexington Planning Board.
   Frank Michelman, Harvard Law School Professor.

   The "shouted reasons" include:
   1) apartments don't pay their own way
   2) you're constructing tomorrow's slums
   3) property values are reduced
   4) they are not in keeping with the "character" of the community.

6. *Id.* at 1068-71.
   The "whispered reasons" include:
   1) they attract people of the lower classes
   2) they attract transients who have no interest in the neighborhood
   3) they will rent to Negroes


8. heard at the Town meeting on March 31, 1971.

9. from various people in Lexington including Bowyer, Lund and Michelman, *op. cit.*


11. according to a survey in the Boston Globe, February 28, 1971 and my own investigations (See Appendix 12 for a list).
CHAPTER V

THE COURTS AND EQUAL PROTECTION

The Supreme Court has been conspicuously uninvolved in zoning for the past four decades. In 1926 the Court heard its first zoning case, Village of Euclid v. Ambler Realty Co. \(^1\) and concluded that comprehensive zoning was immune to constitutional attack unless it could be determined that a given ordinance was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."\(^2\) Implicit in this decision was the deference to legislative expertise in the matter, for the standards invoked by the Court to test zoning ordinances almost presumed their validity. As a result only the most outrageous of ordinances would fall outside the criteria set by the Court in Euclid.

The basis of the Euclid case was the question of due process, i.e., whether zoning was an unconstitutional taking of property without due process of law. The Court upheld zoning as a valid exercise of police power and lower courts have been validating varieties of zoning ordinances against due process attacks ever since. The due process approach rests on the premise that government
must have some reason to act before it can restrict the freedom of individuals and that reason must be based on the public interest (an objective which outweighs the personal limitations imposed). However, the due process approach has its own conceptual limitations vis a vis exclusionary zoning.

It is an equation formulated to express and resolve the tension between the interests of the planning polity and the individual landowner; what it omits is the interest of the low or moderate income households whose access to the area is banned by the zoning ordinances in question. Due process then traditionally has been limited to the issue of police power versus private property rights. As long as the health, safety and welfare of those within the municipality's boundaries were protected, the zoning ordinance could be upheld. The interests, therefore, of those excluded never enter the argument, but this is precisely the nature of the problem of exclusionary zoning.

The Pennsylvania Cases

However, the death of the due process argument in the exclusionary zoning battle cannot be signaled yet; it is alive and well in Pennsylvania. In National Land and Investment Co. v. Kohn the Pennsylvania Supreme Court held that the minimum lot area requirement of four acres was unconstitutional as applied. Minimum acreage
zoning, it said, was not unconstitutional per se, but was invalid when applied to this particular case—a case of a suburban town trying to build its dam before the population wave reached its walls. The Court struck down the ordinance on the grounds that it placed unfair restrictions on the mobility of the population of Philadelphia which was already suffering from a severe housing shortage. In so doing, the Court obviously was reckoning with the interests of those outside the municipality and the negative impact of the zoning ordinance upon those interests. By asserting that the town had a responsibility to those who might become part of the suburban expansion, it considerably broadened the framework of the due process approach.

Of further interest was the Court's rejection of the township's three major arguments justifying the four acre zoning ordinance. The rationale presented included the necessity of preventing an overload on the sewage disposal and drainage system, the inadequacy of the road system (and thus fire protection) to support the burden imposed by one-acre zoning, and the importance of preserving the "character of the area", i.e., open space, historic districts, the setting for old homes and the rural atmosphere of the town. The Court was not convinced by the significance or relevance of these arguments and
concluded,

A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid.\(^5\)

The Pennsylvania Supreme Court followed its National Land decision in two other recent cases: in Appeal of Girsh\(^6\) it invalidated a local ordinance excluding all apartment houses from the town. In Appeal of Kit-Mar Builders\(^7\) it struck down a two acre lot minimum because it was "a great deal larger than what should be considered as a necessary size for the building of a house..."\(^8\) The Court left no doubt about its position when it summarily declared that "an exclusionary purpose or result is not acceptable in Pennsylvania."\(^9\)

These three Pennsylvania decisions are noteworthy in that the words "equal protection" are never mentioned, yet the basis for the findings appear to rest directly on equal protection strict review standards, i.e., a compelling state interest and a necessary means to achieve it (to be discussed below). Under the traditional due process standards, justifications for such zoning which were raised by the community, such as the preservation of aesthetic character and fiscal prudence, would have been sufficient to preclude judicial invalidation. In short, one way or another, broader social concerns seemed
to be invading the narrowly-defined zoning domain.

The Equal Protection Doctrine

In light of these emerging social implications, i.e., that exclusionary zoning ordinances operate more harshly on the poor than the wealthy, the question is currently being raised whether such zoning ordinances do not, in fact, fall within the scope of the equal protection clause of the 14th Amendment. This issue has been unanswered thus far by the Supreme Court but its imminence and importance necessitates its consideration here.

There are two explicit standards of review in the application of the equal protection clause. The first is the traditional "rationality" test under which legislatures may constitutionally classify citizens into separate groups and treat them differently as long as the classification bears a reasonable relationship to permissible state objectives sought by the statute. Only the "invidious" or "arbitrary" classification is struck down. Under this "passive" review the Supreme Court has only outlawed one such legislative classification which attempted economic regulation in the past 30 years. Obviously, the courts have deferred to the legislature when a form of economic regulation is under attack. Large lot zoning apparently would be upheld using this test; control
of population is a valid state objective and zoning laws are rational means of achieving this goal.

However, a certain number of cases over the past several years have come under closer scrutiny by the Supreme Court and a more vigorous test than rationality has been applied. These cases fall under two headings: those involving a constitutionally suspect classification and those involving a particularly favored right. In cases involving these categories the Supreme Court applies stricter standards of review; legislative classifications are invalidated when their distinctions are not necessary to effectuate a compelling state interest (as compared to the traditional approach which accepts classifications reasonably adapted to a permissible state interest).

The most prominent example of a constitutionally suspect classification is a classification based on race. The Supreme Court has been particularly attentive to this issue, striking down de jure racial classifications as violations of equal protection in such arenas as public movie theaters, golf courses and swimming pools. However, close scrutiny standards have been applied more recently by the Court to de facto classifications which clearly discriminate. Proving racial motivations on the part of the body enacting exclusionary zoning ordinances therefore has been one method of invoking the close
scrutiny tests of equal protection which the Court has been willing to recognize.

In *Daley v. Lawton* the Circuit Court upheld the findings of the district court that the Planning Commission and the City Council were, in fact, acting from racial motivations when they denied an application for a zoning change to permit construction of a low-income housing development. The housing development was a federally-sponsored project to be built in an all white neighborhood for the use of Lawton's poor (who happened to be black and confined to a ghetto area of the city). The court ruled that the proposed project conformed to sound planning principles, was consistent with existing zoning and projected land use patterns, and that the refusal to grant zoning permission was an act of racial discrimination which violated the 14th Amendment. It concluded:

> If proof of a civil rights violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection. 13

Other similar cases which attempt to prove racial motivation as the basis of zoning action are presently in process, involving Black Jack, Missouri; Lackawanna, New York and Mahway, New Jersey. More cases undoubtedly
will be developed through the efforts of the National Committee Against Discrimination in Housing, the NAACP Legal Defense Fund and the Suburban Action Institute. But it is not all that easy to prove that exclusionary zoning is a "sophisticated means of invidious racial discrimination," especially when referendums are concerned.

The Referendum Issue

In Ranjel v. City of Lansing the city council had rezoned a 20 acre site in an all white single-family neighborhood for the construction of a federally-subsidized low income housing development. HUD regulations specify that certain sites shall be selected outside areas of racial concentration, and this development was to help alleviate the substandard housing conditions of the black and Mexican-American families living in Lansing's ghetto areas. Following the zoning change, a citizens group presented a referendum demanding repeal. The state court ordered the city to hold the referendum, but the District Court concluded otherwise. It determined that because numerous rezoning petitions providing housing for white people had been granted to developers without any referendums, the referendum in this case was based primarily on racial motivations. However, the Court of Appeals reversed the District Court decision ruling that
electors have a legal right to a referendum in this case and motivations consequently are immaterial. The Supreme Court denied the subsequent petition for certiorari.

The Courts have been reluctant to investigate the motives of each individual voter in other referendum cases as well.\textsuperscript{16}

In \textit{James v. Valtierra}\textsuperscript{17} on April 26, 1971, the Supreme Court upheld the constitutionality of a 1950 California referendum law which required that any public housing project be approved by a majority of the voters in the local community. The Court ruled that a referendum approval of any public housing project did not rest on distinctions based on race, but rather that it demonstrated a "devotion to democracy, not to bias, discrimination, or prejudice."\textsuperscript{18} A lawmaking procedure, it went on to say, that disadvantages a particular group does not always deny equal protection; if such were the case, the Court full well realized the implications for extensive judicial investigation into all areas of governmental structure to determine which actions disadvantages any of "the diverse and shifting groups that make up the American people."\textsuperscript{19} Thus, in its rather short opinion, the Court refused to extend the referendum issue to apply to wealth discrimination nor could it find an underlying racial motivation. In sum, equal protection
was not denied the plaintiffs who were eligible for the public housing.

In light of this judicial restraint and the ease with which referendum motives can be disguised, it can be assumed that a reliance on racial discrimination to bring exclusionary zoning, on a broad scale, under the strict standards of the equal protection clause will be insufficient. A different legal argument will have to be made.

The second category of cases in which the close scrutiny tests are applicable are legislative classifications which are injurious to a particularly favored right, sometimes called a fundamental or constitutional interest. The Supreme Court has identified several fundamental interests which are entitled to strict standards of review, such as the right to interstate travel, the right to vote, the right to procreate, and rights relating to the criminal process. However, the Court has not made explicit the criteria by which they determined that these rights (and not others) were fundamental.

Before the extension can be made, however, to include equal access to housing among the categories of fundamental rights, the case of Dandridge v. Williams looms as a large hurdle in the path. In this case the
Supreme Court refused to overturn a state regulation which imposed a maximum per family limit on AFDC assistance. The opinion contained suggestions that the equal protection doctrine had been defined (and thus limited). The Court intimated that the category of fundamental interests would be limited to freedoms explicitly guaranteed in the Constitution. Although this may not be construed as repudiating the close scrutiny given such non-constitutional matters as voting and criminal appeals, it would appear to exclude from consideration those social welfare concerns such as housing and education. The opinion suggested also that the suspect classification category be limited to racial classifications, (another potential roadblock to "equal-protectionists" who want to see de facto wealth classification included in the suspect category).

The combination of Dandridge and Valtierra loom ominous for broadening the horizons of equal protection, either by extending the category of fundamental rights or the area of suspect classifications. However, certain mitigating factors should be introduced at this point: referendums are not zoning bylaws and hopefully the underlying motivations of the few who create such bylaws will be scrutinized more carefully than the motivations of the many who vote in referendums. Also, the maximum
welfare grant system in Dandridge did not deprive anyone of welfare benefits but only reduced them on a per capita basis to each member of the family; this is distinguishable from a zoning ordinance which does result in absolute deprivation. Moreover, the case involved a classification by family size; consequently, it may not inhibit expansion of "active" review under the 14th Amendment in the area of wealth discrimination.

Wealth Classifications As Suspect

The argument that discrimination by wealth should be considered like racial discrimination as a suspect classification is very critical if future legal breakthroughs in outlawing exclusionary zoning are to materialize. Because the Court has extended its active review under the equal protection clause beyond de jure to de facto racial classifications the hope is that economic classifications, i.e., classification based on the ability to pay, may come under the same review. That hope was given some foundation when the Supreme Court in McDonald v. Board of Election Commissioners said that wealth was a factor "which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." However, as that was not an issue in the case, the statement becomes pure
dictum, a gratuitous offering by the Court, and by no means an establishment of any precedent.

Explicit de jure wealth classifications restricting important interests have been granted a strict standard of review. In Shapiro v. Thompson the Court held unconstitutional the requirement that in order to be eligible for aid a potential welfare recipient must have lived in the jurisdiction for the immediately preceding year. The classification tested divided needy residents into two groups—those who had lived in the jurisdiction during the previous year and those who had moved into the jurisdiction during that year. The Court ruled that this classification discriminated against welfare recipients solely because they exercised their constitutional right to move interstate, "and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." The language indicates that the strict standard was being applied, not necessarily because a de jure wealth classification in itself was sufficient to invoke it, but because a fundamental interest was also involved.

Nevertheless, the opportunity to move from de jure wealth classifications to de facto wealth classifications
(as in the area of racial discrimination) is available. The Courts handling of such cases, however, is far from clarifying the issue. The following three cases allow for some reading of the Court's position: In *Griffin v. Illinois* the Court held that where it was essential for appellate review of a criminal conviction, an indigent defendant was entitled to a free transcript at the state's expense. Illinois, it determined, was creating a de facto classification by charging for trial transcripts (albeit uniformly) and thereby enabling only those of adequate means to prosecute criminal appeals. Following this precedent several years later, the Court held in *Douglas v. California* that indigent defendants must be supplied with free counsel on their appeal. But where the merits of the one and only appeal an indigent has as of right are decided without the benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

Moving out of the realm of criminal procedure, the Court extended its attack on de facto wealth classifications to the voting rights area. In *Harper v. Virginia Board of Elections* the Court held the Virginia poll tax unconstitutionlal with the resounding words of Justice Douglas that "lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." Although Justice Douglas relied on *Griffin*
and Douglas for support of this statement, it is difficult to ascertain from where he drew such rationale. Michelman points out in his review of Harper that nowhere "is there any occasion for inference that the poor are, in any more general sense, a judicially favored class or that de facto wealth discriminations are generally disfavored." Moreover, the Harper-Griffin-Douglas cases could all have been decided on grounds other than classifications according to wealth being suspect; Griffin and Douglas could have been decided on due process grounds alone and Harper need not have resorted to wealth classifications for its conclusion.

The significant factor in each case (as in Shapiro) was that the classification according to wealth denied the poor an interest which was held to be fundamental and thus sufficient to require strict review standards. The Harper case involved the right to vote; the other two criminal process cases, while admittedly involving classifications of wealth, also stressed the particularly favored interests involved. In short, there are too many forces at work in these cases to justify the conclusion that poverty has now joined race as a suspect classification; the law is simply unclear at this point. The Supreme Court's various offerings intimating that wealth discrimination is sufficient per se to call forth
strict standards of review have been more gratuitous than essential to the merits of the cases decided. As Michelman concluded:

I believe we ought to hear the teachings of Harper and the Griffin-Douglas line with an ear resolutely deaf to superfluous rhetoric. We do better by the Court to regard it, not as nine (or seven, or five) Canutes railing against tides of economic inequality which they have no apparent means of stemming, but as a body commendably busy with the critically important task of charting some islands of haven from economic disaster in the ocean of (what continues to be known as) free enterprise.\textsuperscript{37}

Apparently, Michelman is correct because although the opinion in Valtierra relied on Harper, Douglas and McDonald to hold that an explicit classification on the basis of poverty is a suspect classification, in this case the referendum on approval of low income housing projects, it was, unfortunately, the minority opinion.

However unclear the Court's position has been thus far on the issue of wealth classifications, the intimate relationship between racial and class discrimination in this society would appear to call for the same judicial treatment of both motivations and the arguments must be pressed. At first glance, the case can be made that the same conditions which have made racial discrimination judicially suspect apply to class discrimination, that is, segregation into groups (either by race or class)
reinforces a social stigma, contradicts democratic notions of equality, and invites the danger of governmental abuse of minorities lacking political power. In fact, racial prejudice may itself be but one aspect of a more fundamental attitude of class discrimination.

Nevertheless, there are problems within the general similarity of race and class (or wealth) classifications which present obstacles to immediately striking down de facto wealth discriminations. One basic difference lies imbedded in the value structure of the country: racial discrimination may be growing more intolerable to more Americans but discrimination based on the dollar is a concept which invades the cherished domain of the private, capitalistic, competitive, system in which the housing market operates. Furthermore, given the inequities in society, whenever the government charges for services, the charge can be made that such costs place an undue burden on the poor. The Griffin-Douglas-Harper applications were justified, but the implications are obvious: where do you draw the line? The Court will be reluctant to open the Pandora's box (See Valtierra). Further difficulties arise from the nature of poverty itself; there are varying degrees of poverty and all depend on one's perspective and one's standards.
(Poverty) lies along a continuum of circumstance, while the cross of disfavored racial derivation tends to weigh fully or not at all.\textsuperscript{38}

Moreover, poverty, unlike race, is theoretically remediable. This factor may diminish the enthusiasm of the court for getting involved when the issue might be resolved in time without any judicial decision whatever. In other words, the case for such intervention would not be so strong where governmental classifications impinged upon "diverse and shifting groups"\textsuperscript{39} rather than a "discrete and insular minority."\textsuperscript{40}

The argument to be made here, however, which relates directly to the whole question of exclusionary zoning, involves those instances when the government not only creates wealth classifications but specifically, when it acts in such a way as to frustrate, perpetuate, and put barriers in the way of those who were trying to lift themselves out of the poverty category. By restricting the upward mobility of the poor, the government is creating, in effect, a permanent class of poor people, a "congenital" condition similar to that of race. Stated simply, the argument follows:

active equal protection review is in order when the state creates obstacles which strongly tend to frustrate people desiring to remove themselves from a disadvantaged and discriminated-against group. If it
could be shown that a governmental enactment has this clear effect, the burden of justification would fall on the state to show that the enactment was precisely designed to further an overriding public interest.41

In other words, certain state actions perpetuate the same situation vis a vis the poor that the courts consistently have struck down vis a vis racial discrimination by applying strict standards under the equal protection clause of the 14th Amendment. If these situations are so parallel, they should be dealt with in a similar manner. There are conditions which would have to exist: first, the state acted affirmatively; second, the act substantially impaired the social mobility of the poor. Affirmative action by the state would include any action which raised the cost of some critical resource beyond what it would be in the private unregulated market so that its availability to the poor would be significantly diminished. This action would then be considered de facto wealth discrimination, and treated by the courts as they have been treating de facto race discrimination.

The Fundamental Interest in Zoning

However, de facto wealth classifications have not been sufficient per se to bring to bear the close scrutiny test (as has been previously discussed), so the crucial factor becomes the particular interest at stake. Thus,
what conditions are essential for social advancement such that they merit the special protection afforded a fundamental interest, and how do exclusionary zoning ordinances impinge on these conditions? There are three necessary conditions for social mobility presently being advanced—the access of the poor to employment, education and housing. In each instance the impact of exclusionary zoning is immediate and substantial.

The access of the poor to employment has been severely restricted because of various zoning practices in suburban communities throughout our metropolitan areas. The movement of blue collar jobs and traditional occupations of the poor out of the metropolitan core areas to the suburbs has been well documented. The poor have been unable to move out near the new locations of these employment opportunities because low cost housing has not been available in the suburbs. Therefore, they have been forced to commute to these jobs which has proven very costly and time consuming if possible at all. Public transportation systems thus far have been unable to cope with this decentralization of jobs away from the residences of the lower class. In short, exclusionary zoning, by prohibiting the development of housing for low and moderate income families has critically restricted the job accessibility of the poor.
and thus has exacerbated their already severe employment problems.

The access to educational opportunities denied the poor because of exclusionary zoning is a more complex supposition which involves some measurement of educational quality. The amount of money spent for education is one crucial determinant, however, and the disparity between suburban spending and city spending is clearly in favor of the former. Moreover, the major finding of the Coleman Report conducted for the Office of Education in 1966 was that socioeconomic factors bear a strong relation to academic achievement. Students of low socioeconomic status tend to improve significantly when taken from a homogeneous school and placed with students of high socioeconomic status. Busing is one approach to the problem but this alternative maintains the existing social stigma and fails to relieve another problem of the homogeneous neighborhoods comprised of persons of low socioeconomic status in the central cities, which, may have as great an effect on the educational process as schools. Thus, it can be argued legitimately that exclusionary zoning likewise hinders the ability of lower income students to rid themselves of their stigma of poverty through educational achievement, as it helps confine them to
underfinanced and lower class schools which have been judged inferior.

The third factor critical to upward social mobility is the access to decent shelter. Housing has been accorded a high tribute in several recent decisions of the Supreme Court. In Shapiro v. Thompson the Court referred to "food, shelter, and the other necessities of life." In Reitman v. Mulkey Justice Douglas, in concurrence with the majority, stated "Urban housing is clearly marked with the public interest." In Jones v. Alfred H. Mayer Co. the language returned to the Civil Rights Act of 1866: "All citizens of the United States shall have the same right.....as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." All told, equal access to housing is regarded by the Court as "a matter of the most serious social and constitutional concern."

The right to housing has been judicially protected in the context of racial discrimination, but exclusionary zoning based on class discrimination has similarly denied the poor that right de facto by confining them in deteriorating housing and inadequate environmental conditions (See Chapter I). The failure to build low and moderate income housing in the suburbs has restricted the social
mobility of the poor and thus, their access to occupational and educational opportunities as well. Therefore, it can be argued that exclusionary zoning has had a dramatic effect on the fundamental right of the poor to attempt to move out of the poverty category by creating de facto wealth classifications. Just as with racial discrimination such practices should invoke the close scrutiny tests applied under the equal protection clause of the 14th Amendment.

Another argument could be introduced at this point, claiming that exclusionary zoning also interferes with the right to travel.\textsuperscript{51} Based on \textit{Shapiro v. Thompson}\textsuperscript{52} and \textit{Edwards v. California}\textsuperscript{53} the right to travel forbids the state from arbitrarily excluding a class of persons (\textit{Edwards}) and from seeking to deter or penalize those who wish to enter its borders (\textit{Shapiro}). The argument can be advanced that the right to travel interstate should be equally applied to the right to travel intrastate;\textsuperscript{54} because exclusionary zoning ordinances deny poor people the right to settle in a new community in the hope of bettering their lives, their fundamental right to travel has been unconstitutionally restricted.
Exclusionary Zoning Under Strict Standards

Assume, however, for the moment that the Court has determined either that de facto wealth classifications are constitutionally suspect and/or that the equal access to housing, jobs and education is vital to social mobility, which is a fundamental right. An attack on exclusionary zoning would then come under the close scrutiny test requiring the state to justify the necessity of such zoning ordinances to achieve a compelling state interest. The plaintiffs would have to show that the large lot zoning ordinances minimum floor area requirements, or whatever local conditions were imposed, were not necessary to achieve the state's objectives, that there existed a less restrictive alternative, or that the objectives sought through zoning were not compelling.

There are several well-known justifications for large lot zoning; some of the more common reasons are the protection of property values, the need to balance the cost of municipal services, the preservation of open space and the "character" of the community, and the avoidance of increased traffic and congestion. The property value argument is potentially the strongest and most often referred to. The individual invests more money in his home than any other good and naturally has
a great deal at stake financially in its appreciation in value. But there is little empirical evidence (except in instances of block busting) to show the casual relationship between apartments in the neighborhood and/or blacks and the lowering of property values. In a sense, it is a "self-fulfilling" myth, effective only by predicting its effect. Moreover, it is a self-destructive argument from a legal standpoint; the middle class excludes the lower class and thereby causes them economic hardships in order to further the middle class' own economic interests...hardly compelling.

The argument based on the need for housing which will "pay its own way," i.e. its property taxes will balance off the additional municipal services needed, is of dubious credibility from a strict cost-benefit analysis (if one can be made). Furthermore, the exclusion of households in order to keep down municipal services at the expense of other municipalities and the needs of the region and state is also a rather weak argument. Shapiro and three Pennsylvania Supreme Court decisions, National Land, Appeal of Girsh, and Appeal of Kit-Mar all took a negative approach to this insular position.

The justification according to open space preservation should be examined closely. Large lot zoning
undoubtedly contributes to the beauty of an area, but the question is whether it is a necessary justification. Less restrictive measures such as cluster zoning and Planned Unit Developments can be employed to achieve the same result without excluding the poor, which is too high a price to pay for the objective desired. The last argument concerning the increased load on the roads, creating undue traffic problems, again is generally a weak argument. The objective is hardly compelling when juxtaposed with the infringement of individual rights it creates. At any rate, gradual movement to the suburbs, when achieved, will not cause any further problems than have already been handled through suburban population expansion in the last twenty years. Planning for such increases can be managed.

The real problem emerges when and if the court can dismiss the justifications for exclusionary zoning either as an unnecessary means to achieve objectives or as serving a noncompelling interest. The problem then centers on state action and where the judicial line can be drawn, e.g., if four-acre zoning violates the equal protection clause, can the same be said for half acre zoning? The heart of the matter is the unavoidable balancing process—individual deprivation versus social necessity—which will be endemic to these equal protection
cases. It raises the old criticisms which emerged from substantive due process issues of inviting the Court "to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the states as well as the Federal Government."

Obviously, there is opportunity for judicial "overkill" in this area and such possibilities have created great reluctance on the part of the courts to broaden the scope of the equal protection doctrine. The invalidation of zoning laws would undoubtedly have a much greater impact than the elimination of the poll tax as was done in Harper. Possible judicial remedies include not only the elimination of exclusionary zoning but perhaps the requirement of positive governmental action such as including a certain number of housing units for the poor in a specific town. This "benign quota" system, similar to benign wealth classifications in public assistance programs, might have to be introduced to actively aid social mobility. One Circuit Court has at least recognized the issue:

Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of benefits. Given the recognized importance of equal opportunities in housing, it may well be, as a matter
of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low income families, who usually—if not always—are members of minority groups. 57

The question is essentially a policy and planning question, an area for legislative competence. (See Chapter VI for a discussion of Chapter 774.) But pragmatically speaking, there is the issue of what to do in the interim while the legislature is deciding to act—or if it refuses to act at all? One approach outlines four areas of possible judicial response in the face of legislative inactivity, without embroiling the judiciary in the whole complex issue of equal protection and benign quotas. 58

1. Strike down restrictions which are explicitly imposed to keep out "undesirables," segregate economic classes and avoid the burdens of future growth.

2. Strike down zoning ordinances, which blatantly refuse to consider the needs of contiguous areas.

3. Consider the nature of uses of contiguous land in the same zoning area when making determinations.

4. Accept the density requirements of the municipality but allow for cluster zoning to provide more low cost housing.

Whether the courts are prepared to strike down exclusionary zoning ordinances outside the context of racially discriminatory motives is unclear at this time,
although it is not too hopeful, except for the language of Justice Marshall in his dissent in *Valtierra*: "It is far too late in the day to contend that the 14th Amendment prohibits only racial discrimination." 59

It appears, however, that if exclusionary zoning does get brought under the active review standards of the equal protection clause, it will not stand up to the test. Nevertheless, a possibility still exists that the Court will take a positive stand against exclusionary zoning, despite the ruling of *Valtierra*. The ramifications of such a decision, however, in terms of an impetus or leverage for state legislatures and developers to begin to move on the issue are debatable. The *Brown v. Board of Education* 60 decision in 1954 has taken over 15 years to implement. The real action must come from the state legislatures, and thus far only Massachusetts, by a political quirk of fate, has made a beginning.
FOOTNOTES

1. 272 U.S. 365 (1926).

2. Id. at 395.


5. Id., at 612.


8. 268 A.2d at 767.

9. 268 A.2d at 767.


12. 425 F.2d 1037 (10th Cir. 1970).

13. Id. at 1039.


18. Id. at 4489.

19. Id.


25. 397 U.S. at 848 & n. 16.

26. 397 U.S. at 485 n. 17.


28. Id. at 807.


30. Id. at 634.

33. Id. at 357.
35. Id. at 668.
37. Id. at 32-33.
38. Lawrence Gene Sager, op.cit., p. 786.
45. Id. at 627.
47. Id. at 385.
51. an argument made by Martin A. Schwartz, op.cit., p.362.
52. 394 U.S. 618 (1967).
53. 314 U.S. 160 (1941).
57. Sasso v. Union City, 424 F.2d 291, 295-296 (9th Cir. 1970).
CHAPTER VI

THE MASSACHUSETTS LEGISLATURE: 774 AND THE AFTERMATH

The Passage of Chapter 774

In 1969 Massachusetts became the first state in the nation to pass legislation which overrode local zoning in order to facilitate the construction of low and moderate income housing. While the combination of political circumstances which led to this unique event is extremely complex,\(^1\) one significant factor was easily recognizable. In 1965 the legislature passed a racial imbalance bill which made it illegal to have more than 50% nonwhite children in a classroom. The impact of this bill was felt primarily in Boston, much to the displeasure of the Boston legislators who felt it was being shoved down their throats by liberal suburban legislators. Four years later they had not forgotten.

Nevertheless, the bill was given little chance of passing when it was being drafted during the Spring of 1969, despite its "liberal" label. Suburban liberals, it was felt, could not be counted on to support a measure which attempted to drive a wedge into the "Home Rule" preserve so jealously guarded by their constituents. Thus, the bill's proponents realized that

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they would be without this critical block of liberal support, which helped pass the racial imbalance bill. Their diagnosis proved correct as the "turnabout" by suburban liberals became a journalistic issue:

It is now quite apparent that those in the suburban and rural areas who applauded passage of the law making it illegal to have more than 50 percent nonwhite children in a classroom want no part of any bill which would open the door to the scatteration of nonwhites to the suburbs...

One of the most embarrassing sights of the current legislative session was the spectacle of the so-called "liberal" legislators, who strongly advocated the racial imbalance law, casting their votes against a bill which would really do something about the problem.2

However, unanticipated support came from those urban legislators who previously had not been known for their progressive stance but who seized the opportunity to retaliate for the racial imbalance law; consequently, this coalition of strange "bedfellows" was strong enough to carry the day. Forty-eight of the 118 Representatives who voted on both the racial imbalance bill and the "Snob Zoning Bill" switched their votes. Eleven who had voted for the racial imbalance bill voted against the zoning bill and 37 who had voted against the racial imbalance bill voted for the zoning bill. Traditional voting patterns, it was discovered, especially among the democrats, were no real clue to the final outcome, but the true measure more than likely was
found from the character of each representative's district. The bill passed the Senate by a two-vote margin and was sent to Governor Sargent. Faced with an election in 1970, the Governor knew his "credibility" and "consistency" as a progressive were at stake. Moreover, he knew housing was a serious issue and a top priority in the state, so he turned the opportunity into an asset rather than a liability. By passing the measure he hoped to influence the independent liberals whose votes he needed to beat the Democrats. Thus, he signed the bill on August 23, 1969.

Basically, the Massachusetts Zoning Appeals Act, Chapter 774 of the Acts of 1969, establishes standards under which a local zoning board of appeals must grant a comprehensive permit to an eligible developer of low or moderate income housing, despite local zoning, building or other codes which prevent or restrict the construction of such housing. The act provided that any public agency, non profit or limited dividend corporation could submit an application for the purpose of constructing low or moderate income housing directly to the local zoning board of appeals. This application would request a "comprehensive permit," thus eliminating separate applications to the local building inspector,
board of health, planning board, etc. The comprehensive permit could either be passed, approved with restrictions or denied by the local appeals board. In either of the latter two cases, the application would move directly to a state Housing Appeals Committee (HAC) established within the Department of Community Affairs (DCA). The HAC was to consist of five members, a city counselor and a selectman selected by the Governor and the three others to be appointed by the Commissioner of the DCA.

If the application were denied by the local appeals board, the HAC would have to determine if that decision was "reasonable" and "consistent with local needs;" if the application were approved with conditions or restrictions, the Committee would have to decide if those conditions were "uneconomic" or "consistent with local needs." The decision was "reasonable" if it considered existing regional needs for low and moderate income housing as well as certain local standards of health, safety, open space and building design. "Local needs" referred to a general and annual housing quota which the Act established for every city and town. The general quota would be fulfilled if low or moderate income housing units comprised 10% of the locality's dwelling units or were located on sites equalling 1.5% of its land area zoned for residential, commercial or industrial
The annual quota would be achieved if construction was contemplated to take place on .3% of the municipality's land area or on 10 acres, whichever was larger. In effect, the local board would have to grant a comprehensive permit if the city or town had not fulfilled its general or annual housing quota, unless the proposed development offended the planning standards mentioned above.

If the application were approved with conditions, the Committee would then determine if these conditions were "consistent with local needs" or "uneconomic." This latter definition referred to conditions which would have caused a public agency or non-profit group to suffer a financial loss or would have prevented a limited dividend sponsor from realizing a reasonable return. If these locally imposed conditions were found to be either inconsistent with local needs or uneconomic, they would then be removed by the HAC (but in no case would the approved standards be less than those imposed by the FHA or MHFA, whichever was financially assisting the project). The decision of either the local board or the Housing Appeals Committee could be appealed through the courts. (See Appendix 9)

Thus, certain legislative inroads were made in the area of exclusionary zoning; potential developers could no longer be permanently locked out, if the conditions
were right (and no community in the Boston SMSA could claim they had more than 10% of its housing units subsidized; only Malden met the 1.5% land area criterion\(^5\)). The suburban door appeared to be opening, even though Chapter 774 was limited in scope. No state agency was authorized to take land or build housing and no town was required to build. Local control of land-use decisions was still maintained, except to the degree spelled out in the Act. Nevertheless, the threat of 774 loomed large to anxious suburbanites.

The Impact of 774

However, since the Act went into effect in November 1969, only three applications have made their way to the state Housing Appeals Committee. In Bennington Development Corp. v. Town of Billerica (March 1970) the local zoning board of appeals had dismissed the application on the grounds that Bennington was not eligible because he did not have a charter from the state permitting him to operate as a limited dividend corporation. The Committee first requested a ruling from the Attorney General on whether the Department of Community Affairs had the authority to interpret or define the language in Chapter 774, specifically, the power to define "limited dividend developer;" after it was so affirmed, the D.C.A. defined such a developer as any
applicant which proposes to sponsor housing under the Act, is not a public agency, and is eligible for government subsidy once the comprehensive permit is issued. The application was then remanded to the local board for further hearings, since that board had held no hearings on the merits of the case.

In Bennington Development Corp. v. Town of Winchester (March 1970) the local board had denied the application on the basis of the planning standards established by the Act under the definition of "consistent with local needs." The board said that the proposal would not protect health and safety, preserve open space, nor promote better site and building design in Winchester. (The 60 units were proposed on less than \(\frac{1}{2}\) acre of land.) The Committee heard the case informally, but the developer decided to reduce his plan to 15 units and refile his application. Thus, the case was remanded to the local board, and the developer subsequently dropped the whole proposal.

In Country Village Corp. v. Town of Hanover (March 1971) the Committee held its first formal hearing, but at this point in time, all the evidence has not been heard; there is a problem with the transcripts and both lawyers have asked for extensions to prepare their briefs. Other action attributable to the passage of 774 includes
the adoption of a subsidized housing zone in Lexington (See Chapter II) and study commissions to evaluate the local need for such housing in 13 other communities. In sum, no housing has actually been built as a result of the enactment of Chapter 774 18 months ago. Its primary effect thus far probably has been educational, i.e., forcing many towns to confront the issue of the need for low and moderate income housing throughout the state, the region, and within their own confines.

The Weaknesses of 774

There are several reasons why the effect of 774 has been minimal; some stem from weaknesses in the Act itself and others are caused by the very nature of the appeals process. They can be analyzed as follows:

1) There is a basic ambiguity in that zoning authority is placed in a statutory section dealing with regional planning (40B) rather than in the zoning section (40A). The bill as it was reported out of the Urban Affairs Committee gave the power of appeal to the regional planning agencies in the state, but the Ways and Means Committee, responding to the request of the D.C.A. Commissioner, transferred all appeals for authority to the Department of Community Affairs. At that time the bill should have been transferred to Chapter 40A which contains the provisions relating to the power of
zoning. It made no sense to keep a bill fundamentally related to zoning in Chapter 40B relating to planning law. This ambiguity creates a doubt as to the intended zoning power of the local board of appeals.

2) The Act fails to specifically authorize the local zoning boards of appeal to grant permits for uses which explicitly violate the town's zoning bylaws. Chapter 774 merely states that the local board of appeals shall have the "same power to issue permits or approvals as any local board of official who would otherwise act with respect to such application." This language seems to indicate that the board has the same power as local boards of health, subdivision control, planning etc. in their function of approving applications, but only within the context of the town's bylaws. It does mention that the board has power equivalent to a city council but neglects to mention "town meeting." Thus the argument follows that because the power to grant a comprehensive permit is equivalent to rezoning, a power which resides only with the city council or town meeting, the zoning board of appeals in all towns has not been clearly given this power by the Act.

Chapter 774 also fails to establish that the local zoning boards of appeal must act in accordance with the
guidelines of the Act; in drawing up the standards contained in the definition of "consistent with local needs" the Act only says that the Housing Appeals Committee, not the local boards, shall act in accordance with such standards. If this language is strictly interpreted, the local appeals boards have only the testimony and recommendations of other local boards, as they are called upon, on which to base a decision, thus permitting a certain vagueness and ambiguity to exist in relation to applicable standards. Moreover, if the standards of the Act would only be invoked when the appeal came before the state, then the Committee might be burdened with hearing, for every case itself, which should be unnecessary.

3) The Act has vague standards. A permit can be denied if the decision is "reasonable" and "consistent with local needs;" "reasonable" is never defined by the statute but rather is incorporated under the definition of "consistent with local needs" and is thus redundant and unnecessary. "Consistent with local needs" has two parts: the quota for the town in meeting its share of the regional need for low and moderate income housing, and the planning standards relating to health, safety, open space and design. First, the regional need for low and moderate income housing is never defined in the Act.
Although the D.C.A. subsequently has defined the need to mean the shortage of housing for families and individuals with incomes within the eligibility limits of the State or Federal program subsidizing the proposed housing, this does not provide any information as to the numerical need, the breakdown according to income levels under the different subsidy programs, nor the relationship between each locality and that regional need. For example, does the quota established by the Act, in each instance, fulfill the regional need as applied to that community? Can a community fulfill its share of the regional need without meeting the quota standards? In short, the vagueness in the standards of regional need as allocable to each community prevents all parties from operating on the same basis in arguing their cases.

The second component of the "local needs" definition relates to planning standards mentioned above. The Committee has the power to determine that these standards are being met by the proposed project, and thus grant a permit even though the development falls short of the precise standards established by the locality. In departing from local standards, however, the Committee shall not permit standards less safe than prescribed by the funding agency, either F.H.A. or M.H.F.A. While this restriction is reasonable regarding
F.H.A. which publishes their own standards, it is unclear with M.H.F.A. which does not prescribe its own standards but rather relies on the municipality's codes as a minimum guideline. Therefore, the Committee's authority to vary municipal safety regulations when the project is M.H.F.A.-financed is ambiguous.

Finally, the relationship between the planning standards and the housing quota, both of which constitute the definition of "consistent with local needs," is confusing. Should planning standards prohibit the construction of housing even when the locality is under their quota or should the quota be met by sacrificing some of the planning criteria? Given the broad range of administrative discretion involved, the possibility exists that a town will be unable to keep out "bad projects" (from a physical design and construction standpoint) if their local housing quota has not been met.

4) The Act excludes from eligible low and moderate income housing projects, public housing under the Turnkey program as well as leased housing and rent supplement programs. The definition of eligible housing refers to housing either built or operated by a public agency, non profit or limited dividend organization, but the operating statute refers only to applications to build housing. The language of the Act, therefore, is
inconsistent and too narrow and thereby unnecessarily limits the field of potential developers.

5) The procedures under which the Housing Appeals Committee operate are not clearly defined. The Department of Community Affairs has not fully utilized its rule-making powers in clarifying some of the statutory ambiguities mentioned above as well as the appeals procedures. Because the application before the local board is not required in every instance to receive a full and complete hearing, the case may be brought before the Committee with little evidence on which to base a decision. The Committee would then either be forced into the position of hearing the case in its entirety, including details of plumbing, building materials, etc., which is properly the task of the local board, or else have to remand the case to the local board. The remand and appeal process, which can prolong the final decision, not only imposes undue burdens on the developer but contradicts the main objective of Chapter 774 which is to speed up the process of construction of low and moderate income housing. Furthermore, according to Section 20 of the state zoning enabling act, any denial by the local zoning board of appeals cannot be reconsidered for two years without a unanimous consent of the local planning board. If applications remanded from the Appeals
Committee are covered by this section, then effectively they would be killed. Neither the bill nor D.C.A. regulations resolve this question.

6) The combination of the wide range of administrative discretion and the broad statutory standards involved in 774 leave the door open to extensive judicial intervention. Unlike legislative enactments toward which the courts generally adopt a policy of restraint, administrative decisions are always held reviewable by the courts to determine whether such decisions are beyond the scope of the agency's statutory authority. In this light, Chapter 774 invites judicial review of the power on both the local level and the state level. The local board of appeal's power to grant a comprehensive permit may be challenged as exceeding its statutory authority, as mentioned above, or the Housing Appeals Committee's decisions likewise could be appealed to the court (as provided in the Act itself). Under Section 14 the Administrative Procedures Act, Section 14(8), a court could overturn a Committee decision if it were outside the bounds of its statutory authority or if it were unsupported by substantial evidence. The broad and vague standards of the Act could invite wide-ranging review vis a vis the determination of regional need, its relationship to the locality in question, the
application of planning standards and their relation to the housing need standards, etc.

In short, the entire application process could be reenacted since the court may choose to review all findings of fact, independent of any findings of the board, as well as all applications of legal standards. This process, which could conceivably have taken place on both the local and state levels, only serves to create costly and critical delays for any potential developer and to frustrate the intent of the legislation. (Nevertheless, litigation, at least for the first few cases, will be inevitable.)

7) The vague standards of the Act and the whole process involved create serious risks for developers and thus discourage their interest in going the 774 route.

a. the risk of a long court suit, which has previously been mentioned, acts as a definite deterrent; the cost of preparing plans, the necessity of legal fees, and the cost of securing an option or buying land entails substantial expense with no guarantee of a return if the case should be lost. No one wants to be the "test" case. (However, the Newton Community Development Foundation filed its application for a comprehensive permit on April 23, 1971 and intends to take
the fight all the way through the courts if necessary.10

b. the possibility of retaliation by the town, or even other towns. Most developers had expressed reluctance to attempt the 774 route, preferring to use it only as a last resort (see NCDF, Chapter III) because of the obvious implication to the community that the developer wants to shove his housing down its throat. Not only would such a developer be regarded suspiciously, but if he were granted permission to build by the state in a town which didn't want him to build, his chances of ever building in that community again would be jeopardized. There is the possibility also that other towns might exclude him as well. Local harassment through strict interpretations of different codes, repeated visits of building and health inspectors, lack of cooperation in providing municipal facilities etc. could occur. An indigenous non-profit group formed to build only one housing project in their town could probably accept such retaliation more easily than a professional private developer; moreover, their commitment is likely to be greater than the outside firm, which could avoid the hassle and go elsewhere.

c. Initial planning costs run higher than under normal procedures in applying for a zoning change.
Under 774 extensive planning must be assumed by the developer in order to satisfy all local boards—health, building, subdivision control, fire, sewer, traffic, etc.—in applying for a one-shot comprehensive permit. The financial risks are greater under this procedure because the project might still be denied, whereas in a normal rezoning process denial comes after only preliminary planning and does not necessarily involve the costs of comprehensive studies.

d. the attitude of M.H.F.A. and H.U.D. regarding 774 could be a deterrent. M.H.F.A. has not as yet financed any project which applied for a comprehensive permit under 774, but its recent loan commitment in Lexington, knowing the potential controversy of the plan and the possibility of its going 774, indicates a more positive stance. M.H.F.A. made a commitment for interim and permanent financing to a local developer, Mark Moore, before the Town Meeting granted or denied rezoning. (See Chapter II) H.U.D., on the other hand, will not give any loan commitment until rezoning has been granted. Thus, the developer has to make all his preparations for a comprehensive permit without knowing from where his ultimate source of financing will come.
In summary, the passage of Chapter 774 by the Massachusetts legislature in 1969 was a much heralded event and gave some indication that political support could be mobilized on the state level to confront the housing crisis. However, both the suburban alarmists and the 774 proponents subsequently have been tempered by the relative inactivity resulting from the bill. Many of the reasons behind this poor showing have been discussed; in general they result from the weaknesses and vagueness of the bill itself (which is unfortunate but understandable given the time constraints and haste in which the drafters of the bill had to work). Nevertheless, much ground will be broken and many of these questions hopefully will be answered when the first application which presents a solid and clear case is taken through the whole process from the local board of appeals to the Housing Appeals Committee to superior court to the Supreme Judicial Court, and gets a ruling on the statutory authority and application of standards in 774. Perhaps, NCDF will provide that breakthrough.

1971 Amendments: H. 2162

Meanwhile, the 1971 session of the state legislature presently has before it a bill (H. 2162) which proposes to amend Chapter 774; on April 27 the Urban Affairs Committee reported it out favorably. H. 2162
was drafted by Representatives Martin Linsky and Robert Creedon, two of the original draftees and sponsors of Chapter 774. This bill attempts to eliminate several of the weaknesses and ambiguities already mentioned in 774 in the following ways:

1) it expands the definition of low or moderate income housing to include Turnkey, rental assistance and leased housing programs when they are applied for either by a local housing authority or by a private developer.

2) it reduces the amount of planning expenses assumed by the developer in preparing for a comprehensive permit by specifying what documents are to be included in the application. The necessary papers are only the site plans, financing proposals and whatever else is required by the Department of Community Affairs and/or the subsidizing agency; thus, one set of papers suffices for both financing and permit application.

3) it eliminates the possible stand-off in 774 where the local board can deny rezoning because the developer does not have a financial commitment from either H.U.D. or M.H.F.A. when H.U.D. will not, nor will M.H.F.A. (more often than not), give a loan commitment unless the developer has been given the
rezoning approval. Under H. 2162 a local board cannot deny a developer a permit solely on his lack of a formal financing commitment; rather, the board must grant a permit conditional upon the applicant obtaining such financing.

4) it specifically gives the local boards the power to override local zoning ordinances, building codes, etc. The failure of 774 to make this explicit created legitimate doubts as to its validity.

5) it eliminates the additional "reasonableness" standard for the Housing Appeals Committee to review decisions of the local appeals board. The issue of reasonableness is covered under the definition of "consistent with local needs" and was therefore unnecessary as a separate standard.

6) it redefines the concept of "consistent with local needs" by clarifying the relationship between the local and regional need on the one hand and the planning criteria regarding health, safety, open space, etc., on the other. This bill makes more explicit the Housing Appeals Committee's task of balancing the one standard against the other. Requirements and regulations will be consistent with local needs "if the legitimate local objections to the proposal outweigh the need for low or moderate income housing in the affected city or town and
in the region in which the city and town is located."
The dual standard remains but the Committee is clearly
supposed to weigh one against the other. Furthermore,
additional planning criteria have been added by which
the community can raise objections. The "proximity
to transportation, schools, recreation facilities and
neighborhood convenience shopping and service facilities;
and public access, expected traffic generation and pro-
vision for off-street parking" are all new elements
which have to be taken into consideration by both the
local board and the HAC. These requirements, however,
cannot be more restrictive than those applied to
unsubsidized multiple unit housing.

The first five elements mentioned above are posi-
tive contributions to making 774 a more workable bill,
but there remain some problems. Most significantly,
H. 2162 eliminates the housing quota to which each
locality was subject, i.e., 10% of its housing units or
1.5% of its land zoned for residential, commercial or
industrial use must be fulfilled or any developer has
the right to appeal to the HAC if denied a comprehensive
permit by the local board. According to Allan Rogers who helped draft 774 and who drafted H. 2162, the
housing quota was not intended to be dropped. Section 7
of the bill was supposed to strike out the first sentence in Section 20 of 774, instead it reads, "by striking out the first three sentences..." which wipes out the housing quota.

The problem of vague standards still plague the definition of "local need" under H. 2162 in that local and regional need remain undefined. The burden of administrative interpretation remains with the HAC. Perhaps, the definition of regional and local need cannot be established by statute but then it must be forthcoming from substantive standards issued by the Department of Community Affairs (which have not yet arrived). This remains a real problem because towns like Dover, Weston and Lincoln can maintain that there is no local need when, in fact, there is a regional one which impinges to some degree on every town, despite their prior success in excluding such housing. A housing quota for every city and town, therefore, becomes essential as it is the only hard and fast legislative standard in the Act (which, in turn, makes it easier for the courts and the Committee to justify going at least that far as the quota requires).

One further problem of H. 2162 is its reference to regulations and criteria for unsubsidized multifamily
units as a reference point in the community; many suburban communities have no multifamily units and thus are seemingly exempt from such guidelines. At any rate, the Urban Affairs Committee reported out H. 2162 favorably on April 27, 1971, so the proponents of the bill are faced with either fighting for it as it stands or introducing further amendments.

The Redraft Of H. 2162

As of May 1, 1971, there had been already one redraft of H. 2162 prepared which makes further improvements on that bill, including the following:

1) the definition of "local board" is amended to include town meeting among those local boards which the board of appeals displaces when making decisions; this clarifies the board's position in making changes in zoning by-laws of towns which 774 failed to explicate.

2) the board of appeals specifically is given the task of determining whether local requirements made the project uneconomic and if so, whether they are consistent with local needs. Previously, the use of the 774 standards, strictly interpreted, were only made explicit in reference to the HAC and not to the local board.

3) appeals from the granting of comprehensive permits at either the local or state level will go
directly to the Supreme Judicial Court instead of through the superior court. Most of the issues involved will be strictly legal questions and it is more appropriate to have the Supreme Judicial Court clarify the problems of interpretation as soon as possible.

4) "consistent with local needs" is redefined again. "Needs" is changed to "conditions" and the housing quotas are reintroduced. Moreover, in any housing development in which only a portion of the units will be low or moderate income, only that portion of the total will be counted toward the quota and only that percentage of the total land area which goes to these units will be utilized for purposes of determining land area. Furthermore, the "balancing" element is eliminated and the local or regional need is reduced as a factor in determining consistency with local conditions. The finding of such a need is provided by the developer (in almost all cases such a finding is necessary before the subsidizing agency will fund a project); it is treated almost like a "given." The major factor in determining consistency with local conditions becomes the planning standards of the community. These standards are lengthened again to include density in the context of the past land-use policies of the locality, the unfeasibility of utility services, and the failure of
the intended site to coordinate with a local plan for providing subsidized housing.

This language places a burden on the community to come up with their own plan for subsidized housing, or else they would have nothing on which to base their determinations. Moreover, the restrictiveness of the language in establishing the planning criteria is intended to diminish the freedom with which the locality can invoke standards in order to deny the application.

It is obvious that the complex issues surrounding 774 and its proposed amendments have not yet been solved to the satisfaction even of the drafters of the legislation. The whole area of local criteria, housing need and quota definitions has not yet been truly clarified, but the bill's proponents are still attempting to produce really clear and comprehensive amendments to H. 2162 (and 774). Their strategy is yet undecided—whether to replace H. 2162 with a new bill in the Ways and Means Committee or hope H. 2162 gets passed in the House by a substantial enough margin to justify the risk of introducing new amendments to it between the House and Senate and thus sending back for more debate.

Regardless of the strategy, it is clear that H. 2162 is not sufficient as reported out of the Urban Affairs Committee because it lacks the essential housing quota.
Moreover, even the present redraft of H. 2162 contains ambiguities in that troublesome section on "consistent with local needs" or "conditions." By reducing the importance of the regional and local need (which is not a given, at least as applicable to each locality) and increasing the litany of conditions with which the locality can utilize to argue against the proposed housing, the language of the redraft appears to place too much emphasis on such local criteria and thus increases opportunities for denial. Furthermore, factors such as the density being out of line is almost assumed in a community which has no apartment units at all. The drafters believe that the application of local standards has been made more restrictive than in 774, but judgments will still have to be made on each issue, e.g., who is to determine whether utility services are unfeasible? Finally, the inducement to the community to begin developing its own plan for subsidized housing could either result in a delaying tactic on the part of the community ("We are in the process of preparing our plan...") or could result in an inadequate plan. Suppose the community determines, after eliminating all open sites which are designated for conservation or recreation use, that it does not have enough suitable sites remaining to even
allow for 10% of its units to be subsidized? There should be a minimum content specified to be in each plan, similar to the quotas established in 774.

1971 Zoning Amendments: H. 1869

Chapter 774 and its amendments deal with Chapter 40B of the General Laws which relate to planning. There is corollary work which must be done with Chapter 40A, the state zoning enabling act. The Urban Affairs Committee had two bills before it in the Spring of 1971 which attempted to modify the zoning enabling act. On April 27 the Urban Affairs Committee reported them out with the recommendation for further legislative study, thus effectively killing them for a year. The Committee was not enthusiastic about touching Chapter 40A this term because of a pending report, due in August 1971, revising the zoning enabling act. Chapter 141 of the Resolves of 1967 directed a legislative advisory committee to be created by the Department of Commerce and Development (now the Department of Community Affairs) to prepare such a study and until that study is reported, zoning bills have little chance of receiving any legislative action. Nevertheless, the importance of these two bills deserves some commentary.

H. 1869, sponsored by Representatives David Liederman and Bruce Zeiser and drafted by the land use committee
of the Boston Bar Association, attempts to amend the zoning enabling act by giving authority (like 774) to local zoning boards of appeal to override local zoning, building and other regulations in order to provide for low or moderate income housing. Any locality could create a new zoning bylaw which would be applied as developers came forth with proposals. This zoning bylaw would allow for mixed-use areas to permit the construction of housing which meets a local or regional need as designated by the community's master plan, the regional planning agency's development plan or a state or federal agency's plan, or the construction of housing which is financed by M.H.F.A. or approved by the D.C.A. as worthy of special zoning consideration.

Before permitting any construction, the requirements of the subsidizing agency would be considered along with the needs for such housing as determined by any governmental agency or public body. But other factors would also have to be accounted for, and these factors are even more extensive than the provisions of the redraft to H. 2162 mentioned previously. Besides considering factors such as health, safety, open space, proximity to transportation, schools, shopping, economic feasibility of site preparation costs and utility services, traffic and off-street parking, additional
conditions are included. The site must be sufficiently separated from other subsidized housing to achieve a mixing of income levels; the relocation of residents and businesses is required (which is presently not required of developers using M.H.F.A. financing); and the extent to which the construction will eliminate or reduce deleterious, non-conforming or substandard uses will be considered. If the locality adopts these new zoning bylaws, the appeals board would then have the authority to approve a comprehensive permit application under 774 procedures. It is possible, however, that a developer who did not meet these stricter standards would still appeal to the HAC under 774 and be granted a comprehensive permit.

If the community does not wish to create this new zoning bylaw, H. 1869 includes another section which requires the local board of appeals to grant a special permit to a developer to build low or moderate income housing unless it makes a finding that the application either does not meet the local criteria (mentioned in the previous section), that there is no housing need, or that another site would be more appropriate. The local board is required to take action if the Department of Community Affairs has "certified" that the community's zoning bylaws "unduly restrict" the meeting of local
and regional needs for low or moderate income housing. This certification from the D.C.A. can be requested by any developer, subsidizing agency or governmental body of the town; if the D.C.A. makes such a finding, then the certification stands in lieu of adequate bylaw authority for the board. If the board's decision is still negative based on the factors mentioned above, the developer can appeal to the Housing Affairs Committee under the 774 procedures and standards.

This "threat" of a negative finding from the D.C.A. is supposed to be a leverage point which induces the local city or town to create their own zoning bylaw so that their standards will be used in approving any housing rather than the standards interpreted by the state under 774. However, if the community remains reluctant to create such a bylaw it appears that H. 1869 provides only a delaying tactic in the normal 774 process. If the developer comes before the local board for a permit, the town can then request the D.C.A. to make a certification on the restrictiveness of their zoning bylaw; this would take investigation and public hearings before the certification was made, after which the board could still reject the application on local planning criteria and the appeal would have to go before the HAC anyway.
Nevertheless, the intent of H. 1869 is basically good. The inducement to the local community under the state zoning enabling act would be to create their own "floating" zone, similar to Lexington's NH subsidized housing zone. This procedure would allow the community to establish its own standards within that zone; it would not be mapped until a developer came in with an application on a particular site whereupon the zone would "descend" on that parcel. The advantage of this process would be greater local control over the development than if the state applied its own standards, and less administrative discretion and cause for judicial intervention. The function of the local board would be to determine if the application met the standards in the zoning bylaw, which would allow for much less argument than when 774's "consistent with local needs" standard is applied. If, however, the developer were denied on the basis of the standards in the community's floating zone, he could still appeal to the HAC for a final determination.

H. 4941

The second bill proposing amendments to the state zoning enabling act is H. 4941, prepared by the Department of Community Affairs. This Act broadens the intent of
the zoning enabling act simply by stipulating within its purpose clause the objective of "ensuring the provision of adequate, safe and decent housing of all citizens of all income levels of the commonwealth." It further amends Section 3 of Chapter 40A by adding three new purposes for zoning regulations and restrictions:

(c) encourage the provision of adequate, safe and decent housing for its inhabitants and all the residents of the commonwealth at all income levels, through the consideration of local and regional needs;

(d) encourage regional development policies for growth including the provision of housing needs; and

(f) promote better site design and integration of new and existing patterns of development.

Moreover, it eliminates from the original enabling act the purpose of preventing undue concentration of population; it adds the adjective "serious" before "overcrowding" in the phrase "to prevent overcrowding of land;" and it alters "to lessen congestion in the streets" to read "encourage the rational development of communities over time, through consideration for appropriate levels of traffic on local streets."

(One criticism was raised, however, during the hearings before the Urban Affairs Committee--that eliminating the phrase "to avoid undue concentration of population" from the purposes of zoning regulations could be construed
by the courts to mean that the legislature intended to signify that population concentration was good. The D.C.A. subsequently indicated that they would reword the phrase and insert it back in the bill before it came up for reconsideration with the whole zoning package at the next session.)

In general, the thrust of the bill is to expand the purposes of zoning away from being restrictive, negative, local and narrowly construed to incorporate positive steps toward the consideration of social goals as well as economic and physical ones and to take into account state and regional interests in community development. The emphasis is placed on the promotion of housing in the context of present need and future regional growth patterns. H. 4941 would alter fundamentally the basic concept of zoning from a device used to preserve and protect a static notion of the world to a more flexible, broadly envisioned tool to guide local development in an ever-changing world. The courts, in relying on the zoning enabling act, would be forced to expand their interpretations of the "public interest," to include interests beyond the borders of each individual community. Such a judicial stance would enhance the legitimacy and direction of the 774 approach.
Further Recommendations

Two further amendments to the zoning enabling act might be recommended at this point: the first carries the concept of H. 1869 a step beyond prodding a locality to create a floating zone for subsidized housing developments. Chapter 40A ought to require that each community in the state create such a zone and place a quota, similar to 774, on the housing or land which must be eventually mapped for that zone. In other words, if such a zone had to provide for 10% of the housing units in the locality to be subsidized or 1.5% of the zoned land to be utilized, with each decision of the town to remove available land from potential use for such housing (through zoning for other purposes) the density for the housing on the remaining sites would have to be raised, perhaps even above the standards established in that zone, if the community unduly delayed or failed to prepare a comprehensive plan for action. This strategy would combine the intent of both 774 and H. 1869 and improve the process by which subsidized housing could be constructed in the suburbs. It also could be implemented by each locality gradually, rather than once-and-for-all, in accordance with the changing development pattern of the city or town.
The second apparently simple but critical step is based on both political pragmatism and philosophic principle. It conforms to the findings of the Report of the Department of Community Affairs Relative to Modernizing Land Use Regulations vis a vis the inflexible and negative nature of the zoning enabling act. The recommendation would be to amend Section 7 of Chapter 40A which requires a two-thirds vote in cities and towns to change any zoning ordinance. A simple majority vote should replace the two-thirds requirement.

If a majority vote were required (which is all that is necessary for the board of appeals to grant a comprehensive zoning permit under 774) then NCDF would have its housing in Newton, two housing proposals would have passed in Lexington with the possibility of a third, and several other communities would have passed similar rezoning proposals. Not only would more housing be built but the fundamental principle and purpose of zoning would be updated, as proposed in H. 4941. It should take only the majority of a town to alter its direction and plan for its development rather than two-thirds which, in effect, freezes a "plan" and a zoning map which may be twenty years out of date.
The theory behind the current system is that the members of a community can sit down on a fine day and determine not only the general nature of its future development but also every detail to such a precise extent that very little need be left to the discretion of an on-going administrative process. The idea that a community can do this rests on assumption that it has a clear vision of an end state for itself and that little, if anything, can happen to mar that vision. The only way to describe the system, therefore, is to say that it subscribes to a static and state concept of land use control. Plainly, that concept is in conflict with reality. As a result, what we have now is a system that is called upon to react to constantly changing circumstances with a machinery that was designed to handle a static world. 

The system is structured such that most, if not all, development will occur within pre-established rules, yet the reality is that land use controls relate to development largely as a series of individual permissions. Indeed, 774 is but another example of the recognition of this modus operandi.

Why then should it take two-thirds approval to rezone for needed housing, when it can take as few as 11% to deny the same housing from entering the community? No minority group that small should have such negative power over subsidized housing. In light of the recent Supreme Court decision on referendums, (James v. Valtierra—See Chapter V) there is little chance that they will be overturned by the Massachusetts legislature,
but at least the required vote to overrule a decision of the Town Meeting should be a majority of all the registered voters in the community (as in California), not a majority of 20% of the voters (as in Lexington). This change should be implemented.

Conclusions

The overwhelming housing need for low and moderate income families in Massachusetts is evident; this housing must be built throughout the state, but because the population, the jobs and the residential land base are all in the suburbs, much of the supply must be created there. There has been very little subsidized housing built in the suburbs because those communities have the power to control the use of their land (specifically through zoning) and carry out their objectives in terms of racial and class segregation. While such goals may appear "rational" to suburbanites, they have, in no small way, been responsible for urban sprawl, inefficient and costly metropolitan development, severe housing shortages and geographic polarization of society into rich and poor, black and white.

Local initiative has made sporadic attempts to deal with the issue, but, in general, such initiative has been sorely lacking. If rhetoric were housing, suburbs
like Newton and Lexington would have no low and moderate income housing shortage, for almost all the elected representatives have, at one time or another, approved the concept of subsidized housing in their communities. They just haven't been able to find the appropriate neighborhood or neighborhoods in which to build it. Left to their own devices, they will never find the neighborhoods or build the housing, at least approaching the degree to which it is needed. In sum, the power to zone out the poor must be taken away from the local level of government.

This power can be taken away from local government only through court action or by the state legislatures or federal government. Lower level courts in various states have struck zoning, exclusionary zoning as unconstitutional, but until the Supreme Court makes such a finding, litigation will have little effect. In light of James v. Valtierra, the expectation that exclusionary zoning could be brought under the strict review standards of the equal protection clause of the 14th Amendment has suffered a temporary setback; the possibility still exists, however, that the Court could consider the right to housing as a constitutional right and classifications based on wealth, just as those based on race, as "suspect" and thus overrule some exclusionary zoning
ordinance. Nevertheless, the Court will be reluctant to move beyond such a determination, even if made, into the area of affirmative action which might then be required by the locality in question. While the Court's role is essential, it is limited...

to act as a predicate to legislative reform; to so dramatize the absurdities and inequities in a fractured system of governmental regulation, designed for a quieter era, that the legislators will get about the business of realigning some of the decision-making power and redefining the criteria by which the public regulation of land use is to be measured.  

Consequently, we are left with the role of the state legislature which is where zoning began. The state gaveth (to the localities) but can the state taketh away? The political realities of state legislatures are not too unlike those in the local community; many states are dominated by rural interests and with the increasing percentages of population moving out of the cities and into the suburbs, the urban bloc will be weakened even further. Consequently, no states have really regained control of the zoning powers which they relinquished in their state zoning enabling acts.

Only Massachusetts, with the passage of Chapter 774, provides the opportunity to discuss the role of the state, in reality, vis a vis local zoning and subsidized housing.
Yet the enactment of 774 was a political quirk, a unique set of circumstances which produced a strange (and perhaps "one-shot") coalition just strong enough to pass the bill. The bill, moreover, has many weaknesses and has not signaled any breakthroughs in the suburbs since its passage. However, if new amendments previously discussed get into the bill and get passed and if the Department of Community Affairs issues some meaningful guidelines for the whole process, then the effectiveness of 774 might be realized. Massachusetts is, at least, providing a political forum where such issues can be debated, worked out, and revised; the most hopeful sign is that such action is politically possible in the state legislature and is not relegated to academia's "ivory towers" for serious consideration. It remains to be seen, however, how palatable a stronger 774 bill will be.

The same question can be asked of the proposed amendments to the zoning enabling act, and the specific recommendation of this paper, that the requirement to change zoning should be reduced from two-thirds to one-half. The idea of "built-in" change mechanisms, such as allowing only a majority to shift the development direction of a community when it has taken two-thirds for over 40 years, is frightening indeed when the issue at stake is the fundamental belief in what Donald Shoen calls the
"stable state." Nevertheless, this recommendation should be pursued, for its political fortunes cannot be determined in advance. At the same time, at least a majority of all the voters should be required in any local referendum vote to block subsidized housing, or else any strategies to approve rezoning will be fruitless.

Viewed from the total perspective of what needs to be done, these steps are relatively insignificant, but the expediency of the short run, by its very nature, has to deal in such compromises. If 774 were never passed, there wouldn't even be a foot-in-the-door to see if the room which was opened was where we wanted to go. If NCDF wins a court case testing 774, this door will be open that much wider, and other strategies might become possible. If planning really is "disjointed incrementalism," then these short run approaches to the issue presented are where it happens to be.

However, long run objectives must be borne in mind or else the short run compromises might, in fact, run counter to overall goals. It is in this context that I see the "carrot" and "stick" approach. Some housing experts claim that the only way to get subsidized housing built in the suburbs is to fiscally "bribe" the communities into building it. The suggestion has even been made to provide "property value" insurance to
abutters of the housing developments to guarantee them against the risk that their property value might diminish. Such approaches I cannot accept.

If the underlying motivation which produces segregation is racial and class discrimination, then such "carrot" approaches only legitimize and solidify this basic attitude that the poor or the nonwhite are, in truth, inferior in several ways, and therefore the rich and the white should be compensated for letting the inferior ones in their neighborhoods and in their schools. The short run objective may be to live with the compromise in order to get the intended result, but I think the price is too high. In this case, the long range moral principle outweighs the short run expedient solution. The results of such a "carrot" approach, moreover, would not be significant enough to justify the long run damage which would be done on this deeper level of attitudes. If the function of law is basically educative, it makes little sense to establish a structure which specifically stigmatizes being poor or nonwhite while, at the same time, teaching on the long range level about justice and equality. Perhaps, it is facile to moralize about such approaches to the housing crisis when many might be glad to avail themselves of decent housing.
despite the dignity they might have to relinquish; but if both levels of social change are to be pursued together, they cannot work at odds and expect to overcome a force as strong and persistent as racial and class discrimination. To paraphrase Reinhold Niebuhr, in terms of state (or federal) action it is a question of "The Immoral Carrot and the Moral Stick."
FOOTNOTES


3. Ibid. p. 60.

4. Ibid., p. 90.


7. Interview with Allan Rogers of the Massachusetts Law Reform Institute and resident of Winchester, April 27, 1971.


10. Interview with Marc Slotnick, Executive Director of the Newton Community Development Foundation, April 27, 1971.
11. Interview with Allan Rogers, op. cit.

12. shown to me by Allan Rogers, who darted it, April 27, 1971.


THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF COMMUNITY AFFAIRS
OFFICE OF REGIONAL AFFAIRS
REGIONAL PLANNING AGENCIES

Prepared by the Bureau of Planning Programs

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OUTLINE MAP OF THE VARIOUS BOSTON METROPOLITAN DISTRICTS

THE COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF COMMUNITY AFFAIRS PLANNING ASSISTANCE

MANUFACTURING JOBS:
ABSOLUTE GAIN: 1958-66

○ = 2000+
● = 1001-2000
★ = 500-1000
LOW & MODERATE INCOME
BOSTON HARBOR FAMILY HOUSING: 1/71
○ = BUILT
● = IN PROCESS

Excl. Brockton
Lowell
Lawrence

LEGEND
SM3A
STATE BOUNDARY LINES
-- -- COUNTY BOUNDARY LINES
- - - CITY AND TOWN BOUNDARY LINES METROPOLITAN DISTRICTS
P=PARKS S=SEWERAGE W=WATER
T=TRANSPORTATION 14 PLACES
B=TRANSPORTATION 65 PLACES

SCALE IN MILES
APPENDIX 3
### Manufacturing Jobs: 1958-63

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### Totals

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### Sources:

- 1970 Census of Housing and Population
- Demographic and Economic Statistics
- 1970 median rent for these 30 communities = $123/mo.
- 1970 median rent for the Boston SMSA = $106/mo.
- 1970 median rent for the state = $91/mo.
APPENDIX 4
ARTICLE 88. To see if the Town will vote to amend the Zoning By-Law by adding thereto a new Section 36 as follows:

Section 36: Subsidized Housing District

36.1 The provisions of this Section shall be applicable to RH districts only and shall be in addition to other provisions of this By-Law applying to RH and other districts.

36.11 Definition of Subsidized Housing. The term “subsidized housing” shall mean housing for people of low or moderate income which is constructed, rehabilitated, remodeled and sold, leased or rented by the Town of Lexington, the Lexington Housing Authority or by any other public agency, non-profit or limited dividend corporation or cooperative, the construction, remodeling, financing, sale, lease or rental of which housing is regulated and financially assisted by agencies of the government of the United States or of the Commonwealth of Massachusetts under programs the purpose of which is to provide housing for people of low or moderate income. The terms “low income”, “moderate income”, and “limited dividend corporation” shall have the meanings defined in the programs or laws administered by such agencies.

36.12 Land Uses and Dimensional Control in the Absence of Special Permit. Except in the case of a special permit granted by the Board of Appeals pursuant to the procedure hereinafter described, land uses and dimensional controls in RH districts contained within the geographical limits of the RS district, as defined in Subsection 22.2, shall be the same as those of the RS district, and within the geographical limits of the RO districts shall be the same as those of the RO districts.

36.13 General Objectives: the Lexington subsidized housing program is intended to result in the construction of sufficient dwelling units for people of low and moderate income to increase the Town’s stock of subsidized housing to a total of approximately 950 units, thereby fulfilling Lexington’s responsibility to furnish its proportionate share of such housing in the metropolitan Boston area. The special permit procedure hereinafter established is intended to accomplish this objective while ensuring compliance with local planning standards and policies concerned with land use, building design and requirements of health, safety and welfare of residents of the Town of Lexington.

36.2 Special Permit Provisions. The Board of Appeals may grant a special permit for the development of any tract of land in an RH district in which not less than 40% of the dwelling units to be constructed in such development come within the definition of subsidized housing contained herein.

36.21 Where the proposed construction of subsidized housing is dependent upon obtaining approval and/or a commitment of financial assistance under relevant federal or state housing subsidy programs, it shall be a condition of any special permit issued hereunder that no building permit shall issue for any portion of the proposed development until the applicant has filed with the Board of Appeals evidence that such approval and/or commitment has been obtained.

36.22 Any special permit granted hereunder shall designate the dwelling units to be used for subsidized housing and shall impose appropriate safeguards to ensure the continued use of such designated units or equivalent units for subsidized housing.

36.23 A special permit granted hereunder may allow the construction of single family detached houses, two-family houses, two-family semi-detached houses, townhouse-type dwelling units separated by party walls meeting state or federal safety requirements, garden apartments not exceeding in height three stories used for human occupancy, duplex-over-duplex type dwelling units not exceeding in height four stories used for human occupancy, or any combination of such housing types or other housing types not exceeding in height three stories used for human occupancy determined by the Board of Appeals to be appropriate for subsidized housing. Ownership of such housing may be in any form permitted by law, including condominiums.
The Board of Appeals shall have discretion to permit dwelling unit density in RH districts of up to, but not exceeding, 18 dwelling units per acre. However, in each instance in which the Board of Appeals permits such density to exceed 12 dwelling units per acre, the Board shall file with its decision the basis for its determination that such density would be appropriate and, in reaching such determination, shall consider, among other factors, soil conditions, drainage, traffic or other neighborhood conditions brought to the Board's attention, the provision of usable open space in excess of the minimum required per dwelling unit and the provision of off-street parking under or within buildings which contain dwelling units.

36.25 Front yards shall not be reduced to less than twenty feet. The minimum distance between detached buildings, including the distance to buildings permissible on adjacent properties, shall be 30 feet or the height of the taller building, whichever is greater.

36.26 For up to 24 dwelling units there shall be provided at least one direct street access of adequate width, for 24 or more dwelling units there shall be provided at least two direct accesses each of adequate width.

36.27 There shall be provided at least one off-street parking space per dwelling unit, reserved for the use of such dwelling unit and within 150 feet thereof. The total number of off-street parking spaces provided shall be not less than 1/4 times the number of dwelling units. Such parking spaces shall be paved, contained in garages, or under or within buildings which contain dwelling units.

36.28 Not less than 1,000 square feet of permanent usable open space per dwelling unit available for outdoor activities shall be provided. Required front yards, paved vehicular areas and wetlands shall not be considered usable open space.

36.29 Any special permit granted hereunder shall incorporate by reference the building design, site development and financing plans submitted by the developer with the application. Development of the tract in question under such special permit shall be in conformance with such designs and plans, unless, after hearing, the Board of Appeals amends such special permit.

In granting a special permit, the Board of Appeals may impose such additional conditions and safeguards as public safety, welfare and convenience may require, either as recommended by the Planning Board or upon its own initiative. Special permits issued hereunder shall lapse if no building permit issues within two years of the date of the special permit, unless the Board of Appeals upon application extends this time.

36.3 Application Requirements. The application to the Board of Appeals for a special permit for subsidized housing under this Section shall be accompanied by the following plans and supporting materials, copies of which shall also be submitted to the Planning Board.

36.31 Plan of the tract showing topography, soil culture, existing streets and structures within and adjacent to the tract.

36.32 Where a subdivision of land is involved, a preliminary subdivision plan, which may be combined with the plan required under the preceding paragraph.

36.33 Site development plans showing the proposed grading of the tract and the proposed locations, dimensions, materials and types of construction of streets, drives, parking areas, walks, paved areas, utilities, usable open space, planting, screening, landscaping and other improvements and the locations and outlines of proposed buildings.

36.34 Preliminary architectural drawings for building plans including typical floor plans, elevations and sections identifying construction and exterior finishes.

36.35 Financing plan describing the federal or state subsidy program, the subsidizing agency, the estimated cost of land, site development, building, operation and maintenance and the planned approximate schedule of rents, leases or sales prices.

36.36 A tabulation of proposed buildings by type, size (number of bedrooms, floor area), ground coverage and a summary showing the percentages of the tract to be occupied by buildings, parking and other paved vehicular areas, and the usable open space.

36.37 Descriptive material providing information about
the owner and developer, the developer's experience in building and eligibility as public, non-profit or limited dividend housing sponsor, evidence of preliminary approval under the subsidy program, the names of architect, engineer and landscape architect, if any, and other pertinent information.

36.4 Planning Board Report and Recommendations. The Planning Board shall submit in writing to the Board of Appeals its report and recommendations as to the appropriateness of the proposed development for subsidized housing, to include at least the following:

36.41 A general description of the tract in question and surrounding areas.

36.42 An evaluation of the probable impact of the proposed development on Town services and facilities.

36.43 The availability of permanent public open space in the immediate vicinity.

36.44 The proximity of the proposed development to public transportation, schools, recreation facilities, neighborhood shopping and service facilities.

36.45 Whether the site is sufficiently separated from other subsidized housing and housing of equivalent rental value to achieve a desirable mix of income levels.

36.46 A determination from known or estimated land and site preparation costs whether or not such costs might render the proposed subsidized housing development uneconomic.

36.47 A review of the proposed development, including such aspects as the type or style of buildings, the size of development (number of dwelling units) and density per acre, the arrangement or layout design of buildings and site improvements, the location and capacity of parking, the provisions for open space within the development, grading, landscaping and screening, the provisions for access, egress, and traffic within the development and on adjacent streets.

36.48 Whether or not, in the opinion of the Planning Board, the site, the proposed development layout, the proposed number, type and design of housing will constitute a suitable development compatible with the surrounding area.

36.49 Recommendations for the granting or denial of the special permit, including recommendations for modifications, restrictions or requirements to be imposed as a condition of granting the special permit.

36.5 Board of Appeals Action. The Board of Appeals shall not take any action on an application for a special permit for RH district development until the Planning Board shall have submitted its written recommendations to the Board of Appeals or forty-five days have elapsed from the date of submission of the application. Where the decision differs from the recommendations of the Planning Board, the Board of Appeals shall state in its decision the reasons therefor.

36.6 Denial of Special Permit. The Board of Appeals may deny an application for special permit hereunder and base its denial upon:

36.61 A failure to meet the standards established by sub-sections 36.2, 36.3 or 36.4 hereof.

36.62 A finding that the proposed development would not be consistent with the general objectives of RH district development.

36.63 A finding that the proposed development is not likely to result in a permanent increase in the Town's stock of subsidized housing.

36.7 Compliance with Other Rules and Regulations. Nothing contained herein shall in any way exempt a proposed subdivision in an RH district from compliance with the rules and regulations of the Planning Board, nor shall it in any way affect the right of the Board of Health and of the Planning Board to approve, with or without modifications, or disapprove a subdivision plan in accordance with the provisions of such rules and regulations and of the subdivision control law.

36.8 Revisions. Subsequent to a special permit granted by the Board of Appeals under the provisions of this Section and where applicable, the approval of a definitive subdivision plan by the Planning Board, minor revisions may be made from time to time in accordance with applicable laws, by-laws and regulations, but the development under such special permit shall otherwise be in accordance with the submission accompanying the developer's application for a special permit, except as modified by the decision of the Board of Appeals.
36.9 *Severability.* No section or subsection of the special permit procedure established herein shall be deemed severable from other sections or subsections of the special permit procedure for the construction of subsidized housing. In the event that any section or subsection of such procedure shall later be invalidated, whether by judicial decree or otherwise, all other provisions contained herein relating to the issuance of special permits for subsidized housing shall become inoperative, except that special permits previously issued by the Board of Appeals hereunder shall remain valid.
APPENDIX 5
OBJECTIONS BY MEAGHERVILLE RESIDENTS

1) Has the Planning Board asked YOU if you want low income housing in your area?

2) Urge the board to consider the alternatives:
   a) Conservation use of the area
   b) Expand the golf course
   c) Do nothing with the area
   d) Elementary school and/or recreational area only
   e) Regional vocational high school

3) Traffic on Reed Street is too heavy now.

4) Can you afford a drop in property values and a tax increase (for more police, firemen, school, library facilities, etc.)?

5) Remember, we cannot take back a decision to build clustered housing.

6) High-rise or low-rise? The board may count a vote for either as a vote for clustered low income housing.

7) DISTRIBUTED low income housing EQUALLY TO ALL AREAS. Meagherville will accept only its share.

OBJECTIONS TO CLUSTERED HOUSING PROJECTS

1) Distributed housing would not disturb the character of existing neighborhoods. Offering equity would encourage upkeep.

2) Nice appearance and well maintained? Can the Board point to any non-profit, rent subsidized project in the Boston area that has maintained its initial "beauty" for more than 10 years?

3) Will high density clusters bring the MBTA, followed by slums?

4) Low density is approximately 16 units per acre. Try to imagine your typical 1/2 acre lot with eight 4-member families living on it.

5) The state law requiring low income housing is ambiguous and contains such uninterpreted phrases as "40 per cent ... consistent with the town's needs ... ".

Remaining silent will be taken as a yes vote. Voice your opinion to the Planning Board and to your Town Meeting Members.
Above is a copy of the proposed site plan for the Meagherville area. This is the plan recommended by the consultants and engineers undertaking the study. The lower housing area would contain 210 units on 21.04 acres of land. Combined with the other housing area (A), there would be a total of 318 units.
APPENDIX 7
NCDF'S LETTER TO THE ALDERMEN

Last August the Newton Board of Aldermen displayed to the citizens of Newton and indeed to the nation a rare courage as it took a stand overwhelmingly in favor of resolving Newton's housing problem. A vast majority of its twenty-three members voted to support what might have been a productive resolution of the housing proposals of the Newton Community Development Foundation. That fact of courage and commitment was not lost on our Foundation, nor was it lost on the citizens of our city.

But because many steps must be completed before housing can become a reality, we seem to be now, near the end of January, no closer to that reality than we were many months ago. We recognize how difficult it has been for your Board to arrive at new approaches to zoning which would provide better controls and better assurance that such housing could indeed be built. We are also well aware that, even given early resolution of zoning ordinance changes, there still remains much planning, negotiation, review and approval before housing can be built. Pending resolution of zoning ordinance changes we have obviously felt it inappropriate to refile petitions under existing ordinances and thus further complicate deliberations. We have undertaken additional site negotiations and studies in order to arrive at alternative proposals, but there is nothing concrete at the moment that makes possible a substantially changed package or proposal. Essentially I think it can be said that we have been obliged to mark time for the past five months.

As I am sure you understand, there are pressures on the Foundation which simply cannot be indefinitely resisted. The primary one is, of course, the commitment to build housing in Newton, the best which this city and its resources, and the federal and state governments and their resources, can provide. This commitment by NCDF has not only not been altered but in fact has been continually strengthened in recent months as more and more financial and moral support has been forthcoming. NCDF must fulfill the obligations it has undertaken to the thousands of people who have supported it, not only with their social commitment but with their personal resources.

There is another pressure which we can do nothing about ourselves, and that is the pressure of time. NCDF, as you know, executed option agreements with owners of private land, and has been paying substantial sums to keep these options alive. They have finite terms and can't be extended beyond certain dates. If the land is to continue to remain available to us we must be able to proceed directly with zoning so that financing and construction agreements can be finalized during the period when the land is under our control. That period is now dangerously short.

During these five months NCDF has been analyzing every possible alternative and over the recent weeks narrowed these to three. At a meeting of the NCDF Board of Directors on January 18th, we reviewed these three options. The first was to refile as necessary on a seven-site package similar to the one proposed last August, but with the substitution of the Pierce School for the Homer and Walnut site. Our Board investigated the probable time span to completion, based on past history of the negotiation and decision process, and concluded that it would be extremely risky to pursue only this option. We were also forced to recognize the very strong likelihood that the total time needed to obtain zoning changes under any ordinance, conveyance of city land (including land held by the Recreation Commission, the Park Commissioners and the School Committee), permissive use approval on specific site plans, and FHA or MHFA financing arrangements, could greatly exceed the remaining land control time we have. The Board voted not to confine itself to this option.

As a second option, the Board reviewed the results of a careful analysis of
the possibility of including in a revised proposal a substantial proportion of single home units under combinations of the Federal 235 and Turnkey III programs. The study was made in response to suggestions made by many people that a large component of individually owned homes would make any proposal far more attractive and thus more speedily approved. We studied in detail the experience of Rockford, Illinois, with which you may be familiar. We analyzed over 50 small parcels of tax-title and other uncommitted land which the city owns as a possible additional source of land. We reviewed with our own architects and other architects the design and cost possibilities. We reviewed with construction firms in the field the cost realities in the Boston area. We reviewed with HUD officials the present HUD support level for those programs and the cost constraints imposed on this kind of housing. We would be glad to discuss with you at any time our findings. I regret exceedingly to have to report that the facts of life under present programs simply do not make this approach a practical possibility, and I need not go into all the details here. Suffice it to say that NCDF would like to propose such a package, feels it would be desirable, but sees no way in which it can be done in Newton in this building market under present programs. The Board was obliged to reject this option simply because it is not feasible.

The third and remaining option is the one which we have deliberately refused to consider until we were absolutely forced to do so, and that is to proceed under Chapter 774 to seek a comprehensive permit from the Board of Zoning Appeals for construction on the 6 private sites controlled by NCDF. The advantage of Chapter 774 is that it has mandatory deadlines for action built into its zoning and building permit process which could shorten the time span considerably (excluding litigation which we can expect in any route.) Yet we have postponed this kind of consideration because we do not believe it will provide as good a housing solution as the one which we originally proposed. Costs in Newton of private land require, in order to be economically feasible, construction of housing at higher densities than would be the case if these land costs could be reduced by the use of city-owned land. We also are deeply aware of the impact on the city of using this route because of the impression that this is a solution forced on the city, rather than one which the city has worked out by itself. But the facts are regrettably true. Under Chapter 774 the housing will be more dense and less scattered than it might have been were we able to use city land. It will assuredly appear to our citizens to be an imposed solution and it will cause bitterness. We deeply regret these facts, but they are facts.

At the meeting our Board voted unanimously to instruct its architects to redesign site plans for submission to the Newton Board of Zoning Appeals under Chapter 774, and we expect these plans will be completed within a month or so. Nevertheless, we would still prefer to build our first option - less dense housing on more scattered sites through your Board. The possibility of proceeding on this option is one on which only you can act. I wish the facts made more time available. I wish the existing zoning process were a faster one. I wish in every way that this decision had not been forced on us by all of the complex circumstances surrounding this thorny problem.

This letter is going to each of you and to the Mayor, and to no one else, for the moment. We have not made this decision public in any other way. It is probable that word of this decision will become known in one way or another in the next few days, though this will not be of our choosing. If you wish to meet with NCDF, either individually or in a body, to discuss the implications of this decision, we shall be delighted to do so at your convenience. We shall continue to hope for a better solution.

January 22, 1971

Robert C. Casselman
President
DEDHAM—Three conversion articles representing an appropriation of $55,000 were approved at the town meeting last night despite attempts to alter them down with substitute motions.

The money will be used to purchase wetlands in the Little Wigwam Pond rea at a cost of $42,200 and in the Jersey street rea for $18,800; and for a 1,350 aerial survey of the town's flood plain area.

Voters completed action on the warrant, which represents a budget of $10.9 million, reflecting an estimated $1 tax rate increase. The new tax rate is estimated at $36.52.

The Housing Authority was granted permission to petition the General Court to use the Reynolds Farm property on the Dedham-Boston line for a housing project for the elderly.

Another article, to permit multiple housing in business sections, was soundly defeated.

Voters gave Harold J. Carney, who was attending his 50th town meeting, a standing ovation when the session ended.

WELLESLEY—Town setting members rejected a proposal last night to zone a single residence street on Rte. 9 to a unified apartment district, an apartment complex said have been made up of 96 units.

Voters also defeated a motion to set aside land used by the public works department for use by the planning authority.

The meeting will reconvene tonight.

WAKEFIELD — Residents from the Bear Hill area waged a successful campaign last night to defeat an article proposing six high-rise apartment buildings to be built on the lake front — Neesingon Pond.

The two-year struggle, according to builder Joseph Capozzoli, would have realized $125,000 in revenue for the town, and called for two six-story apartments with a heated garage for 50 vehicles.

Larry Murphy, an official from the Bear Hill Country Club, cited traffic problems, lack of available water, vandalism, and the necessity of police and fire protection as problems arising from the high-rise apartments. The vote was 491-491. An article creating a seven-man conservation commission was indefinitely postponed. The meeting continues Monday.

FRAMINGHAM — On a vote of 118-59, town meeting members last night reversed their action of last Thursday and voted to take by eminent domain an 18.5-acre tract of land on the south side of town known as Cedar Swamp for $266,000.

More than 50 persons spoke in favor of reconsideration of the article, and taking of the land for a school or municipal fire station.

The land was zoned for apartment buildings about three years ago and was being developed by Cypress Associates of Boston into 247 units of garden apartments. Two weeks ago, the firm threatened to sue the town if the land was taken by eminent domain. Cypress Associates claims it has invested $500,000 in site preparation and architects fees.

The Department of Public Works' budget of $2.8 million, which was tabled two weeks ago, was approved last night. An attempt to cut $10,000 from the highway salt account failed.

Hingham — Nine zoning articles for garden-type apartments at scattered locations were rejected last night at the concluding session of the town meeting.

The Advisory Committee had recommended action on only one of the nine articles, a site on Lincoln street, but it was defeated 204-171.

MASHFIELD — An article proposing all restrictions on apartment buildings recommended by a Planning Board subcommittee was approved last night, 306-13, after being heavily amended from the floor.

Restrictions include a minimum height of two and a half stories, a minimum of 50 feet between apartment buildings, a change from 2000 to 6000 for required square feet per apartment and a minimum of 150-foot frontage.

A sum of $26,536 was approved, reimbursable by the state, for the continuation of an organized youth program. Also approved was $24,000 to update the town's master plan in two stages.

The tax rate is now $63, up $3 dollars from last year.
Project foes bid for vote in Lexington

A referendum petition signed by nearly 1000 Lexington residents will be discussed tonight at a meeting of the Board of Selectmen.

The petition calls for a special election which may overturn the action of Town Meeting members, who approved a proposal to construct 106 units of subsidized housing for families with low and moderate incomes.

Selectman Chairman Robert Cataldo said yesterday that the board will probably not set a date for the special election tonight. The latest possible date is May 4.

The plan for the housing, to be called Center Village, submitted to Town Meeting in Article 72 by developer Mark Moore, was passed April 5 by a roll call vote of 127 to 56, five more than the two thirds needed.

It was the first such housing proposal to get through Town Meeting since the concept of an RH zoning, which permits subsidized housing, was adopted last year.

A special town meeting January turned down a subsidized housing proposal by the Trinity Covenant, Church, and two similar proposals have been defeated.

At least 20 percent of the voters must vote against the decision of Town Meeting to overturn the action. The last official figure given for Lexington voters is 16,885.

Voters rejected, however, a proposal for the construction of 50 low-income housing units was approved for the second time last night by a vote of 72 to 56.

Supported by the planning board, the article drew opposition from Rep. Joseph J. Semensi, who contended that a show of interest in low-income housing would encourage builders like the Interfaith Housing Corp. to locate here.

OTHER TOWNS INCLUDE:

Ashland----3 articles on cluster zoning defeated

Bedford----created new apt. zone specific site defeated

Cohasset----zone for garden art. defeated

Lincoln----new condominium zone passed

Stoneham----one condominium proposal defeated

Wayland----elderly project (45 units) passed

Wilmington----new apt. zone defeated

Rockland----one apt. proposal defeated

Hopkington----elderly project (60 units) passed

North Reading----

An article appropriating $80,000 for tennis courts and recreation field areas at the new junior high school were approved last night.

Voters rejected, however, a request by the Randolph Housing Authority to prepare plans for the construction of 25 to 50 low-income housing units was approved for the second time last night by a vote of 72 to 56.

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Chapter 774 of the Acts of 1969
THE COMMONWEALTH OF MASSACHUSETTS
IN THE YEAR ONE THOUSAND NINE HUNDRED AND SIXTY-NINE

AN ACT PROVIDING FOR THE CONSTRUCTION OF LOW OR MODERATE INCOME HOUSING IN CITIES AND TOWNS IN WHICH LOCAL RESTRICTIONS HAMPER SUCH CONSTRUCTION.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 40B of the General Laws is hereby amended by adding the following four sections under the following caption: LOW AND MODERATE INCOME HOUSING.

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

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

"Uneconomic", any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development or on the amount or nature of the subsidy or on the tenants; rentals and income permissible, and without substantially changing the rent levels and unit sizes proposed by the public, nonprofit or limited dividend organization.

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

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

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

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

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

SECTION 2. Chapter 23B of the General Laws is hereby amended by inserting after section 5 the following section:

Section 5A. There shall be within the department a housing appeals committee, consisting of three members to be appointed by the commissioner, of whom one shall be an officer or employee of the department, and two members to be appointed by the Governor for terms of one year each, of whom one shall be a member of a board of selectmen and one a member of a city council or similar governing body of a city. The members shall serve for terms of one year each, and the commissioner shall designate
the chairman. A member of the committee shall receive no compensation for his services, but shall be reimbursed by the commonwealth for all reasonable expenses actually and necessarily incurred in the performance of his official duties. Said committee shall hear all petitions for review filed under section twenty-two of chapter forty B, and shall conduct said hearings in accordance with rules and regulations established by the commissioner.

The department shall provide such space and clerical and other assistance as the committee may require.

SECTION 3. The provisions of this act are severable and, if any provision shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

August 23, 1969,
Approved,

Francis W. Sargent,
Acting Governor.
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100. Interview with Frank Michelman, member of the Lexington Town Meeting.


102. Interview with Allan Rogers, Massachusetts Law Reform Institute.

103. Interview with Marc Slotnick, Executive Director of Newton Community Development Foundation.
Court Cases


