WHITHER 215?
Limitations on the Use of Discretionary Funding Incentives
As a Means of Inducing Local Land Use Policy Reform

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ABSTRACT

Executive Order No. 215 serves to withhold certain kinds of
state discretionary funding from municipalities found to be
"unreasonably restrictive of new housing growth." This
withholding practice was explicitly designed to help induce local
land use policy reform. This paper concludes that the prospects
for achieving this goal are extremely limited.

Chapter I examines the formulation and implementation of the
215 withholding policy from its historical roots to the present.
Several case studies are included to illustrate 215 in practice.
Chapter II analyzes the legal context of the executive order and
concludes that while the withholding practice appears to be
legal, significant legal obstacles remain as to what this
practice can achieve. Chapter III examines the multifarious
goals behind the executive order and the various strategies that
the state has attempted to use to achieve these goals. It argues
that 215 has not and probably could not have been used as a true
bargaining mechanism to induce communities to be less restrictive
in their land use policies.

Chapter IV begins a rethinking of the issue of state
encouragement of local land use policy reform. It analyzes the
degree to which housing allocation formulae are a prerequisite to
effective state intervention. Chapter IV argues that the
conceptual and political problems inherent in determining a
community's "fair share" may well be overwhelming, and that the
concerns that underlie a theory of fair share might better be
served through other mechanisms.
Chapter V examines the range of intervention options potentially available to the state based on the inclusion of outside interests into the local regulatory process. It argues that bargaining schemes based on obtaining commitments from local officials as to future actions can be self-deluding, and that compensation mechanisms should be based on past growth and/or current restrictiveness. It concludes that a mixture of devices designed to test the legitimacy of local regulation with incentive mechanisms designed to alter is needed as neither strategy can be successful on its own.

Chapter VI begins with an examination of some of the institutional problems encountered in the formulation and implementation of the 215 process. It argues that the goal of demonstrating that the intervention worked tended to overshadow the goals that the intervention was designed to achieve. The chapter concludes by offering suggestions of how to formulate more effective policies.

Thesis Supervisor: Professor Philip B. Herr
Title: Ass. Professor of Urban Studies and Planning
To the Memory of Guy Emerson Marshall
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Introduction

Executive Order No. 215 embodies a state practice of withholding discretionary funding from municipalities found to be "unreasonably restrictive of new housing growth."¹ This paper will examine the prospects for and limitations of this practice as a mechanism for inducing local land use policy reform. While the discussion focuses on the context of growth policy in Massachusetts, much of it is relevant elsewhere.

The first three chapters comprise a critique of the executive order. Chapter I will examine the factual background of 215, including a look at its historical roots and several case studies illustrating the executive order in practice. Chapter II will assess the legality of 215 as well as the legal constraints on its implementation. Chapter III will examine the goals behind the executive order and the strategies by which the state attempts to achieve these goals.

The second three chapters attempt a rethinking of the issue of state encouragement of local policy reform. Chapter IV examines the question of to what extent a resolution of a community's "fair share" is needed to underlie state intervention. Chapter V will examine the range of intervention options available to the state of the type necessary to effect substantial local reform. Last, Chapter VI will give some summary remarks and offer some concrete recommendations as to what actions should follow.
CHAPTER I

Factual Background

A. The Historical Context of Growth Policy in Massachusetts

In Massachusetts, land use and housing policy is primarily committed to local governments. While the procedural aspects of local decision-making are carefully prescribed by statute, with a few notable exceptions municipalities are essentially free to set the substance of their regulatory policy. The result of this atomistic structure is a collection of local policies which taken

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2 See Mass. Gen. Laws Ann. ch. 40A §1 et seq. (West 1979) (zoning enabling act); ch. 41 §§ 81K et seq. (West 1979) (subdivision control enabling act); ch. 23B §§ 16-23 (West 1981); ch. 143 §§ 1 et seq. (West 1981) (state building code); ch. 131 §§ 40, 40A (West 1981) (wetlands regulation); ch. 111 §§ 127A et seq. (West 1971) (State sanitary code). For a discussion of the state standards constraining local policy in the zoning and subdivision control enabling acts, see p. 139 infra. Note that Massachusetts' state building code is a notable exception to local prerogative. Even here there is some local role, localities can petition the state commission for more restrictive standards. ch. 23B §21.
individually or as a whole are often perceived as conflicting with state-wide goals. Most importantly, the policies of some communities are commonly believed to restrict the supply of housing, raise the price of available housing, and/or create an unfair distribution of the costs associated with housing development. In the past fifteen years, there have been several attempts to increase the state role in the local regulatory process.

The first major incident of state intervention was the passage of the so-called "Anti-Snob Zoning Act," 1969 Mass. Acts ch. 774. This act allows for the overriding of local policy that might otherwise restrict the development of subsidized housing. In short, the act works as follows:

1. Public, non-profit, and limited dividend developers of subsidized housing are given the opportunity to apply for a comprehensive permit from the local zoning board of appeals (ZBA). This procedure takes the place of all other local permitting.

2. If the local ZBA disapproves the proposal or approves it with conditions that render it economically infeasible, the developer has the right to appeal the decision to the Housing Appeals Committee (HAC), an independent, quasi-judicial body included for administrative purposes within the Executive Office of Communities and Development (EOCD).

3. Municipalities are in effect exempted from the over-ride process if they meet one of three criteria relating to:

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3See generally Chapter III infra and citations therein.

- the relative amount of subsidized housing already within the community
- the relative land coverage of the subsidized housing already within the community
- the relative and absolute increase in land coverage that the proposed subsidized housing would entail. 5

The scope of ch. 774 is limited in several ways. First, it deals only with the siting of subsidized housing and not with the reform of local policy generally. 6 Second, the statute can be described as a "passive" mode of intervention. 7 The process

5 Id. ch. 40B §§20, 23 (West 1979). The exact standards are as follows:
(1) low or moderate income housing 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. If one of these standards is meet, a developer can still apply to the local board of appeals for a comprehensive permit, but the HAC is limited in its powers of review.

6 "Low or moderate income housing" is defined as "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." Id., ch. 40B §20.

7 J. Breagy, Overriding the Suburbs: State Intervention for Housing Through the Massachusetts Appeals Process, 2, 3 (Citizens Housing and Planning Ass'n, 1976).
incorporated within the statute is only triggered upon the application of the developer, and the state seeks to achieve its reform goals through providing an avenue of appeal rather than through direct intervention. Lastly, there is no absolute pre-emption of local authority, but a process that attempts to incorporate local boards and accommodate local policies.8

The passage of ch. 774 has been traced to an anomalous coalition of pro-housing liberals and urban conservatives seeking revenge against the suburbs for the passage of a school desegregation bill the previous year.9 Still, despite the "illegitimacy" of its birth, the statute has survived many attempts at its repeal.10

In the period 1970 -1978, 111 applications were made under

8The decision of the local board of appeals must be "consistent with local needs." The definition of this term restricts local considerations to health or safety—general welfare is not included—the promotion of "better site and building design," and the preservation of open spaces. Moreover, any such requirements must be "applied as equally as possible to both subsidized and unsubsidized housing," and are to be balanced against the regional need for low and moderate income housing. Mass. Gen. Laws Ann. ch. 40B §20 (West 1979). Courts have interpreted the balancing test as heavily weighted toward allowing the housing to be built. See e.g., Bd. of Appeals of Maynard v. Housing Appeals Committee 370 Mass. 64, 345 N.E.2d 382 (1976).(HAC ruling upheld despite certain planning objections). For an explanation of the workings of the HAC, See Breagy, supra n.7 at 31,38.

9Breagy, supra n. 7 at 9.

10Id. at 1.
ch. 774 amounting to 14,639 dwelling units (d.u.'s). Of these, 9,717 units eventually received comprehensive permits and 3,362 were built. During the same period, some 340,000 d.u. of all types were built, of which some 57,000 were subsidized housing units not using the ch. 774 process. Much of the subsidized housing that was built within and outside of the ch. 774 process was elderly and not "family" housing.

The next major incident in the saga of state intervention in local land use policy was the passage of the Growth Policy

11 E. Ruben & C. Williams, Comprehensive Permits for Housing Lower Income Households in Massachusetts, 2 (Citizens Housing and Planning Ass'n. 1979). Note, the data includes some applications from 1979 and not all applications made in 1978.

12 Id. at 14,16,17.

13 Data compiled by Philip Herr, Planner, from U.S. Census materials. For a critique of the statute arguing that its effects have been "inconsequential", see E.F. Reed, Tilting at Windmills: The Massachusetts Low and Moderate Income Housing Act, 4 W. New England L. R. 105 (1981).

14 Note, for example, that of the 3,362 built under ch. 774 through 1978, 1,215 were for family housing compared to 1,337 for elderly housing even though the need for family housing is believed to be much greater. The remaining units were in mixed family-elderly developments for which no breakdown was given. Ruben & Williams, n. 11 supra at 2. It is unclear to what extent more elderly housing has been built in the attempt by communities to meet one of the exemptions of ch. 774. The differential between family and elderly housing built can possibly be explained simply by the fact that elderly housing faces less local resistance. But even if the elderly "loophole" has not in fact allowed communities to escape the workings of the statutory override, it may have an important psychological effect as an imprimatur to the local belief that the community's regional housing responsibilities are being met as long as elderly housing development is approved.
Development Act of 1975 (GPDA). The purpose of this bill was to create a process through which a state growth policy would emerge. The planning process was to be guided by the Office of State Planning (OSP)--created by recently elected Governor Dukakis--which was given the job of encouraging the formation of Local Growth Policy Committees (LGPC's) within each municipality. The formation and participation of the LGPC's was mandatory, but no sanctions were specified for non-participation.

The function of the LGPC's was to generate a local growth policy statement through a process of public hearings based on a questionnaire written by OSP. Eventually 320 LGPC's were formed, of which 301 submitted growth policy statements. These statements were then condensed into regional growth policy statements by the thirteen regional planning agencies. OSP then reviewed the local and regional policy statements and transformed

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16. Id.

17. Id. ch. 807 § 3. Some communities undoubtedly felt the implied threat of a stronger form of state intervention.


19. Welles, n. 18 supra, at 49.
them into a single document. The "findings" of the report were then tested in a series of local public hearings.

The OSP report emphasized increasing growth planning and channeling growth into areas already developed. It endorsed a level of growth sufficient "to provide job and housing opportunities for all [Massachusetts] citizens," but at the same time reaffirmed local prerogative in land use and growth policy decisions. Direct local growth phasing and management were to be encouraged, but such management should not only restrict undesirable growth, it should "stress facilitating desirable growth." The "action recommendations" section proposed a system of local growth programs whereby each community would voluntarily plan for how much growth it could "reasonably accommodate." Upon state approval of the local program, the municipality would be allowed to restrict growth beyond this amount. The report also recommended that state sewer and water funding be used "to make certain that local development policies

\[\text{Mass. Office of State Planning, City and Town Centers: A Program for Growth (Sept. 1977).}\]

\[\text{Welles, n. 18 supra at 51.}\]


\[\text{Id. at 61-62.}\]

\[\text{Id. at 61.}\]

\[\text{Id. at 78-79.}\]

\[\text{Id.}\]
are maintained."27

The GPDA was based on a theory of "bottom-up" policy formulation advanced by certain MIT academics directly involved in the work of the Growth Policy Commission, the legislative commission that drafted the bill.28 This theory is thought to generate a policy more responsive to local needs and desires and at the same time to generate a consensus to support implementation of the policy.29 After the bottom-up formulation process was over, the task that faced the proponents of state growth policy was how specifically to implement the derived policy.

On June 29, 1978, the Growth Policy Commission published its third interim report which recommended that legislation be drafted to implement the state growth policy.30 While the final product of the Commission's efforts would not emerge for over two years, the basic structure of the proposed state intervention was

27Id. at 80.

28The official name of the Growth Policy Commission was the "Special Commission of the Effects of Growth Patterns on the Quality of Life in the Commonwealth," created by 1973 Mass. Acts ch. 98. Lawrence Susskind who was at the time an associate professor and head of the Dept. of Urban Studies and Planning (DUSP) served on the Commission. Charles Perry who was at the time a doctoral candidate at DUSP served as staff for the Commission. Susskind and Perry wrote an article examining the theory underlying the GPDA and evaluating the success of the process. Susskind and Perry, The Dynamics of Growth Policy Formulation and Implementation: A Massachusetts Case Study, 43:2 Law and Contemp. Probs. 145 (1979).

29Id. at 166-171.

30Welles, n. 18 supra at 54,59.
set from almost the start. The state would encourage localities to follow desired "state-wide" goals through incentive mechanisms.

That Fall, Michael Dukakis lost the Democratic primary to Ed King, who later won the general election. Almost immediately after taking office, King dissolved the OSP and with it the centralized planning perspective that OSP entailed. Joe Flatley, Project Coordinator of the growth planning process within OSP, survived the change in administrations and moved on to EOCD. From his new position, Flatley was able to assist in the continuing efforts of the Growth Policy Commission.

In the Spring of 1981, the Growth Policy Commission finally produced a draft bill, the proposed Balanced Growth and Development Act (BG&DA). The LGPC's were to be reconstituted to formulate local growth plans which would include the mapping of districts in which housing development would be "fast-

31Indeed, the Commission's proposals did not substantially differ from the "action recommendations" of the OSP report. See nn 25,26 supra.

32Welles n. 18 supra at 61.

33E.g., Flatley was able to funnel the Commission $25,000 to pay for outside legal counsel and other expenses. Note, Flatley joined EOCD as an Administrator of the Office of Policy Development and was appointed Assistant Secretary in 1981, a position he still holds.

These growth districts were to be designed in order to ensure that the community would accept a specified number of new dwelling units per year, that number to be specified by the state but subject to negotiation.

Local participation in the program was essentially voluntary but would be encouraged by the availability of the following benefits that could be obtained through buying into the process:

- priority in the disbursement of state discretionary funding
- technical assistance grants to help pay for the planning
- growth control authorization
- agreement by the state not to stimulate development within Environmentally Sensitive Zones.

Under the BG&DA, communities could control their growth directly if they gave some assurance that they would otherwise accept their "fair share." They could choose not to participate in the process--perhaps controlling their growth through other means--but would lose the incentives offered.

In order for the BG&DA process to be successful, at least the following three assumptions would have to be true:

- the incentives would induce local participation
- state determination of each municipality's "fair share" was technically and politically feasible
- "fast-tracking" would induce the desired housing growth

35 Developers could apply for comprehensive permits within the so-called "Planned Development Zones." §15. The proposed act would have also endorsed the mapping of "Environmentally Sensitive Zones" where growth would be discouraged. §4.

36 BG&DA §§11,12.

37 BG&DA §14.
These assumptions never got tested in practice. By 1981, the momentum begun some six years earlier had died. With no legislator to "champion" the bill, the Balanced Growth and Development Act "died in committee." 38

Meanwhile, Flatley had become impatient with the legislative process and sought ways to "network" existing programs to achieve similar goals. The solution he fixed upon was to find state funding that could be withheld through administrative discretion until localities complied with certain desired practices. 39 This withholding policy was first implemented through a "memorandum of understanding" between EOCD and the Executive Office of Environmental Affairs (EOEA). 40 Under this agreement -- described in detail below -- open space acquisition funding was withheld from communities determined to be "unreasonably restrictive of new housing growth." A procedure was established through which the communities could then agree to take certain

38 Interview with Lawrence Susskind, former member of the Growth Policy Commission (April 11, 1983).

39 Memorandum of Understanding between the Executive Office of Environmental Affairs and the Executive Office of Communities and Development (Oct. 10, 1979), discussed below in detail beginning at p. 15.

40 The Federal government had begun a structurally similar process earlier by including local housing issues in the A-95 regional review process for the disbursement of Federal funding for certain kinds of development assistance. Office of Management & Budget, Circular No. A-95 (1971), see 24 C.F.R. §§52.101 et seq. (1982). One commentator labelled this process one of the only major "fair share" tools that has been implemented. T. Muller, "Issues in Land use Policies and Housing," in Housing Costs and Housing Needs, Greendale & Knock, eds. 1976).
actions and thereby obtain their funding. In 1982, this policy was expanded through the promulgation of Executive Order No. 215 to apply to potentially all development related discretionary funding. Executive Order No. 215 is the only state intervention in the local land use planning process other than ch. 774.

The withholding policy proposed by Flatley and now incorporated into Executive Order No. 215 differs in many ways from the statutory intervention that had been proposed. Gone was any hope of the backing of a state-wide consensus building process or even that of the consensus that is normally worked out through legislative debate. Moreover, unlike the BG&DA, Executive Order 215 does not even have the appearance of a comprehensive policy directly applicable to all municipalities. Instead, the policy applied only to communities as they applied for development assistance and in practice only applied to suburbs. Thus, the Executive Order became in effect an administrative complement to ch. 774's efforts to open the suburbs. Further, while the inducement offered by 215 is structurally identical to one of those of the BG&DA, in appearance they are quite different. The built-in prioritization incentive of the BG&DA was replaced by the administrative withholding of funds appropriated by the legislature for other purposes. The positive-oriented incentive had become a sanction.41

41For a more detailed analysis of the distinction between sanctions and incentives, see p. 153 infra.
Given the obstacles to legislative change, Flatley's switch to executive fiat is perfectly understandable. But what of his product? How has 215 worked in practice? Could it be improved? These are the questions of this paper.

B. General History of 215

On October 10, 1979, the Secretaries of the Executive Office of Environmental Affairs (EOEA) and the Executive Office of Communities and Development (EOCD) executed a "memorandum of understanding" concerning the disbursement of so-called "Self-Help" funds to municipalities. These funds are to be used towards open space acquisition within the communities. EOE agreed to withhold Self-Help funds from municipalities found to be "unreasonably restrictive of new housing growth" by EOCD.

In practice the withholding process worked as follows:

1) EOCD reviewed local policies upon the municipality's application for funding. EOCD used a complex building permit index which compared the community's percentage of growth for the period 1970-79 (adjusted by a bonus for subsidized housing constructed) to the adjusted percentage of growth of the region in which the community was situated. If this index were below a certain standard, EOCD would recommend that funds be withheld.

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43 Memorandum of Understanding between the Executive Office of Environmental Affairs and the Executive Office of Communities and Development (Oct. 10, 1979).

44 EOCD settled on this formula early in the process of administration of the Memorandum of Understanding after trying certain variations. Interview with John F. Loehr, EOCD Planner (Dec. 7, 1982). For a more complete discussion of this formula and its administration, see p. 131 infra.
2) The communities were then given a chance to show special circumstances, peculiarities about the town that could explain its low growth index.\footnote{Id. Specifically, the municipalities were given a questionnaire which probed the community's land use policies and also allowed them the opportunity to show how the EOCD formula was misapplied.}

3) If EOCD were not satisfied with the municipality's explanation, it would recommend that the funds be withheld until the municipality signed an agreement specifying what actions it would take towards making its policies less restrictive. Normally, EOCD proposed an initial draft of the agreement followed by some bargaining over terms.\footnote{EOCD initially had hoped that workable proposals would be initiated by the municipalities themselves. See e.g., Lincoln case study \textit{infra} p. 20. When this hope was not substantiated, EOCD began a practice of proposing all initial agreements itself.}

The agreements usually had two parts. The first part was a commitment by the municipality to apply for low or moderate income housing or an agreement not to block subsidized housing already proposed or -- in its strongest form -- a commitment to make every reasonable effort to develop such housing.\footnote{See generally, the case studies that follow beginning at p. 20.} The second part of the agreement entailed review of the locality's land use regulations generally. In one form of this provision, selectmen agreed to support proposals made by the local planning boards as to the use of innovative land use techniques (such as density bonuses) "where appropriate."\footnote{See e.g., Reading case study at p. 32.} In another form, selectmen agreed to urge such proposals on the planning boards.\footnote{See e.g., Topfield case study at p. 37.}

4) When the appropriate local officials signed the agreement, EOCD would recommend that the Self-Help funding be released.\footnote{See e.g., Groveland case study at p. 44.} The only enforcement mechanism available to the state was the threat of reprisal against the municipalities in future funding rounds.
During Fiscal Years 80 and 81, there were 64 applications for Self-Help funding.\textsuperscript{51} EOCD sent letters to 12 municipalities indicating that they appeared to be unreasonably restrictive and briefly explaining the process of review.\textsuperscript{52} Of these 12, six were able to show special circumstances or to convince EOCD in some other way that they were not being unduly restrictive.\textsuperscript{53} Five of the remaining communities signed agreements, leaving only one town that refused to cooperate.\textsuperscript{54}

The withholding policies of the EOCD-EOEA memorandum of understanding were greatly augmented by Executive Order No. 215, signed into law on March 15, 1982.\textsuperscript{55} The process by which the funds were withheld remained essentially the same, though the executive order did entail two major changes. First of all, the withholding process could now be applied to all "development-related financial assistance to cities and towns."\textsuperscript{56} The order specifies certain programs that this definition "may include (but

\textsuperscript{51} Interview with John F. Loehr, Policy Planner, EOCD (Dec. 7, 1982); see also, Memorandum from Joseph L. Flatley, Ass't Sec'y, EOCD to Andy Dabilis, United Press International (March 22, 1982) in re "Summary of 'Self-Help' Housing Review."

\textsuperscript{52} Id.

\textsuperscript{53} Id.

\textsuperscript{54} Id. The Town of Needham could in fact have passed EOCD's standards based on its present housing policies, but decided not to pursue its funding application when it became angered at EOCD's intervention and initial withholding. Interview with John F. Loehr, EOCD Policy Planner (Feb. 3, 1983).

\textsuperscript{55} 304 Mass. Admin. Reg. 28.

\textsuperscript{56} Id. at 29.
is not limited to) and explicitly states that "local aid fund reimbursement or distributions" (so-called "local aid" or "state aid") are not included. There is no indication within the executive order as to how the decision of what is to be included within "development-related financial assistance" is to be made. At present, the order is applied to several programs within EOEA, four within EOCD, and one within the Executive Office of Transportation and Construction (EOTC).

Secondly, the executive order changed the institutional and legal structure of how the withholding policy was implemented. The earlier memorandum of understanding was a voluntary agreement by EOEA to abide by EOCD's recommendations. The executive order, on the other hand, is a mandate from the governor to all relevant agencies. The exact nature of this mandate, however, is somewhat ambiguous. The order states that all such agencies

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57 Id.

should consider, in making such discretionary awards, the applicant city's or town's housing policies and practices....[I]t should be the general policy of all state agencies not to award discretionary funds to cities or towns which have been determined to be unreasonably restrictive of new housing growth." [emphasis added]59

The rest of the order requires EOCD to make determinations of whether the municipalities have been "unreasonably restrictive" and specifies procedural aspects of these determinations, including a codification of the bargaining process through which EOCD "signs off".60 Thus, the intent of the executive order would appear to be to bind the affected funding agencies by EOCD's determinations. However, there is no explicit requirement that the funding agencies even withhold funding. In practice, these agencies have agreed to EOCD's determinations.61

One other change took place at about the time 215 was adopted, though it was not brought about by the order. EOCD decided to change the standard of restrictiveness that triggered the initial withholding of funds.62 The agency now focuses only on the presence of subsidized family housing built within the community.63 An absence of such housing will normally trigger withholding.

60 Id. at 30.
61 See generally, the case studies beginning at p. 20 infra.
62 Interview with John F. Loehr, Policy Planner, EOCD (Dec. 7, 1982). For a discussion of why the standard was changed, see p. 134 infra.
63 Id.
Since the passage of 215, 20 communities have been notified that they were being considered "unreasonably restrictive."\(^{64}\) Seven of these communities have already signed agreements, nine have had their grant applications held up for other reasons, three towns are reported to be well along in the bargaining-agreement process, and one town escaped further review when the state decided that 215 should not apply under the circumstances.\(^{65}\)

C. Case Studies

To understand 215 more fully, we need to take a closer look at how the executive order works in practice. This section includes six case studies each of which raises important issues and questions as to the effectiveness of the order and its implementation. These issues and questions are noted at the end of each section and will be readdressed later in the paper.

1) Lincoln: An Aggressive Use of the Withholding Policy Under the Former Self-Help Memorandum of Understanding

In January of 1980, EOE A notified the town of Lincoln that two grants totalling $286,000 in Self-Help funds had been conditionally approved to be used towards the purchase of the so-called Adams and Umbrello properties.\(^{66}\) The town had already approved the purchase

\(^{64}\)Id.

\(^{65}\)Interview with John F. Loehr, Policy Planner, EOCD (Dec. 7, 1982; March 24, 1983). For a discussion of the town that escaped review when it was determined that 215 should not apply, see Lynnfield case study, p. 38 infra.

of the parcels which were being held by the Rural Land Foundation (RLF), a private land-banking organization. Housing development had been mentioned as one of the proposed uses of the Umbrello parcel prior to the town vote approving its purchase, but no specific development plans had been proposed or approved at the time the state intervened. Lincoln does have a reputation for creative land development, including the mixture of open space preservation and subsidized housing development.

Final disbursement of the Self-Help grants was made dependent on the town’s satisfying the concerns of EOCD and the Mass. Commission Against Discrimination (MCAD) that Lincoln was "unduly restrictive of housing growth." The town was invited to prepare a proposal to demonstrate that it had met these concerns. The resulting proposal was insufficiently specific to satisfy EOCD and EOCD responded with a draft of its own. Accompanying this draft was a letter from Joe Flatley chastising the town for its lack of initiative. The letter reads in part:

One of my principal concerns is that, in effect, we

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68 Id.


70 Concord Journal, March 15, 1980, at 1. MCAD no longer plays this direct role in reviewing housing policy.

71 Id.

72 Id. at 1, 16.
have devised a housing plan for the Town, when in fact the Town should have articulated a balanced housing plan of its own.

If the Town is serious about its commitment to accommodate its fair share of housing growth, some meaningful changes in policy must be made in the near future. Those changes should be made by the Town itself. Toward that end, I would be pleased to discuss further this Memorandum of Agreement, and how we might proceed.73

The draft agreement itself proposed certain specific conditions that the town should satisfy. These included agreements to

- relax certain zoning and design regulations generally
- support the use of density incentive bonuses
- pursue the application of scattered-site family housing funding under 1966 Mass. Acts ch. 705.74

By far the most controversial condition, however, was that the town develop at least 30 units of low and moderate income housing on one of the parcels.75 The composition of these units was to conform to the ratios of 1/6 elderly to 1/2 small family to 1/3 large family housing.76 The development condition was to be implemented through a series of separate written agreements between relevant local bodies including the following:

73 See letter from Joseph Flatley, EOCD, to Robert Lemire, Chairman of the Lincoln Conservation Commission (Feb. 25, 1980).
75 Id.
76 Id. Note these ratios were taken from the Area-wide Housing Opportunity Plan (AHOP) which Lincoln had accepted. Communities were required to agree to AHOP plans as a condition of receiving certain kinds of federal housing aid. See 24 C.F.R. § 891.101 et seq. (1982). See generally, Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, (1974).
an agreement transferring ownership of the parcel from the Rural Land Foundation to the Housing Commission (HC)

an agreement between the HC and the town to develop the parcel as specified

an agreement between the Planning Board (PB) and the Board of Selectmen (BoS) "that all necessary permits and variances will be expeditiously granted."

The Lincoln Conservation Commission (CC), the body that was seeking the funds, and the HC held a joint meeting in March to respond to the Flatley memo. Local reaction was generally sharply resentful and focused in three areas:

- the perceived offensive tone of the Flatley letter
- the specificity of the proposed conditions, especially as to the development of the Umbrello parcel
- the perceived interference with local prerogative that the individual agreements entailed.

Many local officials were particularly upset that the state was tying the two grants together. The Adams parcel-- which accounted for $242,000 of the total-- was composed of 87 acres on the Lincoln-Concord border that was adjacent to Walden Pond and functionally separate from Lincoln. The purchase of this parcel was in its final stages and the state's withholding of funds threatened the

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78 Id.
79 Id.
80 Telephone interview with Robert Lemire, *see* n. 67 supra
81 Id.
whole deal. In the view of the proponents of the project, the Adams piece—arguably of great regional but little local significance—was being hostage to the issue of housing on the other parcel.

Some attending the meeting challenged the legality of the proposed agreements as well as the initial withholding of the funds itself. Despite this local reaction, attention began to refocus on how the agreements might be redrafted so as to obtain the funding. One of the forces behind this reorientation was Rick Paris, a member of the HC that knew Joe Flatley. He announced at the meeting that

I called him [Joe Flatley] to find out what he was looking for. The state wants a commitment from the town to address, in every possible way, provisions for low and moderate income housing. His position is that he's not so concerned about specifics as about a general agreement between the state and the town. It's an extremely flexible document.

He added later

The issue about whether the state should link funding decisions with other departments won't be successfully challenged. We want to be helpful in doing what's needed to get the funds. The issue is to tell the state the things they want to hear in a fashion which expresses commitment and is flexible.

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82 Id.
83 Id.
85 Id.
86 Id.
87 Id.
Another member of the HC suggested redrafting the proposed agreement by removing:

- "mention of the town from throughout and say that the Housing Commission will recommend these things"
- "any reference to relaxing standards or granting lien allowances"
- "specific commitment to ratios on the Umbrello land." 88

The meeting adjourned with the consensus that the HC should redraft a more general statement of housing policy. 89

Eventually, the town resubmitted a revised housing policy plan to EOCD by way of the BoS. 90 MCAD reviewed the plan and recommended against approval. 91 This prompted another revision which, for example, dropped the condition of economic feasibility from the town's commitment to low and moderate income housing, but did not include a specific number of units to be built on the Umbrello site. 92 On October 6, 1980, the BoS adopted the revised statement of policy. 93 The most important provision was an agreement to make every reasonable effort to develop the 14.5 acres

88 Id., comments of Catherine McHugh.
89 Id.
90 Middlesex News (Sept. 1980).
91 Id.
92 Id.
of the Umbrello parcel...into housing units, using then existing ZONING BY LAWS to create greater than normal housing density including a reasonable number of low and moderate income housing units; any such proposal to reflect the housing goals agreed to by the Town of Lincoln in the [regional area-wide housing assistance plan]...any such proposal to be presented to Town Meeting within 12 months from the date of this memorandum.\textsuperscript{94}

The other relevant local boards (CC, HC, PB) passed resolutions supporting the policy statement and pledging their best efforts to implement it.\textsuperscript{95}

In a letter of October 23, Joe Flatley expressed that although he was not entirely satisfied by the town's statement he felt, "it represents a positive step forward, and demonstrates good faith on he part of Town Officials to meet those needs ['the broadening of housing opportunities']."\textsuperscript{96} On the basis of the town's policy statement, EOCD recommended that the Self-Help grants be given final approval, effectively releasing the funds to the town.\textsuperscript{97} However, the Flatley letter informing the town of this action included the following warning:

\begin{quote}
Future applications for Self-Help funding will be evaluated against the good faith efforts of the Town
\end{quote}

\textsuperscript{94}Id.

\textsuperscript{95}Resolution by the Lincoln Planning Bd. (Oct. 9, 1980), resolution by the Lincoln Housing Commission (Oct. 6, 1980), resolution by the Lincoln Conservation Commission (Oct. 16, 1980).


\textsuperscript{97}Letter from Byron J. Matthews, Sec'y of EOCD to John H. Bewick, Sec'y of EOE A (Oct. 23, 1980).
to follow through on the policies and procedures identified in the Statement. Of particular importance will be the Town's effort to develop the Umbrello parcel for a reasonable number of low and moderate income housing units.98

In early 1981, the Housing Commission presented a proposal to develop six acres of the Umbrello parcel into 30 units of mostly moderate income housing.99 At a town meeting on March 27, 1981, 314 residents voted in favor of the proposal with 193 opposed.100 However, because a two-thirds majority was needed to approve the proposal,101 the proposal was rejected. On March 30, 1982, Joe Flatley wrote EOEA to recommend that the funding for the Umbrello parcel of $44,000 be rescinded.102 EOEA followed this recommendation and in a sternly worded letter stated:

The unfortunate Town Meeting action will also have an extremely negative effect upon all future requests for Self-Help assistance unless Lincoln more adequately accommodates its fair share of low and moderate income housing. I trust, and am confident that all concerned will continue to work toward a balanced program of housing growth.103

In retrospect, Robert Lemire—then chairman of the Lincoln

98 Letter from Joseph L. Flatley, n. 96 supra.
99 Boston Globe, March 28, 1981,
100 Id.
102 Letter from Joseph L. Flatley, Ass't Sec'y EOCD to Joel Lerner, Director, Division of Conservation Services (EOEA)(March 30, 1982). The funding for the Adams parcel had already been disbursed.
103 Letter from Joel A. Lerner, Director, Division of Conservation Services (EOEA) to John Q. Adams, Chairman, Lincoln Conservation Comm'n (April 1, 1982).
Conservation Commission--believes that the funding inducement did little to alter the town vote.\textsuperscript{104} The amount of money in question was just too small to make a difference. If anything, Lemire claims, the state intervention strengthened local opposition to the housing.\textsuperscript{105}

In June of 1981, the housing proposal was brought before a town meeting again.\textsuperscript{106} Local officials unanimously supported the proposal.\textsuperscript{107} State funding for this parcel was no longer an issue, but the agreement that the local officials had previously made was a major issue.\textsuperscript{108} Some accused local officials of changing their views of the proper use of the Umbrello piece in response to the state's withholding funds for the Adams parcel and thereby in effect attempting to bypass town meeting.\textsuperscript{109} One resident asked, "On what authority did [the selectmen] make that decision without resurveying the neighborhood and resurveying the town?" The audience applauded.\textsuperscript{110} In defense, the local officials responded that they had no intention of tying the town's hands. Lemire stated, "No way would we proceed with the acquisition of Adams Woods if the funding

\textsuperscript{104}Telephone interview with Robert Lemire, n. 67 \textit{supra}.
\textsuperscript{105}\textit{Id}.
\textsuperscript{106}\textit{Concord Journal}, June 18, 1981, at 1.
\textsuperscript{107}\textit{Id}.
\textsuperscript{108}\textit{Id}.
\textsuperscript{109}\textit{Id}.
\textsuperscript{110}\textit{Id}. 
was linked to a commitment to build housing on the Umbrello land. The housing proposal was defeated 245-194.

The Umbrello parcel is to this date being held by RLF and no housing has been built upon it. Lincoln has not applied for any state discretionary funding since the Umbrello grant was rescinded.

Questions and Issues Raised (Lincoln):

(a) The interagency relations at both the state and local levels appeared to work quite smoothly. Moreover, the state asked for and received a lot, including a specific commitment to work towards developing the parcel. So what in the end went wrong? Was the result inevitable given the need to obtain town meeting approval? What are the implications for attempting to achieve local reform through obtaining the commitments of town boards?

(b) Even if we take for granted that all that could be obtained was the commitment of local officials, to what extent did Lincoln officials do anything that they were not going to do anyway? How were the state's actions constrained by the nature and extent of the incentives it had to offer?

(c) To what extent, if any, did the town's commitments embodied in the policy statement amount to a contract?

(d) Is the town's lack of reapplication for state funding

111 Id. at 19.
112 Id. at 1.
113 Telephone interview with Robert Lemire, see n. 67 supra.
due to its belief that such funding would be denied or to its lack of need for such funding? Each of these explanations raises serious doubts as to the effectiveness of the 215 incentives.

2) Reading: Quick Agreement, But To What End?

An August 6, 1982 letter from Joe Flatley informed the Town of Reading that its ch. 805 water systems grant was being withheld pending the town's signing an agreement with EOCD outlining a strategy to broaden housing opportunity within the community. The letter stated, "The Town can specify whatever actions it deems appropriate, so long as those actions will stimulate additional housing." The town's executive secretary responded to Flatley in a letter dated August 16, 1982. He stated, "I was shocked and a bit upset upon receipt of this letter as the Town has consistently applied for housing funds and has been denied." The rest of the letter documents the efforts the town has made toward subsidized housing:

- 114 units elderly housing (2 years old)
- 80 units of elderly housing (several years old)
- 74 units of elderly housing (recently awarded)
- 55 units of federally subsidized low income housing (built)
- 50 units of federally subsidized low income housing per

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114 Letter from Joseph L. Flatley, Ass't Sec'y EOCD, to Marvin Rosenthal, Chairman, Reading Bd. of Selectmen (Aug. 6, 1982).
115 Id.
116 Letter from John W. Agnew, Jr., Executive Sec'y of Reading, to Joseph L. Flatley, Ass't Sec'y, EOCD (Aug. 16, 1982).
117 Id.
year (applied for over each of the last four years and denied)
- Application for state funding to convert larger, older homes into multi-family housing (recently denied by EOCD)
- Two similar Federal grants to convert existing housing to elderly and low income housing (still pending)
- 8 units of housing for retarded adults (recently awarded)
- Inquiries recently made to EOCD concerning ch. 705 scattered-site, family housing funding (told no funding available this year).

Summing up this record, the letter concludes, "Under the circumstances I feel the Town has actively pursued and is trying to address housing needs and I certainly would hope that your restriction on the 805 water systems funding would be lifted." 119

In a follow-up letter, Flatley acknowledged that EOCD was unaware of some of the town's efforts, e.g., the applications for additional federally subsidized family units. 120 He went on to note that, "Nevertheless, our statement that Reading appears to be unreasonably restrictive is based on a clear imbalance between subsidized elderly and family developments in the Town." 121 Flatley was further concerned that Reading had not applied for ch. 705 scattered site family housing over the last three years,

118 Id. The federally subsidized housing was rental assistance subsidized under the so-called "Section 8" program authorized by the Housing and Community Development Act of 1974, §8 3.-.e n. 76 supra.

119 Id.

120 Letter from Joseph L. Flatley, Ass't Sec'y EOCD to John W. Agnew, Jr., Exec. Sec'y of Reading (Aug. 19, 1982).

121 Id. EOCD was drawing a line between housing built through mortgage subsidies and housing built through rental assistance subsidies. Exactly why EOCD feels this distinction is significant is unclear.
though he admitted that this might have been due to the fact that the town had grant applications pending elsewhere.\textsuperscript{122} He proposed that the town still sign an agreement with EOCD. Flatley's description of the agreement was as follows:

The Agreement acknowledges Reading's housing efforts and affirms the Town's commitment to continue working to ensure broadened housing opportunities in the community, particularly for lower income families. The Agreement makes clear the fact that Reading is not unreasonably restrictive and also strengthen's [sic] the Town's position in applying for other state discretionary funding.\textsuperscript{123}

A draft agreement was enclosed.

The Reading Selectmen executed the agreement without objection.\textsuperscript{124} They agreed that the town would apply for 705 funding and "actively support whatever steps are necessary to ensure the local 705 program is implemented in an orderly and expeditious manner."\textsuperscript{125} They further agreed to "support those zoning amendments that allow accessory apartments, additional multi-family housing, and housing at increased density, where appropriate, as proposed by the Planning Board."\textsuperscript{126} The Planning Board and the Housing Authority passed resolutions supporting the

\textsuperscript{122}id.
\textsuperscript{123}id.

\textsuperscript{124}See Letter from John W. Agnew, Jr., Exec. Sec'y of Reading, to Joseph L. Flatley, Ass't Sec'y EOCD (Sept. 30, 1982).

\textsuperscript{125}Memorandum of Agreement Between the Executive Office of Communities and Development and The Town of Reading (Sept. 20, 1982).

\textsuperscript{126}id.
Board of Selectmen's agreement and pledging their "best efforts to support the implementation of that Agreement." On the basis of the agreement, EOCD recommended that the town's 805 water systems funding be approved.

**Questions and Issues Raised (Reading)**

a) This case demonstrates the bluntness of the present triggering mechanism. EOCD was not aware of the unfunded applications that had been made to HUD and did not even attempt to factor in any restrictiveness on the part of the town outside of the subsidized housing area. Nor was the presence of rental assistance deemed significantly relevant.

b) The lack of controversy as to what the agreement should include bares the underlying nature of that agreement.

- to what extent did the agreement constitute an enforceable contract?
- to what extent could/did the selectmen bind themselves?
- to what extent could/did they bind other local bodies?
- if there was a contract, were the town's "promises" unilateral or were they made conditional on EOCD's "signing off" or even upon receipt of the grant?
- to what extent, if any, was the state bound by the agreement?

3) **Topsfield: Bargaining In Action**

EOCD notified the town of Topsfield that a ch. 805 water systems grant was being withheld because of the absence of

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127 *Id.*

128 *Letter from Byron J. Matthews, Sec'y EOCD, to John H. Bewick, Sec'y EOE A (Oct. 4, 1982).*
subsidized family housing within the town.\textsuperscript{129} A draft agreement was also sent to the town, and a meeting was scheduled to discuss the matter further. Attending the meeting were the Board of Selectmen, the Planning Board, a representative from the local housing authority, and John Loehr from EOCD.\textsuperscript{130} The Chairman of the Board of Selectmen did most of the talking for the town. Before the meeting began, the housing authority representative tried to impress upon Loehr the scarcity of developable land within the town due to a substantial amount of wetlands and state-owned land.

Loehr opened the meeting by explaining a little about the goals of 215 and how it worked. He noted that the review that triggered Topsfield into the process was a simple one that was not necessarily fair. When the preliminary explanation was over, Loehr focused immediately on the agreement that would induce EOCD to "sign off." Specifically, he emphasized the ch. 705 housing program and the fact that the state was only asking the town to "explore" this program when funding became available and to "explore" the subject of affordable housing in general.

The town officials first asked for a clarification of the

\textsuperscript{129}Letter from Joseph L. Flatley, Ass't Sec'y, EOCD, to Henry Garten, Chairman of the Topsfield Selectment (Aug. 6, 1982).

\textsuperscript{130}The meeting took place in the Bd. of Selectmen's conference room in the Topsfield Town Hall on Dec. 13, 1982. The author sat in on the meeting; all observations that follow were taken first hand.
relationship between EOCD's withholding of the 805 grant and "92 Washington St.," a proposed subsidized housing development currently before the House Appeals Committee under ch. 774. Loehr explained that the only relation was that the town's acceptance of the project might be enough to induce EOCD to "sign off."

For most of the rest of the meeting, town officials emphasized three main points:

- the lack of developable land within the town
- a recognition of a need for lower priced housing within the town (especially for the young and the old)
- a general feeling that the town was an inappropriate place for lower income people from outside due to the lack of a jobs base within the town and the lack of a transportation system to go outside it.

Loehr responded stressing the following points:

- other towns were in a similar position
- tailored solutions to each town's problems were encouraged
- the state was only asking for on the order of 4-5 units of housing, with funding to come from the state.

Throughout, Loehr was caught between making the agreement attractive to the town and at the same time ensuring that it had real "teeth." The town specifically wanted to know if there was a way that town residents could be given first preference to any subsidized housing built. Loehr answered that a local preference agreement was probably possible, though he personally did not agree with the idea.

The town officials continued to argue that they recognized the problem of no affordable housing within the town but were impotent to make a change. They began to acknowledge, however, that the state was not asking for very much. The head of the
planning board stated, "You're [EOCD] basically asking for a philosophical commitment." The Chairman of the Board of Selectmen followed, "The numbers you are asking for seem modest; I welcome the opportunity to get money for our young people." Discussion began to focus on the particulars of the agreement and what would follow.

No final agreement was reached at the meeting, but it appeared that the parties were on the verge of one. Nonetheless, there also appeared to be some incongruence as to what the parties thought they were about to agree. Specifically, it was unclear to what degree the town would be bound by the EOCD-sponsored site selection process that would follow the town's application for 705 housing. The town officials had clear ideas as to where they wanted to put any subsidized housing (e.g., in the "business park" district next to the expressway or in a former Department of Youth Services facility no longer used by the state), and it appeared that they believed they would retain full control over the site

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131 Under current administrative procedures, applying for the ch. 705 funding commits municipalities to a state administered site selection process. While the locality is an "equal partner" during the process, the state retains "final say" at the end. The town could, of course, walk away from the housing funds and incur any sanctions imposed. Interview with John F. Loehr, Policy Planner, EOCD (April 12, 1982).

The ch. 705 housing program focuses on small-scale, scattered site development or rehabilitation. It has become the centerpiece of the 215 process. 1966 Mass. Acts ch. 705 (as re-authorized).
selection process. Ambiguity served to suppress potential conflict that could resurface later.

Topsfield recently signed an agreement with EOCD.\textsuperscript{132} The Board of Selectmen agreed "to affirmatively apply" for ch. 705 housing "when funding becomes available," as well as to "examine its zoning by-laws and...consider the benefits of a diversity of housing types and prices."\textsuperscript{133}

\textbf{Questions and Issues Raised: (Topsfield)}

a) This case presented the only observed example of face to face bargaining. Note that the fact that the town officials were on their own turf made them comfortable and perhaps more agreeable, but placed Loehr in a somewhat vulnerable and "outnumbered" position.

b) The town sought out the specifics of what was needed to free up their funding, a development that was encouraged by Loehr. In one sense, then, the incentives clearly worked. But did the desire to secure agreement overshadow and hence overcome the substantive goals that were desired? What in the end did the state gain from the bargain? If the town is able to obtain state funded housing with local preference and local site selection, has the 215 process done anymore than induce a town to look at

\textsuperscript{132}Memorandum of Agreement Between the Executive Office of Communities and Development and the Town of Topsfield (Jan. 3, 1983).

\textsuperscript{133}Id. The Board of Selectmen specifically agreed to "urge the Planning Board to give serious consideration to innovative zoning amendments that encourage more affordable residential developments--such as 2 or 3 family quadraplex structures, or accessory apartments."
another state funding program (705) that is almost undeniably in the town's self-interest?

c) At the same time that the town officials sincerely felt that they were constrained from making real substantive change, it was also apparent that they felt little responsibility for those outside the town. Loehr was always on strongest ground when he compared Topsfield to towns similarly situated.

d) Loehr emphasized that the town's coming to agreement would free it from withholding problems in the future. In what sense (legal, political, moral) was the state bound by this commitment?

4) Lynnfield: Interagency Controversy Over the Scope of 215

In a letter of August 6, 1982, Joe Flatley informed the Chairman of the Lynnfield Board of Selectmen that a ch. 805 water systems grant was being withheld because the town appeared to be "unreasonably restrictive." 134 The applicant for the grant was not a town-wide agency, but the Lynnfield Water District, which serves approximately one-quarter of the town. Upon the urging of the town, the Dept. of Environmental Quality Engineering (DEQE)--the 805 funding agency--reviewed the question of the applicability of Executive Order No. 215 to water districts.

In a legal memo of October 1, 1982, DEQE determined that the pertinent language in 215--"to cities and towns"--did not include

134Letter from Joseph L. Flatley, Ass't Sec'y EOCD, to John F. Donegan, Chairman, Lynnfield Bd. of Selectmen (Aug. 6, 1982).
water districts. The memo continues:

In addition, application of the Executive Order to districts would not make a great deal of sense, as such districts have no control or input into the housing practices or policies of the cities, towns or portions thereof whose residents they service.

Despite DEQE's judgment that 215 did not apply, EOCD continued to press the selectmen for an agreement. John Loehr set up a meeting with various town officials on November 8 in an attempt to further negotiations. The town officials apparently had no intention of negotiating and used the meeting to vent their hostile feelings toward EOCD. EOCD responded by letter stating that because of the town's unwillingness to cooperate, "this office will be unable to make a favorable recommendation to DEQE on the Town's '805' grant."

In a memorandum to DEQE dated December 6, 1982, Joe Flatley challenged DEQE's determination that 215 did not apply to water districts. The memo reads in pertinent part:

In drafting the operative wording for Governor King, EOCD purposely did not attempt to define the term "city

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135 Memorandum from Gloria Fry, Office of General Counsel, DEQE, to Dave Terry, Division of Sewer and Water, DEQE (Oct. 1, 1982).

136 Id.

137 Interview with John F. Loehr, Policy Planner, EOCD (Dec. 7, 1982).

138 Letter from Joseph L. Flatley, Ass't Sec'y, EOCD, to John Donegan, Chairman, Lynnfield Bd. of Selectmen (Nov. 19, 1982).

139 Memorandum from Joseph L. Flatley, Ass't Sec'y, EOCD, to Anthony D. Cortese, Commissioner, DEQE (Dec. 6, 1982).
or town" since local government, by its very nature, is so fractionalized. "Cities or towns" are really an amalgamation, or loose union, of various boards, commissions, and authorities, each having separate and distinct responsibilities, but whose collective actions constitute "local policy."

The purpose of the Executive Order is to withhold funding, where warranted, from the city or town (i.e., the conservation commission, the housing authority, the industrial development commission, the water district, etc.) until the appropriate local boards and commissions cooperatively develop an affirmative housing policy.

The dispute between DEQE and EOCD was recently resolved by EOCD's acceding to DEQE's interpretation that 215 was inapplicable to the Lynnfield Water District. After recent interagency negotiations, EOCD and DEQE have agreed to apply 215 to grants to sewer and water districts that serve over 75 percent of a town's population.

**Questions and Issues Raised: (Lynnfield)**

a) To which funding applications and local agencies should 215 apply? The argument that 215 should not apply to water and sewer districts is not easily contained. While a line can certainly be drawn distinguishing these districts from other local boards, one can still question whether these distinctions should make a difference. Conservation commissions, for example,

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140 *Id.*

141 Interview with John F. Loehr, Policy Planner, EOCD (March 24, 1983).

142 Districts raise their own financing, are subject to separate elections, and are often not geographically contiguous with the municipalities they serve. See Mass. Gen. Laws Ann. ch. 41 §113 et seq. (West 1979), ch. 44 §9 (West 1981).
may have little direct influence on general land use policy within a town. Does it make sense and is it fair to withhold a grant from a conservation commission at the same time the exact same grant would not be withheld from a water district?

b) The interagency disputes at the state level highlight an absence of a force directing or supporting 215's operation from the top down, despite the form of 215 as an executive order.

5) **Groveland: A Real Test**

A letter of July 12, 1982 informed the town that its ch. 805 water systems grant of $207,000 was being withheld because the town was deemed "unreasonably restrictive" in its housing practices. The letter stated that the funds would be released if the town came to a formal agreement with EOCD in the next six months detailing its housing strategies. The town--per its counsel, David Watnick--responded with two strategies. First, Watnick sent a letter to DEQE stating that under his interpretation of 215, a town must be given a chance to rebut the evidence against it as a condition precedent to the withholding of funds. Secondly, he wrote to EOCD asking for copies of such

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143 Letter from John A. Bewick, Sec'y, EOE, and Anthony D. Cortese, Comm'r, DEQE, to Richard Allen, Chairman, Groveland Bd. of Water Comm'rs (July 12, 1982).

144 Id.

145 Letter from David M. Watnick, Groveland Town Counsel, to John A. Bewick, Sec'y, EOE and Anthony D. Cortese, Comm'r, DEQE (Aug. 6, 1982).
evidence and to arrange a meeting with them toward coming to a suitable agreement.146

Secretary Matthews of EOCD responded with a long letter detailing local opposition to subsidized family housing.147 While the local housing authority had made efforts at securing public housing in the past, violent and extended local protests rendered these efforts fruitless.148

Various people including State Senator Sharon Pollard and William Slusher (town meeting representative and member of the Merrimack Valley Planning Commission) unsuccessfully attempted to bypass EOCD by dealing directly with Governor King.149 Slusher wrote to King stating that EOCD had created a "Catch-22" situation because "Groveland has opposed a major low-income housing project because the area lacked adequate water for fire protection."150

Matthews responded to Slucher's claim by stating that "any objective view of the facts" indicates that the preferred

146Letter from David M. Watnick, Groveland Town Counsel, to Byron J. Matthews, Sec'y, EOCD (Aug. 10, 1982).

147Letter from Byron J. Matthews, Sec'y, EOCD, to Earl Sweetser, Chairman, Groveland Bd. of Selectmen (Aug. 19, 1982).

148Id.

149Letter from Sharon Pollard, State Sen., to Edward J. King, Governor (Oct. 13, 1982); letter from William E. Slusher, Groveland town meeting representative and member of the Merrimack Valley Planning Comm'm, to Edward J. King, Governor (Sept. 6, 1982).

150Id.
explanation was not the real reason for the town's opposition to
the housing.151 His letter concludes:

In conclusion, I would urge Groveland officials to
put the unpleasant events of the past behind them, and
to stop insisting that the town has no responsibility
for addressing the need for low-income family housing.
Continued efforts to place the "blame" elsewhere will
not get the town its water system grant. Once again, I
want to make clear that we stand ready to work with
Groveland to resolve this impasse.152

Town officials accepted this invitation, and at a meeting on
October 20th, substantial progress was made toward reaching an
agreement.153

On February 3, 1983, EOCD signed an agreement with the town
whereby the selectmen agreed to apply for 705 family housing
during the next funding round.154 Specifically, the commitment
reads as follows:

The Town, acting through the local housing author-
ity, will affirmatively apply for additional state
Chapter 705 scattered-site family public housing under
the next funding round, and will continue other state
and federal family housing assistance programs currently
in the Town. Furthermore, the Board of Selectmen will
actively support whatever steps are necessary to ensure
the local 705 program is implemented as needed.155

151 Letter from Byron J. Matthews, Sec'y, EOCD, to William E.
Slusher, Groveland town meeting representative and member of the
Merrimack Valley Planning Comm'n (Sept. 23, 1982).

152 Id.

153 Letter from Edward J. King, Governor, to Sharon M.

154 Memorandum of Agreement Between the Executive Office of
Communities and Development and the Town of Groveland.

155 Id.
In return, EOCD agreed:

to transmit a finding to the Secretary of Environmental Affairs that the Town of Groveland is not at this time unreasonably restrictive of housing, along with a recommendation that the Town's application for Chapter 805 funds be favorably acted upon.  

In a cover letter returning the agreement to the town, EOCD states:

Although it is not stated explicitly in this Agreement it is our understanding that the various Town Boards will work in a cooperative and affirmative manner with the Housing Authority in applying for 705 family housing, and will actively support whatever steps are necessary to ensure the 705 program is implemented in an orderly and expeditious manner.  

Questions and Issues Raised: (Groveland)

a) Groveland had a history of overt exclusionary conduct and thus presents a real test for 215's effectiveness. Now that town officials have signed an agreement, can/will they successfully follow through on their commitments?

b) While Matthews was undoubtedly right in implying that the "fire protection" justification was spurious, are there not situations where the withholding of state funding could be counter-productive to the cause of increasing the supply of affordable housing?

c) Are there legal constraints on the type of agreement signed by the town and EOCD?

156 Id.

157 Letter from Joseph L. Flatley, Ass't Sec'y, EOCD, to Earl L. Sweetser, Chairman, Groveland Bd. of Selectmen (Feb. 7, 1983).
6) **Medway: 215 and Chapter 774 Overlap**

A mixed-income, "turn-key" housing development was proposed in Medway by a private developer acting on behalf of the local housing authority. On July 20, 1982, the local Board of Zoning Appeals (BZA) approved the project with 22 conditions of somewhat questionable intent. The developer estimated that these conditions would cost $336,400. An appeal was filed with the state Housing Appeals Committee (HAC) on August 3, 1982, but informal negotiations between the developer and the town continued as well.

Meanwhile, the town was applying for a Public Works Economic Development grant from the Executive Office of Transportation and Construction (EOTC) to build an access road for local industry. This application triggered the 215 review process. The EOTC grant was given at least conditional approval on September 1, 1982. One month later, the town learned that the grant might be

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158 See Appeal from a Decision of the Medway Zoning Bd. of App. to the Housing Appeals Committee (filed Aug. 3, 1982).

159 E.g., a condition that required a six-passenger elevator for a two-story building that had already received a handicap variance from the relevant state agency. For a list of the conditions imposed, see id.

160 See Letter from Lorene Comeau, Project Director for the private development, John M. Corcoran & Co., to Marvin Siflinger, Area Manager, U.S. Dept. of Housing and Urban Development (HUD) (Sept. 20, 1982).

161 See Letter from John M. Corcoran, private developer, to Marvin Siflinger, Area Manager, HUD (Dec 1, 1982).

162 Letter from Patricia M. Kennedy, Admin. Ass't, Town of Medway, to James Carlin, Sec'y, EOTC (undated).
withheld "due to a lack of low-income housing in Medway." The administrative assistant to the Board of Selectmen wrote EOTC "that Medway is very responsive to the needs of low income people." She cited 10 units of Section 8, federally subsidized, rental assistance housing within the town, as well as 31 people receiving rental assistance from the state. She also made references to the proposed "turnkey" development and stated:

The officials of Medway feel that we have done everything positive regarding filling the needs of the low income and should not be penalized for the small minority of private citizens who are currently exercising their constitutional rights in our democratic system to challenge the construction of this project.

She noted that the selectmen were doing all they could to achieve a "swift, amicable compromise." This letter also noted the benefits that would flow from the EOTC grant that was being withheld:

The Industrial Park that will benefit most directly from our creation of this access road via the grant funds will open up a labor force potential, both locally and statewide, that should be a potent factor in the prevention of additional low income families due to unemployment.

163 Letter from Joseph L. Flatley, Ass't Sec'y, EOCD, to James Jeffers, Chairperson, Medway Bd. of Selectmen (Oct. 15, 1982).
164 See n. 162 supra.
165 Id.
166 Id.
167 Id.
168 Id.

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In a letter of October 15, 1982, Joe Flatley officially informed the Board of Selectmen that the absence of low-income housing developments within the town could "pose a problem with respect to Executive Order No. 215." Flatley then made reference to the continuing negotiations between the town and the developer, and informed the town pointedly:

If the outstanding issues can be resolved, the Town will have clearly demonstrated its commitment to housing for low-income families. Prior to our making a determination regarding Medway's Public Works grant, we would like to meet with Town officials to review progress made at the forthcoming meeting towards resolving outstanding issues regarding that housing proposal.

Negotiations progressed to the point where agreement was reached on all but one of the conditions. At about this time, EOTC decided that the Public Works grant program was invalid in its

\[\text{[16]}\text{See n. 163, supra.}\]

\[\text{[17]}\text{Id.}\]

\[\text{[18]}\text{See n. 161, supra. Note that the developer directly credited EOCD with helping to narrow the issues. Letter from Lori Comeau, Project Director, John M. Corcoran & Co., to John F. Loehr, Policy Planner, EOCD (Nov. 24, 1982) ("Your efforts to resolve the Comprehensive Permit appeal, through your communication with Medway officials and EOCD personnel directly involved in that appeal, has resulted in narrowing the issues of 'real' concern to the Town from the original 22 conditions which appeared in the permit.")}\]
particular form,\textsuperscript{172} thus suspending the 215 process and the incentives that it offered. The final issues could not be resolved and as of March 24, 1983 the parties were still awaiting the decision of the HAC. The town is aware of the fact that the longer the project is delayed, the greater the probability that federal funding for the project will be withdrawn.\textsuperscript{173}

\underline{Questions and Issues Raised: (Medway)}

a) The Medway case presents an interesting overlap between Executive Order No. 215 and ch. 774. In the process it demonstrates the potential for creative "networking" as well as the fragile dependency of the 215 process on the availability of the funding incentive.

b) The fractionalization of local authority into several different bodies is once more a major issue.

c) Do the economic development benefits associated with the EOTC grant render its withholding an inappropriate incentive, or is this precisely the case for such linkage?

\textsuperscript{172}The enabling act for the program was ambiguous as to whether funds could be given directly to municipalities without the approval of the Department of Public Works, an independent agency included for administrative purposes within EOTC. Mass. Gen. Laws Ann. ch. 161C \$4 (West Supp. 1981)

\textsuperscript{173}Interview with John F. Loehr, Policy Planner, EOCD (Feb. 3, 1983).
CHAPTER II

LEGAL CONTEXT

This section will have three purposes. First, it will attempt to assess the legality of the current executive order "on its face." Second, it will examine legal constraints on how the order is implemented. Third, along the way it will explore the boundaries of the Massachusetts Constitution, allowing us to assess how much could be achieved through statutory change.

A. Legality

While final conclusions as to legality are always suspect, it does appear that Executive Order No. 215 is legal. More exactly, it is extremely unlikely that anyone could successfully challenge the executive order in court. Potential plaintiffs will have a difficult time obtaining judicial review. Even if this obstacle can be overcome, the practices mandated by the executive order appear to be well within the broad authority delegated to executive agencies in the spending of discretionary funding. While this delegation of authority could be challenged through the various theories discussed below, there remains a glaring absence of case law overturning discretionary powers of governors not in direct conflict with statutory mandates.
Despite the relative ease with which these conclusions can be made, this section will examine the legality issue in comprehensive detail. In order to ensure the fairness of our conclusions as to the order's legality as well as to explore some of the more interesting issues that can be raised, we will attempt to present the strongest arguments that can be made in favor of the order's illegality. The analysis should be read in light of these initial conclusions.

1) Obtaining Judicial Review

Before we examine the substance of the executive order, we have to address the procedural issue of how the order could be challenged. The most likely challenge would be by communities denied funding because of their growth policies. Such plaintiffs would face a significant obstacle to bringing suit, namely that discretionary funding decisions are normally not

174 Funds have not been finally denied to any town. One town withdrew its application when it became angered at the initial withholding. Other towns have been willing to go along with EOCD because the state has not asked for much. See discussion at p. 20 supra.
subject to judicial review. The case law could be distinguished, however. Plaintiffs would argue that the agencies were not withholding funds pursuant to discretion committed to them by the funding program enabling statutes, but pursuant to extraneous concerns. The actions of EOEA and EOCD in treating the growth policy review as a separate step layered on to the initial determination of eligibility bolsters this argument. Further,


176 *See West Broadway Task Force, Inc. v. Comm'r of the Dept. of Community Affairs*, 363 Mass. 745, 297 N.E.2d 505, 509 (1973) (dicta). While refusing to take jurisdiction in the particular case, the court stated:

A charge of arbitrary or capricious action by the agency, like a charge that the agency exceeded its "jurisdiction," could also present a plausible situation for appeal to an equity court. Even in a field in which the agency is acknowledged to have latitudinous discretion, a court would not be excluded if the agency appeared to have been actuated by clearly inapposite or unreasonable considerations. [citations omitted]

*School Committee of Hatfield*, n. 175 *supra*, cites *West Broadway* as listing the exceptions to the general rule of no judicial review of discretionary funding decisions. 363 N.E.2d at 240.

177 At least for purposes of overcoming the procedural hurdle of obtaining judicial review. The program enabling statutes may still provide the strongest support for the 215 withholding policies.
statutes that require discretionary funding to be disbursed pursuant to promulgated regulations themselves provide a route of judicial review. The analysis of the legality of the executive order which follows assumes that this "procedural" obstacle can be overcome.

2) An Overview of the Substantive Legal Issues

Executive Order No. 215 entails the withholding of funds appropriated by the legislature from municipalities found not to meet certain conditions. The overriding legal question is whether this withholding policy could properly be implemented through an executive order or whether such executive action would usurp the power of the legislature in violation of the Separation

178 1979 Mass. Acts ch. 805, discussed infra at p. 69, requires EOE to "establish standards and guidelines for the administration and disbursement of said funds." The agency itself appears to read this phrase as a requirement that regulations be promulgated. Id. n. 244, infra.

179 See West Broadway, supra at n. 176 (jurisdiction lies where the agency has ignored "a specific statutory command or prohibition") (dicta). Were regulations promulgated, judicial review would be triggered under the Mass. APA. Mass Gen. Laws Ann. ch. 30A §7 (West 1981).

180 The two questions of course overlap; the clearer the agencies are outside of their authority, the more willing a court will be in accepting jurisdiction. Note that in dismissing the complaint in School Committee of Hatfield, the court stated that it did not meet the West Broadway exceptions based on its conclusory allegations. 363 N.E. 2d at p. 240.
of Powers clause of the Mass. Constitution. In particular, we must ask the following questions:

- Is the imposition of such conditions on the disbursement of funds within an independent grant of the executive authority from the Mass. Constitution?

- If not, is it within a legislative grant of authority to the relevant state agencies and/or the governor?

- Even if the imposition of such conditions would be otherwise authorized, does it conflict in some way with the Mass. Home Rule Amendment?

- To find a legislative source of authority, are we forced to rely on a delegation that is unconstitutionally broad?

The use of gubernatorial executive orders has increased dramatically in the past few decades. Between 1941 and 1947, 99 executive orders were promulgated, all of which traced their authority to the emergency powers granted to the governor under

181 Mass. Const. pt. I, art. 30 which reads as follows:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.


183 For a comprehensive report on the use of executive orders in Massachusetts, see Legislative Research Council, Gubernatorial Executive Orders (April 3, 1981)(hereinafter, the LRC report).
the so-called War Powers Acts. No executive orders were issued between 1947 and 1950, the date of the passage of the Civil Defense Act. All of the 34 executive orders issued in the decade 1950–59—as well as many of the orders issued after that time—based their authority on the explicit statutory powers given to the governor by the Civil Defense Act. Beginning in 1960, however, governors began to issue executive orders citing statutes that did not explicitly grant the power to issue such orders, citing powers generally conferred by statutes or the constitution, citing the governor's status as the "supreme executive magistrate," or citing no authority at all. In the


186 LRC report, supra n. 183; Appendix A, 123–153.


188 LRC report, supra n. 183; Appendix A, 123–153. Most of these executive orders dealt simply with matters of state agency organization, such as the establishment of executive commissions and task forces. LRC report at 82. A few were of a more regulatory nature, see e.g., Executive Order No. 130 (1976) which restricted the awarding of state contracts to firms participating in boycotts ordered by foreign powers (a reaction to Arab boycotts against Israel); Executive Order No. 190 (1980) regulating the use of off-road vehicles on public lands.
decade 1970-79, 103 executive orders were issued of which only 10
even cite reference to any specific Mass. statute as
authority. 189

Executive Order No. 215 is typical in citing as its author-
ity "the authority vested in [the governor] by the Constitution
and by the statutes of this Commonwealth." 190 To analyze the
legality of the order, then, we are forced to examine all
possible sources of authority. 191

3) Independent Constitutional Authority

A governor's authority stems from three types of sources.
The first type are those powers delegated to the governor by the
legislature. These are discussed below in subsection (b). The
second are those specific powers explicitly granted by the Mass.
Constitution, e.g., the power to convene the legislature. 192
None of these powers gives direct authority for the issuance of
executive orders or is even faintly relevant to land use or

189 LRC report, supra n. 183; Appendix A, 123-153. Citing
legislative authority, of course, does not establish that
authority.


191 Little has been written as to the use and legality of
gubernatorial executive orders. In addition to the LRC report,
supra n. 183, see Comment, Executive Orders of the Wisconsin
Governor, 1980 Wis. Law Rev. 333 (1980); Comment, Constitutional
290 (1965); Note, Gubernatorial Executive Orders as Devices for
Administrative Discretion and Control, 50 Iowa L. Rev. 78 (1964);
F. Swindler, , The Executive Powers in State and Federal Consti-

housing issues. The third kind of authority includes those powers inherent in the office of the governor. These powers are the subject of this subsection.

Under the Mass. Constitution, the governor is the "supreme executive magistrate." Within this phrase the Mass. Supreme Judicial Court has found the authority to issue executive orders. Opinion of the Justices to the Council, 368 Mass. 866, 334 N.E.2d 604, 609 (1975) (executive order establishing a judicial nominating commission upheld). However, while this case recognizes the executive order as a legitimate means of implementing executive prerogative, substantive authority must still be found for that prerogative. In Opinion of the Justices, the executive order merely formalized the delegation of the judicial nominating power, a power that is explicitly granted to the governor by the Mass. Constitution. Thus, we must still locate substantive authority for the withholding of the state discretionary funding in order for Executive Order No. 215 to be legal.

Opinion of the Justices to the Senate, 375 Mass. 827, 376 N.E.2d 1217 (1978) recognizes an area of executive discretion in the execution of the laws with which the legislature cannot interfere. That case involved the constitutionality of a proposed statute intended to curtail executive impoundment of

193 Id., pt. II, ch. II, §1, art. 1.
194 Id., pt. II, ch. II, §1, art. 9.
funds appropriated by the legislature. In short, the bill was an attempt to force the executive branch to spend all appropriated funds in full. Thus, the case forced the question of whether there existed any independent executive discretion in the expenditure of funds duly appropriated by the legislature:

The crucial determination to be made is whether, and to what extent, the act of expending appropriated funds, or refusing to spend the full amount of appropriated funds, may be characterized as the Governor's constitutional prerogative to execute the laws.195

The case outlined the governor's role in the law-making process including the ability to propose new legislation,196 the general veto power,197 and the selective veto power.198 The opinion also recognized that

[O]nce a bill has been duly enacted, however, the Governor is obliged to execute the law as it has emerged from the legislative process. He is not free to circumvent that process by withholding funds or otherwise failing to execute the law on the basis of his views regarding the social utility or wisdom of the law.199

At the same time, the court recognized a constitutionally

197 Id., pt. II, ch. 1, §1, art. 2.
198 Id., Art of Amend., art. 63, §5.
199 Opinion of the Justices, 376 N.E.2d at 1221-2. N.B. This case is cited only in how it bears on the issue of independent, executive authority. Obviously, a case of impoundment of funds presents a much stronger and more direct conflict with a legislative mandate than any withholding done under 215.
based area of discretion committed to the executive in the spending of duly appropriated funds:

The constitutional separation of powers and responsibilities, therefore, contemplates that the Governor be allowed some discretion to exercise his judgment not to spend money in a wasteful fashion, provided that he has determined reasonably that such a decision will not compromise the achievement of underlying legislative purposes and goals.200

The line that the court draws is one between an attempt by the governor to "substitute his judgment of the merits of a program" and a "reasonable determination that the full legislative purposes can be accomplished by spending less..."201 Because the proposed bill did not distinguish between these two situations it was deemed unconstitutional.202

Like the opinion legitimating the use of executive orders, this case appears to create a much broader sphere of executive authority than it really does. The opinion does not recognize independent executive authority to enact social policy but only some executive discretion to operate within legislative purposes. It is clear that executive action cannot infringe upon valid

200 *Id.* at 1223.
201 *Id.*
202 *Id.*
legislative mandates. But direct conflicts with legislative mandates are not the only limitation on executive authority. An arguable implication of Opinion of the Justices to the Senate—as well as direct holdings in other jurisdictions—is that the governor has little if any independent constitutional authority to implement substantive social policy. Executive orders that attempt to adopt such a policy, therefore, would have to be based solely on statutory authority and would be restricted to the scope and intent of that authority.

203 See Mass. Bay Transp. Auth. Advisory Bd. v. Mass. Bay Transp. Auth. 81 Mass. Adv. Sh. 403, 417 N.E.2d 7 (1981) (striking as unconstitutional the governor's attempt to take over the regional transportation authority by executive order). The defendants claimed that the executive order was a proper exercise of the powers inherent in the office of the governor. Id. at 13. The court rejected this argument holding that the governor could not be executive order suspend the operation of the statute that vested fiscal control of the authority in its advisory board. Id. (citing Mass. Const. pt. I, art. 20, reserving the power to suspend the laws to the governor).

See also, O'Neill v. Thomson, 114 N.H. 155, 316 A.2d 168 (1974) (executive order limiting the hiring of state personnel and the purchase of state automobiles held invalid because it contravened the legislative intent implicit in legislative appropriations for such expenditures).

204 See Buettel v. Walker, 59 Ill.2d 146, 319 N.E.2d 502 (1975) (constitutional provision giving the governor the "supreme executive power" and the responsibility to execute the laws held not to authorize an executive order requiring the disclosure from those doing business with the state of campaign contributions to state officials); Rapp v. Carey, 44 N.Y.2d 157, 404 N.Y.S.2d 565, 375 N.E.2d 745 (1978) (executive order purporting to require financial disclosure from and regulate the political activities of state employees held invalid as going beyond the stated legislative policy of the code of ethics statute); Fulilove v. Carey, 62 A.D.2d 798, 406 N.Y.S.2d 888 (App. Div. 1978) (executive order requiring contractors doing business with the state to adopt affirmative actions programs held invalid as not encompassed by the state's anti-discrimination statutes).
It cannot be seriously argued that Executive Order No. 215 does not manifest a substantive policy to encourage housing development. The determinative question that follows is whether the order is within the legislative purposes of the relevant statutes. This question of statutory interpretation is discussed below in subsection 4). The more difficult ancillary question involves who should decide whether 215 is within the relevant statutory authority; that is, how much deference should the executive branch be given when the legislative intent is unclear. This question will be addressed below in subsections 5) and 6).

4) **Statutory Authority**

Executive Order No. 215 can lay claim to legislative authorization in three general areas: the organic statutes of the relevant state agencies, statutes pertaining to local land use and housing policy, and the enabling legislation for the various funding programs to which the order applies. The important question is not the validity of the executive order as such, but whether the relevant executive agencies could pursue the policies

205 Note that this analysis is not applicable to programs directly funded by the federal government, and not appropriated by the state legislature. See n. 58 supra. The question of the legality of attaching growth policy conditions to this funding would be a question of federal statutory interpretation. While the withholding policy would most likely be legal under the relevant federal statutes, the issue itself is of little consequence considering that the federally funded programs apply to cities that can meet EOCD's standards as a matter of course. See discussion at p. 132 infra.
behind the order. If authority for the policy of withholding can be located within these statutes, it follows that the governor could order the agencies to pursue such a policy. We will first examine the organic legislation for EOCD and EOE---the agencies most affected by the order---and then proceed to the other possible sources of authority.

(a) agency organic legislation: EOCD was officially created by 1969 Mass. Acts ch.704, the bill that created the various "executive offices" directly under the governor. The statute specified the departments that would be included within the new "umbrella" agency. There are no general empowering statutes for EOCD as such. For legislative guidance we must look to the organic statute for the Dept. of Community Affairs (DCA), the relevant department within EOCD.

206 See generally Shapp v. Butera, 22 Pa. Commw. 229 (1975), where the court classified executive orders into three categories: 1) proclamations, 2) policy directives to executive agencies (not enforceable as a matter of law), 3) orders implementing constitutional or statutory provisions.

207 The governor has direct control over the various executive agencies. The statutory scheme clearly recognizes that the governor has near unbridled authority to hire and fire secretaries of these agencies: "Each of said executive offices shall be headed by a secretary, who shall be appointed by and serve at the pleasure of the governor." Mass. Gen. Laws Ann. ch. 6A §3 (West 1982)(emphasis added). Moreover, "[e]ach secretary shall act as the executive officer of the governor for accomplishing the purposes of his office." Id., ch. 6A §4 (emphasis added).


209 See id., ch. 6A §8.

The statutory section that generally empowers DCA identifies DCA as the agency to be concerned with "programs of open and adequate housing for all citizens of the commonwealth."\textsuperscript{211} DCA is given considerable procedural leeway in how to implement its programs.\textsuperscript{212} Still, there is no open-ended authorization to set its own programs and policies, not even in general terms. Nor is there any authorization of general regulatory powers. This absence is made more conspicuous by the presence of explicit authorization of certain other specific powers.\textsuperscript{213}

The informing concept of the DCA organic legislation is that the agency's authority will be organized around specific programs authorized elsewhere. One statutory subsection mandates DCA to "discharge the duties imposed on it by or pursuant to law in the fields of housing."\textsuperscript{214} Included within this subsection is an explicit statement "that nothing in this subparagraph shall be construed in limitation of the other powers and duties of the department."\textsuperscript{215} This caveat notwithstanding, there remains an

\begin{itemize}
  \item \textsuperscript{211} See, ch. 23B §3.
  \item \textsuperscript{212} See e.g., id., ch. 23B §3(f) (authorizing interagency coordination).
  \item \textsuperscript{213} See e.g., id., ch. 23B §3 (granting EOCD the power to command certain kinds of information from municipalities and from other state agencies).
  \item \textsuperscript{214} Id. See, ch. 23B §3(i).
  \item \textsuperscript{215} Id.
\end{itemize}
absence of general authorization to set new land use and housing policy.

The organic legislation for EOEA is codified as Mass. Gen. Law ch. 21A.\textsuperscript{216} As was the case with DCA, EOEA is given great flexibility in implementing its programs through creative inter-agency arrangements.\textsuperscript{217} Unlike DCA, however, EOEA is given a fairly open-ended grant of policy setting power.\textsuperscript{218} Moreover, EOEA is given explicit authorization to "promulgate rules and regulations necessary to carry out their statutory responsibilities."\textsuperscript{219}

\textsuperscript{216}Id., ch. 21A (West 1981).

\textsuperscript{217}See e.g., id., ch. 21A §2 (18).

\textsuperscript{218}Note the following four subsections of Mass. Gen. Laws Ann. ch. 21A §2 (West 1981) describing EOEA's statutory mandate:

(1) develop policies, plans, and programs for carrying out their assigned duties;

(7) develop statewide policies regarding the acquisition, protection and use of areas of critical environmental concern to the commonwealth;

(8) develop and administer programs relating to recreation including the acquisition of land, development of facilities, and the provision of advisory services to municipalities and private organizations;

(9) promote the best usage of land, water, and air to optimize and preserve environmental quality by encouraging and providing for, in cooperation with other appropriate state agencies, planned industrial, commercial, recreational and community development. (emphasis added).

\textsuperscript{219}Id., ch. 21A §2(28).
(b) **land use policy statutes**: One of the stronger candidates to provide statutory authority for the executive order is the Growth Policy Development Act (GPDA).\(^\text{220}\) The act mandated the development of a state-wide growth policy through an inductive, bottom-up process.\(^\text{221}\) It can be argued that \(\text{215}\) is based on the policy generated by this process and is itself a mechanism forseen by the statute. Two sections of the GPDA are particularly relevant. Section 7 required the Office of State Planning to submit a report to the legislative Growth Policy Commission which was to include among other things:

(d) strategies for coordinatining [sic] the activities of state agencies involved in the allocation of state and federal funds for economic development, capital improvements, open space preservation and other activities relating to land use;

....

(g) a recommended growth policy for the commonwealth, which shall reflect both local and regional preferences and capabilities, as manifested in the Statements and Regional Reports prepared pursuant to this act, and issues of state concern.\(^\text{222}\)

Section 8 required the Commission to issue a similar report to the full legislature and the governor which was to include among other things the following provisions:

(a) standards and, where appropriate, new mechanisms, instrumentalities and processes to guide growth


\(^\text{221}\)See discussion at p. 7, supra.

and development into those areas where they will be
most desirable to facilitate community revitalization,
to generate new economic vitality, to minimize adverse
environmental effects and to conserve open space and
natural resources;

....

(d) strategies for coordinating the activities of
state agencies involved in the allocation of state and
federal funds for economic development, capital
improvements, open space conservation and other activ-
ities related to land use. 223

There are problems, however, with translating these statutory
roots into legislative authority for the order. The GPDA clearly
looked to other legislation to implement the policy that would be
derived; it did not itself authorize implementation. Moreover,
while the "consensus" policy was generated out of a legislatively
mandated process, it was not itself a statement of legislative
policy. The need for further legislation can be viewed as a
required stage of legislative ratification of any policy derived.
It could be argued that the failure of the passage of implementa-
tion legislation following the GPDA process can be seen as a
manifestation of legislative intent not to enact mechanisms such
as 215 or even as a repudiation of the policies generated out of
the process. This somewhat extreme interpretation is of course not
conclusive, as legislative inaction can never be conclusive. 224

223 *Id.*, ch. 704 §8.

224 See *Director of Civil Defense v. Civil Service Comm'n*,
373 Mass. 401, 367 N.E.2d 1168 (1977) (executive order which
declared that employees of the state civil defense agency had
civil service status upheld on multiple grounds). Civil service
status was necessary to receive federal funding but was not
directly authorized by state statute. Various governors had
issued a series of temporary executive orders placing the workers
in the civil service but also asked the legislature for statutory
authorization that was never granted. *Exec. Order Nos. 36*
The GPDA—as well as the program enabling statutes discussed below—should be examined in light of the general scheme of statutes relevant to land use policy. Though constrained by the procedures and standards of the zoning and subdivision control enabling acts, land use policy is generally committed to local governments. The one major exception—1969 Mass. Acts ch. 774—tends to prove the rule. The statute provides for the overriding of local policy for certain specified types of low and

(1960), 38 (1961), 39 (1961), 41 (1961), 42 (1961), 42A (1963, civil service status made permanent). The court found that "there is good reason to hold that the Governor's had, and properly exercised, delegated authority" in issuing the orders, but specifically did not rest the decision on these sole grounds. 367 N.E.2d at 1172. The court went on the state that, "In the present case, the failure of the legislature to respond to the Governor's requests with a definite enactment cannot be taken as a disapproval or a questioning of the executive orders; it is just as compatible, and possibly more so, with approval of, or contentment with the Orders." Id. Moreover, various actions of the legislature could "well be taken as practical confirmation or ratification of the executive orders even if the latter were in themselves inadequate." Id., at 1173. On the subject of possible legislative ratification, see n. 262, infra.


226 There are of course statutes that limit local discretion within particular subject areas; See n. 2, supra.

moderate housing development. However, communities are in effect exempted from this override if they are able to meet certain conditions. It could be argued that this statutory regime evinces a legislative intent that municipalities be free to set their own land use policy unless specifically limited by statute.

(c) program enabling statutes: The specific program enabling statutes are important in two ways. First they may provide alternative sources of legislative authority for the executive order. Second, they may limit or qualify the authority granted elsewhere. We will examine the authorization statutes for two of the more important programs to which 215 is applied: the so-called "Self-Help" program for open space land acquisition

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228 Id.

229 E.g., if over 10% of units in the community are already within the low or moderate income housing category. See ch. 40B § 20.

230 This result parallels the mandate of the Home Rule Amendment, Mass. Const. Art. of Amend., art. 89, amending Art. of Amend., art. 2. See discussion infra p. 71.

One could, of course, make the opposite argument: that the aim behind 1969 Mass. Acts ch. 774 to override local policy in order to induce more low and moderate income housing reveals a similar statutory intent in other legislation. As a matter of pure legislative intent, this argument seems more tenuous. Where the boundaries of local autonomy have been so carefully delimited in Mass. Gen. Laws ch. 40A, 40B, one would expect similar specificity elsewhere.

(the subject of the original memorandum of understanding) and the so-called "Water Systems" program for leak detection and water systems rehabilitation.232

The "Self-Help" program provides matching grants to municipalities for open space acquisition. The enabling legislation for the program reads in pertinent part as follows:

The secretary of environmental affairs shall establish a program to assist the cities and towns...in acquiring lands.... He may, from funds appropriated to carry out the provisions of section three [for state acquisition of lands], reimburse any city or town for any money expended by it in establishing an approved project under said program in such amount as he shall determine to be equitable in consideration of anticipated benefits from such projects.... No reimbursement shall be made hereunder to a city or town unless a project application is filed...with the secretary setting form such plans and information as the secretary may require and approved by him....233

This statute appears to grant EOEAs broad though not limitless discretion in setting the standards of eligibility for Self-Help funding. EOEAs has codified its standards into a set of administrative guidelines; formal regulations were never promulgated.

The Self-Help program is administered by EOEAs Division of Conservation Service with advisory direction provided by an inter agency "Self-Help Advisory Committee." To be eligible at all, a community must fulfill certain mandatory planning requirements as


well as provide assurances that it will uphold its share of the funding.\textsuperscript{235} The communities are then ranked through a point system based on certain specified "demographic factors" and "project quality characteristics."\textsuperscript{236} These rankings are commonly known as a "priority list." Grants are preliminarily approved based on the list, but ad hoc adjustments are made to ensure a broad geographical distribution.\textsuperscript{237} The municipality must then pass DCA's 215 standards as well as those set by the Mass. Commission Against Discrimination (MCAD) concerning local affirmative action plans.\textsuperscript{238}

The Water Systems program is based on a less broad grant of authority.\textsuperscript{239} The intent of the enabling legislation is clearly


\textsuperscript{236}EOEA, supra n. 234; see also, EOEA, Self-Help Land Acquisition Program Procedures, Pub. # 12036-5-500-8-80-CR (1980).

\textsuperscript{237}Interview with Joel Lerner, Director of the Division of Conservation Services, Feb. 3, 1983.

\textsuperscript{238}Executive Order No. 74 (1970), as amended by Executive Order No. 116 (1975). This paper takes no position on the legality of MCAD's withholding policies. It should be noted in passing, however, that MCAD is given broad powers to fight discrimination in the state's anti-discrimination statute. Mass. Gen. Laws Ann. ch. 151B (West 1982). Further, the Mass. Supreme Judicial Court has held that this enabling act "states legislative policy that the act be 'construed liberally for the accomplishment of...its purposes.'" Mass. Comm'n Against Discrimination v. Liberty Mutual Insurance, 371 Mass. 186, 356 N.E.2d 236, 239 (1976) (finding an implied power to order subpoena decus tecum for MCAD investigations within the statute).

delineated in §1 of the act:

For the purpose of developing ongoing programs of investigating and identifying sources of loss of potable water and for rehabilitating water supply distribution systems...there is made available the sum of ten million dollars which shall be expended by the cities, towns and water districts of the commonwealth under the direction and subject to the approval of the department of environmental quality engineering [(DEQE) a department within EOEIA. [emphasis added]240

The act requires DEQE to "establish standards and guidelines for the administration and disbursement of said funds."241 It then specifies five criteria that must be used in establishing eligibility for the ch. 805 grants e.g., "the amount of unaccounted for water usage in a community."242 The eligibility criteria are explicitly not limited to these five.243 Pursuant to the statutory mandate, regulations were promulgated specifying the criteria under which grant applications would be prioritized.244 DEQE added to those criteria specified in the statute, but all of the criteria are directly relevant to local water supply systems and water policy.245 There is no mention of land use or housing policy.

Two representative program enabling acts have now been

240 Id., (emphasis added).
241 Id., ch. 805 §2, as amended.
242 Id.
243 Id.
245 Id.
described. Before we continue our statutory analysis, we must consider the constitutional balance of power between localities and the state in which the executive order controversy is embedded.

5) **Home Rule Considerations**

With the passage of the Home Rule Amendment (HRA) in 1966, Massachusetts moved to a regime of local home rule. The state retains the power to override local government policy, but this power must be exercised through a statute that comports with the conditions specified in the HRA. This requirement as to the form of the state intervention applies not only to direct pre-emption of local authority by regulatory statutes, but also to the coercive attachment of conditions to state funding under the "spending power." Executive Order No. 215 entails the administrative attachment of conditions to state grants with the express purpose of influencing local policy. If these conditions have been authorized by statute—that is, attaching the conditions

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247 E.g., a general law must apply to a class of no fewer than two cities or towns. Id., art. 2, §8. For an example of a judicially recognized use of the override power, see Bd. of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 294 N.E.2d 393 (1974)(upholding the constitutionality of 1969 Mass. Acts ch. 774).

248 Mayor of Boston v. Treasurer & Receiver General, 8 Mass. Adv. Sh. 2351, 429 N.E.2d 691, 695 (1981)(invalidating local aid disbursements because the legislature attempted to attach a condition as to the hiring of police and firemen that applied only to the City of Boston.)
is within the discretion delegated to the agency—there would be no violation of the HRA.\textsuperscript{249} Thus, in one sense, the HRA creates no additional doctrinal impediments to 215's legality; the determinative question remains one of statutory authorization. However, it could be argued that the HRA is still be important as it relates to the issue of statutory interpretation and the question of whether such authority exists in the first place.

The Home Rule Amendment in effect created a sphere of local autonomy free from state intrusion unless the legislature passed a statute curbing local authority. Courts have been careful to preserve this balance of power by refusing to find state pre-emption except where there has been a clear statement of an intention to preempt or the object of the state statute could not be achieved in the face of the local action.\textsuperscript{250}

Analogous reasoning could be applied to judicial review of statutory authorization for state funding used to influence local policy. It is helpful to consider a spectrum of state funding

\textsuperscript{249}Note that the enabling acts themselves comport with the HRA.

programs that differ in the amount of statutory specification of the criteria of eligibility for the funding. At one end are the pure statutory entitlements where the statute specifies the conditions under which the funding must be granted or specifies the only conditions under which it can be denied. Administrative agencies could not attach other conditions to this funding without violating the HRA.

Moving along the spectrum toward less specification and more administrative discretion, we come to funding programs which have criteria of eligibility specified or clearly implied by the

251 This definition of entitlement is taken from Note, Statutory Entitlement and the Concept of Poverty, 86 Yale L.J. 695, 696 (1977).

252 Cf. Mayor of Boston, supra n. 248 (state aid to localities). See also, Op. Att'y Gen. (Nov. 20, 1973) (concluding that Executive Order No. 74 (1970), n. 238 supra, would be invalid as applied against local school districts). Specifically, the advisory opinion dealt with the question of whether the Dept. of Education may legally require, as a condition of school construction grants, that local school authorities include in all school construction contracts a provision requiring affirmative action in regard to the employment of minorities.

The Attorney General stated that through the action of HRA, the construction of schoolhouses appeared to be committed to "the control of the cities and towns, subject only to the standards and requirements of the General Court." While the legislature had passed a statute outlawing discrimination by local governments,

[t]he Executive Order appeared without any accompanying legislation binding municipalities and agencies thereof, and, at the present time, the legislature has not imposed any such affirmative action plans on local authorities.

Id. After deciding that none of the arguably relevant statutes helped save the executive action, the Attorney General ruled that the Executive Order could not be applied against local school districts. This opinion is somewhat confusing in that the Attorney General avoided the question of whether the executive order as a whole was authorized in the first place.
statute, but have the exact standards of eligibility left to agency discretion.\textsuperscript{253} Because of this agency discretion recipients could not be said to possess a pure statutory entitlement. Still, it is clear that agencies would not be authorized to withhold funds by attaching conditions outside of the statutory criteria of eligibility. Put another way, the legislature intended all who met the statutory criteria to be eligible, no matter the exact standard used to measure these criteria.

It is seldom so easy to decide which criteria are and are not authorized by statute. Courts therefore must locate the boundaries of agency discretion by implication. Normally, the agency action should be accorded a strong presumption of

\textsuperscript{253}That is, the agency is given discretion \textit{within} the individual criteria of eligibility. \textit{See, e.g., Opinion of the Justices to the House of Representatives}, 368 Mass. 831, 333 N.E.2d 388 (1975) (ruling that an amendment to the state general relief program was valid on its face despite an absence of a specific standard of eligibility to the program). Important to the court's decision was the fact that: although the relevant statutory section includes no description of those who are eligible, there can be no doubt that the only test for those not declared to be ineligible is financial need. 33 N.E.2d at 393.
validity, even with the risk that some deemed eligible by the legislature would not receive funding. But different rules could apply in the home rule context. It could be argued that agencies should not be allowed to use discretionary funds to induce local action unless the action sought is a criterion of eligibility that can be clearly inferred from the program enabling statute. The more difficult the inference, the more it should be avoided.

As we move further down our spectrum, the discretion granted to agencies becomes so broad that it is clear that the legislature intended the agency to have the authority to determine which conditions of eligibility it will impose. The existence of such discretion could be seen as running afoot of the Home Rule Amendment, which created a sphere of local autonomy free from state intrusion save by clear statutory preemption or conflict.

254 See e.g., White Dove, Inc. v. Director of the Division of Marine Fisheries, 80 Mass. Adv. Sh. 1043, 403 N.E.2d 1169, 1173 (1980) (regulation governing tuna fishing upheld). The court held that "there is a presumption that the regulation does not exceed the statute which is as strong as the presumption that a statute squares with the Constitution." Id. (citation omitted). The court also stated that "respect is owing to the agency's own view that its regulation is within the statute." Id. This respect is diminished somewhat in the present case because the main funding agency (EOEA) did not treat the growth policy criterion as within the enabling statute. Growth policy review was added as an extra layer after eligibility was initially determined.

255 This argument risks "proving too much." It could perhaps be limited to situations where state agencies attempted direct and specific changes in the policies of individual communities.

256 The breadth of the delegation may raise independent problems as well; see discussion at p. 78 infra.
Following this reasoning, agency discretion as to the use of discretionary funding to induce local policy changes should be limited by a rule of clear statement.257

With this perspective, we can re-examine the representative program enabling statutes. The Water Systems act is about midway down the discretion spectrum.258 While the criteria specified in the statute are not meant to be exclusive of others, they do serve to illustrate the type and range of criteria that the legislature had in mind. Discovering growth policy considerations as an implied criterion of eligibility requires a substantial degree of inference. Even without any home rule concerns, attaching growth policy conditions to the distribution of water systems repair funding might be seen as withholding funds from municipalities that the legislature deemed eligible for funding.259 Factoring in our home rule concerns, the argument for the invalidity of attaching such conditions is strengthened.

The Self-Help program is further down the spectrum towards the pole of total discretion.260 The enabling act authorizes

257 Such a rule need not invalidate the entire funding program, only the imposition of conditions designed to induce local policy changes when those conditions cannot be clearly inferred from the statute.


259 This is true even though the expectations of these municipalities might not rise to the level of a statutory entitlement.

EOEA to spend the funding but does not require it to do so. Further, the statute contains no specification of the criteria of eligibility to be used. Therefore, a stronger argument can be made that the statute authorizes the imposition of growth policy conditions. Note, for example, that the statute's authorization to evaluate the benefits of a proposed open space project calls into question the need for additional open space within the municipality and hence, indirectly, its growth policy. Still, to argue that a community's lack of affordable housing necessarily implicates the merits of individual project applications requires a not in-substantial degree of inference. The determinative question is whether the degree of relevance between an evaluation of individual projects and a need to examine a municipality's growth policy is strong enough to attribute the growth policy criterion to the legislature, in the face of a home rule framework that appears to require clear statements of legislative authorization for administrative interference with local policy.

261 The statute leaves it up to the Secretary of EOEA to reimburse municipalities "in such amount as he shall determine to be equitable in consideration of anticipated benefits from such project...." Id.

262 Note that the link between open space projects and the present standard of no subsidized family housing is considerably weaker.

It could be argued that even if the withholding policy was itself unauthorized, that it was ratified by legislative action, to wit, reappropriation of the discretionary funding programs in the face of the Memorandum of Understanding or the Executive Order. See Director of Civil Defense v. Civil Service Comm'n, 373 Mass. 401, 367 N.E.2d 1168, 1173 (1977) (alternate holding), n. 223 supra. The relevant legislative action in Director of Civil Defense was the legislature's "repeatedly making appropriations that attracted Federal contributions dependent upon a merit system being in effect" (the subject matter of the executive
6) **Delegation Doctrine**

In order to find authority for growth policy considerations as a condition of eligibility within the funding program enabling statutes, we may be forced to rely on a delegation of discretion that is unconstitutionally broad. If this is true, the statutes should be interpreted so as not to authorize the withholding policy so as to uphold their validity.\(^{263}\)

Massachusetts case law supports a broad delegation of legis-

executive order), as well as the passage of a statute that changed certain temporary civil service positions to permanent ones expressly to retain federal funding. *Id.* These actions have an affirmative quality about them from which an approval of the executive policy can be inferred. Such an affirmative quality would not seem to be present when a legislature simply reauthorizes a program to which the executive branch has attached certain conditions.

\(^{263}\) *Cf. O'Shea v. City of Holyoke*, 345 Mass. 175, 186 N.E.2d 608 (1962) (interpretations of statutes that render them meaningless are to be avoided).
ative authority in the appropriation-expenditure context.\textsuperscript{264}

The Mass. Supreme Judicial Court has taken note of the fact that no matter how narrowly an appropriation bill is drawn, some discretion is always left in the actual expenditure of the appropriated funds.\textsuperscript{265} Moreover, the court has stated:

\begin{quote}
...it is also clear that the General Court in the exercise of its legislative power of appropriation has a broad scope for determining whether it will describe in detail the particular purposes for which money appropriated shall be expended or, on the other hand, will permit executive or administrative offers or boards to exercise judgment and discretion within a wide field in the expenditure of money appropriated for a given object to accomplish the general purposes of the appropriation.\textsuperscript{266}
\end{quote}

The delegation doctrine is so seldom used to invalidate

\textsuperscript{264}\textsuperscript{264} In \textit{Re Opinion of the Justices}, 302 Mass. 605, 19N.E.2d 807 (1939) (reviewing the constitutionality of a proposed bill that would have allowed for certain emergency expenditures while the legislature was out of session). Money was to be appropriated into a general fund from where it could be transferred to "items of appropriation for the purpose of providing for unforeseen conditions of an emergency nature...on the order of the Governor, after written consent by a special recess commission." \textit{Id.} at 810. While the court ruled the bill defective because of the manner in which the recess commission was appointed, it approved of the delegation of authority to the governor.

\textsuperscript{265}\textsuperscript{265} \textit{Id.} at 815.

\textsuperscript{266}\textsuperscript{266} \textit{Id.}; see also, \textit{Opinion of the Justices to the House of Representatives}, 368 Mass. 831, 333 N.E. 2d 388 (1975) (ruling valid an amendment to the state's general relief program despite the absence of a specific standard as to who would be eligible to the program).
statutes that one might well question its practical validity.\textsuperscript{267} Three observations are worth noting, however. First, finding authority for growth policy as a criterion for eligibility arguably involves a broader delegation of authority than that in the leading cases where delegation has been upheld.\textsuperscript{268} Second, legislation such as the Self-Help enabling act is so vague that arguably one cannot even infer a clear delegation of the authority to set criteria of eligibility. That is, the boundaries of the intended delegation are difficult to locate. It can be argued that upholding broad agency discretion in such a case would fundamentally shift the locus of state power from the legislative to the executive branch. In effect, the executive branch would be authorized to do anything not prohibited by the

\textsuperscript{267}The only case in recent decades is \textit{Corning Glass Works v. Ann & Hope, Inc.}, 363 Mass. 409, 420-423, 294 N.E.2d 354 (1973) (holding invalidate the "non-signor" provision of the state "fair trade" statute as an unconstitutional delegation of legislative authority). This provision in effect allowed manufacturers to set the price at which retailers could sell their goods. Though the private nature of the delegation may have been central to the court's concern, the case itself did not turn on this point.

\textsuperscript{268}Note that \textit{Opinion of the Justices to the House of Representatives}, n. 266 supra, involved the delegation of setting the exact standard to be used to determine eligibility and not the criteria of eligibility themselves. See n. 253 supra. The discretion that would be required to ground the authority for executive order 215 in the Self-Help statute entails an inquiry of a much broader scope. The comparable situation to that of the welfare statute would be if were clear from the Self-Help statute that "nonrestrictiveness of growth was a condition of eligibility. The only job left for the agency would be to fill in the standard of what constituted "nonrestrictiveness." Instead, the question posed by 215 is whether "nonrestrictiveness of growth" itself can be said to be a criterion of eligibility.
legislature, a sort of "agency home rule" that would seem to violate the spirit if not the letter of the Separation of Powers clause.

Last, while there is a general trend towards upholding broad delegations of legislative authority, this trend is based on the presence and feasibility of alternative means of checking agency discretion. Few of these means have been incorporated into the process. The standards that EOCD uses in evaluating local policy were never promulgated as regulations, a status that would subject them to judicial review as well as certain procedural requirements. Further, individual determinations of ineligibility are not subject to judicial review. There

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269 See e.g., Town of Arlington v. Bd of Conciliation & Arbitration, 330 Mass. 769, 352 N.E.2d 914 (1976), where in upholding a compulsory arbitration statute in the face of a charge of an unlawful delegation of legislative authority, the court emphasized the presence of the following protections against arbitrariness: ten specific standards listed in the statute, regulations promulgated by the agency to guide the arbitration proceedings, the fact that arbitration would follow negotiation, mediation, and fact-finding, and judicial review open to either party.

See also, Opinion of the Justices to the House of Representatives, supra n. 266, where the court emphasized the general standard articulated in the statute and the existence of judicial review. See generally, 1 K. Davis, Administrative Law Treatise §§ 3:14-15 (2d ed. 1978).

270 See Mass. Gen. Laws Ann. cn. 30A §14 (West 1981). If 215 is based on valid authority, it is as a criterion of eligibility under the various program enabling statutes. Some of these statutes require the promulgation of the criteria of eligibility as regulations (independent of any delegation doctrin concerns). See discussion at p. 70.

271 See n. 175 supra. The delegation doctrine issue does not appear to have been raised in School Committee of Hatfield.
are few independent checks on EOCD using arbitrary criteria or using criteria arbitrarily.272

B. Legal Constraints on the Bargaining Process

Beyond the question of whether 215 is illegal on its face, there are independent legal constraints on how the executive order is implemented. Section A examined whether the funding agencies could withhold the funds because of a locality’s land use and housing policies. But the withholding step is only half the story. The animating mechanism of 215 is the bargaining process that is triggered once the funds are withheld and the agreement that ends the process. Two important questions follow:

- what are the legal constraints on the various actors in the bargaining process?
- to what extent does the agreement constitute an enforceable contract?

1) Town Government and Avenues of Reform

Because cities as a matter of course are able to meet the requirement entailed by 215,273 only towns have been targeted by

272 Under the old building permit index used under the Memorandum of Understanding, EOCD gave communities an opportunity to show special circumstances to explain why they did not meet the regional standard. This separate review stage is no longer given, but under the current standard it would serve little purpose.

273 See further discussion at p.132 supra.
EOCD. This subsection will trace the ramifications that flow from the structure of town government.

a) **Influencing the town in its enterprise capacity:**
Executive Order No. 215 has the potential to produce change in two major ways. First, the order attempts to change a town's activities in its enterprise capacity, e.g., inducing local housing authorities to apply for subsidized housing funds. There appears to be no independent legal obstacle to this avenue of change. The goal of housing authority legislation is to build needed housing.\(^{274}\) A simple agreement to apply for subsidized housing funds would not amount to an improper invasion of the discretion committed to local housing authorities.\(^{275}\) Nor should it lead to bad results; presumably, if there were not sufficient need for the proposed housing, the housing funds would be denied.

b) **Legal change (administrative proceedings):** The second major avenue of change attempts to remove legal impediments of housing growth. If housing could be built as a matter of right, there would be little need for state intervention. Legal change can be further subdivided into two subcategories. The first includes administrative approval of housing development,

\[^{274}\text{See generally, Mass. Gen. Laws Ann. 121B \S3 et seq. (West 1981).}\]

\[^{275}\text{Nor would this in theory be inefficient as housing funds would presumably be denied where there was insufficient need for the housing.}\]
including such approvals as variances, special permits, comprehensive permits, and wetland permits and involving such agencies as zoning board of appeals and conservation commissions.

EOCD is limited in its ability to intervene in such proceedings. An agreement by a local administrative agency to effect a particular outcome in a quasi-judicial proceeding would clearly violate that agency's statutory mandate and would entail an authorized suspension of local by-laws or. EOCD could still attempt to influence local administrative action in less formal ways such as letting local agencies know the consequences of their actions.

c) Legal Changes (legislative action): The second sub-category within the legal avenue of change is that of legislative amendment—such as upzoning and allowing accessory apartments—

\[277\] Id., ch. 40A §§2,9 (West 1979).
\[278\] Id., ch. 40B §§20-23 (West 1979).
\[279\] Id., ch. 131 §40 (West 1980).
\[281\] Id., ch. 40 §8C (West 1981).
\[282\] Presumably, affected landowners could raise constitutional objections as well.
\[283\] Local standards are soft enough to allow local officials a range of "lawful" actions and outcomes. See e.g., the Medway case study at p. 46 supra.
and involves the town meeting, the board of selectmen, and the planning board.\textsuperscript{284} Changing local zoning by-laws requires a two-thirds vote at town meeting.\textsuperscript{285} The board of selectmen and the planning board can influence policy development and help set the agenda for town meetings, but they have little substantive authority to effect change on their own or to bind the town.\textsuperscript{286} Ultimately, their role is advisory.

So far, EOCD has not attempted to exact commitments directly from town meetings. Presumably, the agency believes town meetings to be too unwieldy forces with which to bargain. Dealing directly with town meetings is not inconceivable; for example, a town could be given certain policy choices in ultimatum form, or alternatively could simply be denied funding until certain actions were met. The advisability of such an option will be discussed later in the paper.\textsuperscript{287} The question for us now is whether such action would be legal.

One potential impediment to such action is the Home Rule

\textsuperscript{284}See generally, Mass. Gen. Laws Ann. ch. 39 \textsuperscript{9} et seq. (West 1981)(town meetings), ch. 40A \textsuperscript{5} (West 1979)(adoption and change of zoning by-laws and ordinances), ch. 41 \textsuperscript{20} et seq. (West 1979)(selectmen), ch. 41 \textsuperscript{81A} et seq. (West 1979)(planning boards).

\textsuperscript{285}Id., ch. 40A \textsuperscript{7} (West 1979).

\textsuperscript{286}See, n. 285, supra.

\textsuperscript{287}See p. 166 infra.
Amendment. Our concerns for the preservation of local autonomy against administrative intrusions increases as the agencies move beyond simply withholding the funding to direct attempts to influence the policies of singled-out communities. On closer examination, however, these home rule problems dissolve. In fact, the bargaining component of the 215 process is designed to serve the local autonomy objectives behind the Home Rule Amendment. EOCD attempts to allow communities to formulate their own "solutions" to meeting the nonrestrictive standard. If we are troubled by the ad hoc quality of EOCD's "signing off" decisions, our concerns stem from the lack of substance in EOCD's standard of restrictiveness and not from any home rule problems.

Instead of dealing directly with town meetings, EOCD has sought agreements from town officials to commit themselves to

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289 See discussion at p.104, infra.

290 EOCD could not use a stronger standard in the bargaining phase than the standard authorized by the statute to withhold the funds in the first place. Moreover, if EOCD chooses to use a weak or limited standard in the initial withholding decision, it might be restricted to no stronger a standard in the bargaining phase. Otherwise, communities that did not meet the initial triggering standard would be held to a higher standard overall than that applied to all towns. Perhaps this is one reason why EOCD asks for little general housing policy reform in the bargaining stage in the face of an initial withholding standard that only looks to the presence of subsidized family housing in the municipality.
certain specified or vaguely defined policies. These agreements appear to be legal, though an argument can be made that they interfere with the independent discretion committed to town boards by statute. Qualifiers that have been included within the agreements such as "where appropriate" should solve any remaining problems by reducing the officials' commitments to what they should be doing anyway. 291 The more interesting question is to what extent, if any, such agreements constitute binding legal contracts.

2) The Legal Status of the Agreements

The agreements that have been signed have reached or at least approached the form of enforceable, bilateral contracts. 292 So far, none of the parties has treated them as such. EOCD appears to desire the written agreements only to memorialize the town's commitments in order to aid the reevaluation of the town's efforts in the future. Nor does it appear that either party as the legal authority to enter into such contracts. 293

With proper statutory authorization, a regime could be created in which state agencies and town officials could enter

291See e.g., Reading case study at p. 32 supra. Note that agreements by one town agency to be bound by the policies of another may create their own statutory problems.

292See e.g., the Groveland case study in which the town officials agreed to take certain actions and in return EOCD agreed to remove its restrictions on the funding that had been withheld, p. 43 supra.

into such binding contracts. Upon failure of the town to perform, the state would have a contractual cause of action, with damages perhaps to be measured by the amount of the original grant. If, on the other hand, the state rescinded funding claiming non-performance, the town could sue on the contract.

C) Conclusion

Those seeking to challenge the legality of Executive Order 215 will face a substantial—though not necessarily fatal—obstacle in obtaining judicial review. Even once this obstacle is overcome, the withholding policies of 215 can claim authority from a variety of potential sources. Arguably, the executive branch as no independent, constitutional authority to promulgate substantive social policy. Still, there are several, promising sources of legislative authority, the strongest of which is that of the funding program enabling statutes, which give the agencies broad authority in the disbursement of the discretionary funding. Under normal rules of agency law, courts can be expected to defer to the agencies and find legislative support for their policies. But when an agency adds to an existing funding program a layer of review specifically designed to alter local policy within a

294 Conflicts with the Home Rule Amendment could probably be solved by specifying the relevant standards in the statute. The necessity or desirability of such an option is, of course, a different question. Note that noncompliance would be extremely hard to show, see discussion at p. 111 infra.
regime of home rule, courts could be stricter in their interpretation of statutory authority. Last, while the delegative doctrine is moribund, it is not yet dead and could provide another argument against the legality of the order. Opponents of 215 would face a difficult though perhaps not impossible task in challenging the legality of the executive order.\textsuperscript{296}

Notwithstanding the ostensible legality of 215, the structure of town government presents EOCD with legal as well as practical obstacles to the implementation of the executive order. To date, EOCD has been able to sidestep these problems by seeking only the weakest forms of commitments from the towns: nonenforceable agreements by town officials to support the adoption of certain policies "where appropriate" and agreements to apply for state housing funds for "on the order of four to five" units of family housing "when funding becomes available". Enforcement depends entirely on the threat of withholding future funding.\textsuperscript{297}

Pursuing more direct routes would appear to require statutory action.

\textsuperscript{295} One wonders, for example, whether Lincoln officials could have prevailed arguing that they had substantially performed their end of the bargain. See Lincoln case study at p. 26 supra.

\textsuperscript{296} Aside from the relative weakness of its case and the associated costs of suit, there are undoubtedly other reasons for towns not suing. The communities do not want to pique state administrators who could hide their displeasure in low rankings on other criteria. Moreover, the state has asked for little substantive action in return for its "signing off."

\textsuperscript{297} See discussion at p. 154 infra.
CHAPTER III

The Goals of the Process and Strategies of Intervention

This section will examine the main goals that 215 attempts to serve and how the process is structured to achieve these goals. The goals behind 215 are relatively simple. What are complex are the mechanisms designed to effect these goals and the assumptions on which these mechanisms are based.

A. The Goals Behind 215

1) Housing Growth

The leading goal behind the executive order is the production of new and especially less expensive housing. This goal is really a composite of two related subgoals: an increase in the amount of housing built and a reduction in the price of housing. The first subgoal will be examined in this subsection, the second in the one that follows.

The mechanism by which an increase in housing supply is supposed to occur is not spelled out, but can be reasonably inferred. As to public housing, the withholding of the state

298 The opening paragraph of the preamble to the order stresses the need to increase the supply of affordable housing within Massachusetts. 304 Mass. Admin. Reg. 28
discretionary funds is intended to induce communities to apply for and/or accept housing it would not have otherwise. But assuming that subsidized housing funds themselves are limited, 215 can do little to increase the overall supply of public housing. The real effect of 215—if any—is to alter where subsidized housing is built.\textsuperscript{299}

The situation with private market housing is much more complex. Optimally, 215 is seeking to induce changes in local policy—e.g., upzoning, allowing accessory apartments, etc.—that would allow for more housing to be built. But two questions immediately follow. To what extent are communities willing to allow an increase in the supply of housing and to what extent is housing supply constrained by regulation in the first place?

(a) \textbf{Housing supply and the local polity:} When confronting the issue of housing exclusion, it is tempting to fall back on evil motives and irrational behavior to explain the phenomena. While such motives may play some role, local attitudes and actions can be explained fundamentally as the product of rational—if not necessarily altruistic—behavior. Homeowners compose the great majority of a suburban town's polity and therefore control local policy.\textsuperscript{300} These same homeowners face a direct and

\textsuperscript{299}See discussion at p. 101 infra

\textsuperscript{300}Seventy percent of suburban households live in homes they own. Ellickson, R.C., \textit{Suburban Growth Controls: An Economic and Legal Analysis}, 86 Yale L.J. 385,406 (1977). As Ellickson points out, if the model of control by the majority is true anywhere, it is in smaller municipalities. \textit{Id.}, at 405.
powerful incentive to maintain and to increase the value of their homes, normally their most significant capital investment. Keeping a lid on the supply of housing serves this goal by raising the price of all housing.\textsuperscript{301} Restricting new development is also, of course, important for other reasons, e.g., to preserve the qualities of the town that drew the homeowners there in the first place. The preservation of these amenities, in turn, maintains the value of their homes; the economic and

\textsuperscript{301} Restricting the supply of new housing not only bids up the price of new housing but the price of housing already built as well. As Ellickson observes, if suburbs are equally desirable to consumers, isolated restrictive policies by some communities will do little to raise the price and hence value of homes. 86 Yale L.J. at 400. Home buyers will simply purchase housing built elsewhere. This assumption tends to ignore the cumulative effect of many communities acting almost as if in consort. Further, as Ellickson himself acknowledged, suburbs are not indeed fungible goods. In fact, restrictive policies themselves increase a community's desirability by retaining amenity value for those lucky enough to live there.

The simple economic analysis done in this paper is not meant to deny the difficult complexities of real housing markets. The simplicity is maintained not only for the sake of brevity and clarity but under the belief that a return to first principles is sometimes necessary to escape confusion "among the trees." For a classic examination of some of the complexities of housing markets, see W. Grigsby, \textit{Housing Markets and Public Policy} (1963).
noneconomic factors reinforce each other.\textsuperscript{302}

On top of the private disincentives, there is the public disincentive of the fiscal impact of the new development. Other things being equal, residents are likely to oppose development that has associated service costs outweighing associated tax.

\textsuperscript{302}The aim of preserving property values has been recognized as a legitimate exercise of the police power. \textit{See e.g., Blades v. Raleigh}, 280 N.C. 531, 187 S.E. 2d 35,43 (1972) ("The whole concept of zoning implies a restriction upon the owner's right to use a specific tract for a use profitable to him but detrimental to other properties in the area, thus promoting the most appropriate use of land throughout the municipality, considered as a whole.") Note that the goal of preserving property values through zoning has roots at least as far back as the Standard Zoning Enabling Act. Advisory Committee on Zoning, U.S. Dept. of Commerce, A Standard State Zoning Enabling Act \textit{883} (rev.ed. 1926).

The aim of preserving property values has an allure of legitimacy because it carries along with it connotations of net social losses of a nuisance character. But in most cases there are no net losses at all; new housing normally increases the \textit{overall} value of property within a municipality. What courts have in effect upheld is the use of delegated state power to preserve the individual wealth of those who already own a home within the community. There is no a priori justification of the privilege of a guaranteed market price for one's home, and its legitimacy should be challenged. \textit{See also, Joseph Skillken & Co. v. City of Toledo}, 528 F.2d 867, 880-881 (6th Cir. 1975), \textit{vacated and remanded}, 429 U.S. 1068, 97 S. Ct. 800, 50 L.Ed.2d 786 (1977), \textit{prior decision adhered to on remand}, 558 F.2d 350 (6th Cir. 1977).(reversing an order of the lower court requiring the rezoning of certain property to allow for the development of low income housing). In sharp criticism, the Sixth Circuit stated the trial court's mandate would have had the following results: Low cost public housing could move into the most exclusive neighborhoods in the metropolitan area and property values would be slaughtered. Investment people who labored hard all of their lives and saved their money to purchase homes in nice residential neighborhoods and who never discriminated against anyone, would be faced with a total change in their neighborhoods, with the values of their properties slashed.

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revenues. Much has been written about the effects of this so-called "fiscal zoning." In response, many states have adopted financing reforms to help cure these effects. At least some of these reforms have been substantial enough to tip the balance and make classic "fiscal losers" such as apartment buildings fiscally desirable. But these reforms appear only to have taken one argument away from opponents of new development; they

303 Conversely, municipalities can be expected to attempt to attract development such as "light industry" that brings in a high tax base but relatively low service costs.


Alleviating the fiscal zoning issue is still seen as a fundamental step in opening up the suburbs, See e.g., Housing for All Under Law, at 533-534 (R.Fishman, ed. 1978) ("The fiscal pressures on local jurisdictions are usually so great tat the use of land use controls to increase the local tax base and limit the costs perceived to be associated with lower income housing is often irresistible.") Some courts have held fiscal zoning concerns to be illegitimate. See, e.g., Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11. 283 A 2d 353 (Law Div. 1971) ("Fiscal zoning per se is irrelevant to the statutory purposes of zoning.")

305 In Massachusetts, for example, the distribution of local aid is structured so as to increase funding for municipalities with higher numbers of children. Therefore, types of housing associated with school age children do not present the same kind oscal drain they may have presented in the past. See discussion at p. 148 infra. Another example of fiscal reform is "tax base sharing" which has been implemented for the Twin Cities area pursuant to 1971 Minn. Laws Extra Session ch.24.

306 In Massachusetts, multifamily housing appears to at least
have not created local willingness to accept new housing. In other words, though most of the public debate has focused on the public disincentives to housing development, these factors are probably grossly overshadowed by the private disincentives discussed above.

There are some forces within the town that countervail these disincentives. First of all, while residents are—not surprisingly—not looking out for the interests of outsiders, they would be expected to look out for the interests of some of the non-homeowner residents. This expectation is borne out in the frequently voiced longing for more affordable housing for "our children."307 Second, many residents may have developable land they wish to sell or develop. Freeing up land use regulation may allow them to increase their profits. However, the effect of this countervailing force is problematic because land owners would only want to free up the regulation on the land that they themselves own. Loosening regulation generally may be pay its own way due to the presence of the local aid formula. The association of this type of development with fiscal drain may still be important to the extent that it is engrained in the public psyche.

307See e.g., Topsfield case study at p. 36 supra. As the price of housing goes up, more and more people are frozen out of the market, including the children of voting residents and local apartment dwelling voters. Therefore, as the problem gets worse, the perception of the need for affordable housing as a local issue should increase. This change in perception may offer increased opportunities for local reform, at least to the point where the interest of local home owners takes over again. Note that some communities have enacted pro-development legislation that favors their own residents. See Sturges v. Town
directly counter to each individual land owner's interest by lowering the amount he can exact from the market, as well as being undesirable for other reasons. Last, communities should be willing to accept growth to the extent that the disincentives are outweighed by the associated benefits such as added jobs and an increased tax base. But communities can be expected to be selective in the type of housing they are willing to accept. For example, a municipality might be willing to accept new industrial development because of the desirability of nearby jobs and a higher tax base, but might at the same time attempt to exclude any housing development that would otherwise be induced by that development.

Upon this analysis restrictive housing policies in the suburbs should come as little surprise. But this very fact should not be slid over too quickly; its existence itself is of paramount importance. We cannot begin to address the housing shortage problem without questioning for whom is it a problem? For many suburban homeowner-voters the housing shortage is not only not a problem, it is highly desirable.

(b) Housing supply and local land use regulation: One might well question the extent to which the amount of housing built is constrained by local regulation. Freer regulation undoubtedly leads in the direction of increased housing supply, but the

of Chilmark, 320 Mass. 246, 402 N.E. 2d 1346 (1980) (upholding a "youth lot by-law" which created an exception from the town's minimum lot size requirement for applicants under 30 years of age who had been residents of the town for eight consecutive years).

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amount of any increase may be so small as to be negligible.\footnote{308} Recent history has demonstrated the dramatic impact that interest rates have on the housing market.\footnote{309} Engrained housing tastes are also an important, though often overlooked, determinant of the housing market.\footnote{310} These demand side influences may so overshadow the role of regulations as to reduce it in effect to a determinant of where new housing will go and not how much will be built.

The fact that gains in the housing supply through regulatory reform may only be possible "at the margin" does not mean that such reform is not an important aim. If the quantitative impact of such action is ultimately small, it is significant precisely because it is within the power of state and local government.

The relevance of the low magnitude of gains possible is that we

\footnote{308}{See G. Hack & G. Polk, Housing Cost and Governmental Regulation: Is Regulatory Reform Justified by What We Now Know, (draft of unpublished Lincoln Land Institute paper, 1981) (a survey of the literature on the impact of regulation on housing costs). Hack and Polk conclude that the impact of regulation and hence the prospects attainable through deregulation have been grossly exaggerated in the popular press and that serious studies have shown them to be relatively small.}

\footnote{309}{The recent severe recession in housing production is directly traceable to high interest rates. See e.g., Egan et al., "Sinking Foundations: Builder's Losses Mount as Prolonged Slump in Housing Continuing Problems of Unsold Homes and High Interest Rates Cause a Mood of Despair," Wall St. J. (Nov. 9, 1981) at 1. Hack and Polk, supra n. 11, at i, note that a reduction in the mortgage interest rate from 14 to 13 percent on a conventionally financed $65,000 home is equivalent to a reduction in the price of the home of approximately 9 percent.}

\footnote{310}{For example, large lot zoning can only constrain housing supply to the extent that developers would not build on large lots in the absence of regulation.}
must examine the costs of any attempts at overcoming the major obstacles that must be faced with particular scrutiny.

2) Reducing Housing Costs

An increase in the amount of housing built should itself help reduce the cost of new housing as well as that of housing already built. But as we have seen, there are significant political obstacles encountered in trying to increase the supply of housing within a municipality. This forces the question of whether or not and to what extent housing costs can be decreased without increasing the supply.

Regulations increase the price of new housing not only by restricting its supply, but also by increasing the quality of what is built. To the extent that increases in quality are not recaptured as consumer benefit, "dead weight losses" occur. Another example of such a dead weight loss is the cost of procedural delay. The existence of these dead weight costs appears to present an attractive solution to reducing the price of new housing.

There is significant disagreement as to the magnitude of

311 E.g., homes are larger, granite curbing is supplied, and so on. The word "quality" is not used to signify preferability, only an increase in resources expended.

312 See e.g., Ellickson supra n. 300 at 396-397.

313 Procedural delay increases the price of housing by increasing the carrying costs of developers. But note that the added costs produced by delay must be netted against what is gained through procedural review before they can be labelled "dead weight."
these dead weight costs. One central problem in measuring them is estimating how much deregulation would alter the type of housing built. This problem is not merely practical, it is

314 See generally, Hack & Polk n.308 supra. Hack and Polk conclude that while the popular press and many studies assume a large impact of regulation on housing costs, more detailed analyses and the few empirical works that have been done point toward much smaller impacts. Accord, R. Silverman, Housing for All Under Law: The Limits of Legalist Reform, 27 UCLA L.Rev. 99 (1979).


315 That is, to what extent does the public desire the same level of quality anyway. Some tastes such as large lot zoning are probably so engrained that existing patterns would change little, at least in the short term. Some development standards, however, border on the irrational and provide so little consumer
theoretical as well. Consumer preference is not exogenously determined, but is dependent in part on market conditions.\(^{316}\)

Even if the dead weight costs are substantial, however, removing them does not in and of itself assure that the savings will be passed along to housing consumers.\(^{317}\) In a free market, at least some of the cost savings are likely to be passed along.\(^{318}\) But it must not be forgotten that these dead weight costs—however irrational or inefficient they may be in themselves—serve the locally desired goals of restricting housing supply and of raising housing prices. Pruning these dead weight costs may simply quicken the search for other ways to accomplish the same purposes.\(^{319}\) If supply is constrained to the

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\(^{316}\) That is to say, consumers are not omniscient or entirely rational, and that their tastes are determined partly by what the market has to offer.

\(^{317}\) Savings are passed along, by definition, to the extent that price reductions exceed quality increments lost.

\(^{318}\) It is reasonable to assume that housing demand is not perfectly inelastic.

\(^{319}\) These other means could include direct controls on growth or the imposition of new dead weight costs.
same level that it was before the dead weight costs were removed, the cost savings are likely simply to be captured by developers and/or land owners. While this substitution may be good for society as a whole, it will not directly lead to lower priced housing. Theoretically, the "pure rent" reaped by developers and land owners could be recaptured through development exactions or other techniques, but these methods can be expected to face substantial political resistance of their own.

3) Fairer Distribution of New Development

Even if it cannot induce a greater amount of housing overall or a reduction in the price of housing that is built, it may be able to affect where new development occurs. The second major goal of the executive order is to seek a "fairer" distribution of new development, regardless of how much housing is produced. Closely coupled to this concern for equity is the idea that certain arrangements or distributions of housing are substantively preferable to others, e.g., that public housing should not be concentrated in any one area.

The goal of "fair share" distribution of housing rests on two underlying assumptions. The first is that housing develop-

320 At least when growth is directly regulated instead of new dead weight costs added.

321 Moreover, public recapture does not mean that the money collected will be distributed to those frozen out of the housing market. A likelier scenario is intrajurisdictional redistribution from the owners of undeveloped land to other residents in the form of lower taxes or increased services.
ment is a "cost" thereby necessitating equitable distribution. Our analysis of the various local disincentives to growth bears out the truth of this assumption. The second is that municipalities, for whatever reason, are unequal in their capacity to exclude growth, thereby necessitating state intervention. This assumption is probably also valid, though the causes of the differentials are not entirely clear. However, significant obstacles remain to effectuating the goal of a fairer distribution of new housing development. For example, this goal is still dependent on inducing local growth where it would otherwise not occur, and thus must still overcome the local opposition to increased housing supply discussed above.

Of course, lay voters may not be fully aware of the role served by dead weight costs. To the extent that this is true, appealing to the need to get rid of such costs may be an effective way of increasing the housing supply and reducing costs further.

The executive order itself states that communities with restrictive policies "have imposed development costs inequitably on other communities...." 304 Mass. Admin. Reg. 28. Exactly which costs the order is referring to is unclear.

Note, if the only goal was to achieve intermunicipal equity, the solution would be to equalize municipalities' abilities to exclude housing development. To some limited extent this is done through free planning advice and services from EOCD.

Presumably, communities differ in the resources they can draw upon both in terms of professional services that can be volunteered to local boards and of ability to pay for outside services. Moreover, residents in some areas may "require" certain kinds of development--e.g., development that produces jobs--within close proximity while wealthier residents living elsewhere can afford to live further away. That development in turn induces secondary housing development that cannot be entirely stopped. Different "tastes" for different levels of growth could also, of course, play some role.
Moreover, the success of this second goal is also dependent on the state's ability to determine what is an equitable distribution of housing development. The substantive content of "fair share" is far from obvious.\textsuperscript{325} In practice, EOCD has attempted no comprehensive answer to this issue, but instead goes after those communities that appear obviously restrictive.\textsuperscript{326} The motives behind this strategy are soundly based in the inherent political difficulties that face a final answer to the "fair share" question.\textsuperscript{327} But because there has been no open political resolution of the issue, EOCD is left to fight its battles with little ammunition. Except in the case of extreme or overt exclusionary behavior, EOCD is left to argue that a community is being restrictive without a politically accepted or informed definition of restrictiveness.

This is not to say that a resolution to the issue must take the form of a definitive formula allocating so many units per town.\textsuperscript{328} Indeed, the beauty of the 215 process is its ability to sidestep this need by invoking "hard standards" only to trigger a process solution to the problem. But neither the "hard trigger" nor the softer standards necessary to frame the bargaining process have been resolved in an open political process necessary to generate their wider acceptance.

\textsuperscript{325} See discussion at p. 118 infra
\textsuperscript{326} See p. 19 supra
\textsuperscript{327} See p. 125 infra
\textsuperscript{328} Id.
4) Autonomy and Initiative

Executive Order No. 215 attempts to effect its two main positive goals discussed above while preserving certain key attributes of the former system of no state intervention. The most important of these is the preservation of local autonomy. The order attempts to induce local action that will increase housing development without specifying what form that action should take. This strategy is based not only on defusing local resistance, but also on the theory that only the localities know what specific actions are best for themselves. Local initiative is not only tolerated, it is encouraged.329

There is a tension between the goal of local autonomy and the structure of the 215 process. Faced with the withholding of state funding, local officials focus immediately on what they have to do in order to obtain that funding. Thus, while these officials resent the state intervention, when they are in the 215 process they are looking for the state to tell them what they must do.330 Local autonomy is not funneled into a set of positive local initiatives but is preserved merely in the town's reserving the right to turn down the funds all together. In a sense, the short-term, action-oriented nature of the order backfires.

Perhaps when and if the state is able to press for more

329 See Lincoln case study at p. 21 supra.
330 Id.
substantive local reform. Local initiative and more explicit bargaining will be stimulated. When that point is reached, there may be some assurance that the induced local actions will have some effect on the "bottom line," an increase in the supply and/or a decrease in the price of affordable housing in the locality. At present, the deference to local autonomy merely reflects and/or is equivalent to an abdication of state oversight.

B. Strategies of Intervention

Intervention strategies designed to overcome the powerful local incentives to restrict housing growth can be classified into three categories. The first includes appeals to altruistic behavior and so-called "consciousness raising," and might be deemed "the conversion approach." The second seeks to identify techniques to mitigate local concerns while still providing housing. When pursued by a body outside of the town, this strategy might be deemed the "educative approach." Lastly, there is the "directive approach," the political imposition of external interests. Executive Order No. 215 attempts to encompass all three of these approaches.

1) Conversion Approach

The withholding of funds induces the localities to at least stop and listen to what the state has to say. Through this opportunity, the state hopes to instill upon the towns a sense of
responsibility for those outside town borders. While this aim is laudatory, one can well doubt its efficacy when used alone. When combined with the other strategies, appeals to altruistic behavior tend to get lost amidst the town's search for what it will have to do to obtain the release of its funds. A fair evaluation of 215 in practice indicates little real stress or reliance on the conversion approach. At best, any "conversion" will occur only as an incidental by-product along the way.

2) **Educative Approach**

The withholding of funds also gives the state the opportunity to "educate" the localities as to ways that housing can be provided with less disruption and cost. So far, EOCD appears to have concentrated its efforts on this educative approach. On the public housing side they have been able to point out the immensely attractive benefits of the 705 scattered-site subsidy programs. On the private market side, EOCD has stressed "innovative" techniques--such as allowing accessory apartments--

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331 Interview with Joseph L. Flatley, Ass't Sec'y of EOCD (October 19, 1982).

332 EOCD has expressed the hope that labelling communities "exclusionary" will embarrass them enough to induce some change in policies, a sort of negative version of the conversion approach. Interview with John F. Loehr, Policy Planner, EOCD (Feb. 3, 1983).

that produce new housing units with little disruption.\textsuperscript{334}

The educative strategy rests on the assumption that because of lack of resources, "inertia," or some other reason, a locality is unable on its own to perceive what is in its best interests. The role of the state is simply to help the town image the full range of options before it. While the underlying assumption undoubtedly has some validity, the educative approach may be useful only "at the margin." That is, a town's lack of vision can only be used so far in explaining the restrictiveness of town policies. At some point, a town's self-interest diverges from the action desired by the state, a fact the educative strategy cannot overcome. For the reasons discussed above, townspeople may not want additional housing no matter how attractively it is packaged. The overall rationality or desirability of the various "innovative" planning techniques should not blind us to the fact that a town ultimately will only accept what is in its self-interest. The educative approach may still be important precisely because it is non-controversial. However, if the state wants to induce more than a marginal level of new housing, it will have to "bite the bullet" and rely on the third strategy.

3) \textbf{Directive Approach}

The directive approach is based on inducing a town to take certain action it would not have done otherwise, even if it were

\textsuperscript{334}See \textit{e.g.}, Reading case study, \textit{supra} p. 32.
fully capable of understanding its own interests. This strategy can be subdivided into two subcategories. The "mandatory" approach takes the relevant choice out of a town's hands all together. The "incentive" approach leaves the choice within a town's hands but alters the town's self-interest that informs that choice. Structurally, these two subcategories are not as different as they might first appear; after all, an incentive is merely a mandatory condition on something that would have otherwise been unburdened. They may differ, of course, in other regards such as their political acceptability and effectiveness.335

Executive Order No. 215 is structured on the incentive model. The state is willing to give towns funding if they accept certain conditions. A rational town will accept the funding only if the associated benefits of the state funding outweigh the costs of accepting the state's conditions. This is bargaining in its truest sense.

While 215 appears to be based on the directive approach, it has been used very little in this manner. Instead of trying to obtain a substantive quid pro quo for the funding, EOCD has used the withholding of funds principally to create the opportunities to hold the town's attention in order to pursue educative ends. One could well ask whether the educative goal could perhaps be

335 The directive approach and its two subcategories are examined in detail in Chapter V, infra.
served in a better, more direct manner.\textsuperscript{336} The presence of ostensibly coercive state intervention may be counterproductive by stimulating local defensiveness that interferes with an town's ability to perceive its self-interest.

The more interesting question is whether \textsuperscript{215} has the capacity to serve the directive approach. Three shortcomings are readily apparent. \textsuperscript{EOCD} has not shown an inclination to take a hard-line stance with the towns. There are, in turn, several possible explanations for this attitude. The legality of the order may be sufficiently tenuous so that EOCD feels constrained from asking too much.\textsuperscript{337} So far, the towns have found it easier to comply with the little the state has asked than to challenge the order in court. Other potential explanations include a possible lack of real support from the governor's office during the King administration, an implicit acknowledgement that EOCD did not have a well thought through, non-arbitrary program on which to take a stand, and a simple desire to avoid confrontation. The second major shortcoming is that even were EOCD to take a hard-line stance, it is highly questionable whether the incentives that can be offered are enough to induce real change.\textsuperscript{338} Last, there is a whole set of questions raised as to whether \textsuperscript{215} is functionally designed to effect such change.

\textsuperscript{336}See discussion at p. 171 infra
\textsuperscript{337}But see the legal analysis in Chapter II, supra.
\textsuperscript{338}See discussion at p. 147 infra.
To address these issues, we must examine more closely the implicit functional model on which the executive order is based. So far our analysis has focused on the town as a single entity without focusing on its constituent parts. EOCD characterizes town government as a "loose amalgamation" of various boards and agencies that together generate town policy. The executive order is implicitly based on the theory that the agencies most directly responsible for setting land use and housing policy will feel pressure from the agency from which the funding is being withheld, thereby in effect recreating a single entity with which the state can deal. The history of 215 to date bears out the validity of this theory. \[339\] Town agencies have worked remarkably closely with each other to do what had to be done to obtain their funding. \[340\] The case of Lynnfield where the agency applying for the funding served only one-quarter of the town is probably the exception that proves the rule. \[341\]

The real deficiencies lie elsewhere; the relevant local agencies themselves have little authority to effect substantive change. As was noted in Chapter II, most of the communities that would be affected by 215 have town governments in which major policy changes must be done through a two-thirds vote at a town

\[339\] In one sense, however, this assumption has not been put to a real test. Were EOCD to ask for real substantive changes in local policy, local "turf" battles may begin to be observed.

\[340\] See e.g., Lincoln case study at p. 23 supra

\[341\] See n. 142 supra
Thus, opponents of any change need only to must one third of the vote at a town meeting in order to defeat the proposal. The governing bodies of a town are merely the machinery by which the agenda of local policy is normally set. Therefore, 215 can at best influence local policy and not directly change it.

The success of the executive order is also dependent on the parties fulfilling what they have promised. So far, no one appears to have envisaged the signed agreement as a binding contract enforceable through specific performance or otherwise. The only enforcement mechanism that appears to be available to the state is the threat of reprisal against the town in future funding rounds. But measuring a town's good faith compliance with an agreement is more difficult than it might first appear, especially when the agreements are so vague or ambiguous. Moreover, turnover in local government has the capacity for letting each succeeding administration "off the hook." As long as the measure of a town's policies is based on future promises and not past performance or at least enforceable and specific agreements, the state is limited in its ability to identify noncompliance.

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343 See n. 285 supra
344 See discussion at p. 87 supra
345 For a discussion of the viability of this mechanism, see p. 154 infra.
C. Conclusions

On a first look, Executive Order No. 215 appears extraordinarily attractive. Without the necessity and difficulty of getting a statute passed, EOCD has devised a scheme that appears to preserve local autonomy while inducing communities to agree to policy reforms that will themselves induce real substantive change toward solving one of our most important state problems. A closer examination, however, makes us realize that our initial assessment was too good to be true. While the overall, incentive based, process-oriented theory behind 215 may be sound, the executive order possesses neither the legal structure nor the fiscal "bite" necessary to make it effective. Meanwhile, EOCD continues to argue for 215's viability, measuring its success by the agency's ability to exact paper agreements from town officials with insubstantial authority agreeing to do little if anything that was not in the town's best interest anyway. The costs of the program include not only direct costs such as person-hours invested, but also the delusion that the state has a program in place producing real change.

In order for a 215-process to have any hope for success, a full rethinking of the issues must be done followed perhaps by a

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346 One of the problems with the executive order is the lack of person-hours invested. In the past, only one administrator has spent approximately one-third of his time implementing the order. Still, many total local person-hours have been expended, a factor to which EOCD is perhaps not particularly sensitive.
statutory solution. The remainder of this paper will attempt to provide some of that necessary rethinking.
CHAPTER IV

Housing Allocation Formulae

One mode of state intervention is the assignment of housing growth by region through housing allocation formulae. This chapter will examine the problems associated with such an approach and will consider the degree to which such formulae are a necessary component of land use reform.

A. Housing Allocation and Fair Share

In the late 1960's and early 1970's there was a great burst of interest in the problems of exclusionary zoning.347 One response to this problem was the concept of "fair share," the belief that each community should be responsible for meeting its fair share of regional housing needs.348 The term "fair share" is most commonly associated with judicial opinions invalidating certain zoning practices that served to exclude lower income


348 See e.g., Babcock & Bosselman, supra n. 347, at 102-104.
housing from the suburbs. But courts have not attempted rigorous definitions of a region's fair share. Instead, courts have used fair share as a conceptual basis to validate the striking of obviously exclusionary practices.

349 See e.g., the following leading cases: Southern Burlington County NAACP v. Township of Mount Laurel, (Mt. Laurel I) 67 N.J. 151, 336 A.2d 713 (1975), appeal dismissed 423 U.S. 808 (1975) (zoning ordinance held invalid to the extent that it precluded a municipality from providing its fair share of the regional housing burden); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672 (1975) (in an appeal from a denial of summary judgment in a declaratory judgment action concerning the validity of an ordinance prohibiting multi-family housing, the N.Y Ct. of Appeals laid down the standard that "in examining an ordinance [a court] should take into consideration not only general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities."); Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466, 468 (1975) (ordinance which allowed apartment construction in only 80 acres out of 11,589 total acres held invalid as not providing for "a fair share of the township acreage for apartment construction.")

350 See e.g., Surrick v. Zoning Hearing Bd., 476 PA. 182, 382 A.2d 103 (1977) (though often cited as establishing a fair share "formula", Surrick lays down only the most general of decision rules). Presumably courts have felt that they were not the proper government bodies to answer the difficult question of the specific content of fair share. See e.g., Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 499, 371 A.2d 1192 (1977) ("the basic underlying problem [of determining fair share] is far better addressed by administrative action than litigation.")

Note that the Mt. Laurel I court appears to have believed that local, regional, and/or state agencies were prepared to take on this task. In Oakwood at Madison the court took note of a fair share allocation scheme that was being drafted by the State Division of State and Regional Planning pursuant to Executive Order No. 35 (April 2, 1976) 371 A.2d at 1217, n. 37. In the face of this administrative effort the court held that "the factors that make up the Mount Laurel doctrine are simply too complex and too interwoven with social, political and economic issues to permit judicial resolution...[and] need not be resolved." Southern Burlington County NAACP v. Township of Mt. Laurel (Mt. Laurel II), 92 N.J. 158, 456 A. 2d 390, 437 (1983) (discussing the holding in Oakwood at Madison). But the State-wide Housing Allocation Plan was never finalized and the
Several state and regional governments have pursued the task of developing specific, "fair share" allocation schemes. Like the court decisions, these legislative attempts tend to focus on low and moderate income housing. This emphasis may be misplaced for a number of reasons. By narrowing the issue to one of the siting low and moderate income housing, the need to reform land use regulation generally is suppressed. Put another way, the focus on such housing may have the ironic effect of legitimating the overall regime of land use regulation. Further, this focus also tends to demarcate low and moderate income housing from other housing, reinforcing our stereotypes that the residents of

legal authority for this effort was rescinded by Executive Order No. 6 (May 4, 1982). In its recent, long-awaited opinion re-examining the "fair share" doctrine, the New Jersey Supreme Court acknowledged the extreme difficulty of the task of defining a municipality's "fair share". Mt. Laurel II at 436-441. Still, the court embraced judicial determination of this issue and set forth some of the procedures and standards to be used. Id.

351 For an overview of housing allocation formulae implemented or proposed by 1974 see D. Listokin, Fair-Share Housing Distribution: Will it Open the Suburbs to Apartment Development?, 2 Real Estate L.J. 739 (1974); for a discussion of the California system see C. Burton, California Legislature Prohibits Exclusionary Zoning: Mandates Fair Share, 9 San Fern. V.L.Rev. 19 (1981); see also 1969 Mass. Acts ch. 774 (arguably a crude fair share allocation scheme) and the proposed Mass. Balanced Growth & Development Act, n. 34 supra. A fair share formula was developed for the state in 1973, but this formula was never implemented to induce localities to accept their designated share; see W. Apgar & A. Solomon, Housing Needs, Programs and Policies for the Commonwealth of Massachusetts (report prepared for the Dept. of Community Affairs, Jan. 15, 1973).

Surprisingly little work has been done to evaluate the effect of programs that have been implemented. Note that the effectiveness of such programs depends on the strength of the enforcement mechanisms and/or incentives offered to accompany the formula allocation.

352 Some fair share programs attempt to allocate all low or moderate income housing, other programs focus only on low or moderate income subsidized housing. See, Listokin, n. 351 supra at 743.
such housing must be somehow different from us. These problems would be overcome if municipalities could be induced to produce substantial amounts of low or moderate income housing, but one can well doubt whether this is true.353

Some states have begun to rethink the issue of "fair share" in terms of all housing development and not just in terms of the attempt to remove barriers to the siting of lower income housing.354 The proposed Balanced Growth and Development Act was just such an attempt.355 This chapter focuses on attempts to allocate all new housing development; the term "fair share" is used hereinafter to refer to regional responsibility for housing growth in general and not just the development of low and moderate income housing.

353 Localities may not be the appropriate level of government to which to assign the duty of producing housing for the poor. While communities can and should undertake land use reform generally, they may be limited in their ability to ensure the production of market housing that poor people can afford. Many commentators have fixed upon inclusionary zoning as the solution. See e.g., Burton, n. 351 supra. But inclusionary schemes should not be viewed as some sort of panacea. Note that for incentive inclusionary systems to be effective, the overall zoning in a community has to be sufficiently restrictive to create a market for bonuses offered. The economic incidence and effectiveness of mandatory inclusionary schemes is also problematic. The danger of inclusionary systems is their ability to obscure their real economic impacts.

Instead of adding new layers of regulation to attempt to cure the effects of old ones, deregulation might be preferable solution. See generally, R. Ellickson, The Irony of "Inclusionary" Zoning, 54 So. Cal. L.R. 1167 (1981).

354 See e.g., California's attempt to mandate that local land use decisions be consistent with a local plan that includes a housing element making "adequate provision for the housing needs of all segments of the community." Cal. Gov't Code §§65302(c) (housing element), 65860, 66473.5, 65300.5 (consistency requirements) (West Supp. 1980). See further discussion of this California approach in n. 417 infra.

355 See n. 34 supra.
B. The Problems Associated with Housing Allocation Formulae

1) Formulation Problems

Housing allocation schemes are based on a planned allotment of housing development to the various municipalities within a region. The first step is to define the applicable region. This line-drawing is in turn based on theories of metropolitanism under which a region is defined as an urban area with the suburban and exurban fringe economically, socially, and physically linked to it. Obviously the real map does not fit the regional planner's ideal, making the line-drawing process a messy business. Moreover, the criteria chosen to set the boundaries of the regions are in no sense predetermined. The variety of possible criteria reveals a variety of possible regions and thus a variety of corresponding regional responsibilities.

Further, the entire theory of metropolitan regionalism is subject to challenge, especially as suburbs become increasingly self-sufficient. Acceptance of the idea of regional responsibility for regional needs depends on the perception of regions as "natural" units. The problem of defining individual regions could be bypassed, however, by designating the entire

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356 See e.g., Apgar & Solomon, n. 351 supra.

357 For an interesting though somewhat dated study of Massachusetts regions examining everything from road and highway networks to general hospital service areas, see Dept. of Community Affairs, Massachusetts Regions (1971).

358 Note that EOCD used three different sets of regions under the building permit index. See discussion at p. 132.
state as the applicable region.\textsuperscript{359}

Once the regions have been drawn, the next step is to determine the "need" for new housing within each region for a set period of time. A projection is made of the net new home-owners for that period based on extrapolations of current demographics, estimates of net migration, and behavioral assumptions about household formation.\textsuperscript{360} This figure is then added to the number of units that are determined to need replacement over the time period to yield the net regional need. In 1980 EOCD estimated that there was a need for 440,000 new dwelling units before 1990 for Massachusetts as a whole.\textsuperscript{361} This enormous need is explained by the "baby boom" generation reaching homebuying age coupled with a decrease in the average household size.\textsuperscript{362}

While most of the population projections are probably sound if the regions are drawn large enough, the assumptions as to

\textsuperscript{359}This was in effect the approach that the proposed Balanced Growth and Development Act took, though regions still played a role in the allocation of housing to individual municipalities.

\textsuperscript{360}This is the method that underlies the state's estimation of housing need. See EOCD, \textit{Housing Massachusetts: Meeting the Needs of the 1980's} 7 (1980). A somewhat more sophisticated model to estimate housing need based on similar principles can be found in Frieden, \textit{Forecasting the Nation's Housing Needs: Assessing the Joint Center's First Efforts}, Joint Center for Urban Studies Working Paper No. 30 (Feb 1975).

\textsuperscript{361}This figure includes 350,000 units of net need and 90,000 replacement units. EOCD, \textit{Housing Massachusetts} 7, n. 360 supra. This report was recently updated by EOCD, \textit{Housing Massachusetts: Meeting the Needs of the 1980's: A Progress Report} (1982). Housing need figures were not changed.

\textsuperscript{362}\textit{Id.}
human behavior--such as household size--are subject to unpredictable fluctuations. It is therefore invalid to project present trends very far into the future. Further, any system that attempts to synchronize fair share numbers with housing policy will require frequent manipulations and adjustments.

There are theoretical problems as well. To what extent is there an exogenous concept of "need" and to what extent is this concept determined by the marketplace? The desire to form independent households--a principal component of housing demand--is intimately related to the price of housing. As the price of housing decreases, more subsets of existing households can be expected to desire to be on their own, increasing the number of households, and hence the "need" for housing. Increasing the supply of housing is therefore somewhat like widening a road, which itself leads to increased traffic flow.

In a perfectly free, ideal marketplace, there is no place for concepts of "need." The proper amount of housing will be determined by the invisible hands of supply and demand. But the pure marketplace model fails for two reasons. First, because of housing and land use regulation--not to mention hidden subsidies--we obviously do not live in a perfectly free market.

Indeed, the decrease in household size is one of the major components of present "need" outstripping supply. See Frieden, n. 360 supra at 16 (acknowledging systematic errors in earlier housing demand projections due to an overestimation of household size).
Second, housing is one area that society has deemed should not be ruled by the laws of supply and demand. In the words of neo-classical economists, housing is a "merit good." In lay terms, many people are simply not wealthy enough to afford the level of housing the society would like them to have. Rejecting the pure market model, however, does not cure the problem of determining how much housing should be produced, i.e., the regional "need."

The third and final step is to choose criteria by which the housing "need" will be allocated, the housing allocation formula that measures a community's "fair share". Few concepts are as facially compelling as "fair share" which has the illusion of being self-contained and self-executing. In reality, the substantive content of "fair share" is far from obvious and entails difficult political choices. One obvious choice would be to allocate the growth evenly among communities in the region.364 This approach takes no account of differences between communities and is likely to produce an allocation of growth that will be perceived as inefficient, unfair, and undesirable.365 Municipalities differ in their capacity to accept new growth (fiscal capacity, presence of jobs, etc.), their past performance

364 Even this choice represents a variety of options. That is, should growth be allocated evenly per municipality, per municipality population, per municipality area, or per some other ostensibly neutral but politically charged criterion?

in accepting development, and their desirability to the population of housing consumers. More sophisticated fair share formulas attempt to take account of these factors.\textsuperscript{366}

During the drafting stages of the Balanced Growth and Development Act, a study was done at MIT examining the allocational effects of two alternative fair share formulas.\textsuperscript{367} In all fairness to the study, it was not meant to produce a definitive formula, only to test the "sensitivity" of different approaches.\textsuperscript{368} The first formula included two factors: a measure of the municipality's past growth and a measure of its fiscal capacity.\textsuperscript{369} The past growth factor was used as an indicator of consumer preference.\textsuperscript{370} The formula was designed to

\begin{equation}
\text{Fair Share Growth Index} = ((0.4 \times \text{average annual number of building permits issued 1970-1974}) + (0.6 \times \text{average annual number of building permits issued 1975-1978}) \times (0.85 + (0.01 \times (\text{equalized valuation per capita - total net debt per capita - tax paid per capita}))))
\end{equation}

\textsuperscript{366} Id. Rose and Listokin illustrate the variety of criteria that have been proposed or enacted. See also G. Lefcoe, \textit{California's Land Planning Requirements: The Case for Deregulation}, 54 So. Cal. L. Rev. 447, 486-487 (1981).

The fair share formula developed for Massachusetts in 1973 focused on the following four factors: the local growth in low and moderate paying jobs over the previous ten years, the number of low and moderate paying jobs within the vicinity of the municipality, fiscal capacity, and the housing needs of current residents. See Apgar & Solomon, n. 351 supra.


\textsuperscript{368} Welles, \textit{supra} n. 18 at 68.

\textsuperscript{369} Liepins & Santos, \textit{supra} n. 369 at 2-4. The exact formula was as follows:

\begin{equation}
\text{Fair Share Growth Index} = ((0.4 x \text{average annual number of building permits issued 1970-1974}) + (0.6 x \text{average annual number of building permits issued 1975-1978}) \times (0.85 + (0.01 x (\text{equalized valuation per capita - total net debt per capita - tax paid per capita}))))
\end{equation}

\textsuperscript{370} Id. at 2.
continue present growth trends but to skew more growth into municipalities that were fiscally strong. Fairness was based on consumer preference tempered by one measure of a community's capacity to accept new growth.

The second formula also used a past growth factor, but to opposite ends. It was designed to funnel more growth into municipalities that had accepted less growth in the past. Past growth was thus used as a measure of a community's restrictiveness and not of consumer preference. Fairness was based on evening off growth rates over time.

These two examples—as simple as they are—poignantly demonstrate some of the conflicts inherent in a theory of fair share. Each of the various factors is difficult to measure in itself, and there is no set formula as to which factors should be chosen or how they should be weighed against each other. These problems are not merely technical; they are inherent in the concept of fair share and stem ultimately from the contradictions in the socio-economic-political environment in which the debate is imbedded. Fundamentally, our system is based on notions of

371 Id. at 4. If a municipality had an annual growth rate for the years 1970-1978 of between 0.4% and 2.4%, it was assigned a growth index equal to this past rate. If the municipality had grown at less than 0.4%, it was assigned a growth index = 1.4 - the square root of (1.4 - the past growth rate). If it had grown at greater than 2.4%, it was assigned a growth index = 1.4 + the square root of (the past growth rate - 1.4).

372 See Lefcoe, n. 366 supra at 487. Lefcoe argues that many of the criteria relevant to the issue of "fair share" contradict each other.
private wealth, market allocation of the proper level of goods and services, and local determination of land use policy. At the same time we adhere to the belief that some things are or should be morally entitled and to the legitimacy of state-wide goals such as housing for all. Understandably, though somewhat arrogantly, we want it all. The difficult task that faces land use reform is the mediation of the conflicting goals and value structures. The distinctive feature of fair share is that it attempts not merely to mediate them but to resolve them.

2) Implementation Problem

Even if a fair share program can be agreed upon, there is no assurance that such a formula can be successfully implemented. Projecting "x" d.u. for Town A does not assure that those units will be built. First, there is a basic problem of translating the numbers into regulatory reform to match them. Second, local opponents of growth may be able to slow development in

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373See e.g., the Mt. Laurel I court's simple but trenchant comment: "Courts do not build housing nor do municipalities." Mt. Laurel I, n. 349 supra, 336 A.2d at 734.

374Chapter III notes the complex and subtle relationship between land use regulation and the amount of housing built. Note also that the state can probably be expected to underassess the fair share determination for relatively restrictive communities due to the same pressures that caused it to underassess equalized valuations of local property values for the purposes of state aid calculations. Cf. Town of Sudbury v. Comm'r of Corporations and Taxation, 366 Mass. 558, 321 N.E.2d 641 (1974).
other ways despite the reform.\footnote{Local opponents of housing growth may be able to block development through other legal avenues--such as state environmental review--or through extra-legal means.} Third, housing will be built in a specific location only if there is sufficient demand for that housing in that location. If municipalities are given the authority and/or are encouraged to curb further growth once they have met their fair share, the mismatch between fair share allocation and consumer preference could reduce the supply of housing. \footnote{This might have been one of the ironic effects of the proposed Balanced Growth & Development Act, n. 34 \textit{supra}.}

C. \textbf{Weighing the Options.}

The problems associated with fair share formulas may not render them unworkable. But these problems do force us to weigh the costs and the benefits of the fair share approach. The concept of fair share is so attractive because it appears to offer both a justification for state intervention and an objective and rational basis for structuring that intervention. As we have seen, however, there is no a priori content to fair share. Any formula will not be deduced from first principles but will have to be battled out in the political arena. At the same time, through its assignment of specific numbers to specific locations, the fair share approach is symbolically the most intrusive form of intervention. The political resistance that will be generated is likely either to scuttle the efforts before implementation or skew them during implementation. Note that the
MIT study that was done during the drafting of the Balanced Growth and Development Act was considered so potentially explosive that its findings were in effect given "top secret" status.\textsuperscript{377} Considering the implementation problems that exist even once a formula is chosen, we are led to reexamine our real concerns and the question of whether they can be met through other means.

1) Real Concerns

What then are our real concerns? What specifically is wrong with certain municipalities adopting exclusionary policies? Once concern is that such policies tend to restrict the supply of housing and raise its price. Our discussion in Chapter III noted that this effect is probably overstated.\textsuperscript{378} More importantly, this problem does not necessarily point to a fair share solution. If providing more and cheaper housing is the primary goal, a solution that attempts to allocate housing to specific locations may be counterproductive.\textsuperscript{379} The main impact of exclusionary policies is on the spatial distribution of housing and it is to this impact that the fair share effort is addressed.

There are three kinds of disparities that are created along

\begin{itemize}
\item [\textsuperscript{377}] Welles, n. 18 \textit{supra}, at 69. As Welles points out this treatment seems inconsistent with the espoused theory of open political debate that underlay the policy formulation process.
\item [\textsuperscript{378}] See discussion at p. 98 \textit{supra}.
\item [\textsuperscript{379}] A system of deregulation that allowed housing to be built where demanded would better serve this goal.
\end{itemize}
the way. The first category is that of "amenity disparities." Exclusionary communities are able to reserve to themselves certain amenities such as open space and low traffic volumes. Development is in turn induced elsewhere causing the reduction of amenities in those areas.

The second category is that of "fiscal disparities." Exclusionary communities are thought to exclude development that brings with it fiscal costs exceeding revenues.380 Beyond the public economic disparities, there are also private, "wealth disparities." Even where new development pays its own way in fiscal terms, it may reduce the value of existing housing. Exclusionary regulations empower property owners to perpetuate the value of their homes and hence their wealth.381

The last category--that of "social disparities"--can also be further subdivided. One component relates to the social mixture associated with the skewed spatial distribution of housing. Exclusionary regulations is believed to prevent the free

380 See discussion at p. 93 supra.
381 See n. 302 supra.
intermixing of races and classes.\textsuperscript{382} But there is also a second component that deals with the loss of individual mobility.\textsuperscript{383} The fact of exclusion is important by itself, independent of whatever mix of amenities, races, and so on that each community has to offer.

It should be pointed out that fair share—or even local policy reform in general—may not be necessary or sufficient to cure these discrepancies. It would not be sufficient because some discrepancies would continue to exist even were all local housing policies dictated by the state. It is not necessary to the extent that these discrepancies can be thought of as problems of redistribution independent of the pattern of growth. To some extent these disparities could be overcome by compensation schemes—e.g., state subsidies of local amenities—linked not to

\textsuperscript{382} The data clearly bears out the segregation in fact though the economic segregation is much less pronounced. See A. Downs, \textit{Opening Up the Suburbs} 187 (1973). The degree to which this segregation is a direct result of land use regulation and/or the degree to which land use regulation should be used to remedy it are still the subject of some controversy. \textit{Compare} Downs (strongly advocating for the encouragement of economic integration of households) with Ellickson \textit{supra} at 506 ("There is little to recommend policies designed to encourage that each neighborhood has a mixture of all housing types (and hence all income groups.")

\textsuperscript{383} It is this concern that the legal system has a difficult time classifying and has given such labels as the "right to travel". See \textit{Construction Ind. Ass'n v. City of Petaluma} 375 F. Supp. 574, rev'd 522 F.2d 897 (9th Cir. 1975), \textit{cert. denied}, 424 U.S. 934 (1976) (invalidating a growth control ordinance as an infringement on the constitutional "right to travel.") The difficulty of classifying this problem stems from the difficulty of integrating the reality of an absence of individual freedom in a system that espouses such freedom as a fundamental norm.
prospective growth policy but to indicators of present congestion. Fiscal disparitis could be alleviated through changes in the state aid formula, wealth disparities through changes in the tax system. Even the social disparities could be remedied to the extent that wealth is equivalent to opportunity. Non-residents could simply buy their way into exclusive communities.

There are two major problems with this characterization. First, while it is instructive to engage in such discussions of redistribution in the abstract, this analysis obviously does not reflect political reality. It is still fair to make the following conclusions, however. We should not fool ourselves into thinking that land use reform—no matter what form it takes—is some sort of panacea. On the other hand, the reform of local policies may be one way of curing some of the various disparities that concern us. Lastly, many of these disparities can be addressed without resorting to fair share.

The second major defect with our reasoning so far is the static character of the analysis. In fact, the rate of growth in each community may be as important as the level of growth. If the rate of growth outstrips the capacity of the municipality to
accept the growth, wasteful inefficiencies result.\textsuperscript{384} The existence of these costs is the "market failure" justification of growth policy planning.

It must not be forgotten that the consensus that emerged from the Growth Policy Development Act process was a mandate for controlling growth.\textsuperscript{385} Fair share was as much incidental to the push to contain growth as it was an important goal in itself. The question remains to what extent fair share is necessary to achieve these planning ends. To answer this question we should consider the options available.

2) \textbf{Options}

At one extreme is what we might call the "hard fair share" model, under which the fair share allocation is mandated by the state or alternatively is directly linked to the release of the incentives offered. This approach was incorporated into the proposed Balanced Growth and Development Act.\textsuperscript{386} At the other extreme is what might be called the "fair is fair" model. This model attempts to remove barriers to the housing market without

\textsuperscript{384}Congestion and overtaxed resources occur in growth areas and underutilized resources and sprawl in restrictive areas. It is difficult to separate out the problem of too rapid growth from that of inefficient spatial distributions of housing. On this latter subject see Real Estate Research Corporation, \textit{The Costs of Sprawl} (1974); D. Keyes, \textit{Channeling Metropolitan Growth: In What Direction, Toward Which End?} 43:2 Law & Contemp. Probs. 239 (1979); Tolley, Graves & Gardner, \textit{The Urban Growth Question}, 43:2 Law & Contemp Probs. 211 (1979). A full examination of this issue is beyond the scope of this paper.

\textsuperscript{385}See discussion at p. 9 supra.

\textsuperscript{386}See discussion at p. 11 supra.
trying to determine its spatial distribution. It would be coupled with a compensation scheme to reimburse municipalities for the impact of development. Though this approach is more comprehensive, it is less intrusive in the sense that it does not single out communities and does no attempt to dictate how much growth each community should accept. Instead of trying to outguess the market, it attempts to use the market. This approach focuses ultimately on the question of what is legitimate regulation.387

In between these two poles are "hybrid fair share" models, which entail a partial resolution of the fair share issue. For example, a community's past record is compared against what it "should" have been, but the state review is of the locality's prospective policy without an attempt to tie that policy to a specific numerical quota. This approach was in fact the one used by EOCD under the "Self-Help" memorandum of understanding.388 Towns were triggered into the review process by a numerical standard but were evaluated ultimately under soft standards applied to their prospective promises. The formula in effect established "prima facie" violations of fair share responsibilities. Moreover, a final resolution of the content of fair share was avoided in another way. The numerical standard was

387 Oregon has adopted a form of this approach, See p. 142 infra.

388 See discussion at p.15 supra.
not absolute but relative. Municipalities were compared against each other instead of some calculated "need."

Let us examine the "Self-Help" approach more closely. This method compared the percentage growth of a community (over a ten year period and adjusted by a subsidized housing bonus) to the adjusted percentage growth of the region in which the community was located. The town that grew at the regional average thus would have a growth index equal to 1.0. Towns with an index below a set floor—which varied from .75 to .80—were triggered into the review process.

There were in fact three sets of regions used and therefore three growth indices. A community had to fall below the floor on all three indices to trigger the withholding and review process. Urban areas were excluded from the regions. In effect, then, suburbs were compared against other suburbs. The

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\text{INDEX} = \frac{1970-79 \text{ local build'g permits + sub. housing bonus}}{1970 \text{ local housing units}} \frac{1970-79 \text{ regional build'g permits + sub. housing bonus}}{1970 \text{ regional housing units}}
\]

The subsidized housing bonus = 3 x's the number of subsidized units built.

The three sets of regions were the Regional Planning Agency regions, the Housing Needs Regions drawn from Apgar & Solomon, n. 351 supra, and a new set of regions drawn by EOCD based on a somewhat subjective evaluation of the location of major highways, distances from regional centers, town character, etc.
implicit theory that underlies this formulation is to isolate the effects of restrictive regulation by grouping together municipalities of presumably similar desirability facing similar growth pressures. In many ways this model is similar to the second model in the MIT study of fair share formulas but with no resolution down to a specific numerical quota. A hard fair share model is based on the assumption that similarly situated towns should grow at the same rate. EOCD's growth index test was based on the assumption that similarly situated towns should grow at rates not too disparate from each other.

Though such a hybrid version is less comprehensive than the "fair is fair" model, it may well create less political resistance. In fact, this approach appears to blend the political advantages of both extreme versions. It both plays communities off against each other, like the hard fair share model, and avoids specific allocations of growth, like the "fair is fair" model. Further, comparing towns against each other may provide enough of a bias to distinguish which towns should be allowed to control growth directly.

EOCD's growth index test was structured so as to have a clear bias toward leniency. The minimum floors were set quite low, three sets of regions were used, and municipalities were given an opportunity to show special circumstances as to why their index came out so low. Providing individual review is desirable if the associated administrative costs are not too

\[ ^{394} \text{How sensitive this approach is to "micro-climate" variations in demand and growth pressures remains to be tested.} \]
high, but a more balanced approach is needed to uncover towns with restrictive policies despite their passing the growth index test. One solution might be to give housing consumer groups administrative standing to show special circumstances why the growth index came out too high. Moreover, towns with high growth indices should be rewarded. The more competition that can be created between municipalities, the less important the conflict between municipalities and the state will become.

There are some administrative problems with EOCD's version of the hybrid approach. Building permit information was used instead of units constructed because EOCD felt it to be a better measure of a community's permissiveness toward new housing. EOCD rejected the building permit index all together when they discovered almost no correlation between building permits granted and housing stock constructed data taken from the census.\(^{395}\) This data collection problem does not appear insurmountable. No matter which measure EOCD chooses, it has the power to require communities to submit such data to it.\(^ {396}\) To the extent that communities are not aware of such information there will be administrative costs in obtaining it, but these costs are probably outweighed by the benefits of having each community aware of exactly how much growth is occurring.

\(^{395}\)Interview with John F. Loehr, Policy Planner, EOCD (Dec. 7, 1982).

Another problem is the fact of great fluctuation in the amount of new construction per year in any one place. One cannot take the number of units built as a measure of restrictiveness unless this figure is averaged over a significant period of time. But the longer the period of time, the less meaningful the figure is as a measurement of current policy. Weighted averages help, but do not eliminate the problem. The existence of these fluctuations may itself provide a reason to base review on a municipality's policies and not on a numerical standard.

Our last task is to examine the current standard that EOCD uses in the administration of Executive Order No. 215: the presence of subsidized family housing within a community. The standard is not without some merit. The lack of any subsidized housing within a community may be important in itself and it may give some indication of the community's restrictiveness in general. Moreover, the standard is objective and "hard." Still, the standard remains extremely narrow and arbitrary. For example, the standard takes no account of the relative amount of subsidized family housing. A large community with minimal

\[397\] Note for example that in the decade of the 1960's building permits issued per year for Boston varied from 1,292 to 9,930, and for Springfield from 135 to 1,572, the two municipalities for which one would expect the least variation. The highs and lows of various municipalities did not correspond well with time indicating that the variations were caused by other factors in addition to the general economic environment. See Mas. Dept. of Commerce and Development New Home Building in Massachusetts: 1961-1971 (1972).
subsidized housing which meets the test may be more restrictive than a small community with none. Further, the standard makes no attempt to factor in the presence of rental subsidy programs though one could well argue that such programs might be a more desirable solution to the housing problem. Lastly, a community's absence of subsidized housing may in fact say very little about its restrictiveness of housing in general. Considering the fact that subsidized housing funds are in such short supply anyway, one could well question this emphasis.

D. Conclusion.

A solution based on a housing allocation formula to determine each community's "fair share" is extremely attractive, but entails political problems that may preclude its adoption or effectiveness. It attempts a final resolution of goals and value structures that may defy final resolution. But all is not lost. Our real concerns that led us to fair share may be able to be met in other ways. For example, impediments to growth can be attacked without attempting to allocate specific growth to specific areas. The disparities that still occurred might be able to alleviated in other ways. To the extent that some numerical standard is needed to accompany the authorization of direct growth controls, fair share models can be tempered into various soft alternatives. A numerical standard could be used to determine prima facie

\[398\] See J. Yinger, State Housing Policy for the Poor (discussion draft of unpublished paper; Aug. 1982).
violations, while a municipality's policies are ultimately evaluated against more flexible standards. Or communities could compared against each other without mandating how much growth each community should accept. Lastly, housing consumer groups could be given some form of administrative standing to ensure a more balanced debate.
CHAPTER V

Intervention Options

In Chapter III, we stressed the importance of the "directive approach" to local policy reform, the inclusion of external interests in local decision-making. Executive Order No. 215 is modelled to serve the directive approach but has not—and perhaps could not have—been used in this manner. The directive approach was itself subdivided into the mandatory approach (taking certain choices out of local hands) and the incentive approach (changing a locality's self-interest). This chapter will attempt a more sophisticated assessment of the range of options available to the state under the directive approach.

A. Altering Local Discretion

Under this approach, the problem of exclusionary regulation is viewed as stemming from the amount of discretion granted to local governments. The solution, then, is to pull back some of the authority delegated to municipalities and/or constrain its use. An extreme version of this approach would be to take land use policy out of the hands of local governments completely and

399See discussion at p. 107, supra.
make it solely a state issue. This option will not be considered below because not only is it of questionable desirability, it is outside the range of political possibilities. The real question is how to achieve certain state objectives while living within a regime of local discretion.

1) **Static model: changing the rules of the game**

One solution is to amend present enabling legislation to provide for standards limiting local discretion. This approach returns to first principles in its questioning of the legitimate scope of regulation. Local discretion is to be retained within an acceptable range of standards. Zoning enabling acts, for example, could be amended so as to prohibit, say, three acre zoning or to limit the conditions under which it could be imposed. Subdivision control legislation could be amended so as to limit the street width that could be imposed or to prohibit requirements of, say, granite curbing.

Some such limitations have been enacted. The Mass. Zoning Enabling Act, for example, explicitly precludes municipalities

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400 Not even Oregon, a state much more amenable to strong state intervention in land use planning, has gone to this extreme. For a discussion of the Oregon system see p. 142 infra. Perhaps the most extreme override was enacted by New York in the creation of the Urban Development Corporation (UDC), which was given the power in effect to override local zoning for the development of low and moderate income housing. 1968 N.Y. Laws ch. 174, N.Y. Unconsol. Laws ch. 252 §1 et seq. (Consol. 1977). The UDC enabling act was later amended to modify this override power by giving communities the power to veto proposed UDC development in residential areas within their borders. 1973 N.Y. Laws ch. 446, N.Y. Unconsol. Laws ch. 252 §15(5) (Consol. 1977).
from restricting the interior area of a single family home.\textsuperscript{401} A recent amendment to the subdivision control enabling statute prohibits communities from applying stricter road and street standards to new development than that "commonly applied by that city or town to...its publicly financed ways located in similarly zoned districts within such city or town."\textsuperscript{402} Still, calls for this type of reform are relatively scarce and examples that have been enacted are even scarcer.\textsuperscript{403} Three explanations are possible. The first is that this approach is just too simple, not sophisticated enough to capture the hearts and minds of planning reformers. The second is that this approach is considered too blunt, that is, that it does not leave enough room and flexibility for legitimate local discretion. The last is that it is simply too difficult politically, that people and interest groups do not want to face up to the question of what is an illegitimate regulation.


\textsuperscript{402}1981 Mass. Acts ch. 459, amending Mass. Gen. Laws ch. 41 \S 81Q. There have as yet been no judicial interpretations of this extremely ambiguous requirement. Note that this requirement may in effect by rendered meaningless by the fact that most communities currently do virtually no road building of their own. Interview with Donald Schmidt, Administrator of the Office of Local Assistance, EOCD (April 5, 1983).

\textsuperscript{403}Many such bills are in fact filed each year, but gain little support in the face of strong "home rule" ideology. Two examples of bills that were filed but failed to garner sufficient support are an act that would have prohibited minimum lot sizes above one acre except upon special showing of public need and an act that would have prohibited discrimination against prefabricated housing. Interview with Donald Schmidt, Administrator of the Office of Local Assistance, EOCD. (April 5, 1983).
2) Dynamic models

It is possible to confine local discretion without resolving the question of what regulation is illegitimate. These dynamic models are based on procedural determinations of legitimacy. A bypassing of the final resolution of the question may also bypass the impediments to reform associated with the static model.

b) review model: Under this model, local regulations are subject to review by a state body. Courts currently have this power, but because of the lack of standards in enabling statutes, they are essentially limited to constitutional review.\textsuperscript{404} Because of the presumption of validity normally granted to local legislative acts,\textsuperscript{405} this review in effect amounts to no review at all by all but extremely activist courts.\textsuperscript{406} In

\textsuperscript{404}One commentator has argued that the delegation doctrine should be applied to zoning enabling statutes. Payne, Delegation Doctrine in the Reform of Local Government Law: The Exclusionary Zoning, 29 Rutgers L. Rev. 803 (1976).

\textsuperscript{405}See e.g., Crall v. Leominster, 362 Mass. 95, 102, 284 N.E.2d 610, 615 (1972) ("every presumption is to be made in favor of [municipal by-laws' and ordinances'] validity, and that their enforcement will not be refused unless it is shown beyond reasonable doubt that they conflict with the applicable enabling act or the Constitution.")

\textsuperscript{406}See n. 351 supra. Massachusetts courts have not been interventionist despite the early date at which they recognized the problem of exclusionary zoning. See Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942) (one acre zoning upheld, but strong dicta arguing that the zoning power cannot be used for exclusionary purposed); see also Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964) (zoning by-law requiring 2-1/2 acre minimum lot size and 200 foot minimum lot width held invalid).
Massachusetts, zoning by-laws must be approved by the attorney general. In theory, the attorney general would be applying the same standards a court would use. In practice, the requirement of attorney general approval might hold towns to stricter standards, and certainly amounts to some increased state oversight.

The presumption of constitutional validity could be reversed by statute, thus inducing increased judicial intervention, or legislatures could adopt statutory tests of legitimacy, for example, disavowing local regulation that unduly raises the cost of housing. This method would be structurally similar to the static model but with softer standards of legitimacy.

Oregon has given a state administrative agency the power to review local land use policy. One of the administrative standards promulgated is that local policy should "encourage the availability of adequate numbers of housing at prices reasonably commensurate with the financial capabilities of Oregon residents."
Pursuant to this standard, the state agency has invalidated such local actions as a proposed downzoning and a conditional use permitting procedure which had standards that were considered too vague.\footnote{411}{OAR 660-15-000, Goal 10 (1974), as adopted by the state agency, the Land Conservation and Development Comm'n.}

\textbf{b) political model:} This model works on the theory that if the results of a political process are consistently skewed to favor certain interests, counter interests should be given a stronger voice in the political process. One example of this approach would be to give housing consumer groups administrative or judicial standing to challenge local regulation.\footnote{412}{Note, \textit{LCDC Goal 10: Oregon's Solution to Exclusionary Zoning}, 16 Williamette L. Rev. 873, 877, 879 (1980), citing \textit{Seaman v. City of Durham} LCDC No. 77-025 (April 18, 1978) (upzoning found to violate Goal 10) \& Denial of Acknowledgment of Compliance, City of St. Helens Comprehensive Plan (Aug. 11, 1978) (approval standards found too vague).}

\footnote{413}{Executive Order 215 does allow for virtually any party to present evidence that a community is unreasonably restrictive of new housing growth, but this practice has never been actively encouraged nor would it be of much help given the standards of restrictiveness which EOCD has used. \textit{See} EOCD, \textit{Local Housing Policies and State Development Assistance: A Guide to Executive Order No. 215} (1982).}
Another example would be to amend the zoning enabling act to authorize zoning amendments by a simple majority vote. But the effects of such a change are far from obvious. Under some circumstances, this change would tip the balance in favor of pro-growth forces. But the overall effect of such a statutory amendment might be to increase the control of those wishing to exclude development.

c) conditional authority model: Another approach is to condition local authority on a functional test of legitimacy. One example would be to authorize direct local control of growth but to suspend such authority once the community fell below a certain numerical standard. Automatic suspension of authority seems a more workable approach than that of the proposed Balanced Growth

414 Even where housing interest groups have been incorporated it is doubtful that they can demonstrate the requisite "injury in fact" to obtain judicial standing. Cf. Save the Bay, Inc. v. Dept. of Public Utilities, 366 Mass. 667, 322 N.E.2d 742 (1977) (standing of organizational plaintiffs ruled doubtful under applicable statute not here relevant).

Other states have loosened their standing requirements. Mt. Laurel I, n. 349 supra reserved the question of "organizational standing." 336 A.2d at 717 n. 3 (1975). That same year, the N.J. legislature passed the Municipal Land Use Law which included extremely liberal standing provisions. Based on these new provisions, the New Jersey Supreme Court has approved standing to sue on Mt. Laurel grounds for "any organization that has the objective of securing lower income housing opportunities in a municipality." Mt. Laurel II, n. 350 supra, at 483.

415 See Lincoln case study at p. 27 supra.

416 That is, while the requirement of a two-thirds majority entrenches the status quo of zoning, moving to a simple majority system might allow more situations in which zoning could and would be more restrictive.
and Development Act which authorized growth management once a town agreed to accept its fair share.  

A functional test of legitimacy can be formulated in other ways, e.g., it can be based on the type/price of the housing built. Chapter 774 is essentially an embodiment of this approach. Local regulation is deemed illegitimate if it prevents the development of low income housing. There may be no reason --other than political ones--to stop this theory at subsidized housing; it could be extended to include all low and moderate income housing whether public or private. This approach would give developers the incentive to search for ways of cutting housing costs and could be structured so as to pass most of these cost savings on to housing consumers. This tack could be linked to a concept of fair share, i.e., a municipality would

417 The numerical standard could be derived from a "hard fair share" housing allocation formula or from a comparison of a municipality's growth rate against the regional average. See discussion at p. 130 supra.

Note that California has adopted a scheme that could be called a hybrid of the review and conditional authority models. Local land use regulation must be consistent with a "general plan" which includes a housing element making "adequate provision for the housing needs for all segments of the community." See n. 354 supra. While the local plans are subject to state review, no sanctions were specified for communities whose plans did not pass muster. For an optimistic view of the prospects of the California program, see Burton, n. 351 supra; for a sharp critique of the approach, see Lefcoe n. 366, supra.

418 See discussion at p. 00 supra.

419 For example, ceilings could be set on the sales and resales of new housing like those established through inclusionary zoning schemes.
retain full authority once it a met a numerical quota, but this may not be necessary or desirable.

B. **Altering Local Interest**

Under this approach, local discretion is not seen as the problem. Rather, the problem of exclusionary regulation is viewed as stemming from the fact that communities face a strong disincentive to grow. The solution is to alter a municipality's self-interest by removing the disincentives and offering incentives. There are two major subcategories of incentives: those tied directly to growth and those tied to policy changes expected to produce more growth. The questions we must ask of each are what sorts of incentives are appropriate and how much is needed to make the incentive effective?

1) **Incentives Tied Directly to Growth**

There is no inherent reason that incentives need be tied to policy reform. Incentives could, for example, be tied directly to indicators of past growth through, for example, changing the formulae through which local aid is distributed. Once the formulae were reset, there would be no need for procedural review of local policy. Municipalities would be afforded the maximum degree of flexibility in setting their own policies, but would have to pay the fiscal price for doing so.

Setting the formulae initially, however, raises difficult political problems similar to those encountered in trying to agree on a fair share formula. During the legislative debate on the local aid formulae, each legislator will be forced to consider whether his or her municipality will gain or lose under the various proposals. These pressures may well preclude
statesmanlike conduct than may be necessary to link local aid with growth. Moreover, changing the formulae in this way would somewhat diminish their predictability, a quality highly desired by local officials.

How high would economic benefits have to be set in order to induce changes in local policy? As long as the local polity retains full control over local policy, we are led back to the initial reasons why local residents oppose growth. For compensation schemes to have real effects on policy, enough voters must be induced to "switch sides" to change the outcome. For this switch to occur, these people will have to be compensated for the full "costs" of development to them. As was stated earlier, these costs entail much more than any net fiscal loss to the community. The most important elements are the loss in private value of extant homes and the loss in amenities. Unless enough of these costs are compensated, economic reimbursement cannot be successful as an incentive.

There is also a question of whether people will understand the incentives even if they are set high enough to work. This question can be given some perspective by asking whether the current local aid formula is pro-growth or anti-growth.

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420 This problem parallels that of trying to decide on a "fair share formula".

421 Interview with Joseph L. Flatley, Ass't Sec'y, EOCD (Oct. 19, 1982).

422 See discussion at p. 91 supra.
The presence of local aid helps mitigate the impact of new development which has perceived fiscal costs outweighing expected revenues.\textsuperscript{423} Still, the present formulae taken on their own terms are neither strongly pro-growth nor anti-growth. That is, given the present local aid formulae, it is not clear whether pro-growth policies will increase or decrease local aid per capita in a community.\textsuperscript{424} More importantly, the relationship is

\textsuperscript{423}The largest drain on local budgets is school costs. Developments that bring with them large numbers school age children would otherwise be considered highly fiscally undesirable. The most important local aid formula—accounting for almost half of total aid distributed—allocates aid in proportion to the number of "weighted full-time equivalent pupils" within a school district. Mass. Gen. Laws Ann. ch. 70 §1 et seq. (West 1982). Development with school age children can now more than "pay for itself".

\textsuperscript{424}Note that the ch. 70 formula, n. 426 supra, includes a "hold harmless" provision that guarantees communities 107% of what they received in aid in 1978. Mass. Gen. Laws Ann. ch. 70 §6 (West 1982). Thus, many communities cannot increase their ch. 70 local by accepting development with school age children unless they accepted enough to outweigh the effect of the "hold harmless" floor. In fact, until this "tipping point" were reached, such development presents the same disincentives as if no local aid existed by reducing funds available for other purposes. The formula that was used up to 1978 favored wealthier communities because it was based on a percentage reimbursement of school expenditures. Thus, the "hold harmless" provision appears to discourage the growth of family housing in wealthier communities. See generally, League of Women Voters of Mass., "Achieving Equitable State Aid for Education," Impact: 2-1/2, no. 41 (Jan. 1, 1983).

Note further that it would be more exact to use changes in local aid per capita as the measure of impact of development on local aid, though such estimates get rather complex for ch. 70 local aid. Another local aid formula manifests the following relationship between local aid per capita and new development: local aid per capita increases if the percentage change in assessed valuation due to the new development is less than the percentage change in population due to the new development. Mass. Gen. Laws Ann. ch. 58 §18C (West Supp. 1981).
so complex and non-obvious that the exact formulae used to
disburse local aid probably influences local behavior very little.425 People might sense the effects over time and feed
this information back into their attitudes toward growth, but
these effects are probably masked by other factors such as
reevaluations, changing tax laws, and changing service levels.
Therefore, without a strong pro-growth tilt coupled with a public
education campaign at both the state and local levels, it is
unreasonable to expect small changes in the local aid formulae to
have any substantial impact on local attitudes or actions.426

There is another impediment as well, which holds true of all
the economic incentive options. The "costs" that new development
brings to a community are relatively fixed and long term. The
added benefit offered by the state to compensate for these costs
is subject to the winds of political change. Statutes can be
amended and state administrations can change; it is somewhat
harder to raze someone's home.

There does not appear to be great cause of optimism that
changing the local aid formulae could induce substantial change

425 Even though ch. 70 aid amounts to almost half of total
local aid, there are some 40 formulae in all. Their
complications are immediately apparent to anyone who cares to
unearth them.

426 The link between accepting new development and obtaining
the monetary incentives could be made quite direct. Note a
scheme of "Municipal Incentive Grants," enacted in canada which
funnels a grant of $1,000 to communities for each specified type
of lower priced housing unit they accept. Hack & Polk, n. 308
supra at 49.
in local regulation. In one sense, however, the efficacy of using these formulae as incentives is irrelevant to the desirability of amending them. That is, compensation is an important goal in itself whether or not changes in policy are induced. Some losses such as efficiency losses caused by too rapid local growth, of course, cannot be remedied through compensation alone.427

2) **Incentives tied to local reform:**

Alternatively, state incentives could be tied directly to local policy reform and not to the levels of housing built.

(a) **pure money model:** One form of this approach would be to set aside a certain percentage of local aid money and channel it to communities that met state growth policy standards. The main benefit of this approach is to make explicit the link between the incentive offered and the action that the state is attempting to induce. The disadvantages are of four kinds. First, most of the problems of the local aid formula approach are still present such as whether the incentive can be set high enough to produce real change.428 Second, the administrative costs of the program are higher due to the added review of local policies. Third, to the extent that communities can meet state standards without having

427 See discussion at p. 129.

428 The problem of increased unpredictability is even greater.
to accept new growth, compensation will be less synchronized to the real costs and disparities created. Last, this approach probably has less of a chance of being enacted than changing the local aid formulae. There is currently talk of a local aid set-aside for education. Not only does this set-aside claim priority over one for growth, its passage would probably preclude the passage of a second one for any purpose.

b) discretionary funding: Another form of this method is to tie the local policy reform to discretionary funding, which brings us back to Executive Order No. 215. In what way is this version different than the pure money model? That in part depends on the degree of relatedness between the reform objective and the funding programs to which it is to be linked. Take, for example, the Self-Help open space acquisition program. While they are not inherently linked, open space preservation is associated in the public mind with exclusionary growth policies.

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429 This discrepancy could be due to the ability of local opposition to stop growth through other means or through a lack of demand where housing was assigned.

430 Note that a local aid set-aside was proposed during the drafting of the Balanced Growth & Development Act and was rejected almost immediately as politically unfeasible. Welles, n. 18 supra at 74.

431 See e.g., Lockman, "Dukakis says he'll work to improve local-aid system," Boston Globe, March 6, 1983, at 21, col 5.

432 The reputation of the town of Lincoln demonstrates this association. Interview with Robert A. Lemire, former Chairman of the Lincoln Conservation Comm'n (Feb. 13, 1983). The case of Lincoln also demonstrates that open space preservation and the development of low and moderate income housing need not be mutually exclusive.
open space preservation communities are able to retain amenities to themselves, excluding others along the way. To some extent such tactics are justified when a municipality spends its own money. It does seem inappropriate, however, for the state in effect to subsidize a locality's exclusionary policies. Therefore, conditioning open space acquisition funding on the restrictiveness of housing policy does appear rational.

The links to other grant programs are not as strong. Take, for example, sewer construction funding and other true "development related assistance." At first blush there appears to be a strong rationality behind the argument that growth should occur where such development funds are spent. But the real link is between growth and all sewers, not between growth and those municipalities currently applying for state sewer funding. Unless similar sanctions are retroactively applied to all municipalities with sewers, conditioning such funds on housing policy will be grossly underinclusive and perceived as unfair.

Further, it is important to consider the validity of conditioning the discretionary funds not in the abstract but in the political environment in which it occurs. Consider the pure money model in which there is little symbolic link in the public perception between bare dollars and growth policy. But such a link would be created were a statute passed after extensive

433 This would help ensure, for example, an efficient use of the infrastructure built.
public debate of the issue. Conversely, if state discretionary funds are perceived to have been passed for other purposes, the public perception of the strength of the link diminishes. To the extent that this occurs, conditions imposed by executive fiat will be perceived as arbitrary and coercive. The administration will be perceived as holding the funds hostage because they constitute the only leverage available, and any rational link that might otherwise exist will be obscured.

These fine distinctions help distinguish between "sanctions" and "incentives". Structurally, the two are identical. The difference exists in the public perception of the relative coerciveness of the state action. When incentives are perceived as illegitimate, they become sanctions. This legitimacy in turns rests primarily on whether the policy has been generated out of an open political process in which the localities have had a say and secondarily on the perceived rationality of the linkage between the incentives being offered and the reform being sought. Public acceptance of the linkage also diminishes as the importance of the independent goal behind the funding program increases. Imagine, for example, if the state attempted to condition hazardous waste cleanup funds on local housing policy. This policy would not necessarily be irrational, but surely no public would stand for it.

Making discretionary funds the incentive has another defect as well. The effectiveness of the incentive is tied to the availability of the funding and the existence of municipal need for that funding. There is no comprehensiveness to this approach; municipalities are only triggered into the process as
they desire the funding and as they apply for it. Moreover, if the threat of retribution in future funding rounds is the only means of enforcement, the efficacy of this threat depends on the future availability of state funding and future local need for the funding as well as on the withholding policy staying in effect at the time of both of these conditions are true.434

As was true of the other economic incentives examined, one can well wonder how much real change can be effected through the level of incentives that can be offered. If a locality had to replace the withheld funding, its tax rate would increase very little.435 But there are several important mitigating factors. First, not all tax dollars are equal; marginal increases in the rate of taxation are politically more significant than their mathematically equivalent share of the existing tax bill. Second, Proposition 2-1/2 has put explicit limits on increases in

434See e.g., Lincoln case study, p. 27 supra. Towns have traditionally made application for discretionary funding on the order of once every three to four years though this is expected to increase due to recent large state appropriations. Interview with John F. Loehr, Policy Planner, EOCD (April 15, 1983).

435Note, for example, that a town with an equalized assessed tax base of $200 million could replace a $200,000 grant in 4 years with a tax increase of about 32 cents per $1000 of equalized assessed (assuming an interest rate of 10%).
the local tax rate and the local tax levy.\textsuperscript{436} Third, when the state is subsidizing a large share of a local project the attractiveness of that project to the municipality increases dramatically, beyond the economic value of the state subsidy. Therefore local proponents of the project will lobby extra hard for those measures that will win release of the state funding. Lastly, the projects to be funded may provide a more appropriate and acceptable "medium of exchange" than bare dollars. A town might be willing to make a trade of accepting more growth for obtaining more open space even where cash of equal value might be perceived as either insufficient or offensive as a bribe.

Manipulating local interest to the point where some voters would switch sides in order to obtain the funding is not enough to effect local policy reform. There is still a need for bargaining and enforcement mechanisms to translate this willingness into such reform. Consider the case of Lincoln, again, where the proponents of the open space project were keenly interested in doing whatever had to be done to obtain release of the funding. These proponents, however, not only could not bind the town as a whole, the perception that they attempted to bind

\begin{flushright}
\footnotesize
\textsuperscript{436}1980 Mass. Acts ch. 580 (by initiative), as amended by 1981 Mass. Acts ch. 782. Local property tax rates are limited to an equalized rate of 2-1/2%. Tax levies are limited to 102.5% of what they had been the previous year, though there is now a provision that allows a further increase equal to the value of new development multiplied by the tax rate of the previous year. 1981 Mass. Acts ch. 782 S\textsuperscript{10}.
\end{flushright}
the town itself may have encumbered local policy reform.\textsuperscript{437}

The efficacy of conditioning discretionary funding on local policy as an incentive mechanism may again be somewhat irrelevant. Such linkage may still be important as partial compensation for the disparities created by exclusionary policies. In order for this compensation goal to succeed, however, EOCD has to be willing to turn some grant proposals down, that it attach conditions that municipalities are unwilling to accept. When communities are excused without giving up anything in return, the compensation goal is subverted.

Put another way, if the state is left without a position from which to bargain, little real bargaining can take place. Many of the state-local interaction under 215 have the appearance of bargaining, but there has been little bargaining in fact. It appears to have been an accepted fact that the towns eventually would receive their funding.\textsuperscript{438} What appears to be bargaining is merely quibbling over the exact form of ambiguity to let the towns off the hook. This situation is likely to continue because it gives each of the actors the appearance that their goals are being satisfied.

Another way of viewing the effort to condition discretionary funding on local growth policy stems from deficiencies in the grants programs themselves. While the funding programs look to

\begin{footnotes}
\item[437] See discussion at p. 28 \textit{supra}.
\item[438] For possible explanations of this practice, see discussion at p. 109 \textit{supra}.
\end{footnotes}
the community's need for the proposed project, the relative need for state funding for the project is statutorily irrelevant. The situation is in reality worse because wealthy communities have the resources to be able to put together winning proposals.\textsuperscript{439} EOC\textsuperscript{2}D's efforts to link discretionary funding and growth policy can be seen as an attempt to provide an economic type of needs based test without saying so. Therefore, some of the concerns behind conditioning the funds could be met through explicitly adopting such a test and by providing increased technical grant writing assistance to the municipalities. One wonders, of course, to what extent such measures are politically feasible.\textsuperscript{440}

C. \textbf{Hybrid Solutions}

The alternatives of altering local discretion and altering local interest were not meant to be mutually exclusive. In fact, combinations of the two approaches will be necessary as neither one can be sufficient alone. Controlling local discretion cannot

\begin{quote}
\textsuperscript{439}The problem is in fact worse due to the fact that wealthier communities have the resources to draft "winning" grant applications. The town of Lexington, for example, was able to receive $600,000 in Self-Help funding in one year for the purchase of eleven separate parcels. EOE\textsuperscript{2}A implemented a partial remedy to this problem in the Self-Help program through the use of a "sliding scale" which decreases the percentage of state reimbursement once a community has received specified amounts of funding. See memorandum from Daniel L. Oullette, Planner in the Division of Conservation Services, EOE\textsuperscript{2}A, to John A. Bewick, Sec'y, EOE\textsuperscript{2}A (April 18, 1979).
\textsuperscript{440}That is, to what extent would representatives from many communities vote for a change in state discretionary funding that would ensure that their communities would receive little or no funding.
\end{quote}
be sufficient, because when communities have a strong interest to
exclude growth, they will find alternate routes to achieve that
end.\textsuperscript{441} Controlling a locality's self-interest is sufficient in
theory, but impossible to obtain in practice. As we noted
earlier, one strong inducement to exclude growth is the
preservation of private wealth. Full levelling of interest
between communities would require the levelling of wealth between
individuals.

There are various ways to combine the different approaches.
First, they could simply be enacted at the same time. For
example, state zoning standards could be adopted concurrently
with changes in the local aid formulae. Second, the approaches
themselves could be dynamically linked together. For example,
the conditional authority approach examined in Part A could
itself be used as an incentive mechanism. This is in fact the
approach that ch. 774 takes.\textsuperscript{442} The statute offers localities
exemptions from preemption if they can meet the crude state
standards delineated therein. Expanding and fine-tuning the list
of exemptions could have the effect of strengthening the 774

\textsuperscript{441} For a parallel discussion of the same problem as to the
siting of hazardous waste treatment facilities, see L. Bacow & J.
Milkey, Overcoming Local Opposition to Hazardous Waste
Facilities: The Massachusetts Approach, 6 Harv. Env'tl. L. Rev.
265, 272-275 (1982).

\textsuperscript{442} See discussion at p. 4 supra.
approach instead of weakening it.\textsuperscript{443}

The need for a balanced "portfolio" approach can be generalized further. Public policy-making is subject to the phenomenon that underlying concepts come in and out of fashion. The pendulum swings between alternate policy paradigms, from one "idea in good currency" to its counter.\textsuperscript{444} More often than not, a scatter-shot approach is needed, but such approaches have little of the "flash" that obtains academics and politicians their jobs. Executive Order No. 215 can be thought of as the result of such a pathology. It is so disappointing precisely because it is so seductive and because it promises so much. But one stroke of the pen cannot possibly overcome the interests at stake. As structured and administered, 215 appears to be another liberal program doomed to failure seemingly from the start. This forces the question of to what extent such measures are passed and continued because they appear to offer the best of both worlds, the illusion of reform.

D. Conclusion

The directive approach that is necessary to effect substantial local reform can be further subdivided into attempts to control local discretion and attempts to alter local interest.

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\textsuperscript{443} Such a change was proposed by the state at least as far back as in City and Town Centers, \textit{supra} n. 20 at 79. For a discussion of how such an amendment at ch. 774 might be structured, see B. Parker, \textit{An Alternative to Ch. 774}, (unpublished paper, Feb. 1978).

\textsuperscript{444} See Schon, \textit{Beyond the Stable State}, 123 (1971).
The first option questions the legitimacy of local regulation. Measures of legitimacy can be set through the enactment of state standards or through the enactment of various dynamic tests. The second option seeks to induce local reform through the offering of incentives. Where these incentives cannot overcome local resistance to growth they may still be important as partial compensation for the disparities created by exclusionary policies. Both of these options should be used as neither one can be sufficient on its own.
CHAPTER VI

Summary and Recommendations

This chapter will attempt to build on the analysis done thus far and to give specific recommendations as to what actions should follow. It will not posit some ideal form of state intervention, but will rather propose an agenda of the important issues that need to be addressed and ways these issues should be approached.

A. In Retrospect: An Institutional Perspective on What Went Wrong

The birth of Executive Order No. 215 is traceable to the frustration of key policy-makers with the failure of the legislative process to implement a comprehensive response to the growth policy issue. The felt imperative to "do something" lead to the search for ways to leverage available means. What emerged was an administrative practice to withhold funding from

Aside from other obvious faults, such an approach would be of little value. To have a chance of succeeding, an attempt to solve the problem of local land use policy must, of course, emerge from an open political process and not out of the head of one outside observer.
communities in the attempt to induce local land use policy change.

The administrative practice of withholding funds borrowed heavily from the incentive-based, process-oriented theory that underlay the proposed legislative initiative. But the form of the intervention as executive fiat and the reliance on available means necessarily altered the essence of that intervention. Yet there appears to have been a lack of reflexive thinking as to what this transformation would mean. Some of the goals behind the proposed Balanced Growth and Development Act were simply broken out and given the particular imprint of the administrators involved. There was little rethinking as to whether these goals made sense on their own and little open debate as to their particular form. The exact goals that 215 would be used to achieve seemed to have been either ignored or suppressed.

There was also a marked absence of critical analysis as to how the 215 mechanism could have worked, a fact which seems surprising in retrospect given its inherent structural limitations. Even if these limitation were not realized from the start, they should have been apparent during the earliest stages

Note, for example, that the promulgation of the policy as an executive order diminished potential public acceptance of the state intervention. A program with systematic goals and comprehensive application was transformed into one comprising essentially one-on-one confrontations between the state agency and selected municipalities based on criteria and goals determined entirely by the agency. The reliance on available means constrained not only the incentives the state had to offer the towns, but also the form and scope of the actions that the towns could offer in return.
of its implementation. But after 215 was born, it began to take on a life of its own. The initial goals behind the withholding policy were partially suppressed by the new goal of justifying its existence. Success became measured by the ability to exact agreements from the towns and not by the substance of what those agreements entailed; and bargaining-in-appearance masked little bargaining-in-fact. Overall, the role of the executive order could be said to be to uncover just enough conflict to impress us how the order has succeeded when this conflict is purportedly resolved through the state-local agreements. If this analysis is correct, where should we go from here?

B. Whither 215?

1) Clarification of Goals

One of the biggest deficiencies in the 215 process is a lack of clarification of the goals that the withholding of the discretionary funding is intended to serve. The scope and magnitude of the incentives that 215 has to offer are dwarfed by the range of ends it has attempted to accomplish. At one time or another, 215 was intended to be used or was in fact used to attempt to achieve all of the following goals:

- raising of public consciousness
- educating municipalities as to ways they can accommodate growth with less disruption
- overcoming opposition to the siting of subsidized housing
- lowering the cost of housing
- increasing the supply of housing built
- improving the efficiency of use of state funded capital improvements
- preserving local control
- compensating municipalities for some of the impacts of new housing development
In attempting to serve all of these goals, the order risks serving none of them.

This is not to say that the state should resign itself to interventions that serve a single purpose. Indeed, one of the most important roles of any planning intervention is to uncover ways that conflicting interests can be mediated and multiple ends can be achieved. But attempts to mediate conflict must be tempered with a realistic assessment of what can be achieved given the underlying structure of interests and a clarity of purpose that keeps track of the goals that should be served. Where conflicts cannot be resolved, it is the planner's duty to point this out. A pretense of successful conflict resolution in such a situation is both self-deluding and destructive in its suppression of other initiatives.

It is imperative that the state resolve which of the many goals should be served and to focus on how the goals of highest priority can be served. Despite the self-evident character of this imperative, it seems to have been largely ignored during the formulation and implementation of 215.

2) General Land Use Policy Reform

The impact of restrictive, local growth policies presents a strong case for state intervention. The existence of uneven patterns of growth results in inefficient use of resources and significant intermunicipal inequities. Moreover, while the effect of restrictive policies on the overall supply and price of housing may be relatively small, it may still be significant in light of the fact that it is within the control of government.
Even where the state chooses not to influence the pattern of growth directly, it is appropriate to channel state money where growth occurs. The biggest irony of Executive Order No. 215 is that it has not been structured or administered to achieve these ends.

The executive order is based on an informal bargaining model under which trade-offs made by the parties in interest are expected to produce a fair, efficient, and politically acceptable solution. But for at least the following reasons, the executive order appears to present a singularly inappropriate situation for bargaining:

- the state is not offering enough to effect the desired result
- local officials doing the bargaining do not have the authority to produce the desired result
- noncompliance with any bargained agreement is difficult to measure
- enforcement mechanisms present are of questionable effectiveness.

Both sides to the bargaining appear to be conscious of these deficiencies. The state feels constrained from asking too much at the same time that the towns are willing to go through the bargaining process—which is little more than a minor bureaucratic delay—in order to obtain their funding. Any initial goals of intermunicipal redistribution to compensate for the impact of growth are subverted by EOCD's release of the

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447 See e.g., M. O'Hare, L. Bacow & D. Sanderson, Facility Siting and Local Opposition (1983).
funding no matter the lack of substantive reform obtained.

"Bargaining" directly with town meetings through the issuance of ultimatums by the state could solve some of these deficiencies and might allow a direct test of the importance of the others. Such a direct approach would undoubtedly produce problems of its own. But query to what degree these problems—such as increased confrontational character of state-local interactions--simply manifest conflicting interests that are otherwise buried. Put another way, any reasons for rejecting this direct approach may call into question what can be achieved through a bargaining process in general.

In sum, an approach that is based on tying incentives to future promises of local reform does not seem advisable. A preferable alternative would be simply to tie the incentive or compensation payments to the amount of housing development that a community has accepted and/or to the present state of its land use policy. The need for bargaining would be obviated, communities would simply decide how much growth to accept or what policies to enact in the face of the incentives offered. Undoubtedly, some municipalities would choose not the meet state standards, but these municipalities would forfeit their claim to the state payments. Other communities would at least receive partial compensation for the impact of development.

The present bargaining scheme has at least the appearance of measuring local action by the particular desires of the state officials. A mode of state intervention based instead on measuring local action against past performance and/or the present state of the community's policies should be perceived as
less arbitrary. With due investigation and drafting, flexible standards could be formulated that checked agency arbitrariness without precluding flexibility. The original EOCD building permit provides a useful model for further study as a measure of past performance.\textsuperscript{448} The examples listed in the "what are some examples of exclusionary zoning practices" section of the guide to 215 provides a useful starting point for further investigation of standards to measure the current state of a community's land use policy.\textsuperscript{449}

3) \textbf{Subsidized Family Housing}

It can be argued that EOCD has in fact chosen which of many possible goals the withholding policy should serve. From its origins as an instrument of general land use policy reform, 215 has been narrowed into a device that attempts to site subsidized family housing in communities that have none. This goal may of course merit EOCD's narrow emphasis. But this emphasis should be reviewed in light of the following constraints.

(a) \textit{local opposition still important}: At its best, 215 can prompt local housing authorities to make funding application they

\textsuperscript{448}See discussion at p. 90 \textit{supra}.

should have been making anyway, and gain an endorsement of any proposed development from other local officials. The executive order cannot itself locate subsidized housing where town meeting approval is needed. Moreover, to the extent that 215 is seen as coercive, its application could increase rather than decrease local opposition. Even where subsidized housing is developed, local opposition may prevent its successful use.

This does not mean, of course, that state planners must or should give in to local opposition. It does, however, force the issue of how the state should best focus its efforts to use its limited resources to achieve the most good.

(b) housing funds are limited: State housing subsidies are limited in supply. Because of this fact, 215 embodies a substantive policy of where subsidized family housing should be built rather than a policy that it should be built. The goal of seeing that every municipality accepts some subsidized family housing may remain preeminent, but this decision should be made in light of the trade-offs that must be made. Specifically, locating public housing where it will be successful may not be

450 In fact, many communities are applying for subsidized housing funds on their own, including some towns that were triggered into the 215 process. See e.g., Reading case study at p. 30 supra.

451 See e.g., Lincoln case study at p. 27 supra.

452 See e.g., Groveland case study at p. 42 supra.

453 There is a possibility that public housing would garner increased fiscal support if successful sitings of such housing increased.
congruent with the goal of effecting the broadest distribution of such housing.454

(c) alternative means of accomplishing the same ends: The public housing goals behind 215 could potentially be served through alternative means. For example, there may be other ways of "selling" the ch. 705 scattered site housing program to municipalities. Further, incentives could be directly tied to accepting subsidized housing development within a community instead of being tied to the promises of local officials to support such development.

EOCD has focused on the acceptance of subsidized, family housing development within a community, while virtually ignoring the presence of rental assistance programs. A full assessment of the alternatives would have to address whether this emphasis makes sense. If rental assistance subsidies engender less local opposition, perhaps this says more about the relative

454 Measuring the success of public housing is a difficult conceptual and empirical question that this paper has no pretensions of answering. We simply raise the question in an attempt to show that the implicit locational assumptions behind the administration of 215 are far from self-evident. Any allocation of scarce resource must pay particular attention to where the expenditure of that resource can do the most good.

Note that the wing of EOCD that administers 215 has sought to ensure that applications for state subsidized, family housing funds from communities that have signed agreements under 215 be given priority over other applications. This seems but another step to justify the 215 intervention by hiding its deficiencies. Giving these towns priority could have the effect of preventing public housing where it is most needed. It may also have the perverse effect of withholding state housing subsidies from towns unless they concurrently apply for other discretionary funding.
desirability of rental assistance than the need to overcome opposition to subsidized development.

C. Beyond 215

1) Statutory Incentive or Compensation Schemes

Assuming they could be enacted, statutory incentive schemes would have two significant advantages over administrative approaches. First, they might be able to provide the level of incentives and the legal structure to effect substantial local change. Second, the public debate surrounding the passage of such a bill could be as important as the substance of any measures enacted. Administrative interventions such as 215 suffer a lack of public exposure from those communities that have not been directly affected. Statutory enactments also carry with them broader based political support and hence increased moral weight than mere administrative promulgations.

But statutory incentive schemes based on obtaining promises as to future local action would encounter similar problems as 215. A system linked instead to indicators of past growth or measures of current policy would be preferable here as well. An appropriate change in the local aid formulae would be one of the simplest solutions, though perhaps one of the hardest to enact. An amendment of the discretionary funding statutes to include a test of economic need is also advisable.

2) Constraining Local Discretion

In at least some areas, the most effective form of state intervention would be the addition of state statutory standards as to what is legitimate local regulation. This area merits
increased state consideration in spite of the controversies that are likely to be created. State intervention could range from the enactment of simple "hard" standards to that of more general and/or more elaborate tests of legitimacy. One of the more elaborate schemas would be to expand the scope of ch. 774 beyond merely subsidized housing. Such a change would of course engender substantial political opposition even if the statute were changed to accommodate more local planning interests, but warrants further study.455

3) **Education goals and statutory authorization**

In Chapter III we discussed the goal of helping a municipality image ways of perceiving its full range of options.456 The executive order attempts to serve this goal once a community's attention is held through the withholding of the relevant funding. But the confrontational setting may itself impede the success of these efforts. This raises the question of whether the educational goals could better be served in other ways. One answer might be simply to authorize local action that

455 Note that housing advocates might produce the most opposition to an alteration in ch. 774. Compare the case of rent control which virtually all commentators agree is an inefficient means of subsidizing rents, but which remains in place because the supporters of rent subsidies can obtain no guarantee of a better program being enacted. With pro-housing forces opposing changes that could possibly weaken it and anti-growth forces opposing changes that could possibly strengthen it, ch. 774 may present the most severe form of entrenchment.

456 See discussion at p. 106 supra.
could reduce the cost of local housing or to accommodate growth in less disruptive ways. The statement of authority may be as important as any actual grant of authority; municipalities already have broad authority but seldom are able to think in terms of their full range of possibilities. One example of where a statute has been enacted to help stimulate local imagination and initiative is the amendment to the zoning enabling act authorizing cluster development. An example of such an amendment that could be enacted is the authorization of floating zones where normal zoning and subdivision standards would be waived in favor of special design or performance standards.

4) Growth Controls

The issue of growth controls is treated separately because of its importance and because it includes aspects of each of the three subsections above. The state should strongly consider the adoption of a growth control enabling act. Municipalities already have the power to enact "time based" growth controls. If this power were simply taken away, it is likely that municipalities will continue to find ways of excluding growth

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458 Such a scheme might also be accomplished by authorization for restrictions on the sales price of housing built under the scheme to ensure public recapture of cost savings, but the economic incidence of this inclusionary zoning variation should be given further study.

through the imposition of dead weight costs. Further, there are important positive gains through allowing communities to control growth directly.\textsuperscript{460} Therefore, there appear to be few reasons not to enact a growth control enabling act. The difficult substantive question is what standards and mechanisms should be used to ensure that the power to control growth is not misused to exacerbate overall housing restrictiveness. Chapters D and E touched on one possible answer, the automatic suspension of growth control authority once a community's share of the regional growth fell below a specified standard.

Perhaps a more difficult problem is the political question of how to enact such a growth control enabling act in the first place. Proponents of growth are likely to oppose such legislation because of their fear of increasing local power of excluding growth. Opponents of growth are likely to oppose restrictions on a power they know they already have. Still, it is not impossible to envisage the enactment of such a statute, and the investigation of ways to organize political support for this legislative change should be given high priority.

\textsuperscript{460}A comprehensive growth management system could ensure that no community accepted a grossly disproportionate amount of growth as well as avoid the inefficiency of too rapid growth. See discussion at p. 129 \textsuperscript{supra}.
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The conclusions drawn in this paper may give scarce cause for optimism. Note, for example, that there is little indication that the environment for enacting legislative reform has improved. Indeed, this problem may be far deeper than legislative inertia or some other pathology of the legislative process. It may simply reflect the conflicting interests present.

Critical analysis of the interests at stake always bears the risk of inducing fatalism or paralyzing disillusionment. But what we lose in optimism, we gain in self-understanding. And perhaps from these roots of self-understanding can ultimately spring social reform. It is with this faith that we must continue.