Diversity Task Force
Town Hall
173 Main Street
Groton, Massachusetts 01450
selectboard@grotonma.gov

Regular Session Minutes

Date/Time: March 17, 2022 at 7 pm
Location: Virtual Meeting
Members in attendance: Raquel Majeski, Gordon Candow, Bhaskar Gupta Karpurapu, Susan Hughes, James Moore, Amy Degen, Deirdre Slavin-Mitchell, Michelle Collette, and Fran Stanley

Raquel Majeski called the meeting to order at 7:01 pm and was pleased to see that this evening's meeting had full attendance by Committee members. Members introduced themselves via a roll call and cameras for committee members were on.

Agenda Item: Approve Minutes

James Moore moved to approve the February 24, 2022 draft minutes. Michelle Collette seconded and the motion carried (8:0:1) by roll call vote of Hughes – aye, Moore – aye, Gupta Karpurapu -- aye, Slavin Mitchell – aye, Stanley – aye, Collette – aye, Degen – aye, Majeski – aye, and Candow – abstain.

James Moore moved to approve the March 3, 2022 draft minutes. Deirdre Slavin-Mitchell seconded and the motion carried (8:0:1) by roll call vote of Hughes – aye, Moore – aye, Gupta Karpurapu -- aye, Slavin Mitchell – aye, Stanley – aye, Collette – aye, Degen – aye, Majeski – aye, and Candow – abstain.

Raquel Majeski reiterated committee policy to follow the Open Meeting Law (OML) by having working groups (a/k/a subcommittees) post agendas with the Town Clerk's office and generate minutes. Michelle Collette asked and clarified that if 5 committee members attend any working group meeting, then because 5 members represent a quorum for the full committee then the meeting will be considered a meeting of the Diversity Task Force as a whole. Since committees cannot meet without posting an agenda 48 hours in advance under the OML, having a quorum of the full committee when an agenda has only been posted for the working group is problematic. So long as the 'extra' committee member is prepared to withdraw from a working group meeting if it looks like there might be 5 committee attendees, then this should resolve the OML issue.

Agenda Item: Recap Listening Sessions on Town Seal

The first listening session was held at the Groton Center (163 West Main St.) on March 8th at 2 pm. Michelle Collette and Becky Pine hosted the event. James Moore operated the PowerPoint presentation. Fran Stanley was also there. Michelle Collette said that there were about 20 people in attendance. Attendees liked the PowerPoint presentation and Michelle Collette thought that the slides set a respectful tone for the discussion. The result, she said, was a good discussion. Michelle Collette added that the event was held one day after the Select Board voted unanimously to withdraw the Town Seal from the warrant for Town Meeting and Listening Session attendees were disappointed that the matter would not be discussed at Town Meeting. James Moore reminded that in order to change the seal, a Town Meeting vote will be required. James Moore said that he answered an emphatic 'no' to one question about whether Groton's effort was part of a larger group nationwide to change things.

Susan Hughes asked if the Diversity Task Force was notified of the Select Board's intention to consider removing this warrant article. And, does the Select Board need to get back to this committee regarding its decision. The answer to both questions was 'no'.

Deirdre Slavin-Mitchell said that she did appear on *Groton Matters*. She said that Jack Petropoulos did a great job but that she was taken aback by the level of discord that she received. She thought that the Diversity Task Force effort was balanced but this is not what she heard back from the participants. Other than that comment, Deirdre Slavin-Mitchell said that she is going to let the program speak for itself. Raquel Majeski will share the link to the broadcast (https://www.grotonmatters.com/). Michelle Collette said that she had seen the broadcast

and thought that Deirdre Slavin-Mitchell did a good job. Michelle Collette added that the back and forth was more contentious than expected.

Agenda Item: Housing working group (subcommittee) update

The housing working group met on March 14, 2022. Fran Stanley, Deirdre Slavin-Mitchell and Michelle Collette participated in that meeting. Fran Stanley updated the group on three housing matters that are currently before the Town:

1. Heritage Landing: the proposed MGL Chapter 40B development of 40 homes (10 to be affordable) on Cow Pond Brook Road.

2. MBTA Communities: new state law requiring MBTA communities (Groton is one) to zone for 'by right' multi family housing or lose access to certain state grants.

3. Citizens Petition: warrant article for the Spring Town Meeting (April 30th) that both updates a zoning bylaw by changing the definition of age restricted housing while also removing the affordability requirement.

All three issues were discussed in greater detail at the March 14, 2022 housing subcommittee meeting and draft minutes for that meeting have been shared. Tonight, the discussion touched on each item but the question for the whole committee is what should the Diversity Task Force's role be on these matters.

Deirdre Slavin-Mitchell spoke up for the importance of education and that this could be an ongoing role for the Diversity Task Force. Michelle Collette highlighted the issue of fair housing. Fran Stanley commented that affordable units must be rented or sold using fair housing standards where equality of opportunity is one of the requirements. Michelle Collette added that for issues coming before Town Meeting, then the Diversity Task Force can vote to take a position as a committee on warrant articles and then explain our committee's reasoning. Hearing from various committees on Town Meeting floor on particular warrant articles can help attendees to understand the issues before they vote.

Heritage Landing is a residential subdivision proposed under state multi-family zoning. MBTA Communities is a state law attempting to encourage towns and cities to enact multi-family bylaws. The citizens petition is a request for Groton to modify one of its existing multi-family bylaws for seniors. James Moore asked about what are towns like ours doing with respect to affordable housing. Specifically, why are there so many players and how does that help. Fran Stanley said that some communities like Acton produced a lot of affordable housing of various kinds. Groton has done a good job with its inclusionary zoning bylaw that has produced a lot of homeownership affordable units. MGL Chapter 40B contains a 15% profit limitation and anecdotally this restriction has been a real constraint. The multi-family zoning called for under the MBTA Communities legislation does not have a profit limitation. Michelle Collette observed that original 1969 law (MGL Chapter 40B) was popularly known as the "Anti-Snob Zoning Act".[1]

Raquel Majeski and Amy Degen expect to call a meeting of the community outreach working group soon.

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[1] See first three pages of the attached legal review for an explanation of the existing conditions in 1969 that prompted the passage of the MGL 40B (Rodgers, Allan G. (1970) "Chapter 18: Snob Zoning in Massachusetts," Annual Survey of Massachusetts Law: Vol. 1970, Article 21.) Available online at https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1454&context=asml.

Agenda Item: Annual Report

Raquel Majeski said that she listed committee members' affiliations on the annual report. Raquel Majeski explained that for the Diversity Task Force specific components of diversity were intentional in its make up so it is important to name those affiliations. The group offered a few edits to the draft annual report.

Michelle Collette moved to submit the annual report as revised in the meeting. Deirdre Slavin-Mitchell seconded and the motion carried (9:0) by roll call vote of Hughes – aye, Moore – aye, Gupta Karpurapu -- aye, Slavin Mitchell – aye, Stanley – aye, Collette – aye, Degen – aye, Majeski – aye, and Candow – aye.

Meeting adjourned at 8:07 pm.

Second Listening Session: Tuesday, March 29, 2022 at 7 pm at The Center (163 West Main Street)

Next regular meeting: Thursday, March 31, 2022 at 7 pm.

Notes by Fran Stanley

Annual Survey of Massachusetts Law

Volume 1970 Article 21

1-1-1970

Chapter 18: Snob Zoning in Massachusetts

Allan G. Rodgers

CHAPTER 18

Snob Zoning in Massachusetts

ALLAN G. RODGERS

§18.1. **Introduction.** That there is a woeful shortage of decent housing throughout Massachusetts, and most especially in the Boston area, needs no documentation. Despite this long-standing situation, since 1954 there has been no family housing[1] built in the Commonwealth, except in Springfield and Brookline. There is a wide range of federal and state programs to construct new housing, but it takes more than what the available programs provide to work out the complex process of bringing together the builder, a suitable site, local approval and financial assistance to a point where the housing can be built. It takes more money and fairer zoning. Some money is now available, particularly at the state level,[2] but winning local zoning approval for multiple-unit housing, especially if it is for persons of low or moderate income, remains extremely difficult.

Land use controls, once thought an unwarranted interference with private property rights, have more recently been seen by cities and towns as indispensable to preserve their "character," their visual amenities and their property values. They also have the effect of screening out lower income groups and members of nonwhite races. And they form an important part of each city's or town's jealously guarded right of self-governance.[3] Thus, even though zoning began in a less crowded world as the savior of open spaces, pleasing appearances and sound planning, it now operates as social policy to determine in good measure where certain economic groups will live. Moreover, the status quo in Massachusetts zoning has been lent an enormous advantage by the state-imposed requirement that any zoning change

ALLAN G. RODGERS is Codirector of the Massachusetts Law Reform Institute, a federally financed law reform center in Boston. Alexander Kovel and Mr. Rodgers, of the institute, were the principal draftsmen of Chapter 774 of the Acts of 1969, the Anti-Snob Zoning Act.

§18.1. [1] Family housing is subsidized housing for families of low income, as contrasted with housing for elderly persons of low income, which has not suffered the standstill of family housing during the past 15 years.

[2] The 1970 Massachusetts legislature, by Chapter 855 of the Acts of 1970, increased the bonding capacity of the Massachusetts Housing Finance Agency from $50 million to $500 million.

[3] Of all the states, only Hawaii, with statewide zoning, has escaped the virtually exclusive local control over land use which characterizes state laws on the subject.

must be approved by a two-thirds vote of the local legislative body.[4] It is usually not difficult for opponents of multiple-unit housing to muster one-third of the votes, particularly in the smaller towns. If the much-needed new housing is to be built, zoning laws have to be made fairer and more flexible.

One might ask at this point why long-accepted zoning concepts should be swept away when most of those who now need housing live in urban areas where zoning restrictions are not as great. First and foremost, the assumptions set forth in the question are probably not valid. Although we will have to await the results of the 1970 census for confirmation, a recent study suggests that more than half of the poor in Massachusetts live outside the cities.[5] Surveys in some of the more affluent suburbs of Boston have turned up a surprisingly high number of persons who could qualify for public housing. Moreover, the recent opposition to scattered-site low income housing in some sections of Boston and zoning controversies which have erupted in smaller cities like New Bedford and Pittsfield illustrate that obtaining approval for such housing in the cities can be as difficult as in a tightly zoned suburb.

There are further reasons, however, why it is unwise and unfair to place most of the burden on the cities. There is more available and less costly land for low-cost housing in the suburbs and small towns. Jobs are tending to move out of the cities and into the surrounding areas, as the development of Routes 128 and 495 (the circumferential highways around Boston) illustrates. And, the maintenance of income barriers to housing mobility through zoning and other local restrictions creates an economic and racial "ghettoization" that has serious social consequences. Land use reformers, after all, have their social policy concerns too. Their basic concern is not to force racial or economic integration as an end in itself, but simply to allow all persons a reasonably large range of choices as to where they wish to live. Everyone should be familiar with the elderly couple who can no longer afford to live in the town in which they have spent all their lives, and with the black family whose father cannot accept a better job outside the city because the family cannot find suitable housing near his prospective place of work. But zoning should not be so completely obliterated as to transform the towns into urban areas. What is needed is a delicate balance between retaining the sound planning notions of local zoning and allowing persons in urban-suburban regions, regardless of their

[4] G.L., c. 40A, §7, provides that any change in a zoning ordinance or by-law must be adopted by a two-thirds vote of the city council or town meeting. If the owners of at least 20 percent of the subject land and of adjacent land in any city file a petition objecting to a proposed change, the change must be approved unanimously in a city council having eight or fewer members and by a three-quarters vote in a council having nine or more members.

[5] Beer and Barringer, The State and the Poor 32 (Table 2-5), 36 (Table 2-9) (1970). In 1960 approximately 55 percent of the poor resided in cities and 45 percent in suburbs.

income, a chance to choose their habitat from a greater diversity of housing.

§18.2. Chapter 774 of the Acts of 1969. The Massachusetts legislature passed the popularly named Anti-Snob Zoning Act in 1969,[1] after a number of perilously narrow votes in both houses, as a result of a curious coalition of urban conservatives and suburban and rural liberals.[2] It was drafted during a series of conferences between representatives of the legislature's Urban Affairs Committee, Speaker David Bartley's office and outside persons interested in housing. Its sponsors were as surprised as anyone when it became law. The concepts and definitions of Chapter 774 are unique, and the act was simply superimposed on the existing zoning law. It suffers from vagueness and even obscurity. Nevertheless, its importance as a symbol of the state's impatience with exclusionary zoning should not be underestimated.

Basically, the act establishes a procedure to enable the state to override the unwarranted refusal of a city or town to permit the construction of low or moderate income housing. It works as follows: A qualified builder[3] wishing to build low or moderate income housing[4] may file with a local board of appeals an application for a comprehensive permit, instead of filing separate applications with each local agency having jurisdiction over various aspects of the project (such as the planning board, board of health and building commissioner). The statute permits the board of appeals to grant a single permit after receiving the comments and recommendations of the other boards. The statute also contains specific deadlines for decisions by the board of appeals and upon appeal.[5] These are designed to expedite action on such applications where previously a builder might have suffered delays of months and even years in negotiating approvals from various boards.

How a board of appeals decides whether to grant a comprehensive permit is not clear in the language of the statute. It was the intention of the draftsmen to ask the board to balance the need for the type of proposed housing against the valid planning objections to the details of the proposal. The board has the right to impose upon the builder any conditions it wishes (short of denying the application) so long as

§18.2. 1 Chapter 774 of the Acts of 1969, establishing new §§20 through 23 of G.L., c. 40B, and §5A of c. 23B. The act will be occasionally referred to in this chapter as Chapter 774.

2 The political story of the act's passage is told in a paper entitled "Watch Out Suburbs—Here Come the Cities!" by Representative Martin Linsky of Brookline, the principal legislative sponsor of the act, and Robert Turner, who covered the story for the Boston Globe.

3 G.L., c. 40B, §20, limits those who can invoke the procedure to public agencies, nonprofit organizations and limited dividend organizations.

4 The statute itself does not define these terms but incorporates the definitions contained in the federal or state program under which the housing is subsidized. See G.L., c. 40B, §20.

5 G.L., c. 40B, §§21, 23.

those conditions do not make the project *uneconomic.*[6] Then, if the conditions make the project uneconomic, the board can still validly impose conditions which are *consistent with local needs.*[7] This standard requires the board, as a matter of planning judgment, to grant the permit if the "regional need for low and moderate income housing considered with the number of low income persons in the city or town affected" outweighs the local need to "protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces."[8] In evaluating those local needs, the municipality must not apply different standards to subsidized housing than it does to unsubsidized housing.

The statute further defines three exemptions under which requirements or regulations imposed on an applicant for a comprehensive permit will automatically be "consistent with local needs," where

> (i) low or moderate income housing already exists equal to more than ten percent of the housing units in the city or town reported in the most recent decennial census; or
>
> (ii) such housing exists on sites comprising one and one-half percent or more of the city or town land zoned for residential, commercial or industrial use (excluding public land); or
>
> (iii) there has already commenced in that calendar year the construction of such housing, within the city or town, on sites aggregating more than three-tenths percent of land so zoned as in (ii) or on ten acres, whichever is greater (including the site proposed in the subject application).[9]

The value of these exemptions is that they define precisely the outer limits of a municipality's obligations under the statute and permit it to do some intelligent, long-range planning about how and where the necessary housing should be built.

If a locality denies a builder's application for a comprehensive per-

[6] G.L., c. 40B, §23. *Uneconomic* is defined as "any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development or on the amount or nature of the subsidy or on the tenants, rentals and income permissible, and without substantially changing the rent levels and units sizes proposed by the public, nonprofit or limited dividend organizations." See G.L., c. 40B, §20.

[7] G.L., c. 40B, §23.

[8] G.L., c. 40B, §20.

[9] Ibid. As of October, 1969, the Metropolitan Area Planning Council, in a memorandum entitled "Chapter 774: An Interpretive Analysis For Cities and Towns," concluded that none of the 109 communities within its Metropolitan Boston area qualified under standard (i) and only Malden qualified under standard (ii).

mit, or if the builder feels that the permit is improperly conditioned, he can appeal to the five-member Housing Appeals Committee within the Department of Community Affairs. The committee conducts a de novo review, with hearing, of the action by the local board of appeals; and if it finds that the board's action in the case of a denial is not consistent with local needs or, in the case of conditional approval, that the conditions make the project uneconomic and are not consistent with local needs, it may order the local board to grant or modify the permit.[10] Any appeals thereafter go to the Superior Court.[11]

There are a number of problems with Chapter 774 which will have to be solved by legislative amendment or by administrative or court action:

(a) The act nowhere explicitly gives a town board of appeals the power to override zoning by-laws.[12] It was clearly the intention of the sponsors of the act to give the boards this power, but a legislative preamble so stating, and other suitable language, were eliminated as the bill passed through the legislative labyrinth. It would greatly weaken the force of the bill if the power were not present.[13]

(b) Chapter 774 may not be available for turnkey developments, or for leased housing or rental assistance programs. The most crucial of these is turnkey, which has become popular since its legality was endorsed by the Supreme Judicial Court.[14] To accomplish turnkey, a housing authority advertises for and obtains a letter of intent from a private builder who constructs the desired housing and then sells it to the housing authority. Such a development may be covered by Chapter 744, since *low or moderate income housing* is defined as subsidized housing "built *or operated*" (emphasis supplied) by a housing authority.[15] But the statute is unclear whether the housing authority or the builder should be the applicant for a comprehensive permit, because it states that the applicant must be a public agency "proposing to build"

10 The statute also provides that the Appeals Committee may overrule the local board of appeals if it finds that the board's denial of a permit was "unreasonable." This additional standard was added late in the legislative process, and probably has no independent meaning since the more specific standards governing reasonable conduct by boards of appeals are contained in the definition of *consistent with local needs.*

11 G.L., c. 40B, §23.

12 The same is not true for cities, where zoning changes are made by the city council, because a city council is one of the "local boards" (e.g., health) which the board of appeals displaces in making decisions on applications for comprehensive permits. A town meeting, which must approve zoning changes in the towns, is not within the definition of *local board.* See G.L., c. 40B, §20.

13 One can argue that if the local board of appeals has no power to vary zoning, its denial of a permit requiring a zoning change would never be "unreasonable." Cf. note 12 *supra.*

14 Commissioner of Labor and Industries v. Lawrence, 1970 Mass. Adv. Sh. 1323, 261 N.E.2d 331.

15 G.L., c. 40B, §20.

low or moderate income housing.[16] The most sensible solution is to recognize that the housing authority is the real party in interest in any turnkey development and that it is the appropriate applicant. Even so, statutory clarification will be necessary to remove all doubts.

(c) One of the key parts of the definition of *consistent with local needs* is the "regional need for low and moderate income housing." Yet the word *regional* is nowhere defined in the statute. By regulation, the Department of Community Affairs has defined *regional need* as

> the shortage of housing for families and individuals with incomes within the eligibility limits of the State or Federal program subsidizing the proposed housing, for the entire Standard Metropolitan Statistical Area of which the city or town is a part, as defined by the U.S. Bureau of the Census; or if the city or town lies outside any such area, for the entire regional planning district created by Chapter 40B of the General Laws, or any other special act.[17]

The difficulty with this is that the need in a region such as Metropolitan Boston is so great that it would probably not be satisfied even if all cities and towns other than Boston satisfied their numerical quotas set forth in the definition of *consistent with local needs.* Only experience with the act will tell whether the "region" has been defined too broadly by the regulation.

(d) The definition of *consistent with local needs* must be revised and clarified. The language should be reworded to make clear the balance expressed above; and, other planning factors, such as the proximity of the housing to essential services and the public access and traffic impact of the housing, should be added as legitimate concerns of an affected city or town. Increased municipal financial burdens created by new housing, such as new schools and more costly local services, should not be proper factors.

(e) The standards "reasonable" and "unreasonable," now governing the Housing Appeals Committee's review of local adverse decisions, should be stricken as unnecessary.[18]

(f) The act does not specify what the builder must present to the board of appeals so that it can properly assess the application. Since the builder must simultaneously satisfy the various boards which would otherwise have jurisdiction over the proposal, he probably has to prepare far more extensively (and expensively) than if he were merely seeking a zoning change. On the other hand, the intelligent use of a conditional permit could leave the appeals board with enough information to assess properly the merits of the scheme, and the details of

[16] G.L., c. 40B, §21.

[17] Rules and Regulations for the Conduct of Hearings by the Housing Appeals Committee, pt. II, §1.b.(g) (July 1970).

[18] See note 12 *supra.*

compliance could be worked out at a later time. A further practical difficulty is that the Federal Housing Administration thus far refuses to recognize the possibility of zoning change through an application under Chapter 774 for purposes of processing a request for financing. The result is that an applicant for a comprehensive permit who seeks FHA financing can only represent to the board of appeals that he has applied for financing, and he does not have a commitment as to what the FHA will require in the way of site, design and building standards. Efforts are under way to convince the FHA to change its attitude, but, until it does, the only solution is for the board to grant a permit conditioned on the applicant's later obtaining suitable financing. A final issue is the first that has received a definitive clarification from the Housing Appeals Committee. The first two appeals (the only ones as of October, 1970) filed with the committee, both filed by the same developer, raised the issue of whether a builder who intended to form a limited dividend organization, but had not yet done so, could properly file for a comprehensive permit. Boards of appeals in Billerica and Winchester said no, but the Housing Appeals Committee, backed by an opinion of the attorney general that the Department of Community Affairs could by regulation define the term *limited dividend organization*, disagreed.[19]

After a year of operation the long-range impact of the act is uncertain. No housing has been built or even committed that is a direct result of the statute. Even though there was a flurry of interest late in 1969 and early in 1970, there have been only a small number of applications for comprehensive permits. Because of fears of adverse decisions under, or even of the invalidity of, Chapter 774, most private builders have steered away from it, preferring to let someone else bear the expense and delay of obtaining a definitive court test of the act. Nonprofit sponsors are as yet not well enough organized or financed to mount the challenge; and public housing authorities, by and large, lack the political will. Thus, it appears that there will be no immediate upswing in housing activity attributable to the act. But once the act is clarified and tested favorably, the consensus among those working in the field is that it could have significant results.

The shock effect of the act has, however, produced a new interest on the part of both cities and towns in examining what their obligations are to help produce more low-cost housing. A number of towns have

[19] The attorney general ruled that the department could properly flesh out terms in Chapter 774 when such "would facilitate and aid in the discharge of the [Housing Appeals] Committee's statutory functions." Op. Atty. Gen. 3 (July 9, 1970). The department had defined *limited dividend organization* as "any applicant which (a) proposes to sponsor housing under Chapter 40B, and (b) is not a public agency, and (c) is eligible to receive a subsidy from a State or Federal agency after a comprehensive permit has been issued." Rules and Regulations for the Conduct of Hearings by the Housing Appeals Committee, pt. II, §1.b.(f) (July 1970).

commissioned special studies of their housing needs, and 18 new public housing authorities were established in 1970. A number of communities have taken their Chapter 774 "quotas" seriously enough to begin planning how and where the housing will be constructed.[20] For example, the town of Lexington has made tentative plans for slightly more than its numerical quota of subsidized units and has established a special floating "RH" zone which defines the factors and conditions to be considered by the town in evaluating sites and proposals for subsidized housing. However, each proposal must still be approved by the town meeting, and one such proposal, which was endorsed by the planning board, failed to get the two-thirds vote. Similar proposals have met with heated neighborhood opposition even in cities such as Worcester, Boston and Pittsfield. Although the people in the state are reported to favor Chapter 774 by better than two to one,[21] theoretical approval quickly dissipates when one of those "projects" is proposed for "my neighborhood." New discussion and focus on the need for new housing spurred by Chapter 774 will, one hopes, initiate the long process of convincing persons who live in single-family housing that those who will live in nearby subsidized housing are, after all, people much like themselves.

§18.3. **Related 1970 legislation.** The 1970 legislative session saw a wide variety of proposals following up on or relating to Chapter 774, but, when the legislature prorogued at the end of August, none had become law. There was, as might have been expected, a bevy of bills seeking to repeal or drastically weaken Chapter 774. There was also an interesting proposal by Representative Martin Linsky to establish state reimbursement for the increased costs of schools and other municipal services, and for the loss of tax revenue, occasioned by low or moderate income housing built in a city or town.[1] Another significant bill attempted to tackle the issue under the Zoning Enabling Act, independent of Chapter 774. Drafted by a subcommittee of the Boston Bar Association, it received a favorable report from the Committee on Urban Affairs,[2] the incubator for Chapter 774, but did not become law. The bill amends the uniformity clause of the Zoning Enabling Act[3] to

20 The actual number of apartment-type units built as a result of Chapter 774 actually could be much larger than the quotas indicate. Under some government financing programs the builder need only dedicate 25 percent of his units to low or moderate income persons. The rest, presumably, will be higher rent units. Although Chapter 774 does not explicitly state that such a skewed project qualifies, the predominant view is that it does.

21 Becker Research Poll reported in the Boston Globe, July 8, 1970, at 6 (morning edition).

§18.3. 1 House Bill 2240. This is open to the serious objection that it tends to reward those communities which up to now have not been doing much while it gives no credit to those cities and towns which have in the past built such housing.

2 House Bill 5663.

3 G.L., c. 40A, §2.

permit special consideration for local programs for low or moderate income housing. The bill then authorizes localities to establish procedures in their zoning ordinances or by-laws for granting special permits for exceptions for low or moderate income housing, under carefully circumscribed standards. In any city or town that does not have these procedures, the local board of appeals must nevertheless entertain applications for special permits for such housing, and it can reject them only under limited circumstances. The clear incentive is for municipalities to set up their own procedures; either way, the applicant does not have to hazard approval by a town meeting or city council.

Part of the large public housing package prepared by a subcommittee of the Committee on Urban Affairs was strong medicine to be administered to communities that had not moved to solve their housing needs. Under separate bills in the package, communities with an unmet housing need would have to (a) establish a public housing authority or risk action by the Department of Community Affairs in lieu of such an authority, (b) build or commit for buildings in each year units equal to 10 percent of the need, and (c) build approximately one unit of family housing for each five new units of housing for the elderly.[4] Along with the entire package, these proposals passed the House of Representatives intact but were killed late in the session in the Senate Ways and Means Committee. The only amendment to Chapter 774 that received a favorable committee report, making clear the power of the town boards of appeals to override local zoning, was also contained in the public housing package and met a similar fate.

Two other bills, if passed, would have made a significant impact on the production of low-cost housing. A complete draft of a statewide building code[5] was sent to study but may have a good chance of passage during the 1971 SURVEY year. It could significantly facilitate construction of multiple-unit housing and hasten the introduction of component building. Another proposal, the so-called Replacement Housing Bill, combined the governor's community development corporation suggestion with a number of bills providing for the building of housing to replace units taken by public action.[6] A newly created Massachusetts Replacement Housing Corporation was proposed to have condemnation, financing and housing construction powers similar to New York's Urban Development Corporation, but could not, without local approval, build more units in any municipality than had been demolished by public action since January 1, 1967, and not replaced. The bill passed the Senate but died in the House Ways and Means Committee. An important cause of its defeat was a difference of opinion among its backers as to whether the new corporation should be an

4 House Bill 5000, House Bill 5700 (as reported out of the Committee on Urban Affairs).
5 House Bill 5668.
6 Senate Bill 1495.

independent state agency or should be within the Department of Community Affairs.

In sum, legislative activity in the 1970 SURVEY year showed a strong determination to break the housing logjam. Communities which have done little to provide for low-cost housing should take notice that, if they do not respond, the state may devise measures more drastic than Chapter 774 to wrest local control over zoning decisions from those who use their powers for exclusionary purposes.

§18.4. **Constitutional litigation as an alternative approach.** During the 1970 SURVEY year, there has developed throughout the country a strong interest in attacking exclusionary zoning on constitutional grounds. Nationwide organizations such as the NAACP Legal Defense and Educational Fund and the National Committee Against Discrimination in Housing have nurtured and financed test cases and have shared in the development of some promising legal theories. Doctrinally, the easiest first step is to attempt to overturn the refusal of a local community, on racial grounds, to permit the construction of low or moderate income housing. In most situations, opposition to such housing on the grounds of race is circumstantial rather than direct. Two cases employing this approach have reached the federal circuit court level, one succeeding[1] and the other failing.[2]

If it were successful, the theory that the refusal of a community to permit the construction of otherwise sound low-income housing is discrimination on the basis of economic status, in violation of the Fourteenth Amendment, would have the most far-reaching effect.[3] A three-judge court in California, in a case now headed for the United States Supreme Court, has accepted the theory in holding unconstitutional a provision of the California Constitution that requires a referendum before any low rent housing project can be developed.[4] The court held that the referendum requirement was an

§18.4. [1] Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970). The court agreed with the district court's conclusion that city opposition to a low income project proposed for an all-white neighborhood was predominantly racially motivated in light of the fairly extensive and specific evidence of racial bias and the vague and unspecific manner in which other alleged reasons for opposition, such as overcrowded schools and overburdened city services, were presented.

[2] Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), *cert. denied,* 397 U.S. 980 (1970). The court refused to endorse the action of the district court in enjoining on racial grounds a referendum seeking to overturn a city-approved rezoning permitting a low-income project to be built. The court stated that it did not believe that the city's involuntary participation in scheduling the referendum constituted "state action" under the Fourteenth Amendment, and doubted in any event whether such a referendum was open to constitutional attack. The court also noted that the evidence of racial motive was not strong.

[3] A useful beginning in exploring the complex and extremely difficult issues raised by this theory was made in Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan. L. Rev. 767 (1969).

[4] Valtierra v. Housing Authority of San Jose, 313 F. Supp. 1 (N.D. Cal. 1970), *prob. juris. noted,* 398 U.S. 952 (1970).

unjustified discrimination against the poor. Alternatively, it held that, since the actual burden of the provision would fall disproportionately heavily on blacks and other minorities, it violated equal protection on that ground as well.

It is impossible to predict where the law in this area will move. The courts may strike down statutory or constitutional provisions which, like California's, expressly make it more difficult for subsidized than unsubsidized housing to be built. But it is questionable whether courts will choose to overturn referenda or zoning changes which block specific projects where there is no racial discrimination involved and where there is nothing in local or state law which makes it more difficult to obtain approval for low-cost housing than for other housing. It will be instructive to watch these developments, for they illustrate one of the two possible ways[5] in which some progress can be accomplished in states which, unlike Massachusetts, are unwilling to attack the problem through state legislation.

[5] The other is the financial leverage which the Federal Government can exert on local communities to construct low-cost housing, either through mandating units for low income persons in any housing development financed with federal funds or through threatening to withhold federal funds for other local projects, such as construction of sewers or water control facilities or acquisition of land for conservation purposes.