

AFFORDABLE HOUSING V. OPEN SPACE: A PROPOSAL FOR RECONCILIATION

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Abstract: This Article describes the friction in Massachusetts—largely inspired by controversy surrounding the State’s affordable housing law, Massachusetts General Laws chapter 40B—between housing advocates and open space advocates. The sources of this breach are embedded in the State’s land use statutes. This Article reviews the current law and the symptoms of the feud, and it suggests various legislative proposals for the reconciliation of these progressive forces.

INTRODUCTION

Local land use decisionmaking cannot be characterized as conservative or liberal, Republican or Democrat. The vagaries of local politics make such convenient labels impossible. Planning boards are not divided along party lines. Two issues of local concern, however, are clearly on the “progressive” side of anyone’s agenda: affordable housing and open space preservation.

One would assume that advocates for affordable housing and open space preservationists are natural allies.¹ Affordable, decent housing has been a mainstay of the progressive view since the Great Society of Lyndon Johnson.² Open space preservation came to the forefront as a part of the environmental movement of the same period in our nation’s history. In fact, several jurisdictions—notably Oregon, California, and Montgomery County, Maryland—have man-

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¹ Anthony Flint, *Open Space, Not Housing, Is Priority*, BOSTON GLOBE, Feb. 16, 2003, 2003 WL 3380467; Kenneth Rapoza, *Balancing Affordable Housing, Open Space*, BOSTON GLOBE, Jan. 6, 2002, 2002 WL 4105230.

² See President Lyndon Johnson, Great Society Speech (May 22, 1964).

aged to produce affordable housing while preserving valuable open spaces with the support of an alliance of progressive advocates.

In Massachusetts, however, proponents of affordable housing are often most bitterly opposed by those who would prefer open space in lieu of housing. The confrontation often arises in the context of a comprehensive permit application pursuant to Massachusetts General Laws chapter 40B, sections 20–23, the “Anti-Snob Zoning Act” (40B or Comprehensive Permit Law).³ Proposals for affordable housing at a density familiar to Boston’s suburbs have been routinely offered in our smaller, less-developed communities, on sites that are not served by municipal water or sewer.⁴ Once these projects are permitted, there is a resulting decrease in open space.

As this Article will demonstrate, Massachusetts state laws have promoted this feud. By prohibiting exactions of the type allowed in many other jurisdictions, the legislature and the courts have created a jerry-rigged system of horsetrading in which either open space or affordable housing is sacrificed at the expense of the other in permit negotiations. Furthermore, the lack of comprehensive planning, at any level, pits affordable housing proponents against open space preservationists.⁵ Without a comprehensive plan for municipal build-out, all development becomes ad hoc, with no broader vision of the proper balance between affordable housing, open space, or any other municipal or regional concern.⁶ Advocates are forced to go to the barricades parcel by parcel, application by application. The result is animosity between the camps.

The conflict between open space and affordable housing advocates is, for the most part, avoidable. It is Massachusetts’s short-sighted system of land use regulation and utter lack of planning for municipal or regional land use that have created this controversy. This Article suggests revisions to specific statutes, including the Comprehensive Permit Law, 40B, to reduce tension between the camps.⁷ The Subdivi-

³ See Thomas Grillo, *Affordable Housing: The Debate Goes On*, BOSTON GLOBE, Jan. 20, 2002, at H1.

⁴ Recent comprehensive permit applications in Sherborn and Cohasset are examples. The Cohasset application proposes a surface water discharge permit to send wastewater to a nearby wetlands, and, then, downgradient to tidal waters rated “B.”

⁵ See generally Jonathan Douglas Witten, *Carrying Capacity and the Comprehensive Plan: Establishing and Defending Limits to Growth*, 28 B.C. ENVTL. AFF. L. REV. 583 (2001) (discussing how the Massachusetts scheme implements an all-or-nothing approach, which ensures affordable housing at the expense of any environmental regulation).

⁶ *Id.* at 599.

⁷ Low and Moderate Income Housing Act, MASS. GEN. LAWS ch. 40B, §§ 20–23 (2000).

sion Control Law⁸ and the Zoning Act⁹ are also prime candidates for such reform. Moreover, by forging a legal nexus between planning and zoning, the legislature can revise 40B to eliminate many of the bitter confrontations over the development of greenfields for affordable housing. Some of these changes have been considered and rejected in recent legislative sessions.¹⁰ Some are suggested by the recent rule changes promulgated by the Massachusetts Department of Housing and Community Development (DHCD), regarding comprehensive permits.¹¹ Suburban hostility to 40B could be significantly reduced by these modest reforms.

I. THE CAUSES OF THE RIFT—NEEDS OUTWEIGH VISION

Among the reasons for the hostility between advocates for affordable housing and those for open space, none is more compelling than the overwhelming need for action. Dire circumstances undoubtedly make for short tempers and a lack of vision, if not open warfare.

A. Affordable Housing

Nationally, housing prices have climbed in the last decade, although there has been a very recent slump. The median price for home resales is now \$161,400,¹² down slightly from the last quarter of 2002. The median price for the sale of a new home is now \$167,300, down from \$178,900 in the last quarter of 2002.¹³

In Massachusetts, the median price of a home is roughly twice the national median.¹⁴ In the spring of 2001, new home prices in Massachusetts were termed the highest in the country, 48% above the national average.¹⁵ In the fourth quarter of 2002, the median home

⁸ The Subdivision Control Law, MASS. GEN. LAWS ch. 41, §§ 81K–81GG (2000).

⁹ The Zoning Act, MASS. GEN. LAWS ch. 40A (2000).

¹⁰ See H.R. 4284, 182d Gen. Court (Mass. 2001) (amendments proposed by the senate were rejected by the house, thus terminating the bill's consideration).

¹¹ See MASS. REGS. CODE tit. 760, § 45.00 (2002).

¹² *Home Resales Decline*, BOSTON GLOBE, Jan. 4, 2003, at G1.

¹³ Scott Bernard Nelson & Chris Reidy, *New-home Sales Set Month Mark But 27% Decline in Northeast May Mean a Slowdown Looms*, BOSTON GLOBE, Dec. 28, 2002, at C1. The sale of new homes constitutes approximately fifteen percent of total sales nationwide. *Id.*

¹⁴ *Advocates Tackle Massachusetts Housing Crisis*, EQUITABLE DEV. TOOLKIT (PolicyLink, Oakland, Cal.), Nov. 2002, at <http://www.policylink.org/equitabledevelopment/> (last visited Mar. 10, 2003).

¹⁵ Edward Moscovitch, Ph.D., *Why Are Massachusetts Home Prices So High?*, HOUSING DEBATE (Mass. Hous. P'ship Fund, Boston, Mass.), Spring 2001, at 1, available at http://www.mhp.net/termsheets/moscovitch_paper.pdf (last visited Mar. 25, 2003).

price in Massachusetts was \$341,208, down 7.2% from the high of \$367,814 from the previous quarter.¹⁶ Yet, median price for a home in Massachusetts has increased 50% in the last three years.¹⁷ The market for condominiums is only marginally better. The median price for a condominium unit in Massachusetts is now \$247,112, up from \$210,876 in the final quarter of 2001.¹⁸

The supply of affordable housing has suffered accordingly. In 2002, only three cities inside Route 128 have a median home price of \$250,000 or less: Chelsea, Everett, and Revere.¹⁹ Seventeen cities or towns were below \$250,000 only one year earlier.²⁰ Rents in the Commonwealth were up nearly 40% in the period from 1995 to 2000, with the average unit increasing from \$744 per month to \$1035 per month.²¹ In the majority of the 161 towns in the Boston Metropolitan Statistical Area (MSA), a household earning the median income of that community earns less than necessary to purchase a home or rent a dwelling for the median sale or rental price.²² The percentage of income devoted to mortgage payments in the Boston MSA is 44.9%, the second highest in the country after San Francisco at 46.7%.²³

Some of this gloomy news is due to housing construction costs, which are higher in Massachusetts than in any other New England state, New York, New Jersey, Illinois, or Maryland.²⁴ High construction

¹⁶ Thomas Grillo, *A Level Playing Field? That May Be the Most Buyers Expecting a Big Drop in Home Prices Can Expect*, BOSTON GLOBE, Jan. 5, 2003, at J1.

¹⁷ Aaron Gornstein & Jim Gomes, Editorial, *Growth Can Be Green*, BOSTON GLOBE, Jan. 2, 2003, at A15.

¹⁸ Grillo, *supra* note 16, at J1.

¹⁹ In addition to the three named cities, the Boston neighborhoods of Dorchester, Mattapan, Hyde Park, Roxbury, and East Boston had median sale prices below \$250,000 in 2002. Thomas Grillo, *Priced Out?*, BOSTON GLOBE, Oct. 6, 2002, at G1.

²⁰ Only 56 of 161 cities and towns in the Boston Metropolitan Statistical Area (MSA) had a median home sale price under \$250,000 in 2001. RYAN ALLEN ET AL., BOSTON FOUND., THE GREATER BOSTON HOUSING REPORT CARD 2002, at 23 (2002), available at <http://www.chapa.org/completedraft.pdf> (last visited Apr. 6, 2003).

²¹ Anthony Flint, *Home Costs Tied to Construction Dip, Prices Rise by 50% in Region Since '98*, BOSTON GLOBE, Oct. 1, 2002, at A1.

²² ALLEN ET AL., *supra* note 20.

²³ Lew Sichelman, *Study: Boston's High Prices Won't Hold Up Indefinitely*, BOSTON GLOBE, July 13, 2002, at G1.

²⁴ Moscovitch, *supra* note 15, at 1. According to Dr. Moscovitch, "The fierce resistance of New Englanders to housing construction, and the way this translates into delays and extra legal costs for would-be developers, is undoubtedly a major factor in explaining high housing prices here." *Id.* at 5. Dr. Moscovitch also commented that "local requirements make it impossible to build any multi-unit housing in some communities, and calculated that for 16 towns studied in detail, current zoning and other regulations require new development no more than half as dense as existing development." *Id.* (citing MASS. OFFICE

costs discourage production. Supply now falls far behind demand.²⁵ During the 1990s, Massachusetts saw the creation of 129,265 new households, but only 91,567 new dwelling units.²⁶ From 1995 to 1999, the average number of new dwelling units created in the Boston MSA was 8460 units per year; from 1999 to 2002, the average decreased to 8194 units per year. In the Boston MSA, the Greater Boston Housing Report Card 2002 estimates that 15,660 units are needed annually to ease the affordable housing crisis.²⁷

B. *Sprawl*

The news regarding sprawl, and the rate at which open space is lost, is just as alarming. The Sierra Club estimates the total land lost to sprawl at about 100 million acres, of which 25 million acres were lost from 1982 to 1997.²⁸ In the last five years of this period, 1992 to 1997, the United States Department of Agriculture's Natural Resources Inventory found that the nation lost 11.2 million acres of farmland and other open space to development, or 2.2 million acres per year.²⁹ Suburban development constitutes a large part of this sprawl.³⁰ The Maryland Office of Planning projects that from 1995 to 2020 more land will be converted to housing in the Chesapeake Bay region than in the 350 years the region has been settled.³¹ In the metropolitan Chicago area, from 1970 to 1990, residential land development grew at a rate eleven times faster than the rate of population growth, and nonresidential land development was eighteen times higher than

OF ADMIN. & FIN., POLICY BRIEF SERIES NO. 5, REDUCING LOCAL RESTRICTIONS ON HOUSING DEVELOPMENT (2000). These sentiments have long been a standard refrain of the development community. See, e.g., KELLY ELDER, WARREN GROUP, OPEN SPACE VS DEVELOPMENT (2002), at <http://www.thewarrengroup.com/home/wp/gbb/gbbFeb2002/1602-04200200001.asp> (last visited Mar. 10, 2003).

²⁵ The State's poor showing comes while home construction has surged nationally. There were 1.835 million new units developed nationwide in 2002, of which 1.705 million were single family homes. That constituted the best year for the housing industry since 1986. *Home Construction Surges in December*, BOSTON GLOBE, Jan. 25, 2003, at E1.

²⁶ Allen et al., *supra* note 20, at 5.

²⁷ *Id.* at 6.

²⁸ Sierra Club, Environmental Update, Sprawl Losses Staggering, <http://sierraclub.org/sprawl/articles/USDAreport.asp> (last visited Feb. 7, 2003).

²⁹ NAT'L RES. CONSERVATION SERV., U.S. DEP'T OF AGRIC., 1997 NATURAL RESOURCES INVENTORY SUMMARY REPORT 1 (2000), available at http://www.nrcs.usda.gov/technical/NRI/1997/summary_report/ (last visited Feb. 7, 2003).

³⁰ See F. Kaid Benfield et al., Natural Res. Def. Council, Paving Paradise: Sprawl and the Environment, at <http://www.nrdc.org/cities/smartgrowth/rpave.asp> (last visited Feb. 7, 2003).

³¹ *Id.*

population growth.³² In metropolitan Cleveland, the consumption of land has increased by thirty-three percent in the same period, while the City's population has declined by eleven percent.³³

Massachusetts has fared no better. Land is being developed in Massachusetts at four times the rate of population growth.³⁴ Since 1945, Massachusetts has lost more than 1.3 million acres of farmland.³⁵ More than 3 million of the Commonwealth's 5.2 million acres are undeveloped and unprotected.³⁶

Of course, affordable housing and open space advocates compete for the limited state dollars available to address these compelling needs. Recent budget deficits, and a change in spending policy, has significantly cut into funding for affordable housing.³⁷ State spending on housing programs, as a percentage of the total state budget, was 2.9% in 1989, but only 0.7% in 2002.³⁸ State spending for open space acquisition or preservation has also decreased, but not as much as the rate of decline for spending on housing.³⁹ The Executive Office of Environmental Affairs trumpeted fiscal year 2001 as a "record-breaking year" for acreage protected by the Department of Environmental Management (10,656 acres), the Division of Fish and Wildlife (111,920 acres), and the Department of Food and Agriculture (4,755 acres).⁴⁰ These success stories are not offered to suggest that we spend enough money on open space preservation in Massachusetts. They

³² *Id.*

³³ *Id.*

³⁴ Gornstein & Gomes, *supra* note 17, at A15.

³⁵ Cmty. Pres. Coalition, CPA Advocacy—The Status Quo, at <http://www.communitypreservationcoalition.org/frighteningfacts.htm> (last visited Feb. 7, 2003).

³⁶ Mass. Executive Office of Env'tl. Affairs, Protection of 100,000 Acres of Open Space 5 (2001), available at http://www.state.ma.us/envir/openspace/pdf/Intro-duction_jwp3.pdf (last visited Mar. 9, 2003).

³⁷ CITIZENS HOUS. & PLANNING ASS'N, HOUSING BRIEFS: FEBRUARY 7, 2003 DHCD BUDGET REDUCED AND HOUSE CUTS TRUST FUND (2003), at http://www.chapa.org/news_02-07-03.htm (last visited Mar. 9, 2003).

³⁸ ALLEN ET AL., *supra* note 20, at 7.

³⁹ Cosmo Macero, Jr., *On Housing, Bay State's Not at Home*, BOSTON HERALD, Nov. 22, 2002, at 35, 2002 WL 4092972. The article states:

State funding for affordable housing slid by more than \$20 million last year, with the budget crunch promising little if any relief. In fiscal 2002, the state *spent* \$150 million on *housing* creation, far short of [former Cardinal Bernard] Law's proposal, and that *spending* slipped to just \$120 million budgeted for the current fiscal year.

Id. (emphasis added).

⁴⁰ Mass. Executive Office of Env'tl. Affairs, *supra* note 36, at 5.

may, however, indicate that open space is a more popular cause than housing, to the extent that legislative priorities reflect such popularity.

II. CAUSES OF THE RIFT—STATUTES PROMOTING COMPETITION

With Massachusetts state spending on affordable housing and open space at a historic low, when considered as a percentage of the total budget, the production of dwelling units and the conservation of land have become the responsibility of local government. But cities and towns do not build housing, except in rare circumstances. Nor do they routinely buy expensive tracts of open land, at least in the years since Proposition 2½ was enacted.⁴¹ Instead, cities and towns use their land use regulations and permitting practices to bargain for affordable housing and open space. The newly enacted Community Preservation Act of 2000⁴² also allows municipalities to renovate or develop “community housing” or to purchase or otherwise restrict open space.⁴³ The result is a competition for local preference. Two statutes demonstrate this dynamic.

A. Section 9 of the Zoning Act

Section 9 of the Zoning Act states, in part, that by special permit an ordinance or bylaw may authorize an increase in the permissible density of population or intensity of a particular use in a proposed development; provided the petitioner or applicant, as a condition of the grant of the permit, set aside certain open space, housing for persons of low- or moderate-income, traffic or pedestrian improvements, installation of solar energy systems, protection for solar access, or other amenities.⁴⁴ This statutory provision is most often associated with the “cluster” mechanism of an ordinance or bylaw.⁴⁵

⁴¹ Proposition 2 was passed by general referendum in 1980. Most notably, it reduced the amount of taxes cities or towns can assess on real property to no more than 2½%. MASS. GEN. LAWS ch. 59, § 21(c) (2000). Thus grew the colloquialism “Proposition 2½.” MASS. Teachers Ass’n v. Sec’y of Commerce, 424 N.E.2d 469, 473 n.4 (Mass. 1981).

⁴² Community Preservation Act, MASS. GEN. LAWS ch. 44B, §§ 1–17 (2000).

⁴³ *Id.* § 6.

⁴⁴ The Zoning Act, MASS. GEN. LAWS ch. 40A, § 9 (2000). The case law offers only two decisions that touch on this clause of section 9, neither of which are particularly relevant. *See generally* Iodice v. City of Newton, 491 N.E.2d 618 (Mass. 1986); Middlesex & Boston St. Ry. v. Bd. of Aldermen, 359 N.E.2d 1279 (Mass. 1977).

⁴⁵ Not to be confused with the definition of “cluster development” in the statute. MASS. GEN. LAWS ch. 40A, § 9. “Cluster,” as defined therein, means:

Cluster development generally allows for reduced lot size and frontage requirements.⁴⁶ The statute allows the special permit granting authority (SPGA) to authorize cluster development where the proposal sets aside a prescribed amount of open space or number of affordable dwelling units.⁴⁷ To attract developers to this option, the municipality offers a reduction in infrastructure costs. Lower lot frontage and area requirements mean shorter roads.⁴⁸ Some communities also offer developers a density bonus, which increases the number of market rate dwelling units.⁴⁹ Both are a type of "increase in the permissible density of population or intensity of a particular use."⁵⁰ In short, the statute allows municipalities to "bait" developers, by ordinance or bylaw, to create affordable housing or preserve open space. The ordinance or bylaw, however, must specify the terms of the deal.⁵¹

[A] residential development in which the buildings and accessory uses are clustered together into one or more groups separated from adjacent property and other groups within the development by intervening open land. A cluster development shall be permitted only on a plot of land of such minimum size as a zoning ordinance or by-law may specify which is divided into building lots with dimensional control, density and use restrictions of such building lots varying from those otherwise permitted by the ordinance or by-law and open land. Such open land when added to the building lots shall be at least equal in area to the land area required by the ordinance or by-law for the total number of units or buildings contemplated in the development. Such open land may be situated to promote and protect maximum solar access within the development. Such open land shall either be conveyed to the city or town and accepted by it for park or open space use, or be conveyed to a non-profit organization the principal purpose of which is the conservation of open space, or to be conveyed to a corporation or trust owned or to be owned by the owners of lots or residential units within the plot. If such a corporation or trust is utilized, ownership thereof shall be recorded providing that such land shall be kept in an open or natural state and not be built for residential use or developed for accessory uses such as parking or roadway.

Id. See, e.g., New Seabury Corp. v. Bd. of Appeals, 550 N.E.2d 405, 407-08 (Mass. App. Ct. 1990); DiPaolo v. Bradstreet Land Dev. Corp., 500 N.E.2d 1352, 1353 (Mass. App. Ct. 1986); Owens v. Bd. of Appeals, 418 N.E.2d 635, 637-38 (Mass. App. Ct. 1981). This older variation of "cluster" does not authorize the trades discussed herein.

⁴⁶ 5 EDWARD H. ZIEGLER, JR. ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 90:49 (West Group, 4th ed. 2001).

⁴⁷ MASS. GEN. LAWS ch. 40A, § 9.

⁴⁸ Roads are quite expensive to build, with prices approaching \$400 per linear foot in some suburban communities.

⁴⁹ For example, see the zoning bylaws of the Towns of Westford, Andover, and Groton.

⁵⁰ MASS. GEN. LAWS ch. 40A, § 9.

⁵¹ This statute states: "Such zoning ordinances or by-laws shall state the specific improvements or amenities or locations of proposed uses for which the special permits shall be granted, and the maximum increases in density of population or intensity of use which may be authorized by such special permits." *Id.* The local legislature, therefore, must

To be eligible for a special permit, the developer must supply the specified minimum amount of required open space, or the specified percentage of affordable dwelling units.⁵² If the developer meets these terms, and the project is otherwise buildable, then the developer may be rewarded with a special permit authorizing more dwelling units and, perhaps, fewer infrastructure costs.

Do cities and towns prefer open space or affordable housing (or both) as the tradeoff for an increase in density or intensity of use? Because the statute requires municipalities to specify the preferred "amenities" to be traded for an increase in density or intensity of use, it is possible, by a review of local ordinances and bylaws, to identify the preferences of local legislatures.⁵³

The results are not surprising. Far more municipalities prefer open space as a tradeoff rather than affordable housing. Some communities currently trade for open space. These cities and towns are listed in Table 1 (found in appendix A), which indicates the name of the community, the relevant section of the ordinance or bylaw, the minimum amount of open space to be set aside.

These communities have had mixed success in generating open space by the special permit mechanism of section 9 of the Zoning Act.⁵⁴ There are, however, some noteworthy achievements. In Acton, more than 130 acres of open space are now in town ownership. Amherst has preserved more than 220 acres of open space. Groton

choose open space or affordable housing (or both) when the ordinance or bylaw is adopted.

⁵² *Id.*

⁵³ The database Ordinance.com was used to conduct this research, which complemented earlier studies done by Philip B. Herr & Associates for the Massachusetts Housing Partnership Fund, and Christopher Skelly for the Massachusetts Historical Commission. See generally Philip B. Herr & Assocs., Mass. Hous. P'ship Fund, *Zoning for Housing Affordability* (2000); MASS. Executive Office of Env'tl. Affairs, *Preservation Through Ordinances and By-Laws*, Chapter Three: Open Space Zoning (2001). The information contained in the tables of these two reports was verified by researching individual ordinances and bylaws in Ordinance.com, a subscription database containing all local zoning and subdivision regulations. In addition, the following terms were used to search Ordinance.com in order to find additional communities that have adopted cluster-type provisions for open space protection: open space, flexible development, major residential development, cluster, and conservation subdivision. Philip B. Herr and the Massachusetts Housing Partnership Fund have kindly allowed portions of the data contained in the 2000 Study to be reprinted herein, for which I am most grateful.

⁵⁴ See generally Christopher C. Skelly, Mass. Historical Comm'n, *Preservation Through Bylaws and Ordinances: Tools and Techniques for Preservation Used by Communities in Massachusetts* (2002), available at <http://commpres.env.state.ma.us/content/publications.asp> (last visited Mar. 9, 2003).

has a long history of cluster or flexible development; the vast majority of subdivisions have used alternative development and hundreds of acres have been preserved. In Harwich, on Cape Cod, more than twenty cluster-type subdivisions have been approved pursuant to the local bylaw, each resulting in open space. Finally, in Hopkinton, the local bylaw has worked to preserve more than 400 acres of open space. The Executive Office of Environmental Affairs (EOEA) estimates that 6000 acres of conservation restrictions were approved in calendar year 2001.⁵⁵ Many of these restrictions undoubtedly originated in special permit decisions pursuant to the Zoning Act. Another 124 municipalities have used section 9 to trade for affordable housing.⁵⁶ Many of these communities also trade for open space.⁵⁷

Again, there are some notable success stories in generating affordable housing. In the urban communities using section 9 of the Zoning Act⁵⁸—Newton, Cambridge, Brookline, and Somerville are prime examples—the production of affordable dwelling units has been consistent, if not prolific.⁵⁹ In contrast, the production of affordable housing in suburban communities is rare. With the exception of Groton, Sudbury, and Falmouth, few towns have generated any units.⁶⁰ In fact, according to Philip B. Herr's 2000 Massachusetts Housing Partnership (MHP) Study, fewer than two dozen communities have actual production, with most generating only a scattering of units, and then only infrequently.⁶¹ The MHP Study estimates that, at best, 200 units come into existence annually through section 9 trades, constituting far less than one percent of the total number of dwelling units produced statewide.⁶² If the City of Boston's contribution is deducted from this figure, then the results are an inconsequential addition to the pool of dwelling units.⁶³

⁵⁵ Mass. Executive Office of Env'tl. Affairs, *supra* note 36.

⁵⁶ See Mark Bobrowski, Table of Massachusetts Communities and Affordable Housing Units (unpublished table, on file with the Boston College Environmental Affairs Law Review until May 2004).

⁵⁷ See *id.*

⁵⁸ It should be noted that Boston is not governed by the statute; the City produces affordable units pursuant to its own enabling legislation and zoning code.

⁵⁹ See Philip B. Herr & Assocs., *supra* note 53.

⁶⁰ See *id.*

⁶¹ *Id.* at 16–17.

⁶² *Id.* at 13.

⁶³ See Dept. of Hous. & Cmty. Dev., CH. 40B SUBSIDIZED HOUSING INVENTORY THROUGH OCTOBER 1, 2001, at 1–8 (2002), at <http://www.state.ma.us/dhcd/components/hac/HsInvRev.pdf> (last visited Apr. 4, 2003) [hereinafter DHCD Inventory].

The inescapable conclusion from the data is that cities and towns, if given a choice between affordable housing and open space, vastly prefer open space as an "amenity" pursuant to section 9. This choice is a reflection of overall trends. There is some headway being made in the preservation of open space. EOEA estimates that of 5.2 million acres—the total land area of Massachusetts—1.1 million acres have been permanently protected as open space, equal to the 1.1 million acres that have been developed.⁶⁴ On the other hand, only 8.45% of the Commonwealth's 2,526,963 dwelling units are affordable.⁶⁵

The other conclusion that may be drawn from the data is that SPGAs are under considerable pressure to save open space, not create affordable housing. The special permit process of the Zoning Act involves a statutory public hearing.⁶⁶ Those who prefer open space or affordable housing as the amenity of choice are likely to voice that opinion at the hearing. In fact, open space and affordable housing advocates are forced to compete in those cities and towns where either choice is available.⁶⁷ Ultimately, SPGAs must choose the winner of the amenity contest. It seems apparent that affordable housing comes in a distant second to open space preservation statewide.

B. *The Community Preservation Act*

A second statute, the newly minted Community Preservation Act of 2000 (CPA),⁶⁸ pits advocates of affordable housing against those who favor open space. This time the battle is fought exclusively in the local legislatures: the floor of town meetings or the chambers of the city council.

By local option, a municipality's legislative body may choose to accept the provisions of sections 3 through 7 of the statute, and approve a "surcharge on real property of not more than three percent of the real estate tax levy against real property, as determined annually by the board of assessors."⁶⁹ This determination must then be approved by the voters of the city or town by referendum.⁷⁰ In essence,

⁶⁴ Mass. Executive Office of Env'tl. Affairs, *supra* note 36.

⁶⁵ DHCD Inventory, *supra* note 63.

⁶⁶ See The Zoning Act, Mass. Gen. Laws ch. 40A, §§ 9, 11 (2000).

⁶⁷ In those communities that do not specify affordable housing as an option, the choice for open space has already been made by the local legislature at the time of adoption of the ordinance or bylaw.

⁶⁸ Community Preservation Act, MASS. GEN. LAWS ch. 44B, §§ 1–17 (2000).

⁶⁹ *Id.* § 3(b).

⁷⁰ See *id.* § 3(b), (f).

the CPA is a self-imposed tax on the sale of real property, with the revenue to be spent on local projects within the ambit of the law.⁷¹

Once the provisions of the CPA have been accepted by a city or town, a community preservation committee is established.⁷² The committee is charged with the duty to study the various needs of the city or town, after consultation with other officials and agencies.⁷³ Eventually, the committee may make recommendations to the local legislative body with regard to any of the following statutory purposes:

- (1) "acquisition, creation, and preservation of open space";⁷⁴
- (2) "acquisition and preservation of historic resources";⁷⁵
- (3) "acquisition, creation and preservation of land for recreational use";⁷⁶
- (4) "recreation, preservation and support of community housing";⁷⁷ or
- (5) "rehabilitation or restoration of such open space, historic resources, land for recreational use and community housing."⁷⁸

After receiving the recommendations of the committee, the local legislative body must approve an appropriation from the local fund containing the CPA revenues.⁷⁹

The CPA, like the special permit provision of section 9 of the Zoning Act, pits affordable housing against open space preservation. The CPA only generates so much revenue. Voters at town meetings or the members of a city council must choose how to spend these hard-earned CPA funds.⁸⁰

An examination of the spending preferences in the cities and towns that have adopted the provisions of the CPA once again reflects the contest between open space and affordable housing. Fifty-eight

⁷¹ See *id.* §§ 6–7.

⁷² *Id.* § 5(a).

⁷³ See *id.*

⁷⁴ Community Preservation Act, MASS. GEN. LAWS ch. 44B, § 5(b)(2) (2000).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* "Community housing" is defined as "low and moderate income housing for individuals and families, including low and moderate income senior housing." *Id.* § 2.

⁷⁸ *Id.* § 5.

⁷⁹ See *id.* § 5(d).

⁸⁰ A few towns have established guidelines for the expenditure of CPA funds. Of course, these priorities were established by local choice. Community Preservation Act, MASS. GEN. LAWS ch. 44B, § 5(e).

communities have adopted the provisions of the CPA.⁸¹ Only nine of these fifty-eight CPA communities have spent money for affordable housing.⁸² Another three communities have set aside a fixed share of their CPA fund for such purposes.⁸³ Some communities have devoted a considerable portion of the CPA fund to the affordable housing cause.⁸⁴ Cambridge leads the way with \$1.5 million already spent in this regard. Amherst, Bedford, and Westford have earmarked \$130,000, \$400,000, and \$325,000, respectively, for affordable housing projects.⁸⁵

Twelve communities have spent CPA funds on the preservation of open space and three more communities have set aside funds for this purpose.⁸⁶ Weston has committed \$3.5 million in funds and floated a \$2.5 million bond for purchasing open space.⁸⁷ North Andover, Boxford, and Duxbury have spent \$2.4 million, \$3 million, and \$1.7 million, respectively, for open space purposes.⁸⁸

Although it may be too early to draw solid conclusions from the expenditure of CPA funds,⁸⁹ the emerging pattern is all too familiar. Of all funds committed to date, affordable housing is getting short shrift. Spending to date for open space acquisition is, in total, more than five times that for affordable housing. If Cambridge is eliminated from the mix,⁹⁰ then the ratio tilts even more in favor of open space acquisition. Community preservation committees, no doubt, find it easier to convince the voters at town meetings, or the city council members, to purchase open space. Open space preservation serves

⁸¹ See Mark Bobrowski, Table of Massachusetts Communities and Their Spending Preferences (unpublished table, on file with the Boston College Environmental Affairs Law Review until May 2004) [Bobrowski, Communities and Spending Preferences].

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ See Bobrowski, Communities and Spending Preferences, *supra* note 81.

⁸⁸ *See id.* These highlights of CPA expenditures are noted in the Trust for Public Land's "Status of Local Projects" Web site. TRUST FOR PUBLIC LAND, STATUS OF LOCAL PROJECTS, at http://www.tpl.org/tier3_cdll.cfm?content_item_id=11075&Folder_id=1045 (last visited Mar. 10, 2003).

⁸⁹ It must be noted that many of the communities have spent no money at all. The recent vintage of the CPA, or the date of local acceptance, probably has not yielded sufficient funds in these inactive communities. See Bobrowski, Communities and Spending Preferences, *supra* note 81.

⁹⁰ Relatively built-out Cambridge has little open space on which to expend CPA funds. See MASS. DEP'T OF CMTY. DEV., CAMBRIDGE 2 (n.d.), available at <http://www.state.ma.us/dhcd/iprofile/049.pdf> (last visited Apr. 6, 2003).

other, front-burner, objectives. Acquisition reduces build-out and the municipal services required by growth; has the effect of reducing the number of prospective school children; and slows sprawl. Affordable housing is a tougher sell.

III. CAUSES OF THE RIFT—WHAT'S THE PLAN?

In a perfect world, a community's balance of affordable housing and open space would be determined by a rational planning process. Other considerations would receive attention, including, but not limited to the availability of public utilities; the characteristics of traffic flow and the transportation system; environmental constraints; and aesthetic concerns. The community would balance these sometimes-competing concerns, and would frame them in a comprehensive plan enacted by the voters to guide rational municipal decisionmaking in legislative and adjudicatory action. Subsequent land use decisions would require consistency with the comprehensive plan.⁹¹

A "comprehensive plan" requirement is a standard feature of state zoning legislation.⁹² The Standard State Zoning Enabling Act⁹³ mandated that zoning regulations be adopted "in accordance with a comprehensive plan."⁹⁴ At least sixteen states have interpreted this requirement to mean that a municipality is prohibited from enacting zoning regulations, unless it has adopted a plan, and, once adopted, all regulations are in accordance with this plan.⁹⁵ Four of these states are Rhode Island, Vermont, Maine, and New Jersey.

Massachusetts requires by statute that a "planning board established in any city or town . . . make a master plan of such city or town or such part or parts thereof as said board may deem advisable and from time to time may extend or perfect such plan."⁹⁶ The master

⁹¹ This world does, in fact, exist only fifty miles south of Boston and it is called Rhode Island. These are the very elements required by to be contained in a comprehensive plan. R.I. GEN. LAWS § 45-22.2-6 (West, WESTLAW through Jan. 2002 Legis. Sess.). Every city and town in Rhode Island must adopt this document. All land use ordinances must thereafter be in accordance with this comprehensive plan. *See id.* § 45-22.2-5.

⁹² *See* KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 5.02 (4th ed. 1995).

⁹³ *See id.* § 5.03 (citing MODEL LAND DEV. CODE, app. A (1968) (laying out section three of the Standard State Zoning Enabling Act for the comprehensive requirement)).

⁹⁴ *See id.*

⁹⁵ The states are Arizona, California, Delaware, Florida, Hawaii, Idaho, Kentucky, Maine, Montana, Nebraska, Nevada, New Jersey, Oregon, Rhode Island, Vermont, and Virginia. *See* ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S LAW OF PLANNING AND ZONING, § 12.04 (1986).

⁹⁶ MASS. GEN. LAWS ch. 41, § 81D (2000).

plan⁹⁷ is "a statement, through text, maps, illustrations or other forms of communication . . . designed to provide a basis for decision making regarding the long-term physical development of the municipality."⁹⁸ Despite the obvious connection between zoning and planning, there has never been a Massachusetts requirement that zoning be in accordance with a comprehensive or master plan.⁹⁹

Several appellate decisions indicate that compliance with such plans is a factor supporting the validity of a particular rezoning.¹⁰⁰ In *National Amusements, Inc. v. City of Boston*,¹⁰¹ the appeals court went one step further in rejecting the rezoning of a parcel from general business to a residential classification. The court, in strong terms, chastised the Boston Redevelopment Authority:

What is striking about the record is the absence of analysis of land use planning considerations by municipal authority *before* the decision to change the zoning was taken [Z]one changes which have no roots in planning objectives but which have no better purpose than to torpedo a specific development on a specific parcel are considered arbitrary and unreasonable.¹⁰²

The holding in *National Amusements* strongly suggests that any rezoning unaccompanied by only a modicum of planning should be open to challenge.

⁹⁷ The "master plan" should be distinguished from a "comprehensive plan." In those jurisdictions which require zoning to be in accordance with a comprehensive plan, the master plan, if it exists, is relevant, but not controlling. *See, e.g.,* *Mesolella v. City of Providence*, 439 A.2d 1370, 1374 (R.I. 1982); *Sweetman v. Town of Cumberland*, 364 A.2d 1277, 1287 (R.I. 1976).

⁹⁸ MASS. GEN. LAWS ch. 41, § 81D. The statute prescribes that such master plans contain goals and policies for future growth and development, and elements pertaining to land use, housing, economic development, natural and cultural resources, open space and recreation, public services and facilities, roads and transportation, and strategies for implementation. *See id.*

⁹⁹ Act of June 16, 1933, ch. 269, 1933 Mass. Acts 269, which came on the heels of the Standard State Zoning Enabling Act, did not incorporate the clause requiring accordance with a comprehensive plan. As a result, the court has declined to read this requirement into the statute. *See Noonan v. Moulton*, 204 N.E.2d 897, 901 (Mass. 1965); *Town of Granby v. Landry*, 170 N.E.2d 364, 366 (Mass. 1960).

¹⁰⁰ *See, e.g.,* *Manning v. Boston Redev. Auth.*, 509 N.E.2d 1173, 1177 (Mass. 1987); *Henze v. Bldg. Inspector*, 269 N.E.2d 711, 712 (Mass. 1971); *Durand v. Superintendent of Pub. Bldgs.*, 235 N.E.2d 550, 552 (Mass. 1968); *Peters v. City of Westfield*, 234 N.E.2d 295, 297 (Mass. 1967); *Maiden v. Town of Dover*, 306 N.E.2d 274, 276 (Mass. App. Ct. 1974).

¹⁰¹ 560 N.E.2d 138, 142 (Mass. App. Ct. 1990).

¹⁰² *Id.* at 141, 142.

It is time for the legislature to take the bait offered by the appeals court in *National Amusements* and require a link between planning and zoning. The absence of a comprehensive plan requirement has direct consequences for municipalities. Old master plans are not updated for twenty or thirty years. In effect, such communities are entirely without a plan for growth and development. Home rule pits town against town, without any state agency to coordinate regulations or decisions that have inter-municipal land use impacts. The case law is littered with such disputes.¹⁰³ Perhaps the most destructive consequence of the missing nexus between planning and zoning is that all land use decisions become ad hoc determinations, without a consistent frame of reference. Boards grapple with individual permit applications without the big picture of the community's goals and objectives. Open space and affordable housing become chips in a high stakes poker game, along with other amenities like traffic mitigation, deficit reduction, and infrastructure enhancement. No one has a goal in mind, because none is required by law. Build-out becomes a thousand-act play without a script. Veteran actors know how to appeal to the audience—open space instead of affordable housing—but parcel by parcel the remaining opportunities to map a comprehensive strategy with full build-out fast approaching in some communities are wasted.

IV. CONCLUSIONS AND RECOMMENDATIONS

Open space and affordable housing are not inconsistent goals. Massachusetts's woefully short-sighted land use regulations and inadequate emphasis on regional and local planning have caused the present crisis. With a few modifications to our state land use laws, these progressive causes may forge an alliance for positive change.

¹⁰³ See, e.g., *Marshfield Planning Bd. v. Pembroke Zoning Bd. of Appeals*, 695 N.E.2d 650, 653 (Mass. 1998). The Massachusetts Supreme Judicial Court ruled that a board in one town may not appeal the decision of a board in a neighboring town under the "municipal officer or board" clause of Massachusetts General Laws chapter 40A, section 17, despite the fact that the zoning board of appeals of Pembroke approved a ten-screen, 1600 seat cinema complex on Route 139 in Pembroke with traffic impacts largely in Marshfield. See also *Franklin Town Council v. Bellingham Zoning Bd. of Appeals*, 6 Land Ct. Rep. (Mass. Landlaw) 334, 336-37 (Mass. Land Ct. Dec. 4, 1998) (electric generating plant located 600 feet from Franklin town line); *Norwell Planning Bd. v. Scituate Planning Bd.*, 6 Land Ct. Rep. (Mass. Landlaw) 6, 7 (Mass. Land Ct. Jan. 2, 1998).

A. *Allow Communities to Exact Affordable Housing in
Larger Residential Developments.*

In the 2002 round of reforms to 40B, the state senate passed a bill that would allow communities, by local option, to require developments of more than ten units to set aside ten percent of the units for affordable housing.¹⁰⁴ The state house deleted this provision from the final reform bill, which, in any event, was vetoed by Acting Governor Jane Swift.¹⁰⁵ The enactment of this provision would have allowed cities and towns to fall no further behind in the struggle to reach the ten percent threshold for affordable housing established in 40B.¹⁰⁶ Housing for families with low- or moderate-income levels would become a standard feature of every large residential development project. Affordable housing would be elevated from an afterthought to a mandate.¹⁰⁷

B. *Allow Planning Boards to Exact Open Space in Subdivision Approvals*

The Subdivision Control Law states that “no rule or regulation shall require . . . that any of the land within [a] subdivision be dedicated to the public use . . . without just compensation”¹⁰⁸ As a result of the antiquated provision, planning boards must bargain for open space—at the cost of higher density—instead of requiring it.¹⁰⁹

¹⁰⁴ See discussion *supra* note 6. See generally Christine McConville, *Changes to Affordable Housing Law Lauded Change Gives Towns More Say*, BOSTON GLOBE, Aug. 15, 2002, at 1.

¹⁰⁵ The vetoed conference committee bill was H.R. 5288 (2002).

¹⁰⁶ See Low and Middle Income Housing Act, MASS. GEN. LAWS ch. 40B, § 20 (2000); Brenda J. Buote, *Finding Ways to Boost Affordable Housing*, BOSTON GLOBE, Sept. 19, 2002, at 1. See generally Erica Noonan, *Affordable Housing Change Gives Towns More Say Incentive Recognizes Steady Progress*, BOSTON GLOBE, Aug. 4, 2002, at 1.

¹⁰⁷ See also Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, in EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA 125 (Robert H. Freilich & David W. Bushek eds., 1995); Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 70, 72–83 (1987).

¹⁰⁸ Alternatively, section 81U allows a planning board to require the developer to “show a park or parks suitably located for playground or recreation purposes or for providing light and air and not unreasonable in area in relation to the area of the land being subdivided . . . for a period of not more than three years without its approval.” The statute contemplates municipal purchase of such land and is not applicable to this discussion of exactions. See MASS. GEN. LAWS ch. 41, § 81U (2000).

¹⁰⁹ Pursuant to Massachusetts General Laws chapter 40A, section 9. See *supra* Part II.A.

This statutory ban on subdivision exactions¹¹⁰ places Massachusetts squarely in the minority of states:

[P]ublic open space (and particularly a playground) is an important need in connection with new residential subdivisions. A large subdivision will need its own small playground; for a small subdivision, a separate playground would probably be a burden to maintain, and the better solution will often be to secure access to a playground serving several such subdivisions. For this reason, many municipalities have required that large subdivisions should dedicate land for this purpose, and that small subdivisions should make payments in lieu of such dedication. By now the validity of requiring dedication of land for public open space has been generally accepted¹¹¹

Recent decisions in New York¹¹² and Texas¹¹³ support this position. The elimination of the takings clause in section 81Q of the Subdivision Control Law would allow planning boards to exact a reasonable amount of open space—or a payment in lieu—in every subdivision. Open space would become a condition in every approval, not a poker chip.

The adoption of these two statutory reforms would bring Massachusetts into the majority of jurisdictions, which allow such measures. Moreover, it would make open space and affordable housing the inevitable consequence of every large development. Reform would link these progressive causes in an alliance for sound land use planning.

C. Require Every Community to Adopt a Sound Plan for Affordable Housing

Two recent rule changes at the Department of Housing and Community Development (DHCD) acknowledge the importance of local planning. The first makes a community's comprehensive or master plan a factor to be considered by the Housing Appeals Committee

¹¹⁰ The term "subdivision exaction" and the related concept of "payment in lieu" (of such exactions) are widely used in the land use field. See, e.g., RATHKOPF, *supra* note 95, § 65.03; NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW* § 156.08 (rev. 1985).

¹¹¹ WILLIAMS, *supra* note 110, § 156.08.

¹¹² See, e.g., *Bayswater Realty & Capital Corp. v. Lewisboro Planning Bd.*, 560 N.E.2d 1300, 1301 (N.Y. 1990).

¹¹³ *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 803 (Tex. 1984).

in weighing an application for a comprehensive permit.¹¹⁴ The second rewards those municipalities that produce dwelling units pursuant to an "affordable housing plan."¹¹⁵ Both changes signal the dawn of a new era in Massachusetts land use law.

In the immediate future, prospects for the survival of 40B would be immensely enhanced if all cities and towns were required, not just invited, to plan for affordable housing. The careful development of a plan, certified by DHCD, in every city and town below the ten percent threshold would, by definition, eliminate those most egregious abuses of the law that have caused the current furor. DHCD would be obliged to weigh the specific sites chosen by the municipality and the cost to open space, transportation networks, and infrastructure. The "Anti-Snob Zoning Act" could become a device for infill, building conversion, brownfield reclamation, and transportation node development. Rural or unserved locations could be placed off-limits as a matter of DHCD policy. Rational planning may save this valuable statutory tool.¹¹⁶ It may also seal the alliance of affordable housing and open space preservation.

¹¹⁴ MASS. REGS. CODE tit. 760, § 31.07(3)(d) (2002). "The Committee may receive evidence of and shall consider the following matters: (1) a city or town's master plan, comprehensive plan, or community development plan, and (2) the results of the city or town's efforts to implement such plans."

¹¹⁵ *Id.* § 31.07(1)(i).

¹¹⁶ Professor Sharon Krefetz estimates that chapter 40B has created, as of October 1999, more than 21,000 units of housing, of which 18,000 are affordable units, in 173 cities and towns in the Commonwealth. Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW. ENG. L. REV. 381, 392 (2001).

APPENDIX A

City/Town	Affordable Housing	Open Space	Historic Preservation	Recreational Use
Acton		No Spending Yet		
Agawam		No Spending Yet		
Amherst	\$130,000	\$20,000		
Aquinnah	\$35,000			
Ashland		No Spending Yet		
Ayer		No Spending Yet		
Bedford	\$400,000	\$450,000	\$2,510,000 (w/ Bond)	\$85,000
Boxford		\$3,000,000 Bond		
Braintree		No Spending Yet		
Cambridge	\$1,500,000			
Carlisle		No Spending Yet		
Chatham		No Spending Yet		
Chelmsford	\$120,000		\$20,000	
Chilmark	80%	10%	10%	
Cohasset		\$10,000	\$155,000	\$100,000
Dartmouth				
Dracut		\$960,000		
Duxbury	\$320,000	\$1,700,000 (w/ Bond)		
Easthampton		No Spending Yet		
Easton	10%	10%	10%	
Georgetown				
Grafton		No Spending Yet		
Hampden	10% Set Aside	\$100,000 (Over 5 Yrs.)	\$5,000	
Harvard		No Spending Yet		
Hingham				
Holliston		Purchase Made		
Hopkinton	\$100,000	60% of Funds Reserved	\$105,000	
Leverett				
Lincoln		No Spending Yet		
Marshfield			\$212,000	\$40,000
Mendon		No Spending Yet		

Medway	No Decisions Yet	\$30,000	\$83,000
Nantucket			
Newbury- port			
Newton	No Spending Yet		
Norfolk	No Spending Yet		
	\$2,400,000		
N. Andover	(Over 5 Yrs.)		
Norwell	No Spending Yet		
Peabody	1 Project	2 Projects	
Plymouth	No Spending Yet		
Rockport	No Spending Yet		
Rowley	\$1,000,000		
Scituate	No Spending Yet		
Southamp- ton	No Spending Yet		
Southwick			
Stockbridge	No Spending Yet		
Stow	No Spending Yet		
Sturbridge			
	\$400,000		
Sudbury	\$350,000 (5 Yr. Bond)	(4 Yr. Bond)	
Tyngsbor- ough	No Spending Yet		
Wareham	No Spending Yet		
Wayland	No Spending Yet		
Wellesley	No Spending Yet		
Westfield			
Westford	\$325,000	\$1,000,000	\$100,000
		\$6,000,000	
Weston	(5 Yr. Bond)		
Westport	No Spending Yet		
William- stown	No Spending Yet		

