State Land Use Laws and Regional Institutions

George D. Brown, Boston College Law School

Available at: https://works.bepress.com/george_brown/40/
STATE LAND USE LAWS AND REGIONAL INSTITUTIONS

By George D. Brown*

INTRODUCTION

State governments have increasingly assumed a major role in a matter which had been largely the province of local jurisdictions: controlling the use of land. This phenomenon—frequently referred to as "The Quiet Revolution in Land Use Control"—shows continuing signs of vitality throughout the country as special study committees issue their reports and state legislatures debate the enactment of land use statutes. This article focuses upon Massachusetts—a state likely to join the ranks of the Quiet Revolution within the next two years—and upon the intergovernmental issues which have arisen in the course of the land use debate within that state.

In Massachusetts, interest in new land use control systems has converged with the movement toward new institutions at the regional level. The state's Regional Planning Agencies have gained significant new functions in recent years, and some of these agencies are likely to evolve into general purpose regional governments. Enactment of new land use legislation can hasten the development of regional institutions, if such legislation assigns significant responsibilities to the regional level of government. At the same time, the potential ability of regional institutions to play a major role in a non-localized land use system is a factor in deciding whether to set up such a system.

This article advances three general propositions for consideration by the participants in the Massachusetts debate:

First, legislation should allocate significant responsibility to regional (sub-state) entities, but should retain a substantial local role. Development decisions should be made by local governments in the first instance, with higher (state and regional) levels participating in those decisions, or hearing appeals from them, or both.

Second, existing regional institutions are incapable of performing most of the functions which such a system should allocate to the
regional level. New regional institutions must be developed, with particular emphasis on the need for visibility and political accountability, and consistent with the requirements of the one person-one vote doctrine;

Third, statewide land use legislation need not be uniform in structure or operation across the state.

These propositions are advanced in the context of the Massachusetts debate. However, they may be of interest to policy-makers in other states as well, for the debate over new land use laws is emerging as one of the most significant inter-governmental issues in the history of our federal system.6

I. ALLOCATION OF FUNCTIONS AMONG LEVELS OF GOVERNMENT

A. The American Law Institute Regulatory Categories.

Because any new land use system adopted in Massachusetts is likely to be based on the regulatory concepts of the American Law Institute’s Model Land Development Code,7 a brief description of these concepts is necessary at this point. While much of the Model Code is devoted to strengthening the regulatory and planning capabilities of local government,8 the premise of Articles Seven and Eight is that there are certain land use decisions which cannot be entrusted to an exclusively local system of regulation. These decisions (estimated at approximately ten percent of all land use regulatory decisions9) affect interests other than local, which the local political and governmental processes cannot be relied on to protect.10 Thus, local land use control is perceived as a function which can create significant “externalities”; in other words, the “costs” and “benefits” are not fairly distributed among all those who should share in them.11

The Code attempts to delineate the limited categories of land use decisions in which supra-local interests are present. For these categories the Code then establishes a non-local system of regulation. This step is a frequent response to problems of externalities: transfer of the function to a higher level of government.12 At the same time, the Code preserves local control over the large majority of land use decisions, in which no significant externalities are present.

The first regulatory category in the Code’s non-local system embodies those areas where development might affect citizens of more than just the locality in which a particular area is located. The Code terms these “Areas of Critical State Concern.”13 Such areas can be identified in two principal sets of circumstances: first, when historical, natural or environmental resources “of regional or statewide
importance" are present; and second, when an area is "significantly affected by, or has a significant effect upon, an existing or proposed major public facility or other area of major public investment." An example of the first set of circumstances would be a salt marsh used by migrating waterfowl; an example of the second would be land around a proposed major airport.

The second category embodies those types of development which, wherever they occur, are likely to have an effect upon the citizens of more than one locality. The Code terms these "Development[s] of Regional Impact." Such developments may be those of large size, those which create substantial environmental problems, those which attract large numbers of persons or vehicles, or those which will generate additional development. Supra-local interests are potentially present in such cases, and the Code mandates application of a complex cost/benefit analysis (weighing costs and benefits for the locality and the region) to proposals for any such development.

These two regulatory categories are the foundation of Massachusetts' recently enacted Martha's Vineyard Land Use Law. This statute establishes a twenty-one-member regional commission. This body passes on all applications to construct developments of regional impact, defined, in part, as "the types of development which, because of their magnitude or the magnitude of their effect on the surrounding environment, are likely to present development issues significant to more than one municipality of the island of Martha's Vineyard." The regional commission also designates "district[s] of critical planning concern," (similar to the Code's Areas of Critical State Concern) and oversees local regulation of these districts.

**B. Is there a Role for Regional Organization in a System Based on the ALI Model Code?**

Having identified these two categories of land use decisions which call for a different system of regulations than the norm of relatively exclusive local control, the Model Code assigns responsibilities within such a system to the state and local levels. The omission of a significant role for regional governmental entities (other than decentralization of state level entities) is not an oversight. "This Code rejects the idea of creating another level of governmental agency between the state government and the local governments." The draftsmen's principal reason for this rejection seems to be a belief that areawide agencies are inherently weak and highly susceptible to "horse trading" among the component localities. Thus these agencies cannot be entrusted with the mission of protecting the
supra-local interests, whose inadequate consideration by localities is the very reason for establishing the new system.\textsuperscript{24}

This reasoning, however, is not an argument against any role for regional organizations \textit{per se}, but only against a role for those organizations incapable of discharging it. Indeed, the Model Code has been sharply criticized for ignoring the emergence of regional bodies which could be a key element of any new regulatory system.\textsuperscript{25} There are at least three reasons why a substantial regional component should be built into a system based on the Model Code.

First, as the Code itself recognizes, the land use decisions in question have \textit{regional} implications. It is frequently the effect of a particular locality's decisions upon surrounding localities that brings the new system into play. A recent analysis by the Advisory Commission on Intergovernmental Relations reached similar conclusions, calling for a substantial regional or state role to curb the external effects of local zoning.\textsuperscript{26}

Second, a unified areawide approach to interrelated development problems is desirable. Such a unified approach not only leads to planning coordination (as between land use and transportation planning, for example); it assigns responsibility for as many functions as possible to a governmental entity that can balance competing interests.\textsuperscript{27}

A third reason is the continuing vitality of the regionalism movement itself. Significant new functions are being assigned to the regional level,\textsuperscript{28} and new and evolving regional bodies are demonstrating the organizational flexibility of middle-tier government.\textsuperscript{29}

Whether for these or other reasons, the ALI-based proposals pending in Massachusetts, as well as the Martha's Vineyard Law, assign substantial functions to the regional level.\textsuperscript{30} There is, however, disagreement as to the precise allocation of functions among levels of government. Clearly, a range of options is available.\textsuperscript{31} The following subsection represents one possible set of allocations, based on the present status and likely evolution of regional institutions within Massachusetts.

C. A Suggested Allocation of Functions\textsuperscript{32}

1. Critical Areas

Regulation of critical areas involves five general stages: definition of critical areas; delineation of the methods of control which may be applied to them; identification of specific areas; the establishment of particular controls for specific areas; and the application of these controls to individual development decisions. Responsibility for these stages should be allocated among levels of government in
the following way.

The definition of areas of critical concern is largely a matter for the state level. This determination is the fundamental policy decision as to what types of areas may present supra-local considerations. Such a decision should be made by the state legislature in its capacity as representative of the entire body politic. The legislature might act by a detailed statute spelling out the different types of critical areas, or by a more general statute which would be implemented by more detailed state agency regulation. The use of a state agency reflects the role of the state government as guardian of all interests. However, it may be desirable to allow regions to define additional critical areas, as long as their definitions are consistent with the underlying state legislation and are approved at the state level.33

The general delineation of permissible methods of control would be a task for the state legislature, analogous to the passage of a zoning enabling act.34

The identification of specific critical areas presents the most difficult issues. The author believes that this function should be assigned to regional agencies, provided that they are properly constituted. Because this is the most important step in the process, for any supra-local interests, it should not be left to the localities. At the same time, the system under analysis here is not “end state” masterplanning imposed from the top down. The regional level, if the relevant institution is constituted in a politically accountable manner, provides opportunities for the accommodation of local desires as well as protection for supra-local interests.35

There may be instances where state level designation of particular critical areas is necessary. For example, an impoverished region might wish to encourage substantial tourist development in a valuable natural area, even at the risk of damaging the area.36

At the same time that it designates a specific critical area, the regional agency should issue guidelines for the local government’s regulation of that area, indicating what types of development should be allowed and what types should be restricted or prohibited. The Model Code and proposals based on it provide for such guidelines to be issued at this point.37 These guidelines represent essentially a statement of what supra-local interests may be present, and what steps should be taken to protect them.

After this point the local government’s responsibility becomes paramount, with the promulgation of specific regulations—alogous to a zoning ordinance or by-law—for the designated area. There is some room for local choice, since the designation is accompanied by guidelines, rather than mandatory regula-
tions. Local control will be further enhanced by having the local government enforce the regulations for the designated critical area, just as it enforces its other land use controls. Sup

Under this allocation of functions the higher levels of government have identified a specific task for the local government to perform along generally indicated lines. The higher levels must also be available as checks in the event that the local level does not carry out its task. The regulations for a specific area must be reviewed for conformity with the guidelines. This would seem to be the responsibility of the regional agency, since that agency made the basic policy choice which the guidelines reflect. It may also be desirable to provide for an administrative appeal from local decisions applying the regulations. Consideration of such appeals would seem to call for a quasi-judicial body, and such an entity would seem best created at the state level by gubernatorial appointment.

2. **Developments of Regional Impact.**

Regulation of developments of regional impact involves three general stages: definition of developments of regional impact; delineation of the methods of control to be applied to them; and application of the controls to individual development decisions. Responsibility for these stages should be allocated among levels of government in the following way.

Definition of such developments is largely a matter for the state level, for the same reasons as in the case of critical areas, with some room for regional variation. A fifty unit motel may well be of greater regional impact in the Berkshires than in downtown Boston.

Also a matter of state responsibility is the establishment of the tests to be applied to proposed developments of regional impact. The state not only identifies these proposals as different from ordinary development proposals; it mandates a special set of rules to be applied to them. These rules may require a set of environmental and related findings, like the Vermont "Act 250 Criteria," or a cost/benefit analysis like that envisaged in the Model Code. A uniform set of rules across the state would be desirable since the goal is a balance between local desires and the protection of other than local interests. Local values will still assert themselves in the manner in which the rules are applied.

There is widespread disagreement over which level of government should actually apply the rules for developments of regional impact to specific applications for permits to build such developments. Both the Model Code and the Florida statute provide for local decision on the application, subject to administrative review at the state
level. In Massachusetts, however, the Martha’s Vineyard Law and most pending statewide proposals place this responsibility at the regional level. The premise seems to be that local governments will not adequately consider the potential supra-local interests present in these development decisions even when they are directed to and are told how to do it.

Assigning this function to the local level is strongly preferable. To begin with, it is consistent with the general Massachusetts intergovernmental approach of local regulatory power exercised under the overriding supervision of a higher level (generally the state). The Anti-Snob Zoning Law and the Wetlands Protective Law are relevant precedents in the land use field, and, indeed, served as precursors of the ALI Model Code.

A second reason is that supra-local interests can be considered at all stages of the process. The first two stages—definition of developments of regional impact and establishment of special rules for them—are state-level actions designed to identify the presence of supra-local interests and to mandate their consideration in specific ways. The regional entity should participate in the local permit decisions, acting as an advocate for the “regional perspective.” The regional entity should also have standing to appeal any local decision to a quasi-judicial state body. Properly constructed and enforced, a system which makes local government “think regionally” should work.

A third reason for local decisions in these cases is concern for the mechanics of the permit process. A system in which one level of government decides all the issues in one proceeding should save time and also be responsive to builders’ desire for a “one-step” permit system. It may also avoid the “triggering” question which arises when a higher level applies the development of regional impact procedures separately from the local government’s application of its own requirements. At what point should the development of regional impact proceedings begin—before the local government acts at all, after the issuance of conditional local permits, or after all local approvals have been received?

As indicated, this assignment of functions would be consistent with the Model Code, which is at the basis of most Massachusetts proposals. It is not primarily the allocation issue, however, which has prevented the development of a consensus on division of responsibilities among the state, regional and local levels. The principal impediment has been the obvious inability of the proponents of land use reform to agree on what regional entities to use.
II. Regional Institutions for the Future

A. Existing Institutions.

1. Counties

Counties in Massachusetts are not as significant a level of government as they are in other parts of the country. Essentially, they function as arms of the state government, discharging certain responsibilities over courts, the penal system, agriculture, registries of deeds, highways and miscellaneous services. New functions have not, as a rule, been assigned to the counties. Indeed, some functions have been taken away from them. Additional governmental responsibilities at the regional level have generally been assigned either to the regional planning agencies or to newly created regional entities.

Except perhaps in some rural areas, the county is not a viable unit of government in Massachusetts, and certainly not one to which significant responsibilities in land use should be assigned. County government is in disrepute, partly because of questionable political practices and partly because the structure, consisting of three elected County Commissioners, has provided neither accountability nor visibility.

Proposals for county change in Massachusetts have ranged from outright abolition to dramatic restructuring and reform. In some parts of the state, county government will probably wither away and be absorbed by other levels. In other parts of the state, however, it may join forces with the regional planning agencies to become a true middle tier government.

2. Regional Planning Agencies

The Regional Planning Agencies (RPA's) are well on the way to becoming the dominant regional institutions in Massachusetts. There are 12 such agencies, ranging in size from Franklin County with 60,000 people to the gigantic Metropolitan Area Planning Council (MAPC), which contains 101 communities and over 2 million people. Some were established under a general enabling statute. Others were established by special laws, either varying the general statute slightly, or establishing a unique form of organization for a particular region. The regional planning agencies are examples of confederal regional bodies. For purposes of intergovernmental analysis, they can be classified as generally similar to a Council of Governments (COG).

The norm established by Chapter 40B, the general enabling statute, is representation of each constituent municipality by a
member of its planning board. There are substantial variations, however, including joint appointment of one member by the local governing body and the planning board, appointees of both the local governing body and the planning board, and appointees of the local governing body only. The Metropolitan Area Planning Council includes 20 members appointed by the Governor, and twenty representatives of state agencies, public authorities and the city of Boston, as well as a representative of each constituent community.

In most RPA's, each constituent municipality has the same number of representatives and votes. However, the makeup of the Central Massachusetts Regional Planning District Commission represents an attempt to correlate size with voting power. Every community is represented by one member chosen by the planning board from among its members. Each community over 8,000 is entitled to a second voting member, appointed by the local governing body, while each community over 15,000 is entitled to a third voting member, appointed by the planning board. Each community over 50,000 is entitled to a fourth voting member, appointed by the local governing body. Provision is also made for alternate and ex officio members.

The statutory powers of the regional planning agencies are largely advisory. They are to make studies of the "resources, problems, possibilities and needs" of their districts, and are to prepare a "comprehensive plan of development" (or a "schematic study plan") which shall include "recommendations for the physical, social, governmental or economic improvement of the district as in their opinion will be in the best interest of the inhabitants of the district." This significant responsibility is somewhat diminished, however, by the admonition that "such plans and recommendations shall be advisory only."

At times the regional planning agencies have bemoaned their advisory status and their lack of "clout." On paper, at least, these agencies appear to conform to the Advisory Commission on Intergovernmental Relations' lukewarm description of COG's as "essentially a device for incremental local adaptation to changing needs . . . . [a] procedural effort at balancing local independence and areawide interdependence." In fact, under the aegis of the national government and with help from a favorable state administration, the RPA's have become a major force.

The federal government has helped finance the operations of the RPA's through grants-in-aid. It has also enhanced their import-
ance to member communities through the “A-95” review process, which requires that a regional agency review and comment upon local applications for federal funds under a wide variety of programs.\textsuperscript{79} Most important, however, is the regional planning agencies’ role in federal grant programs which require planning on the regional level as a condition of state eligibility for funds.\textsuperscript{80}

Transportation planning provides a good example of this development. The RPA’s function jointly with state transportation agencies to furnish the regional planning component required by federal law.\textsuperscript{81} During 1973, RPA’s received approximately $500,000, under contracts from the state Department of Public Works, for the performance of this function.\textsuperscript{82} In addition, recent Massachusetts legislation creating a statewide network of regional transportation authorities indicates that the RPA’s will probably be the planning arms of these entities.\textsuperscript{83}

Potentially even more important, for those participating, is the designation of regional planning agencies as the “single representative planning organizations” under section 208 of the Federal Water Pollution Control Act.\textsuperscript{84} As of this writing, nine RPA’s have been designated to perform this function.\textsuperscript{85} The “208” planning agencies have major tasks to perform, including the identification of treatment works necessary to meet the anticipated needs of their areas, establishment of construction priorities, and development of a program to “regulate the location, modification and construction of any facilities within such area which may result in any discharge in such area.”\textsuperscript{86}

Taken together these developments amount to a dramatic strengthening of the role of the RPA’s. Although their comprehensive plans are not binding, their functional plans are shaping public and private decisions. Some Massachusetts RPA’s may become “Umbrella Multi-Jurisdictional Organizations,” that is, area-wide quasi-governments with substantial planning control over the operation of other governmental units.\textsuperscript{87}

In greater Boston, the Metropolitan Area Planning Council may become the foundation for a true regional government. A number of proposals along these lines have been advanced within the past year.\textsuperscript{88} The absorption of the preexisting RPA into the newly created Martha’s Vineyard Commission may also be a step in this direction.\textsuperscript{89} At any rate, the present status and possible evolution of the RPA’s is a major consideration in the development of any new system of land use control in Massachusetts.
B. Regional Institutions with Land Use Responsibilities—the Proposed Options.

The land use proposals under discussion in Massachusetts assign regional responsibilities to a wide variety of entities. The institutional options proposed may be grouped into three categories.

The first category takes the regional planning agencies—either in their present form or with some modifications—and assigns land use responsibilities to them. Thus House Bill 644 establishes a special procedure for “developments of regional impact,” along the lines recommended above, and directs that the relevant RPA prepare and submit to the local government considering a permit application for such development “a report and recommendations on the regional impact of the proposed development.” The report covers a broad spectrum of factors, including the proposed development’s effect on the environment and public facilities, and the extent to which “[t]he development will have a favorable or unfavorable impact on the health, safety and morals of the residents of affected municipalities.” Apparently drawing on the Florida system, the bill requires that the local government consider whether the proposal is consistent with the regional agency’s report. Legislative proposals of prior years have given more substantial regulatory authority to the regional planning agencies.

A second category of proposals creates new regional entities, and assigns them substantial roles in land use control. These entities are separate from, but closely related to, existing regional bodies. Thus House Bill 3907, the most frequently cited statewide bill, establishes twelve “Regional Resource Committees” with the same boundaries as the existing RPA’s. Each Committee would consist of eleven members, “six to be chosen by the Regional Planning Commission “from among its own members, and five members to be appointed by the Governor.” The Committees are to designate “areas of critical planning concern,” and regulate proposals for “developments of regional impact.” In other proposals the new entities are elective, or a combination of elective and appointive.

A third category of proposals creates new, general purpose regional governments, and includes land use responsibilities among their functions. The strongest interest in this approach appears to be focused on the greater Boston area. However, the proponents of one such proposal have indicated that it can be applicable in other metropolitan areas.
C. Choosing Among the Options—3 Criteria.

Presented with this bewildering array of options, legislators might well be tempted to conclude that no optimum solution is possible, and that the only wise course of action is to refer the matter to further "study." However, choices among the competing institutional alternatives can, and should, be made now, and there are three criteria which should guide those choices.

1. **Regional institutions with land use responsibilities should be politically accountable.**

The regional functions recommended in this article carry with them substantial power over the way in which a given region will develop and the uses to which its land will be put. The designation of critical areas, along with the basic policy decisions about permissible development (guidelines), and intervention in local regulatory proceedings as advocate of the regional interest represent more than technical "planning" responsibilities. These activities represent planning with substantial power to implement the policies developed. An entity exercising such power should be responsible to the electorate in identifiable ways.\(^{100}\)

Direct election of those who exercise this power is one way of satisfying this criterion\(^ {101}\) Appointment by an authority, such as the Governor, which is itself directly responsible to the electorate is another.\(^ {102}\) Appointment by municipal officials of local representatives to a regional body does not satisfy this criterion, however. Responsibility even for individual appointments may be diffused under such an arrangement, and there is no single election at which the hypothetical regional constituency can express itself.

At the same time, however, representation of local governmental units by members of these units may serve other values important to a regional organization. The support of the local governmental units may be important to the regional entity's on-going work, and may well have been a political prerequisite to its formation.\(^ {103}\) If the local representatives are themselves local officials, their expertise may be a valuable contribution.\(^ {104}\)

One acceptable solution may be the creation of mixed elective-appointive bodies, an approach which has been hailed as the most promising form of regional entity.\(^ {105}\) Certainly in Massachusetts, the Martha's Vineyard Law provides a highly relevant precedent. Regional land use responsibilities are performed by a twenty-one member commission, seventeen of whose members have voting power. Nine members are elected at an island-wide election, with each of
the six towns guaranteed a representative; six are representatives of the individual town governments; one is a county commissioner chosen by the commissioners; one is a member of the state Cabinet appointed by the Governor; and the four non-voting members are non-resident taxpayers appointed by the Governor.108

The evolution of the Martha's Vineyard legislative proposal is particularly instructive in this respect. An early proposal circulated for comment provided for no elected members. The Commission would have been composed entirely of representatives of local and county governments and of gubernatorial appointees.107 By the time former Governor Sargent filed the proposal in August of 1973, six elected members had been added in place of local government representatives.108 However, these "elected" members were to be chosen at the annual town meetings. When the Governor re-filed his proposal in March of 1974, it provided for the Commission in its present form.109 The result is a politically accountable body, the first election of whose members was hotly contested. At the same time, the existing governments have a substantial voice in its operations, as does the state government.

2. **The regional responsibility for land use should not be assigned to a single purpose unit divorced from the performance of other regional functions.**

The land use policies which will be made at the regional level are closely related to other important planning and resource management decisions carried out, at least in part, at the regional level. These include comprehensive planning, and functional planning activities such as transportation planning, water quality planning, and air quality planning.110

These decisions should not be made in isolation from each other. Coordination is necessary at the technical level so that, for example, transportation planning does not call for development of an area where environmental planning is aimed at curbing development. Coordination is also necessary at the fundamental policy-making level. These decisions involve the consideration of competing interests, and should be made by a body responsible for balancing these interests.111

3. **Regional institutions with land use responsibilities must be constituted in accordance with the requirements of the one person-one vote doctrine.**

The impact of the one person-one vote doctrine upon the future
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of local governmental bodies, especially regional institutions, has frequently been analyzed. Although there is little precedent available on the relevance of the doctrine to regional land use agencies, the likely development of such agencies may well direct the attention of courts to such organizational questions as well as to the inevitable challenges by landowners to the underlying regulatory techniques applied. Furthermore, there is evidence of increasing court challenges of the makeup of existing areawide agencies. Analysis of recent judicial decisions suggests three guidelines which may be of assistance to policymakers in a state like Massachusetts, which is considering a substantial regionalization of land use responsibilities.

The first guideline is that the one person-one vote rule does not apply to appointive land use regulatory bodies. This was the holding in People ex rel. Younger v. Dorado County, in which the California Supreme Court relied on Sailors v. Board of Education. In the latter case the United States Supreme Court upheld the Michigan system of establishing county boards of education. Validly elected local school boards each sent a delegate to a county meeting where the assembled delegates elected the county board. Every delegate had one vote, even though they represented local school boards of varying sizes. The Court held that this system was "basically appointive," and that a state could choose to appoint local officials of a "non-legislative" character whose duties are administrative rather than legislative "in the classical sense."

Analysis and application of the Sailors decision presents two main problems. First, it is frequently hard to distinguish between "administrative" and "legislative" functions at the local governmental level. Critics have pointed out that this problem was present in the case of the county board at issue in Sailors, and the Court itself has moved away from the administrative-legislative distinction as a useful test. It is probably accurate to say that any local governmental body (including regional land use entities), other than the local legislative body itself, can be validly constituted through the appointive process.

The second, and more difficult, problem under Sailors is determining which bodies are elective and which are appointive. It has been argued that Sailors itself involved an indirect election system, and that the power of the larger communities' voters was invalidly diluted. This argument is potentially present in every case where a confederal body is composed of constituent communities of different sizes, each one of which has equal voting power in the body. This
argument prevailed in *Bianchi v. Griffing*. There, each town in the county elected a town supervisor who also sat as his town’s “delegate” on the county board of supervisors. Although *Sailors* was invoked as justifying this system, the Second Circuit struck it down. “The mandate of the equal protection clause cannot be effectively circumscribed by a local legislative body with general governmental powers . . . simply by labeling [its] members ‘delegates.’” The test seems to be whether local voters in electing a particular local official are, at the same time, “electing” their community’s representative to the confederal body. If this is the case, then the one person-one vote rule applies to the higher level as well.

The second guideline is that if regional entities performing the land use functions recommended in this article do contain elected members, those members must be elected in accordance with the requirements of the one person-one vote rule.

When the one person-one vote rule was first applied to local government, the Supreme Court was urged to extend it to all local government units whose members were elected from districts, irrespective of the functions performed by any particular unit. The Court, however, left open the question by suggesting that some elected bodies might be exempt. The extent of any such exception seemed quite narrow after *Hadley v. Junior College District*. However, in *Salyer Land Co. v. Tulare Lake Basin Water Storage District* the Court did find an exempt body, and, in the process, gave some vitality to the exception. The Court upheld a system of governance for California’s water storage districts, which limited the franchise to landowners and gave each owner voting power in proportion to the value of land held. The Court applied a two-part test to determine whether an exemption was warranted: first, did the district have a “special limited purpose”, with other than “normal governmental authority?” second, did its operations “disproportionately affect different groups?” The Court found both tests satisfied. It stressed the fact that the districts did not provide “general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body,” and that its water storage and flood control activities were paid for by, and mainly of benefit to, landowners.

The Court never explained why it felt a need to draw a line, nor why the two-part test enunciated was the guidepost for determining on which side of the line a particular local unit should be placed. Perhaps the majority was simply applying traditional equal protection analysis in the determination of whether the California struc-
ture was “not rationally based.” The disproportionate effect of the districts’ operations on different groups might be relevant to the question of whether to permit a differential in voting power of those groups. However, this is only the second half of the test. Why limit this inquiry to those situations where the unit does not “exercise what might be thought of as ‘normal governmental’ authority?” The answer may be a value judgment that all general purpose and similar units of governments have a sufficient impact upon the lives of citizens that those units must be constituted in accordance with the fundamental principles of democratic government enunciated in the reapportionment cases, even if a differential impact might be provable in particular cases.

The test enunciated in *Salyer* will prove difficult to apply, but it will almost certainly lead to other decisions holding local governmental units exempt from the requirements of the one person-one vote rule. Both of these points are illustrated by the recent decision of the Second Circuit in *Education/Instruccion, Inc. v. Moore.* In that case the court denied the validity of a challenge upon one person-one vote grounds to a Council of Governments in the Greater Hartford area. The COG in question has duties generally similar to those of Massachusetts RPA’s. Thus it is charged with formulating non-binding comprehensive plans, and with rendering technical assistance to member municipalities. The Council can also issue reports on the compatibility between regional plans and proposed municipal plans.

The principal ground for finding the one person-one vote rule inapplicable, in both the District and the Circuit Court, was that the Council performed “essentially advisory and non-governmental” functions. Both courts purported to rely on *Salyer,* but neither court applied the two-part test enunciated in that opinion. Rather, the case seems to stand for the proposition that since advisory bodies do not exercise governmental power over anyone the requirements of democratic government do not apply to the manner in which they are constituted.

The dissenting judge argued persuasively that the COG’s powers should not be determined solely from its authorizing state statute. He pointed to the extensive role which the Council played in the planning and administration of federal grant-in-aid programs. The same analysis could be applied to Massachusetts RPA’s and to Councils of Government throughout the country. Unquestionably, therefore, the *Education/Instruccion* decision is a setback for those who have argued that such bodies, if elected, must be constituted...
in accordance with the one person-one vote rule. However, the author believes that the elected members of the regional entities contemplated in this article would be subject to the rule. The land use responsibilities of these entities, apart from others which might be assigned to them, would be sufficient to bring the rule into play. First, under the recommended allocation of functions, regional entities would have sufficient regulatory power and ability to implement their plans to take them out of the category of “advisory” units established by Education/Instruction. Second, the power to designate critical areas and to determine how they are to be regulated (including the power to issue regulations if the regional entity disapproves of proposed local regulations) is sufficiently similar to the “typical governmental powers” of municipalities that the first half of the Salyer test would not be met. Third, these land use activities affect many different groups, not just landowners. Indeed, it is the desire to ensure protection of all potentially affected interests that would lead to creation of any such regional entity.

This conclusion may seem to be at variance with the oft-cited need to encourage flexibility in the structure of regional governments. However, the conflict is resolved by the third guideline—namely, that the one person-one vote rule permits a wide variety of representational structures, and that representation of constituent municipalities can be provided even in the context of substantial population differentials.

The formation of a regional entity with power involves the ceding of some powers presently exercised by local government units. These units may be more willing to cede that power, and the resultant working relationships between levels may be more harmonious, if the local units are assured representation as units on the regional entity. One of the major challenges confronting the designers of new areawide institutions has been the development of a governmental structure which could combine a regional outlook with political legitimacy in the eyes of the constituent municipalities. The policymakers’ dilemma has been to satisfy these considerations without coming “dangerously close to [the argument] rejected in Reynolds, that sparsely populated counties deserve representation without regard to population so that their views can be heard.”

Dusch v. Davis provides an indication of the most promising way out of this dilemma. That case involved the consolidation of a city and its neighboring county into one municipality consisting of seven boroughs. At issue was a representation system for the city council, known as the “Seven-Four plan.” Four members were
elected at large, without regard to residence. The remaining seven were also elected at large, but with the provision that each of the seven boroughs must be represented. There was a substantial disparity in size among the boroughs. The Court held that since all voters had an equal power of choice this residence requirement did not invalidate the system.

The decision has been criticized. It is true that, under this system, citizens of the large boroughs may be forced to elect councilors they otherwise might not have. However, the system is a reasonable and workable attempt at encouraging the election of borough representatives with a citywide perspective, and is seen by most commentators as a promising solution to the metropolitan dilemma.

Although Dusch v. Davis may be the most helpful source of flexibility, it is not the only one. The designers of regional institutions should also give some consideration to the substantial variations in size which may be permitted among the representative districts of an elected regional body with representation by districts. In Abate v. Mundt, the Supreme Court, over a vigorous dissent, permitted a variation of 11.9 percent in a system designed to ensure that each town would have at least one representative on a county legislative board. The Court seems to have moved toward permitting greater population disparity in representative districts at the local level than at the state level, just as a higher degree is permissible at the state legislative level than at the Congressional district level. Abate, however, has its obvious limitations. It would not, for example, have permitted single district election of one member per municipality to the Martha’s Vineyard Commission without creating a substantially larger body.

D. Regional Institutions—Two Recommendations.

The application of these criteria—accountability, integration with other functions, and constitutionality—suggests that substantial changes should be made in many of the proposals currently under discussion in Massachusetts. For example, the Regional Resource Committees proposed in House Bill 3907 do not satisfy the criterion of accountability. Six of the eleven members would be appointed by the Regional Planning Agencies, bodies which are not themselves politically accountable. The Regional Resource Committees also appear to be single purpose bodies, although they would, presumably, work closely with the RPA’s.

On the other hand, the Franklin County Land Use Proposal seems
to satisfy both criteria. The need for accountability is met through the election of twenty-six of the twenty-nine members. Although the Commission created under this proposal would be, strictly speaking, a single purpose entity, the draft mandates a close relationship between it and the county regional planning agency, and provides that the County's plan will ultimately become the controlling factor in the Commission's regulatory operation. However, the allocation of one representative to each town in the county would seem to violate the constitutional requirements analyzed above.

None of the regional functions recommended in this article should be assigned to the RPA's in their current form. An exception might be made for intervention in local proceedings considering proposals for "developments of regional impact." Certainly the RPA would be a more suitable advocate of the "regional interest," and its views would be entitled to more weight, if the agency were constituted by a process reasonably geared to reflect that interest. However, even as presently constituted, the RPA's can contribute technical planning expertise to individual permit decisions by, for example, preparing regional impact statements considering the potential impact of the development on the region. Furthermore, intervention in local proceedings might be a step toward the allocation of greater responsibilities to more broadly based entities.

These criticisms, however, should not be taken as a dismissal of the proposals currently under discussion. Taken together, they show a high degree of concern for the problem of developing a new institutional structure, and point to ways in which that development might come about. Building upon the excellent work that has been done, the author would like to suggest two possible structures.

1. Accountable regional planning agencies with some elected members

The approach here is not to assign regional land use functions to entities separate from the RPA's, but to integrate these functions with the existing responsibilities of the RPA's, and to reconstitute these bodies in a politically accountable way. The Martha's Vineyard Law is a relevant example of this approach. The statute abolishes the existing RPA (the Dukes County Planning and Economic Development Commission), and transfers its functions to the newly created Martha's Vineyard Commission. This solution enhances the interrelationship between the planning functions already performed by regional planning agencies and the newly created regional
land use functions. The structure of the Martha’s Vineyard Commission, combining elective and appointive members, would satisfy the other criteria of political accountability and constitutionality.

This approach may well be replicable in other parts of the state. There are some indications that the RPA’s themselves would support it. Certainly this approach helps solve a dilemma which has been of great concern to planners: the conflict between their desire for more binding and authoritative planning and the need for governmental policy to emanate from a body with governmental legitimacy.

Proposals for mixed elective-appointive bodies are under consideration in the current session of the Legislature. There is strong interest nationwide in the development of such bodies as the most promising form of regional entity. In Massachusetts, the current prominence of the land use issue may well provide the impetus needed to take this significant institutional step.

2. New general purpose entities at the regional level

In some areas of the state it may be possible to go even further, and to create viable, general purpose regional governments with substantial responsibilities for the performance of areawide functions including land use. Since general purpose government is an ideal forum in which to resolve competing claims for resource allocation and in which to make overall policy choices, this may well be the optimum approach for satisfying the three criteria advanced in this article. There are two distinct ways in which this development may come about in Massachusetts: the establishment of a new regional government for the greater Boston area, and the transformation of county government in some rural areas into a new form of regional entity.

Three proposals for a new metropolitan entity in greater Boston are under serious discussion. Two out of the three assign to the new entity land use functions similar to those discussed in this article. A major unresolved issue is the nature of the governing body. The author believes that a combination of elected members and state government appointees, such as that proposed by the Greater Boston Chamber of Commerce, is more responsive to the criterion of political accountability than a governing body composed of existing municipal officials. Perhaps the uncertainty over how far to go in this direction stems from the fact that a clear choice has not been made between a general purpose metropolitan government and a supervisory entity without substantial operating responsibilities.
In other parts of the state, restructured counties might combine with the Regional Planning Agencies to form significant regional entities. Certainly, the regional land use functions suggested here should be part of the responsibilities of such entities. Once again, land use questions may help trigger the process.

3. **Boundaries**

The question of boundaries for new regional entities has not yet emerged as a matter of significant dispute in Massachusetts. All proposals for greater Boston build on the existing Metropolitan Area Planning Council, despite its large size. In the rest of the state problems may arise in attempts to combine counties and RPA's in those cases where their boundaries are not the same. There are some "logical" areas in which this is not a problem. Moreover, the wholesale reform of county government would probably involve a substantial redrawing of boundaries in any event. The problem perhaps does not arise at all when the option chosen is that of developing the existing RPA into a more accountable entity.

### III. **The Need for a Uniform System**

The land use debate in Massachusetts is frequently couched in terms of whether or not one favors the enactment of "state" legislation. A source of confusion is the fact that this word is used in several senses: legislation emanating from the state government; regulation at the state level; and regulation across the entire state. Thus one element of the debate is whether any system that is adopted should be imposed "statewide." But even this question is, in reality, two questions: first, should a system of supra-local land use control be adopted for the entire state; second, should that system be uniform in all parts of the state?

#### A. **Whole State Coverage.**

The premises behind the serious consideration of a new land use control system for Massachusetts suggest that any such system should cover the whole state. Supra-local concerns are potentially present in a wide variety of development decisions. It is true that some regions of the state may have more critical areas than others, or may be more drastically affected by developments of regional impact. The argument here, however, is that supra-local interests should be protected whenever they arise (recognizing that no system will do this perfectly), unless creation of the system to protect them is harmful to other values in such a way that its "costs" (either the...
costs of setting it up or the costs of operating it) outweigh its "benefits" in regions of the state where it is little used. Hopefully the system presented here does not entail substantial "costs;" that is, it can be designed and operated so that it is not destructive of local control, does not cripple economic activity, and does not create a new and otherwise unnecessary level of institutions.

Certainly, the ALI Model Code seems to establish a whole-state system. This is also true of many of the states which have enacted new land use control systems in recent years. However, a state might conclude that only certain portions of it "need" a non-local control system. Coastal Zone Management is the strongest example of this approach.

There is a substantial possibility that Massachusetts will reject the "whole state" approach, and will enact one or more non-local systems for different portions of the state. The 1974 enactment of a special system for Martha's Vineyard may be a precedent in this direction. The Vineyard legislation was presented, in part, as a "model" or "pilot" for the rest of the state, but it may be a model for a segmented system with some regions not included at all.

There are two reasons why the state Legislature might take this approach. First, it might conclude that a particular region "needs" a special land use control system, for example in areas where significant natural resources may be threatened by development pressures. Enactment of a Coastal Zone Management system would also embody this approach.

The second reason would be a conclusion that a particular area "wants" a special land use control system. For example, the Martha's Vineyard legislation was enacted only after a favorable vote in a non-binding island-wide referendum. A particular region's desire for such legislation might be deduced from the fact that state legislators from the area filed legislation, or that a regional institution supported it. One technique which is likely to be used is the passage of a land use bill for a particular region, subject to a local acceptance by popular vote.

There are strong arguments on both sides of the issue. However, if the Legislature accepts the premises behind a non-local system in the first place, such a system ought to cover the whole state. In a sense, the system proposed here could be regarded as the necessary minimum to protect supra-local interests wherever they may arise. If needed, special protection for particular areas or types of development could be added.

Although the local option may seem like a natural compromise,
especially to legislators, it should be rejected. A principal function of the state legislature is to protect interests which the political process at lower levels may not protect. Once the Legislature concludes that these interests are present—actually or potentially—in a region, it should not give that region the option of not protecting them.

B. Statewide Uniformity

Those "whole state" systems which do exist in the United States are uniform in the sense that the same set of institutions operate everywhere within the boundaries of each state. It should be noted, however, that in decentralized systems the various regional agencies may approach their duties somewhat differently. There is no reason why a uniform structure is necessary. Different institutions in different parts of the same state may be employed to protect the same set of interests. The middle tier structure suitable for a large metropolitan area such as greater Boston may differ greatly from the institution which evolves in a large rural county such as Berkshire, which would, in turn, be different from the Martha's Vineyard Commission.

The values inherent in local autonomy can be advanced by letting each region evolve, to some extent, as it "wishes." The ultimate state (and "statewide") legislation might even contain a series of "regional options." A "standard form" of middle tier institution could be established as the norm, with each region given the opportunity to devise its own variant and to adopt it in a regional referendum. The state would have to play some role in delineation of boundaries, in the first instance, and would have to retain some power of approval over any region's alternate choice. In particular cases, such as the creation of a metropolitan government for Boston, specific state legislation would be necessary.

The value of regional differentiation can be advanced in another way: by varying the extent of regulatory activities performed at the regional level. Under the system proposed, the functions assigned to the local level remain constant: adoption of regulations for critical areas; enforcement of these regulations; and enforcement of the standards governing developments of regional impact. At the regional level, however, assignment of functions might depend on the capability of the different regional institutions to perform them. All functions not assigned to the regional level would be performed at the state level.

A significant feature of this system is that it can be set into
motion at once, and as various regional institutions evolve, new
duties can be assigned to them. This might work as follows: Area
“A” has not developed an appropriate regional structure. Critical
areas are designated at the state level, with assistance from the
existing RPA, and the state reviews proposed local regulations, and
adopts its own if these are inadequate. The RPA intervenes in local
development of regional impact proceedings. Area “B” has devel-
oped an appropriate regional institution as outlined above. This
regional agency performs the functions of designation and review of
critical areas, which the regional agency in area “A” is not ready to
undertake. An important effect of this approach will be to hasten
the development of regionalism in area “A”, since the alternative
of state performance of the function will be seen as a lessening of
“local control.”

IV. CONFORMITY WITH FEDERAL LAND USE LAWS—A NOTE

The strong possibility that Massachusetts will enact statewide
land use legislation will be further enhanced by the passage of a
National Land Use Policy Act. Furthermore, Massachusetts is
already participating in the Coastal Zone Management Act, and
has thus committed itself to developing new land use controls for a
substantial portion of its territory. Any statewide land use legisla-
tion should attempt to comply with the likely provisions of a na-
tional bill, and the system should be integrated with the Coastal
Zone Management Plan. State legislation based on the ALI regula-
tory categories should satisfy the requirements of both federal pro-
grams, although the Coastal Zone Management Act appears to re-
quire more extensive regulation of uses than the national land use
proposals.

The institutional structure and allocation of responsibilities rec-
ommended in this article would also comply with the likely require-
ments of both programs. However, one caveat should be noted. The
Martha’s Vineyard Commission is an institutional model, but the
absence of any appeal from its decisions to a state-level administra-
tive body may limit this statute’s value as a procedural model. The
“Land Use Policy and Planning Assistance Act” which passed the
Senate in 1973 gives the states a choice, at the stage of implement-
ing an ALI-based land use program, between:

(1) implementation by general purpose local governments pursuant to
criteria and standards established by the State, such implementation
to be subject to State administrative review with State authority to
disapprove such implementation whenever it fails to meet such criteria and guidelines; and (2) direct state land use planning and regulation.\(^1\)

The first alternative would seem to require case by case review at the state level, as opposed to periodic reviews of compliance. The Martha’s Vineyard Law does not provide for such review. Nor does that statute satisfy the second alternative. The new Commission is a regional body, (indeed, one which might comply with the Senate bill’s definition of “general purpose local government”\(^2\)) rather than a state level entity.

The institutional structure proposed in this article avoids this problem by providing for state-level administrative appeal, primarily as an additional check to ensure the protection of all interests potentially present in critical areas and in developments of regional impact. The conformity of this approach with likely federal legislation is an additional reason for adopting it.

**CONCLUSION**

Massachusetts is still in what might be called the “process” stage. However, the process may be nearing its completion, and the enactment of significant new land use legislation may become a reality. Such legislation will not come about until the institutional questions raised in this article are resolved. Yet these questions can be answered, and from the answers can come not only land use legislation, but also the new regional institutions which Massachusetts reformers have sought to bring about.

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**FOOTNOTES**

*Associate Professor of Law, Boston College. During 1973-1974 the author served on the staff of Governor Francis W. Sargent (Mass.) as Special Assistant for Environmental Affairs.

1 See F. BOSSelman and D. Callies, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

2 A 1974 survey by the National Association of Regional Councils reported that nine states were close to implementing comprehensive programs, and that “studies by or for state legislatures are in progress in 20 states.” NATIONAL ASSOCIATION OF REGIONAL COUNCILS, Memorandum “Need for Action at State Level on Land Use,” August 23, 1974. See also MASS. DEPARTMENT OF COMMUNITY AFFAIRS, STATUS OF STATE LAND USE POLICY IN THE FIFTY STATES: A MATRIX, 1974. (Estimating that an increased state role in land use decision-making is under study in approximately twenty-five states.)
3 See Mass. Department of Community Affairs, Proceedings on Setting A Statewide Land Use Policy, 1973. (Available from the Division of Continuing Education, University of Massachusetts) [hereinafter cited as DCA Proceedings]; Editorial, The Ungreening of Land Use, Boston Globe, April 15, 1974, at 16, col.1. As of this writing, the most significant work on new legislation is being done by the Subcommittee on Land Use Policy of the Special Commission on the Effects of Growth Patterns on the Quality of Life in Massachusetts [hereinafter cited as Land Use Subcommittee].

4 See text at note 87.


8 E.g., P.O.D. No. 1, Articles 2-3.

9 T.D. No. 3, at 5.


11 See Advisory Commission on Intergovernmental Relations, Governmental Functions and Processes, Local and AreaWide 87-88 (1974) [hereinafter cited as A.C.I.R. Vol. IV]; Cf. DCA Proceedings 102-03 (Remarks of Professor Phillip Herr.)


13 P.O.D. No. 1, at 292-94 (Article 7-201).

14 Id. at 293 (Article 7-201(3)(b)).

15 Id. Article 7-201(3)(a). Also included within this category are proposed sites of new communities (identified in a state plan), and land within localities which do not have land use controls.


17 P.O.D. No. 1, at 305-07 (Article 7-301).
Id. at 320-22 (Article 7-402). It should be noted that this process can lead to the approval of development deemed to be “of regional benefit,” even if the applicable local development regulations would bar the proposal.


22 Id. at §§ 9-11.


24 Id. at 58-59.


27 Id. at 7, 46; Cf. DCA Proceedings at 103 (Remarks of Professor Herr, positing as a “system goal” relating “land use to other functional issues at each governmental level at which land use is a consideration. . . .”)


29 See 1 Advisory Commission on Intergovernmental Relations, Regional Decision Making for Substate Districts (1973) [Hereinafter cited as A.C.I.R. Vol. I.] The use of regional level institutions may also be more acceptable to proponents of local control than a substantial transfer of authority to the state level. See English, supra note 5, at 116-17.


31 For analysis of five possible systems, see DCA Option Paper, supra note 5.

32 The system proposed here encompasses only regulation of private, as opposed to governmental, development. Whether to include governmental development is an important, but separable, issue. See P.O.D. No. 1, at 39.


34 The statutory language probably should be permissive rather than preemptive, leaving municipalities free to develop additional control techniques in accordance with Section 6 of the Massachusetts Home Rule Amendment, assuming that such ordinances or by-laws would be “local.” See Mass. Const. amend. art. II, as amended by art. LXXXIX, § 6.

35 See English, supra note 5, at 116-17.
Professor Phillip Herr has suggested the possibility of such a conflict.


P.O.D. No. 1, at 287-88.

See P.O.D. No. 1, at 325-28. See also Text at note 186.

For an example of such a proposal, see Mass. H. 3907 § 3(3) (1975) (Creating "Massachusetts Land and Water Adjudicatory Board," consisting of Attorney General and four gubernatorial appointees.) General purpose regional governments might be assigned the responsibility of appointing such boards. However, appointment at the state level provides uniformity of appellate decisions, and also an additional check to ensure that supra-regional interests will be adequately considered.


P.O.D. No. 1, at 320-22.

See E. Haskell and V. Price, State Environmental Management 190 (1973) (Differences in the various regions' enforcement of the Vermont Law.)


English, supra note 5, at 116.

For a general discussion of this approach, see Brown, Home Rule in Massachusetts: Municipal Freedom and Legislative Control, 1973 Mass. Law Quarterly 29 (Spring issue).


See English supra note 5, at 131-32.


See P.O.D. No. 1, at 290.

This approach is also consistent with the recent thinking of the Land Use Subcommittee, which stresses building on the existing capacity of local governments.


Id. at 325, 334.

Id. at 334-35.

For a suggestion that judicial responsibilities be removed from the counties, see Surkin, Time to Start Court Reform, Boston Globe, March 4, 1975, at 23, col. 1.

Barnstable, Berkshire and Franklin Counties.


Land Use Subcommittee, Working Paper Number II (on file with the author).


A.C.I.R. Vol. 1, at 50. The Commission suggests a possible distinction between COG's and RPA's on the ground that the former are composed specifically of chief elected officials, while the latter are composed of representatives of the member communities who frequently are not officials.

Mass. Acts. of 1967, ch. 332. (Old Colony Planning Council. This system applies only to the towns which are part of the council and not to the cities.)


Other statutes provide for alternate members, and occasionally for appointed representatives of low income groups.


Id. But cf. Id. at § 5B (Authorization to function as economic development district under federal law.)

See Southeastern Regional Planning and Economic Development District, The Crisis in Regionalism, April 18, 1973 (Taunton, Mass.) (on file with the author).


On this trend nationally, see id. at 73-75.

Id. at 88.

Id. at 139-66.

Id. at 167-220. The Commission identified 24 federal programs using the areawide approach.

Letter from Governor Francis W. Sargent to Frank Herringer, Administrator, Urban Mass. Transportation Authority (Dec. 27, 1973) (on file with the author.) The letter indicates that this money has been supplemented by additional federal grants awarded directly to individual RPA's. The MAPC in particular has received

See letter from Governor Sargent to Administrator Herringer, supra note 81.


Letter from Vincent C. Ciampa, Assistant Secretary, Executive Office of Environmental Affairs, Commonwealth of Massachusetts to author (April 15, 1975) (on file with the author). The Martha’s Vineyard Commission has also been designated.


E.g., Mass. H. 1626 (1975) (proposing Metropolitan Service Council with substantial authority over transportation and environmental programs in the Greater Boston Area).


Id. at § F(1).

Id. at § G(3).

E.g., Mass. H. 4438 (1974); Mass. H. 5101 (1974). The latter bill devoted substantial attention to restructuring the RPA’s into more politically accountable entities. Id. at § 5C.


Id. at §§ 4-5.

Franklin County Planning Board, Proposed Franklin County Land Use Bill, November 21 1974, § 3 (Not yet formally filed).


Id. at § 1.

Cf. A.C.I.R. Vol. IV, at 8 (importance of political accountability as criterion for assignment of land use functions); DCA Proceedings, supra note 3, at 112.

E.g., Franklin County Planning Board, Proposed Franklin County Land Use Bill, § 3.


Id. at 756. See English, supra note 5, at 127.


Tentative Outline, Part 1, § 1 (on file with the author.)


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110 See, e.g., the current requirements for preventing air quality deterioration. 40 CFR §§ 51.1-51.33.

111 A.C.I.R. Vol. IV, at 8, 16; Cf. DCA PROCEEDINGS, supra note 3, at 103.


113 The principal case is People ex rel Younger v. Dorado County, discussed infra.


118 Id. at 10.


121 McKay, supra note 119, at 723.

122 393 F.2d 457 (2d Cir. 1968).

123 Id. at 461, as quoted in Education/Instruccion v. Moore, 379 F. Supp. 1160, 1165 (D. Conn. 1973).

124 See, Education/Instruccion v. Moore, 503 F.2d 1187, 1189 n.3 (2d Cir. 1974).

125 McKay, supra note 119, at 732.


129 Id. at 728.

130 Id. at 732-734.


133 The three dissenting Justices argued that the test could easily lead to an opposite result in the fact situation present in Salyer. 410 U.S. at 740 (dissenting opinion of Mr. Justice Douglas.)


135 379 F. Supp. at 1166.

136 503 F.2d at 1189; 379 F. Supp. at 1163.


138 503 F.2d at 1190-91 (dissenting opinion).

139 See generally Jones, supra note 104, at 755.


McKay, supra note 119, at 725.

387 U.S. 112 (1967).

The disparity ranged from 733 to 29, 048. Id. at 117, n.5.

McKay, supra note 119, at 724-25.

Cf. The Supreme Court 1966 Term, 81 Harv. L. Rev. 69, 155 (1968).


403 U.S. 182 (1971).

Id. at 186.

Education/Instruccion v. Moore, 503 F.2d 1187, 1191-92 (2d Cir. 1974) (dissenting opinion).

The disparity in population ranges from 118 to 2,257. A system based on Abate, guaranteeing the smallest town one representative from “its” district, would have led to a body of approximately 58 members.

Franklin County Planning Board, Proposed Franklin County Land Use Bill, § 3.

Id. at § 8.

The smallest town in the County has a population of 216; the largest has 18,116.


See generally § IV, B. infra.

Especially the work of Ms. English, Professor Herr, and the Department of Community Affairs.


The Northern Middlesex Area Commission was one of the sponsors of Mass. H. 5101 (1974).

See generally T.D. No. 3, supra note 7, at 78-81.


Jones, supra note 104, at 756.
168 As proposed in Governor's Task Force on Metropolitan Development, Draft Findings and Recommendations (September, 1974).
170 See Mass. H. 3892 (1974). This proposal would have reorganized Barnstable County and created a County Legislature. The existing RPA would have been transferred to the reorganized County. The new county functions would have included "the designation and control of areas which shall provide for regional needs. . . ." Id. § 7.
172 Cf., T.D. No. 3, supra note 7, at 11-12.
173 E.g., Vermont.
174 California may be an example of this approach.
179 E.g., E. Haskell and V. Price, STATE ENVIRONMENTAL MANAGEMENT 190 (1973) (indicating variations in approach among the Vermont District Commissions).
184 S.268, 93d Cong., 1st Sess. § 203(c) (1973).
185 Id. at § 601(c).