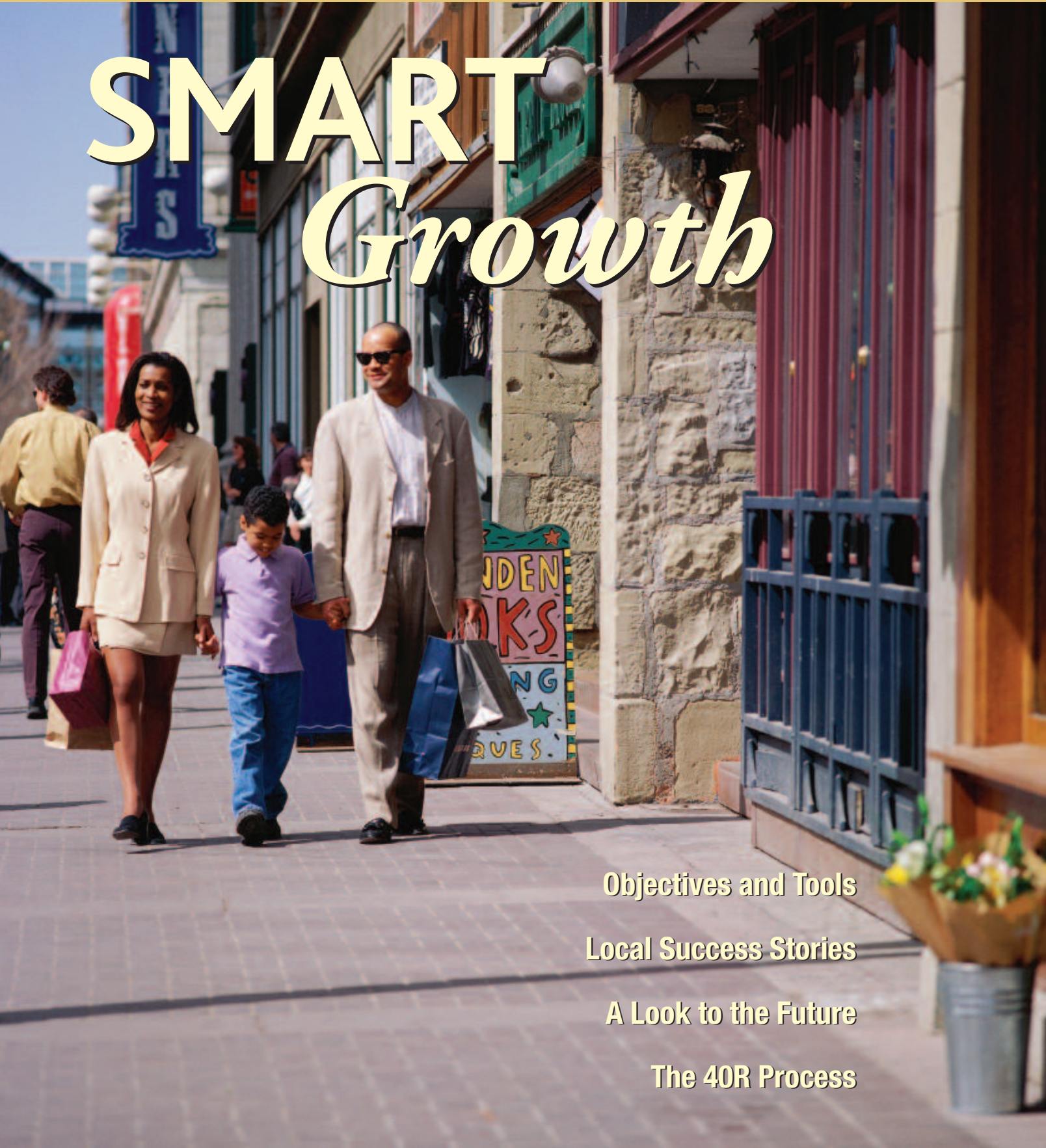


# Municipal Advocate

The Massachusetts Municipal Association

# SMART *Growth*



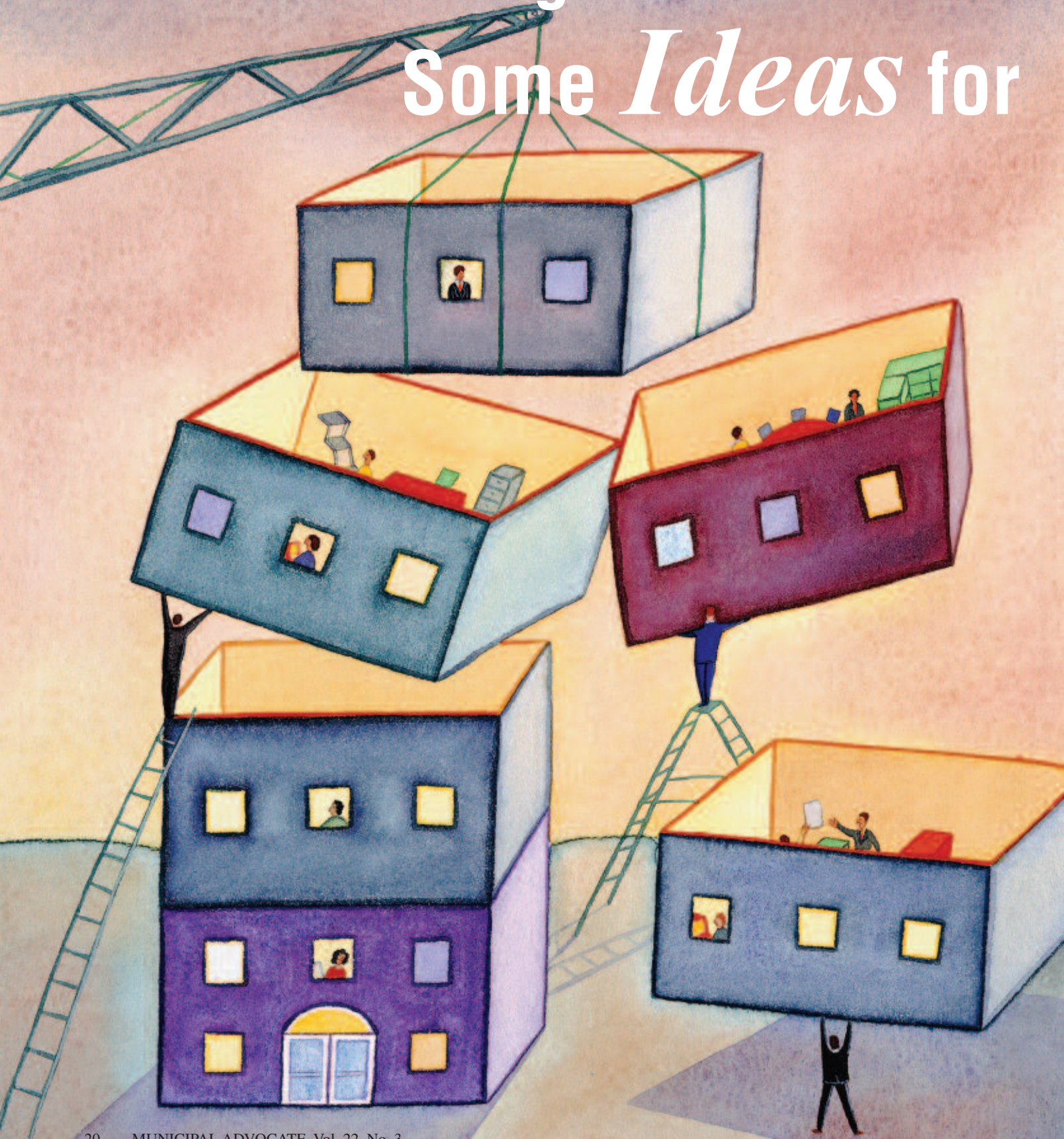
Objectives and Tools

Local Success Stories

A Look to the Future

The 40R Process

# Achieving *Smarter* Some *Ideas* for



# *Growth* in Massachusetts, Moving *Forward*

BY R. LISLE BAKER

“Smart growth” is the current buzz in planning and policy. Of course, who would be in favor of stupid growth? The challenge is to move beyond a catch phrase to effective action. While Massachusetts has taken positive strides, much remains to be done.

The key to success is to involve the citizens and officials closest to the problem—local governments and the constituents they serve—in the solutions. Otherwise, instead of collaboration in search of true commonwealth, we will have unfunded mandates, blame-throwing and little progress.

The following are some ideas to consider as we move forward in making “smart growth” even smarter.

1. Make sure that “smart growth” recognizes situational distinctions, including neighborhood, community, and regional character and important environmental concerns.

Local land use controls add value to housing investments. Anyone could buy land and build a house on it, but if the land next door can become a polluting factory or a dump, that investment would be risky. Before zoning laws existed, landowners would sue incompatible

neighbors under the law of nuisance for interfering with the use and enjoyment of their land. But that is a little like directing traffic by litigation, rather than using painted lanes or traffic lights. Indeed, local zoning laws came about to separate uses that were desirable in themselves, but not necessarily good neighbors. As the U.S. Supreme Court opined in a seminal case upholding an early ordinance, “a nuisance may be merely a right thing in the wrong place, like a pig in a parlor instead of the barnyard.”

Local zoning laws have been part of the fabric of every community in the state for years, so much so that they are taken for granted. If you live in a residential neighborhood where houses are no more than three stories high, for example, you

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can expect the new house next door to be the same, because local zoning imposes use and dimensional controls common to a zoning district. This effect is called the mutual “reciprocity of advantage,” where one landowner’s rights are limited to some degree in return for similar limitations on the land of a neighbor.

In short, citizens live together successfully in part because the residential character of their neighborhoods are preserved by municipal zoning ordinances and bylaws, which help to foster a sense of investment in and contribution to the larger community. In an effort to “grow smart,” therefore, it’s important that state land use planners recognize the positive incentives that local zoning can provide.

## It would be a mistake to assume that “smart growth” is the tube sock of state public policies: one size fits all.

The current draft of the city of Newton’s Comprehensive Plan, now undergoing revision, recognizes the value of smart growth “with a few additional considerations that stem from this being a fully developed community having a valued structure of neighborhood character and cohesion.”

‘Growing Smart’...in Newton must give important consideration to neighborhood as well as Citywide impacts. Consistent with that, we seek to protect the rich choice among the City’s neighborhoods, some highly diverse and others not, some quite compact, others more open. We seek to assure development densities well related to both neighborhood character and infrastructure capacity. We seek to promote a range of housing opportunities.

In setting “smart growth” priorities, it is also important to keep environmental



and regional factors in mind. For example, as global warming appears likely to raise sea levels and storm intensity, coastal locations will become increasingly hazardous, so it would be unwise to focus new development there even if there is existing infrastructure, such as public transportation. And with much of Massachusetts still relatively rural, it is important not to ignore the needs and the character of these communities. In fact, it may be smart not to grow in an area where important natural or other resources need protection.

In short, local officials know that land use is a matter that requires local knowledge. It would be a mistake to assume that “smart growth” is the tube sock of state public policies: one size fits all.

### 2. Make sure that “smart growth” is not simply a way of displacing older homes, which can provide entry-level housing, with new construction, but also help with appropriately sized infill projects.

Much of the housing stock in Massachusetts is old. Indeed, one of the innovations in Martha’s Vineyard and Nantucket has been the reuse of existing housing on public land, echoing an older practice whereby old houses weren’t torn down but simply moved to a new location. Just as used cars are more affordable than new ones, the same is true of much of our existing housing stock, and we should not

allow it to “leak out” of the bottom of the housing bucket while we try to fill up the top with large new housing.

In Newton, for example, the city has adopted a demolition delay ordinance and a limit on house size to check some of the worst abuses where an older, smaller house is torn down to make room for a “McMansion.” Some communities are nervous about enacting such limitations, however, and the proposed Community Planning Act, described below, has a provision to amend current state zoning law by removing the restriction against regulating the maximum interior area of a single-family residential building.

Some local officials consider small, scattered-site, affordable housing development, especially as infill, to be exceedingly “smart” growth. In the process of assuring development, it is important for the state to facilitate small projects as well as big ones, since lots of little successes can add up over time.

It is also worth looking at cities where older structures, such as mills, have not yet been renovated into housing because of the economics involved. Rhode Island, for example, has used a much more extensive historic tax credit than Massachusetts to induce the kind of infill-adaptive reuse of older structures that can help revitalize existing downtowns.

### 3. Remove disincentives and enhance incentives toward “smart growth” in state laws.

The Home Rule Amendment to the Massachusetts Constitution provides that:

“It is the intention of this article to ... grant and confirm to the people of every city and town the right of self-government in local matters ... subject to such standards and requirements as the General Court may establish by law. ...”

Part of the difficulty for local laws is that what the Massachusetts Constitution has granted to municipalities, the General Court has often taken away by enacting restrictive rules applicable to local planning and zoning. (Imagine how we would feel if state government had to get an act of Congress every time it wanted to do something positive for its citizens in the area of land use controls.)

In Massachusetts, the primary responsibility for local land use control falls to

the 351 cities and towns (except for Boston, which operates on its own special acts), but their powers as to zoning and subdivision control are circumscribed by state law. (This point was well-made by the 2004 book *Dispelling the Myth of Home Rule*, by David J. Barron, Gerald E. Frug and Rick T. Su.)

Here's one example: under current state zoning law, a landowner can avoid the impact of a zoning change simply by filing a duly noticed preliminary subdivision plan, followed within seven months by an approved final plan, which will "freeze" the zoning in effect at the time of the first submission. In the late 1980s, the city of Taunton, with Route 495 coming near, attempted to adopt a "smart growth" local planning initiative that would have directed growth into and around existing city and village centers and to areas served by city water and sewer. When the plan became public, the city experienced a rush of subdivision plans, assuring that the city would continue to grow in accordance with the sprawl patterns dictated by the old zoning rather than the new plan.

Massachusetts is also unique in allowing the filing of "approval not required" plans for divisions of lots on existing public ways, some of which may be unpaved, single-lane roads. These contribute to housing dispersion and expensive public services that burden rural towns, all without requiring any of the review that a conventional subdivision would need.

For more than six years, a volunteer

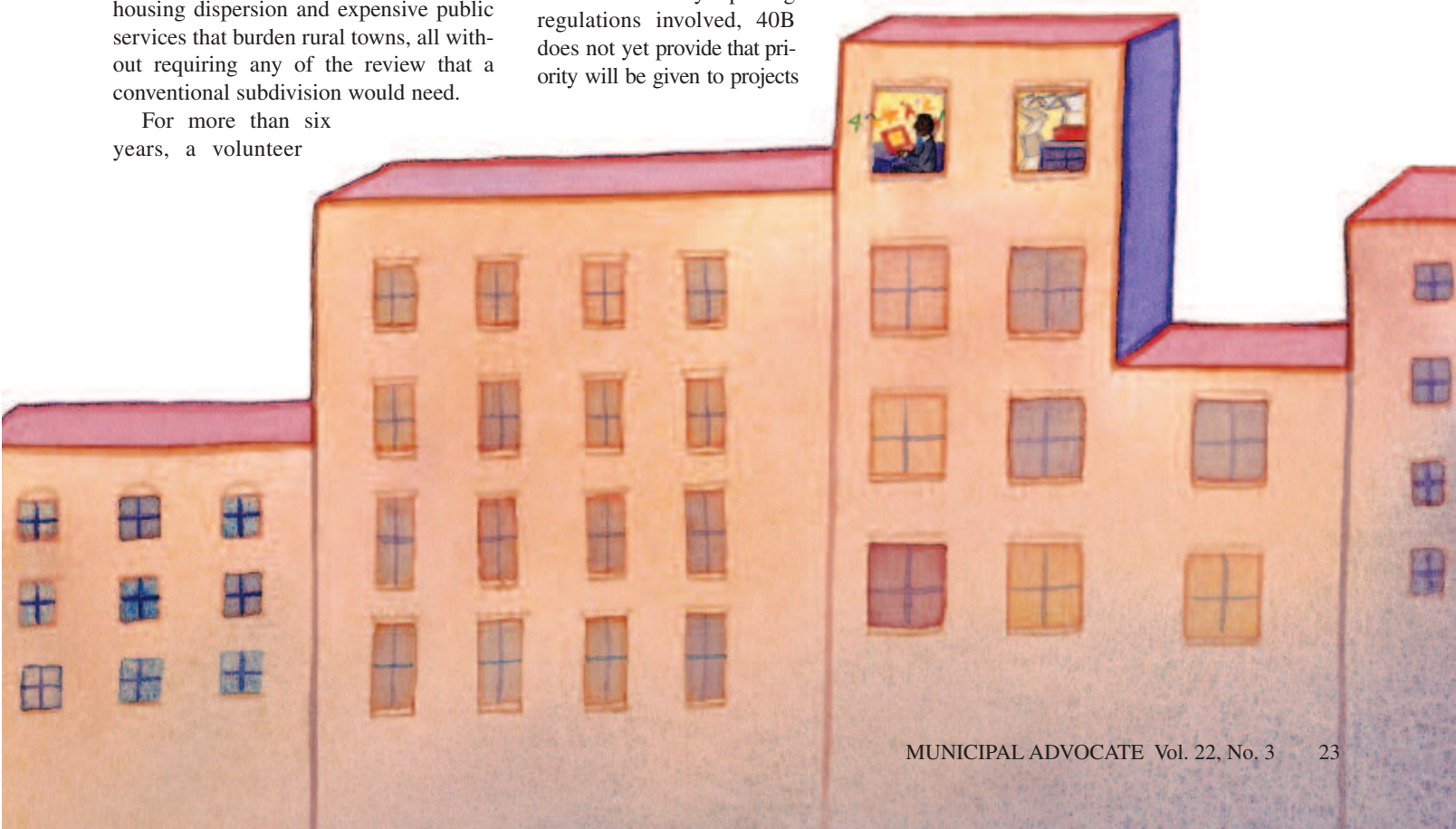
Zoning Reform Working Group composed of representatives of the Massachusetts Municipal Association, local and state officials, the state's major planning and environmental organizations, citizens, and legislators and others have been working on updating the state's outmoded zoning and planning laws, culminating in the proposed Community Planning Act (formerly the Massachusetts Land Use Reform Act). The MMA Board of Directors voted in June 2004 to support the bill in principle as originally filed—it has gone through two major revisions since then—with the understanding that the MMA would continue to support any amendments to the bill that enhanced local control. (For a description of the current version of the Community Planning Act, see the Massachusetts Zoning Reform link at [www.massmunilaw.org](http://www.massmunilaw.org).)

Also, virtually every Massachusetts community has been exposed to Chapter 40B of the general laws, which allows a developer who is willing to commit a quarter of the units to affordable housing, an important and valuable public policy, to bypass much of local land use control by getting a comprehensive permit. While efforts have been made recently to make Chapter 40B projects more responsive to local concerns by updating the regulations involved, 40B does not yet provide that priority will be given to projects

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located on "smart growth" sites rather than at the discretion of the developer. (The state, however, has begun to earmark some housing subsidy funds for "transit-oriented development," including 40B projects, and local Community Preservation Act funds may also be available.)

A law that did attempt to focus on such sites is the recently enacted Chapter 40R, supplemented by Chapter 40S. The idea was to encourage municipalities to rezone property to allow dense development in "smart growth" locations by providing state funds for new housing constructed, including some funding for the cost of educating the schoolchildren who might live there. Unfortunately, the law was enacted without a public hearing



or significant input from local officials who actually vote on zoning changes. So, for example, the law requires a party aggrieved by approval of a project to post a bond equal to twice the estimated landowner's carrying costs and attorney's fees while the appeal is pending. Since 40R is a local option law, will many local officials or town meetings adopt a law with a section that so burdens affected citizens? Provisions like these, which the MMA had opposed, can constitute poison pills that can keep such laws from being locally accepted. Finally, while welcome, the financial aid provided does not go to mitigate the impact on the properties neighboring the proposed denser zoning, but to the community as a whole, again making it seem unfair if part of the community gets the revenue benefit while another part gets the density burden.

It's also easy to recommend altering state law to make some land uses available as of right by over-riding home rule, such as recent proposals to allow mixed residential use in all commercial zones near transit stops, or cluster zoning (wherever located), or even accessory apartments in any single-family home. While these uses can often be worthwhile, it is misguided to attempt to do land-use planning for them by statewide legislative mandate rather than providing communities with positive incentives that fit local needs and concerns.

If there is a lesson to be learned from local zoning experience in the context of state law, it is that high-quality new development can go forward successfully so long as it is well done in a way that tries to fit in, rather than overburden, the affected community.

#### 4. Use the experience of local government with discretionary permits and dispute resolution to help "smart growth" development fit in.

Even public-spirited citizen volunteers can't do it all, and with rare exception, most land use decisions are made by citizen volunteers or modestly compensated part-time public officials. They need legal and planning assistance, even with the best of laws to administer. But these planning and legal service expenses are often low priorities in municipal budgets, where public safety and schools justifiably have first claim.

The Community Preservation Act allowed communities to tax themselves modestly to fund open space, historic preservation and community housing—public expenditures that stood in the back of the line of municipal funding priorities. While some project-specific technical assistance can be obtained from developers under state law (M.G.L. Ch. 44, Sec. 53G), state grants to a municipality for "smart growth" technical assistance are limited to \$30,000, so more funds dedicated to support local planning and zoning are needed too. While state and regional interests need attention, only local government has the site-specific knowledge and the time of citizen volunteers to make land-use planning work. Imagine having a state agency try to plan and zone 351 cities and towns and then administer it day-to-day?

## Positive examples in land use should be rewarded, celebrated and publicized...

The formal and informal dispute resolution experience also provides some lessons. The proposed Community Planning Act already provides for mediation not only after a dispute arises and a case goes to court, but even before a project gets proposed, so as to minimize the burden to everyone involved. Even without such a formal process, however, municipalities work with developers and citizens every day on projects that require a zoning permit to go forward. It is through the public hearings, working sessions, and ultimate conditions that projects with higher density are done in a way that minimizes adverse impacts on neighbors while producing the public benefit that new construction can provide.

Positive examples in land use should be rewarded, celebrated and publicized so that other communities can learn about innovations made possible by the mini-federalism that local government provides. More technical assistance in the form of sample ordinances or planning reports could help other communities seeking to

achieve smarter growth.

Even without the proposed Community Planning Act, there are many local success stories. Here are a few:

- In Franklin, a developer has plans to replace a warehouse with three buildings that include offices, condominiums and commercial space, located within walking distance of a commuter rail train station.
- Newton provides density bonuses by special permit to developers who are willing to commit a portion of their project to affordable housing. Newton also acquired a golf course some years ago by a combination of development on the edge and financing part of the acquisition cost with a special betterment assessment on surrounding properties, including the new development, because they benefited by the preservation of recreational open space next door.
- Framingham has approved almost 500 housing units through mixed commercial and residential, or high-density projects, including the Arcade at Downtown Framingham.
- Natick recently approved a "housing overlay option plan" to allow for redevelopment of industrial sites into housing construction.

[For more examples, see related story, *Smart Growth Is Gaining Ground*, page 16.]

Land use planning and zoning is likely to remain local for the foreseeable future, but municipalities need the cooperation of the state to help them grow smarter. At the same time, the state needs the cooperation of municipalities because they are on the front lines of decision-making and know local conditions. Working together, both state and local government can achieve smarter growth and build the future commonwealth we want. 🌟

