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FRAGMENTS OF REGIONALISM: STATE AND REGIONAL PLANNING IN CONNECTICUT AT CENTURY'S END

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Other articles in this symposium on Regional Land Use Planning address specific aspects of regional planning and cooperation, such as sprawl, protecting natural resources, and providing regional equity in schools and housing. I am going to examine how towns in my state, Connecticut, have reacted to the increasing pressures to consider the impact of local decisions on other municipalities in its metropolitan region. While Connecticut's institutions and laws reflect some of these pressures for regional planning and cooperation, the overall picture is one of ad hoc responses to particular situations, rather than the result of a planned evolution. Regional planning may be inevitable, and some consider it necessary, but Connecticut's experience is that it will be haphazard and not at all coordinated. Unfortunately, it appears that the whole of regional planning and cooperation—its theory—may well be less than the sum of its parts—its implementation—unless stronger and more broadly based leadership asserts itself.

The central idea underlying regional land use planning is that barriers formed by town boundaries, previously thought impenetrable, need to be broken down to enable effective government action over a broader area when circumstances require it. Generally, those circumstances occur when significant externalities are imposed by actions of one town on a neighboring town or towns.¹ A more centralized authority is required to ensure that a town considers the effect of its decisions on areas beyond its municipal borders. Several

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¹ See Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong With Euclid*, 5 N.Y.U. ENVTL. L.J. 277, 284 (1996) (stating that market failure is the basis for the argument on land-use planning).

objectives, not all consistent, can be pursued with a regional planning agenda. For some, regionalism holds out the promise of income redistribution to achieve greater economic equality among neighboring towns. Minnesota's pioneering "Fiscal Disparities Act" is perhaps the leading example and one which some urge Connecticut to adopt.² For others, regionalism's primary benefit will increase economic, racial, and ethnic integration.³ Reviving central cities is another reason to support regional planning efforts.⁴ Others see regionalism as a means of stopping sprawl and preserving open space.⁵ Municipal officials often see regional cooperation as a means of increasing the quality of services they are able to provide citizens, while decreasing costs.⁶

Regardless of the objective, Connecticut's experience suggests that the successes in using regionally based efforts

² Connecticut State Assembly Representative Jefferson Davis is one of the leaders in a continuing but unsuccessful effort to have Connecticut adopt a tax base sharing plan, based on the Minnesota model, to remedy the fiscal disparities between towns. See his remarks as co-chair of the legislature's Planning and Development Committee concerning unsuccessful legislation introduced this past session entitled, *An Act Concerning Municipal Fiscal Disparities*, H.B. 6688 Jan. Sess. (1999), H.R. Proc. 32-000498 (Mar. 1, 1999). For a discussion of Minnesota's pioneering model, see Note, *Minnesota's Metropolitan Fiscal Disparities Act—An Experiment in Tax Base Sharing*, 59 MINN. L. REV. 927 (1975).

³ See James A. Kushner, *Growth Management and the City*, 12 YALE L. & POL'Y REV. 68, 92 (1994) ("Urban growth management . . . must promote . . . economic and racial integration, and social equity for all residents of the city.").

⁴ See Robert D. Bullard, *Building Just, Safe, and Healthy Communities*, 12 TUL. ENVTL. L.J. 373, 392 (1999) (discussing industry flight from central cities as furthering "social and economic inequalities").

⁵ See Peter J. Vodola, *Connecticut's Affordable Housing Appeals Procedure Law in Practice*, 29 CONN. L. REV. 1235, 1240 (1997) (stating that "continuing suburban sprawl . . . helped create a severe shortage of housing within the financial reach of low- and moderate-income families in Connecticut").

⁶ Firefighter unions in four New Jersey towns have been unsuccessful in their efforts to prevent the consolidation of their fire departments. See *Judge Dismisses Suit by Firefighters to Block Regional Department*, N.Y. TIMES, Dec. 10, 1998, at B23. The proponents of combining fire departments claimed the result would reduce the cost while enhancing efficiency. Mayor Rudy Garcia of Union City stated that "[r]egionalization is going to be good for the taxpayer . . . [and] for residents' safety." *Id.* In Connecticut, union pressure has successfully prevented two towns from consolidating firehouses that were less than ten blocks from each other, one in each town. As in New Jersey, the firefighters would have been authorized to respond to fires and other emergencies in both towns, depending upon need rather than the adventitious location of municipal boundaries.

occurred over intense opposition and without any regional planning activity or the participation of land use planners.

I. THE BACKGROUND STRUCTURES FOR REGIONAL COOPERATION IN CONNECTICUT

Public land use planning requires some unit of government to be in control of a structure to develop and, hopefully, enforce the plan. In Connecticut, there are some regional or statewide institutions that do some land use planning for areas larger than individual towns. These institutions, however, have very limited power.

Connecticut used to have an institutional arrangement that carried out planning at a larger scale. In 1959, however, the state legislature abolished county government in Connecticut.⁷ The reasons were complex, but they included the desire to get rid of what some perceived as a corrupt and unnecessary level of government.⁸ The only remnant of county government is the office of the sheriff, "whose election is mandated in the state constitution," and who essentially oversees legal service.⁹ Connecticut Governor John G. Rowland has even proposed that that last vestige of county government be abolished.¹⁰

The counties, had they still existed, would have been a viable starting point for regional government. Instead, Connecticut has 169 independent towns and cities, most with no institutionalized ties to one another.¹¹ Many of these, particularly the central (and distressed) cities that normally form the core of regional growth patterns, are geographically

⁷ See Tom Condon, *Counties Are Worth a New Look*, HARTFORD COURANT, Jan. 10, 1999, at B1, available in LEXIS, News & Information Library.

⁸ See *id.* (quoting Robert Satter, a state legislator in 1959, who referred to county government systems as "archaic").

⁹ *Id.*

¹⁰ See Christopher Keating & Stephen Ohlemacher, *Bid to Eliminate Sheriffs Defeated*, HARTFORD COURANT, Apr. 27, 1999, at A3 (discussing the defeat of Governor Rowland's plan for a constitutional amendment to abolish the office of the sheriff), available in LEXIS, News & Information Library.

¹¹ See Don Noel, *A Headless Regional Government is Better Than None at All*, HARTFORD COURANT, June 28, 1995, at A11, available in LEXIS, News & Information Library.

quite small. Hartford, for example, is one of the smallest central cities in the United States.¹²

The regional approaches to solving land use problems that exist in Connecticut are voluntary. When the counties were abolished by the Constitutional Convention, Article X of the Constitution authorized the General Assembly to prescribe the methods under which towns could establish regional governments and inter-town compacts.¹³ The Connecticut Office of Policy and Management, whose functions include monitoring intergovernmental relationships, has examined and catalogued over 900 existing inter-municipal cooperative agreements.¹⁴ One of the most frequent purposes for creating a compact is to establish regional school districts. A large number of compacts deal with less policy-oriented subjects, such as providing for joint building code enforcement or regional health districts. Significant entities have been created by compact as well. The Metropolitan District Commission (MDC) is a powerful entity in the Hartford region whose mission is to provide water and sewer services to member towns and to protect the water supplies that are used by those towns.¹⁵ Until very recently, the MDC has limited its role to simply arranging for water and sewage services, eschewing any larger role in encouraging inter-town cooperation on land use problems.¹⁶

Of the more than 900 compacts, only two concern one particularly sensitive political issue: The provision of low cost housing in a central city and its participating suburbs. Hartford and Bridgeport formed these two compacts in the late 1980s.¹⁷

¹² Compare *Density Using Land Area for States, Counties, Metropolitan Areas, and Places* (Jan. 6, 2000) <http://www.census.gov/population/censusdata/90den_ma.txt>, with *Land Area, Population, and Density for Places in Connecticut: 1990* (visited Jan. 6, 2000) <<http://www.census.gov/population/census.gov/population/censusdata/places/09ct.txt>>.

¹³ See CONN. CONST. art. X, § 2; see also CONN. GEN. STAT. §§ 7-330 to -339i (1999).

¹⁴ Telephone Interview with David Russell, Office of Policy and Management, State of Connecticut (Feb. 15, 1999).

¹⁵ See Noel, *supra* note 11, at A11.

¹⁶ See Lisa Chedekel, *Hartford Council to Discuss Management of Riverfront*, HARTFORD COURANT, Nov. 9, 1996, at B3, available in LEXIS, News & Information Library.

¹⁷ See Peter W. Salsich, Jr., *Urban Housing: A Strategic Role for the States*, 12 YALE L. & POL'Y REV. 93, 111-12 n.94 (1994) (citing Lawrence E. Susskind & Susan L. Podziba, AFFORDABLE HOUSING MEDIATION: BUILDING CONSENSUS FOR

The Bridgeport compact was not quite as successful as Hartford's; while five towns originally sat down with Bridgeport to work out the compact, two of the towns rejected the compact endorsed by their representatives.¹⁸ Hartford had more success, as twenty-five of the twenty-nine original participants signed the compact, which has been one of the more successful efforts to facilitate the production of more affordable housing in Connecticut.¹⁹

The Hartford Fair Housing Compact was put together by the Capitol Region Council of Governments (CRCOG).²⁰ After the original five-year term of the compact, a Regional Housing Policy Statement replaced the agreement.²¹ The CRCOG Housing Committee felt that the provision of affordable housing needed to be integrated into a comprehensive community development policy, rather than existing as an independent effort.²² The principal focus of the Regional Housing Policy Statement remains encouraging the development of affordable housing throughout the region.²³ This effort is one of the few examples of a meaningful attempt to encourage metropolitan area residents to expand their perspectives beyond the limitations of town boundaries.

Not all the areas of Connecticut have a regional Council of Governments (COG) such as CRCOG, or a Council of Elected Officials (CEO), but all towns in Connecticut belong to a Regional Planning Agency. A network of fourteen Regional Planning Agencies (RPAs) was established by statute in the late 1950s, and covers every part of the state.²⁴ Where there is a

REGIONAL AGREEMENTS IN THE HARTFORD AND GREATER BRIDGEPORT AREAS 1 (1990)).

¹⁸ See *id.*

¹⁹ See Michael Wheeler, *Regional Consensus on Affordable Housing: Yes In My Backyard?*, 12 J. PLAN. EDUC. & RES. 139 (1993).

²⁰ See Mike Swift, *Housing Plan Challenges Value of Regionalism Compact Among Towns May Prove Inadequate Solution*, HARTFORD COURANT, Aug. 13, 1995, at A10, available in LEXIS, News & Information Library.

²¹ See Paul Marks, *Town Asked to Ratify Regional Housing Policy*, HARTFORD COURANT, Aug. 6, 1997, at B3, available in LEXIS, News & Information Library.

²² See *id.*

²³ See memorandum from Beatrice Stockwell, Chair, Farmington Town Council and CRCOG Housing Committee (Mar. 6, 1997) (on file with author) (requesting approval by the CRCOG's member towns of the Draft Regional Housing Policy).

²⁴ See CONN. GEN. STAT. §§ 8-31a to -37b (1999) (detailing formation and administration of Regional Planning Agencies).

COG or a CEO serving the same area, it is usually affiliated with the appropriate RPA. Elected officials in member towns meet in the COG or the CEO, whereas town land use commission members meet as the RPA. During the 1970s the power of the RPAs was extensive, spurred by a federal Office of Management and Budget regulation requiring municipalities to submit their federal grant applications to a local RPA for comment, before sending the application to Washington.²⁵ This approval process provided the RPAs, and constituent towns, with a mechanism that allowed them to wield significant leverage to bring about changes in a municipality's application. This consulting requirement, however, was eliminated from federal programs in 1982, thereby changing the primary role of many of the RPAs. Today, the RPAs provide technical assistance to member towns, assist the towns in entering into cooperative agreements with one another, and help maintain federal and state grants for beneficial programs.²⁶ These are useful services, of course, but they are not particularly effective regional planning methods.²⁷

One of the other tasks of the RPAs is to submit to the state's Office of Policy and Management (OPM) a proposed plan of conservation and development for its region.²⁸ OPM then theoretically uses these plans to create a state plan of conservation and development.²⁹ The Connecticut legislature authorized the state to prepare a state plan in 1971, and in 1976 it required that the legislature approve the plan.³⁰ The plan was put on a five-year cycle in 1983. The plan, however, only provides guidance to state agencies when spending state or federal funds. It does not control regulatory activity—not even activities by state agencies.³¹ The plan's primary force stems

²⁵ See Federal and Federally Assisted Programs and Projects: Evaluation, Review, and Coordination (Circular A-95), 38 Fed. Reg. 32,874 (1973). The reviewing system is described (and somewhat overly praised) in Igor I. Sikorsky, Jr., *Local Control Over Federally Funded Projects*, 19 N.Y.L.F. 113 (1973). Note that 39 Fed. Reg. 32,874 was revoked by President Reagan's Intergovernmental Review of Federal Programs. Exec. Order No. 12,372, 47 Fed. Reg. 30,959 (1982).

²⁶ See CONN. GEN. STAT. §8-164 (1999).

²⁷ Telephone Interview with Richard Eigen, Regional Planner, Valley Regional Planning Agency (Sept. 17, 1999).

²⁸ See CONN. GEN. STAT. §16a-26 (1999).

²⁹ See *id.*

³⁰ See CONN. GEN. STAT. §§ 16a-24 to -33 (1999).

³¹ See CONN. GEN. STAT. § 16a-31 (1999).

from the requirement that OPM review activities of all state agencies and provide a report "commenting on the extent to which the proposed plan conforms to the state plan."³² Repeated efforts to apply the plan to private development decisions through municipalities' land use controls have been rebuffed.³³ Thus, a town can ignore the plan when the town's zoning regulations include provisions contrary to it. There is a clear disjunction between effective local control and ineffective statewide control over land uses.

In response to many inquiries as to the structure of the state plan, an official at OPM has insisted that it is a separate policy statement developed at state level rather than a compilation of regional plans. Assuming, *arguendo*, Connecticut *did* prepare its own original state plan, the categories it uses are so broad that it cannot effectively distinguish between land uses. The regional plans are better able to guide local land usage simply because the RPAs are closer to the towns within their planning areas. But the RPAs have no internal monetary resources with which to implement their plans, so they have to modify their plans to match the available funding from state and federal sources. Thus, Connecticut's state plan of conservation and development is the result of a planning process, which is a reaction to the availability of money, rather than a creation of a municipal or regional vision. The Connecticut Agencies Regulations require each state agency to consider the plan before participating in any program, which affects land use.³⁴ It seems irrational to believe a state agency would not spend appropriated money on a program simply because the state plan makes no provision for that program in a location where the town (and therefore probably the RPA) wants it. Since the state plan is continuously

³² *Id.*; see also *State of Connecticut, Policies Plan for the Conservation and Development of Connecticut, 1998-2003*, at 1-2 <<http://www.opm.state.ct.us/pdpd3/physical/C&DPlan/C&Dintro.htm>>.

³³ See, e.g., 32 H.R. Proc. 542-30, 1989 Sess. 10605 (Conn. 1989). In the House debate on the adoption of the Affordable Housing Appeals Procedure, discussed *infra* Part 2.b., it was asked whether a town could deny a zoning application because it conflicted with the state plan of Conservation and Development. Representative Cibes, a proponent of the proposed legislation, opined that it would be an improper reason for denying the application, citing his frustration with his inability over the years to get the legislature to broaden the impact of the state plan so that it would apply to municipalities. See *id.* at 10605-07.

³⁴ See CONN. AGENCIES REGS. § 8-198-6 (1999).

amended during its five-year lifespan, the RPA can simply propose an amendment that allows the state agency to provide the desired service in the appropriate location.

Thus far mere fragments of regional and state planning have been described. It is a bit optimistic to suggest that any of these efforts might provide a basis for cooperation between towns on land use. This is illustrated by the recent effort to maintain newly created beaches and parks along the Connecticut River. A private non-profit organization, Riverfront Recapture, had worked successfully to open up the Connecticut River around Hartford for recreation and needed a funding source for the subsequently necessary maintenance and supervision. The state declined to take over the beaches, boat launches, and similar new facilities because of the amount of annual funding required. Riverfront Recapture proposed the MDC, an established a water and sewer provider in and around Hartford, provide the required management services, and pay the costs by increasing its water charges by \$0.50 per water user per month.³⁵

Two of MDC's eight member towns at first voted against the proposal.³⁶ Those who chose to speak at public hearings on the proposed funding were concerned with the possibility of what they perceived as higher taxes.³⁷ Conversely, the local political leaders who opposed the plan cited the loss of each town's control over its own park system.³⁸

³⁵ See Editorial, *Riverfront Plan Gains an Anchor; Our Towns; Greater Hartford*, HARTFORD COURANT, Oct. 6, 1997, at A8, available in LEXIS, News & Information Library.

³⁶ See Mike Swift, *MDC Commits to River Park System*, HARTFORD COURANT, Dec. 2, 1997, at A3, available in LEXIS, News & Information Library.

³⁷ See, e.g., Daniela Altimari & Mike Swift, *River Parks Plan Has a Slippery Stumbling Block: Who's Going to Pay?*, HARTFORD COURANT, Apr. 7, 1997, at A6, available in LEXIS, News & Information Library; Angie Chuang, *Wethersfield Opposes MDC Fee for Riverfront Park*, HARTFORD COURANT, Sept. 16, 1997, at B5, available in LEXIS, News & Information Library.

³⁸ See Chuang, *supra* note 37 (expressing fear of a regional government in Wethersfield); Christine Dempsey, *Questions Persist About Riverfront Plan*, HARTFORD COURANT, July 16, 1997, at B3 (discussing East Hartford's concern that the proposal violated the town charter's prohibition on transferring any power to another government body without a referendum, and that it might lead to the creation of a "regional government"), available in LEXIS, News & Information Library. Some of the objections also focused on a recent problem the MDC had with the flooding and pollution of a picturesque cove in one of the towns. See Chuang,

Eventually the MDC Board voted to approve the proposal over the objections of two holdout towns.³⁹ One of the holdouts was Wethersfield, the town just downstream from Hartford, which apparently could not anticipate any benefit from improvements made immediately upstream of its boundary.

The outcome of the MDC battle is a bright note in the effort to bring about cooperation among towns to achieve important objectives. It also was a tribute to the citizens who worked with Riverfront Recapture to create a truly regional asset. But the holdout towns are surprisingly unwilling to assume responsibility for a regional project. This unwillingness came from a fear that they would lose control over town parks, which are already open to residents *and* nonresidents. This illustrates how powerful the image and rhetoric of home rule can be.

II. LEGISLATIVE TIMIDITY AND JUDICIAL COMPLAISANCE

A. *Judicial Review of Decisions with Regional Impact*

In 1985, the U.S. Army Corps of Engineers ("Corps") denied statutorily required permits to Mall Properties, Inc., thereby, thwarting the company's plans to build a regional mall in North Haven.⁴⁰ This denial was the desired result of the advocates of regional cooperation who feared the mall would harm the economy of New Haven, a city ten miles south of North Haven.⁴¹ Even the governor of Connecticut opposed the idea, indicating that "he felt it was not worth the risk to New Haven of building the North Haven Mall."⁴² An administrative law judge denied the permits because of their anticipated negative socio-economic

supra note 37; Angie Chuang, *Hard Questions Expected for MDC*, HARTFORD COURANT, Oct. 6, 1997, at B1; Lizabeth Hall, *Opposition to Park-Upkeep Plan Swells*, HARTFORD COURANT, Nov. 13, 1997, at B9, available in LEXIS, News & Information Library.

³⁹ See Swift, *supra* note 36, at A3.

⁴⁰ See *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 563-64 (D. Mass. 1987) (discussing the Corps's order which denied the permits required by section 10 of the Rivers and Harbors Act and section 404 of the Clean Water Act, 33 U.S.C. §§ 403, 1344 (1994)).

⁴¹ See *Mall Properties, Inc.*, 672 F. Supp. at 564-65.

⁴² *Id.* at 574 (quoting the Record of Decision at 47).

impacts on New Haven.⁴³ The judge considered himself bound by the Corps' regulations to consider both land use and non-land use factors.⁴⁴ The latter included "conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, flood hazards, flood plain values, navigation, [etc.]."⁴⁵ Mall Properties appealed the Corps' decision to the Federal District Court, which reversed and remanded the case to the Corps.⁴⁶ The District Court ordered the Corps to decide the appeal without considering the socio-economic factors.⁴⁷ The District Court found that the Corps should only consider those effects "which are proximately related to changes in the physical environment."⁴⁸ Consequently, any economic effects, which might occur regardless of the mall's location in North Haven, could not be properly considered.⁴⁹

The court based its decision on the legislative history of the Corps' jurisdiction under the Clean Water Act and the Rivers and Harbors Act.⁵⁰ The purpose of section 404 of the Clean Water Act was "to 'protect the quality of water and to protect critical wetlands.'"⁵¹ Hence, the District Court held that the Corps is authorized to examine only the realm of economic impacts resulting from the changes in the physical environment.⁵² The court found section 10 of the Rivers and Harbors Act similarly limited to "effects proximately caused by changes in the physical environment."⁵³

⁴³ See *id.* at 564 (quoting the Record of Decision from Colonel Sciple) ("Still weighing most heavily, however, is my concern for the socio-economic impacts this project would have on the city of New Haven.").

⁴⁴ See *id.*

⁴⁵ *Id.*

⁴⁶ See *id.* at 575.

⁴⁷ See *id.*

⁴⁸ *Id.* at 566.

⁴⁹ *Id.*

⁵⁰ See *id.* at 567-71 (discussing the legislative history and case law in detail and concluding that they "indicate that the Corps may not rely upon economic factors which are not proximately related to changes in the physical environment in denying a dredge or fill permit").

⁵¹ *Id.* at 567 (quoting H.R. 95-14 (1977), reprinted in ENVIRONMENTAL POLICY DIVISION, 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977: A CONTINUATION OF THE LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT, at 532 (1978)).

⁵² See *id.*

⁵³ *Id.* at 569.

The legislative history of section 10 quoted by the court to support its limited concept of the Corps' scope of review, however, does not persuasively support the court's interpretation. The court acknowledged that the interests to be protected under section 10 have evolved since its adoption in the nineteenth century, quoting from a 1970 House Report. The Report discussed a proposed and subsequently adopted regulation that expanded the Corps's scope of review to "consideration of the effects which the proposed work will have, not only on navigation, but also on conservation of natural resources, fish and wildlife, air and water quality, aesthetics, scenic view, historic sites, ecology and other public interest aspects of the waterway [being filled or dredged, etc.]"⁵⁴

The court then jumped to the conclusion that the only proper economic aspects to be considered are those that have an impact "on" the waterway.⁵⁵ This is a considerably smaller scope of inquiry than one based on the "public interest aspects of the waterway," the language of the Congressional report.⁵⁶ *Mall Properties* cites two cases to support its limited vision of the Corps' proper economic concerns.⁵⁷ *Buttrey v. United States*⁵⁸ upheld (without explanation) the Corps' view that job creation was not the sort of economic impact the expanded statute intended to be considered.⁵⁹ In *Hough v. Marsh*,⁶⁰ the court held that while the Corps had properly considered jobs and municipal tax impacts, it had failed to "address properly" the mandated economics factors because it "sidestepped any consideration of adverse economic effects particularly . . . the 'elimination of an attraction . . . on the itinerary of sightseeing buses.'"⁶¹ *Hough's* view of the Corps' scope of inquiry is indicated in the next sentence, not quoted in *Mall Properties, Inc. v. Marsh*, "[t]his conclusion [of the Corps] . . . ignores the directive in the Corps

⁵⁴ *Id.* at 568 (quoting H.R. Rep. No. 91-917, at 6 (1970)) (emphasis added).

⁵⁵ *Id.* at 575 (concluding that the Corps was incorrect to review effects "not proximately related to impacts on the physical environment").

⁵⁶ *Id.* at 568 (quoting H.R. Rep. No. 91-917, at 6 (1970)).

⁵⁷ See *id.* at 569.

⁵⁸ 690 F.2d 1170 (5th Cir. 1982).

⁵⁹ See *id.* at 1180.

⁶⁰ 557 F. Supp. 74 (D. Mass. 1982).

⁶¹ *Id.* at 86.

regulations to consider *all* economic factors.”⁶² Nevertheless, *Mall Properties* considers *Hough* as well as *Buttrey* to support *Mall Properties*' narrow view of the proper scope of economic inquiry, even though *Hough* as well as the statutory history, suggest the scope of inquiry should be broadened rather than narrowed.

Mall Properties quoted the U.S. Supreme Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*,⁶³ which identified the issue in public interest cases as defining “a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.”⁶⁴ The U.S. Supreme Court said courts must “consider the closeness of the relationship between the change in the environment and the ‘effect’ at issue.”⁶⁵ They must recognize that not even all the “‘effects that are ‘caused by’ a change in the physical environment in the sense of ‘but for’ causation [need be considered] . . . because the causal chain [may be] too attenuated;” and that the Corps can only consider factors having a “reasonably close causal relationship between a change in the physical environment and the effect at issue.”⁶⁶

From this sketchy guidance, *Mall Properties* decided to draw the line between proper and improper economic concerns so that the Corps could not consider those economic effects which would have resulted from the mere existence of “a mall *anywhere* in North Haven.”⁶⁷ The real question, according to the Congressional Report and *Hough*, is the nature of the impact that will result from the project's filling of the waterway that give the Corps its jurisdiction.⁶⁸ A regional mall built on landfill in a wetlands will have an economic impact on the property across the street from it, within the town (due to tax revenues, use of town streets, etc.), and on property outside of the town, if its location is on the town border.⁶⁹ Those impacts can extend

⁶² *Id.* (emphasis added).

⁶³ 460 U.S. 766 (1983).

⁶⁴ *Id.* at 774 n.7.

⁶⁵ *Id.* at 772.

⁶⁶ *Id.* at 774.

⁶⁷ *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 569 (D. Mass. 1987) (emphasis added).

⁶⁸ See *Hough v. Marsh*, 557 F. Supp. 74, 86 (D. Mass. 1982).

⁶⁹ See *id.*

further depending on a multitude of considerations that the Corps is authorized to consider. If a court is going to reverse the Corps' decision, an explanation ought to be given. Yet *Mall Properties* offers no explanation for why it has chosen to draw the "manageable line" where it did.

What is left then is the apparent conclusion by *Mall Properties* that New Haven was too far away to be impacted by the proposed new regional shopping mall in North Haven. Nothing in the decision supports that interpretation, nor does it provide any reasoned basis for considering the economic relationship of North Haven and New Haven to be "too attenuated," or not "close enough." There is no indication of the desired proximity. If the Corps' decision had been upheld, New Haven's ability to compel North Haven and Mall Properties to compensate the city for losses it sustained from the North Haven project would have been substantially enhanced. The result would probably have been a decision by the developer made sensitive to the fact that North Haven is not an island unto itself, but instead exists in a neighborhood of municipalities all related to each other. The court's failure to articulate the appropriate considerations for deciding when a development has metropolitan-wide significance reflects the reluctance of our political institutions to recognize or address the economic and social interrelationships between Connecticut towns.

B. Connecticut's Affordable Housing Appeals Procedure

Perhaps the best-known effort to get Connecticut towns to think regionally is the Affordable Housing Land Use Appeals Act.⁷⁰ The Commission's charge was to find ways to reduce the barriers to the development of affordable housing, as well as to find ways to encourage its construction. The author served as the co-chair of the Land Use Subcommittee of the Governor's Blue Ribbon Commission on Housing from 1988 to 1990, and the section 8-30g procedure was the subcommittee's central recommendation. Several incentives to encourage the creation of affordable housing were authorized⁷¹—although funding was never provided for them at the requisite levels—and one big

⁷⁰ See CONN. GEN. STAT. § 8-30g (1999).

⁷¹ See e.g., the Connecticut Housing Partnership Program, CONN. GEN. STAT. § 8-336f (1999).

stick: The Affordable Housing Appeals Procedure.⁷² This stick obligates a town, when sued by a developer whose proposal to build affordable housing units has been rejected, to bear the burden of proving that there is no need for more affordable housing in the town. Municipalities often benefit from an evidentiary presumption that legislative decisions by a unit of government are properly made.⁷³ Due to this presumption, the challenger of a municipal decision bears the burden of proving that the decision was illegal or unconstitutional.⁷⁴ The procedure outlined in section 8-30g effectively nullifies that presumption.⁷⁵ Therefore, under the particular circumstances of a section 8-30g appeal, the municipality bears the risk of non-persuasion.

Under the Act, the reversal of the presumption of regularity only occurs if the proposal before the local land use commission includes at least twenty-five percent of the units with deed or lease covenants ensuring that those units will be sold or rented at affordable housing prices for at least thirty years.⁷⁶ The burden-shifting provision does not apply to a municipality if at least ten percent of its dwelling units are either publicly assisted units⁷⁷ or are subject to deed or the lease restrictions ensuring that the selling or leasing prices are affordable, as defined in the state. The Connecticut Department of Economic and Community Development publishes a list of the exempt towns each year, based on information supplied by the towns. Thirty-two towns have at least ten percent of their housing stock in the affordable category on the State's most recent exemption list.⁷⁸

⁷² See CONN. GEN. STAT. § 8-30g (1999).

⁷³ See, e.g., *Murach v. Planning & Zoning Comm'n of New London*, 491 A.2d 1058, 1066 (Conn. 1985) (discussing zoning commission); see also *Brecciaroli v. Commission of Env'tl. Protection*, 362 A.2d 945, 948 (Conn. 1975) (suggesting findings of municipality are paramount).

⁷⁴ See *Murach*, 491 A.2d at 1066; *Brecciaroli*, 362 A.2d at 952.

⁷⁵ See CONN. GEN. STAT. § 8-30g(c) (1999) ("[T]he burden shall be on the commission.").

⁷⁶ See CONN. GEN. STAT. § 8-30g(a) (1999); see also CONN. GEN. STAT. § 8-39a (1999) (defining "affordable housing").

⁷⁷ See CONN. GEN. STAT. § 8-30g(f) (1999); see also CONN. GEN. STAT. § 8-30g(a)(3) (1999) (defining "assisted housing").

⁷⁸ Memo "To All Interested Parties" from Patricia Downs, Executive Director, Program Planning and Evaluation, Connecticut Department of Economic Development, Feb. 10, 1999. Interestingly, Downs' Memo "To All Interested Parties" five years ago, in 1994, stated that only twenty six towns were exempt.

The ten percent figure was not a statement about the ideal number or fair share of affordable housing units that a town should have. Rather, it was an attempt to protect towns that already had a significant number of affordable housing units from the expense of defending a rejection of an affordable housing proposal. It was recognized that the definition of affordable housing was too narrow.⁷⁹ This resulted in fewer affordable units credited to a town than were warranted. An attempt was made to offset that by offering an exemption percentage that was significantly lower than what would be required of towns if Connecticut were to provide sufficient affordable housing.

If the municipality is not exempt, its rejection of an affordable housing proposal will be sustained if the town can "prove, based upon the evidence in the record" four elements.⁸⁰ First, the reasons for the local commission's decision must be supported by "sufficient" evidence in the record.⁸¹ Second, the rejection of the application must be "necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider."⁸² Third, those interests must "clearly outweigh the need for affordable housing."⁸³ Fourth, those public interests cannot be protected by reasonable changes to the affordable housing development.⁸⁴

The Commission considered, of course, the existing models for encouraging the development of affordable housing already

⁷⁹ See Peter G. Vodola, *Connecticut's Affordable Housing Appeals Procedure Law in Practice*, 29 CONN. L. REV. 1235, 1268-70 (1997) (discussing criticism that the Act . . . does not truly measure the amount of affordable housing in their town because it precludes consideration of affordable housing that is neither publicly assisted nor covenant restricted). The Housing Subcommittee of the Blue Ribbon Commission concluded that the cost of counting all the actually affordable housing in a town each year would be enormous and not worth the precision such a survey would yield. A survey would have to be made annually, perhaps bi-annually, because an affordable housing unit this year, unless restricted by covenants or by the terms of public support, may well go up in price because of a tighter housing market, and would no longer be affordable.

⁸⁰ See CONN. GEN. STAT. § 8-30g(c) (1999).

⁸¹ *Id.* § 8-30g(c)(1)(A).

⁸² *Id.* § 8-30g(c)(1)(B).

⁸³ *Id.* § 8-30g(c)(1)(C).

⁸⁴ *Id.* § 8-30g(c)(1)(D).

adopted by New Jersey and Massachusetts.⁸⁵ It seemed that the effectiveness of New Jersey's *Mount Laurel*⁸⁶ approach depended upon a judiciary that was active enough to compensate for the lack of initiative on the part of the other two branches of the state government. In addition, *Mount Laurel* was decided in 1975,⁸⁷ which is important because that was an era of greater judicial activism on social issues than appeared to be the case in 1989, when Connecticut's Blue Ribbon Commission first convened. The success of *Mount Laurel* also depended on finding a plaintiff, and would have resulted in a delay of several years before the Act would have an impact while awaiting a decision in the all but certain appeal to the Connecticut Supreme Court.

Massachusetts' Anti-Snob Zoning Law⁸⁸ established a state agency charged with hearing developers' appeals of town rejections of affordable housing proposals.⁸⁹ This administrative appeal was inserted between the town's decision and a judicial appeal of that decision.⁹⁰ The Blue Ribbon Commission felt that any effort to reduce a town's ability to keep out affordable housing was going to be difficult for the legislature to pass. The problem would be exacerbated by giving the Governor the opportunity to appoint the members of an agency who would have the power to override a town's zoning decision. The symbolism of a state take-over of local government was obvious.⁹¹ Despite a constitutional provision guaranteeing home rule to municipalities,⁹² Connecticut is politically, but not legally, a strong home rule state.⁹³ Just ask any town official or town resident!⁹⁴

⁸⁵ See, e.g., MASS. GEN. LAWS ch. 40B, §§ 20–23 (1996 & Supp. 1998); N.J. STAT. ANN. § 52:27D-321 (West 1986).

⁸⁶ See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

⁸⁷ See *id.*

⁸⁸ See MASS. GEN. LAWS ch. 40B, §§ 20–23 (1996 & Supp. 1998).

⁸⁹ See *id.* § 22.

⁹⁰ See *id.*

⁹¹ The comments of John Papandrea, Commissioner of the Department of Housing and Co-Chair of the Governor's Blue Ribbon Commission on Housing, at the hearings of the Planning and Development Committee on the Affordable Housing Appeals proposal, Minutes of the Planning and Development Committee, Feb. 23, 1989, at 230 discuss this point.

⁹² See CONN. CONST. art. X, § 1.

⁹³ See Hollister, *The Myth and Reality of Home Rule Powers in Connecticut*, 59 CONN. B.J. 389 (1985) (arguing that Home Rule in Connecticut is a myth, and that

The Commission, therefore, chose to leave affordable housing appeals to the courts to decide, believing that this was the most neutral available venue. The Commission provided them with the four criteria described above in subsection (c) of the statute to guide them.⁹⁵ It was not the intent to require that every affordable housing proposal had to be approved by a town, as there obviously can be some very good reasons for rejecting particular proposals in particular locations. The Commission sought criteria to balance a town's legitimate denial of affordable housing proposals against a recognition that some rejections could be pretextually couched in broad health, safety and welfare language rather than expressing the real but less acceptable reasons such as economic, racial, or ethnic discrimination. Ultimately, the Commission provided that only "substantial" considerations of "health and safety" would be sufficient to justify rejection of an affordable housing proposal. It deliberately omitted "welfare," from the traditional health, safety, and welfare litany, as it had often been the basis for upholding almost any municipal decision.

The Commission expected that the courts and the legislative debates over the adoption of the Act would provide specific content to the word "substantial," which has since been done. For instance, the legislature's debates cited as examples of substantial interests the protection of wetlands, a provision of an adequate water supply, and waste disposal facilities.⁹⁶ Court

at best it extends only to matters of local concern as to which the state has not acted); see also CONNECTICUT ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, HOME RULE IN CONNECTICUT: ITS HISTORY, STATUS AND RECOMMENDATIONS FOR CHANGE (1987).

⁹⁴ See Hollister, *supra* note 93 (providing legal background of the Home Rule doctrine in Connecticut). Senator Lovegrove, in debates on the Act, remarked that requiring the municipality to prove that its rejection of an affordable housing application was justified under the Act (rather than continuing the old practice of making the applicant bear the burden of proving that the municipality's decision was improper) "turn[s] its back on a long belief in home rule in Connecticut." 32 Sen. Proc. Pt. 30, 1989 Sess., June 5, 1989, at 4054-55.

⁹⁵ See *supra* Part II.B.

⁹⁶ See Remarks of Rep. Cibes, at 32 H.R. Proc. Pt. 30, 1989 session, May 30, 1989, pp.10641-45 (affirming that a substantial health interest of a town would be a concern that a proposed development had an adequate water supply, as well as the capability of disposing of its waste); see also *Greene v. Ridgefield Planning and Zoning Comm'n*, No. CV 90-0442131S, 1993 Conn. Super. LEXIS 108, at *27-28 (Jan. 6, 1993) (upholding a town's rejection because the applicant had not complied

decisions have upheld town denials of affordable housing proposals because the dwellings were located in a flood plain, and the developers had failed to provide sufficient protection for the residents, or because statutorily required sedimentation and erosion controls had not been satisfied.⁹⁷ On the other hand, courts have failed to uphold local decisions which had been based on (1) inconsistency of the proposal with the town's existing zoning regulations or with specially adopted affordable housing regulations (the purpose of the Act was to substitute its guidelines for those of local zoning regulations);⁹⁸ (2) the substantial distance from community facilities;⁹⁹ and (3) the proposal's violation of a municipal cap on affordable housing units or on multi-family housing in the community.¹⁰⁰

Planners were among the Appeals Act's most outspoken critics. The most common objection voiced by planners was that the Act turned zoning over to developers. The town planner of Trumbull lamented somewhat melodramatically that planners have no choice but to accept affordable housing projects; "[w]e've lost all control over zoning."¹⁰¹ One planner asserted that the

with wetlands standards); *Frumento v. Zoning Bd. of Appeals of the Town of N. Branford*, No. CV 94-0532862-S, 1996 Conn. Super. LEXIS 1927, at *29-32 (July 30, 1996) (reversing a town's rejection which had denied applicant the right to use a septic system instead of municipal sewers). *Frumento* indeed involved a public health issue, but the town had only prohibited affordable housing applications from using the septic system alternative.

⁹⁷ See, e.g., *United Progress, Inc. v. Borough of Stonington Planning and Zoning Comm'n*, No. CV 92-0513392S, 1994 Conn. Super. LEXIS 575, at *65 (Mar. 4, 1994) (upholding a denial of a developer's affordable housing proposal).

⁹⁸ See *Town Close Assocs. v. Planning and Zoning Comm'n of New Canaan*, 679 A.2d 378 (Conn. App. 1996).

⁹⁹ *Greene v. Ridgefield*, No. CV 90-04421315, 1993 Conn. Super. LEXIS 108 (Conn. Super. Ct. Jan. 6, 1993) (noting that the Town of Ridgefield lacked adequate affordable housing, the court sustained the Board's denial of a permit to rezone and build multi-family "affordable" dwellings). *Id.* at *29.

¹⁰⁰ *National Associated Properties v. Planning & Zoning Comm'n of N. Branford*, 658 A.2d 114 (Conn. App. Ct. 1995); *Shapiro Farm L.P. v. Planning and Zoning Comm'n of N. Branford*, No. CV 92-0517281S, 1993 Conn. Super. LEXIS 2807 (Oct. 15, 1993).

¹⁰¹ *Vodola*, *supra* note 5, at 1265 (quoting Joan Gruce, Planning & Zoning Administrator, Town of Trumbull). This characterization ignores the fact that even as late as a year after her statement, towns had prevailed in fifty percent of the appeals of their rejections. See *id.* at 1238 n.12. By 1997, developers had won sixty percent of the cases. *Id.* at 1238 n.13.

law elevated affordable housing over proper land use planning.¹⁰² Another opined that the Act “says if you want to call it affordable housing, you can get away with anything you can.”¹⁰³ Danbury lost its appeal to the Connecticut Supreme Court because the Court held the city did not prove that its stated reasons for rejection were genuine. In fact, the city’s engineer provided the evidence that the city’s reasons were pretextual.¹⁰⁴ The city planner’s response was that the people who wrote the Appeals Act “don’t understand zoning.”¹⁰⁵

Connecticut is the ninth most racially segregated state in the United States.¹⁰⁶ It is also *the* most economically segregated state in the United States.¹⁰⁷ Connecticut’s residents have the highest per capita income in the United States, but *three* of its cities are among the twenty-one poorest cities in the country.¹⁰⁸ A sharp chasm between Connecticut’s rich and its poor, between its racial groups, and between its central cities and their surrounding towns is a fact that should concern those officials charged with responsibility for planning proper land uses in Connecticut.¹⁰⁹ One effect of this racial and economic

¹⁰² See Vodola, *supra* note 5, at 1265 (citing a telephone interview with Robert Nerney, Town Planner, Town of Southington).

¹⁰³ Vodola, *supra* note 5, at 1264 (quoting William Kweder, Planning Consultant, Town of Suffield) (internal quotations omitted).

¹⁰⁴ See Kaufman v. Zoning Comm’n of Danbury, 653 A.2d 798 (Conn. 1995).

¹⁰⁵ Peter J. Vodola, Post-Litigation Results of Affordable Housing Land Use Appeals: A Survey of Statistics & Opinions Concerning Decisions Based on the Act, 1990–1994 19 (Jan. 7, 1995) (unpublished manuscript, on file with author) (quoting Telephone Interview with Dennis Elper, City of Danbury Planning Director (Dec. 22, 1994)). This student project was the original basis for Vodola’s later published essay in the Connecticut Law Review, *see supra* note 5.

¹⁰⁶ See DAVID RUSK, CITIES WITHOUT SUBURBS 114 (1995) (discussing these statistics in the context of Connecticut’s housing patterns and affordable housing).

¹⁰⁷ See *id.* (blaming, among other things, the domination of central cities by rental properties as the reason it is ranked first in economic segregation); *see, e.g.*, Sheff v. O’Neill, 678 A.2d 1267, 1287 (Conn. 1996) (discussing the effects of racial segregation on school children).

¹⁰⁸ See Jefferson B. Davis, *Towns Will Rise Together*, HARTFORD COURANT, Jan. 1, 1995, at E1, available in LEXIS, News & Information Library. Stating economic segregation as one of the largest problems facing Connecticut and discussing David Rusk’s “Cities Without Suburbs,” which lists Hartford as the tenth poorest, Bridgeport as the fourth from last, and New Haven as the twenty-first).

¹⁰⁹ See American Institute of Certified Planners, CODE OF ETHICS & PROFESSIONAL CONDUCT § A.5 (“The Planner’s Responsibility to the Public”) (1981) [hereinafter CODE]. “A planner must strive to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of disadvantaged

segregation, because poor people reside in the cities and new entry level jobs are being created in the suburbs, will be a continuing cycle of economic disparity. The town planners, however, said the housing patterns fostered by the traditional zoning system were preferable to the patterns sought to be achieved by this legislation. The statute was aimed at eliminating the barriers to economic and racial integration, both at home and at work, and at equalizing educational opportunity.

The Act sought to foster the recognition that housing, education, transportation, and jobs—important issues for people of all incomes—were a common concern for all those persons living in a particular metropolitan area. The Connecticut Supreme Court, in the first two affordable housing cases it decided, did not address the issue of the legislature's intent with respect to the local versus regional scope of the Affordable Housing Act.¹¹⁰ In the first of these cases, the court reasoned that if substantially less than ten percent of the housing stock of the town of West Hartford was affordable then the question as to whether regional or land affordable housing need was an element the town was required to consider, was not relevant to the outcome of the case.¹¹¹ The court recognized in the West

groups and persons, and must urge the alteration of policies, institutions and decisions which oppose such needs." *Id.* Ethical problems arise whenever there are multiple obligations prescribing different courses of conduct. In the affordable housing context, municipal planners face a conflict between their duty to their superiors, *see id.* at § B, and their obligation to further the development of the profession, *see id.* at § C. The proper conduct is never clear, but it seems the quoted section A.5 at the least requires that planners' statements about the Affordable Housing Appeal Act to reflect an awareness that the Act furthers the goal underlying section A.5—that housing for poor people is a professional priority. The statements by planners quoted in Vodola's article, *supra* note 5, some of which are repeated here, do not even suggest that planners should plan for the poor as well as for the better off (visited Feb. 2, 2000) <<http://www.planning.org/abtaicp/conduct.html>>. *See generally* Elizabeth Howe, ACTING ON ETHICS IN CITY PLANNING (1994) (quoting CODE, *supra*, at 212–14).

Generalizations are never entirely accurate and, of course, not all planners in Connecticut were as vehemently opposed to the Act as those quoted. *See* Vodola, *supra* note 5, at 1264–66 (quoting planners in Berlin, South Windsor, and Farmington—to name only a few—who agreed with the purposes of the statute, and offered constructive comments).

¹¹⁰ *See* Christian Activities Council v. Town Council of Glastonbury, 735 A.2d 231 (Conn. 1999); West Hartford Interfaith Coalition v. Town Council of W. Hartford, 636 A.2d 1342 (Conn. 1994).

¹¹¹ *See* West Hartford Interfaith, 636 A.2d at 1349 (reviewing legislative history to ascertain purpose). In 1993, 4.7% of West Hartford's housing stock was

Hartford case that both the chair of the Judiciary Committee and the primary sponsor of the bill in the State Senate stated in the legislative debates that the bill being voted on reflected an abandonment of the Blue Ribbon Commission bill's regional focus.¹¹² The court also observed, however, that if each town had to consider its own need for affordable housing, wealthy towns would never have any need, which therefore would render the purpose of the Act unattainable.

The Connecticut Supreme Court has recently dealt perhaps a mortal blow to the Affordable Housing Appeals Act's effort to employ a means for spreading affordable housing throughout a region. In *Christian Activities Council v. Town Council of Glastonbury*, the court watered-down a town's obligation to support affordable housing to the level it existed prior to the adoption of the Act, ten years ago.¹¹³ The court determined that a town did *not* have any responsibility for providing affordable housing for those residing beyond the town's borders. As the court observed, the legislative history supports the court's localist interpretation.¹¹⁴ In its two earlier decisions, however, brought on appeals under the Act in West Hartford and Danbury,¹¹⁵ the court had *not* decided whether the need for affordable housing was to be determined within the town's boundaries on a regional or on a statewide basis. The court declined to decide the local-regional scope of need in *Kaufman v. Zoning Comm'n of Danbury*, because the city's reasons for rejecting the affordable housing application were inadequate under the law. Consequently, there was no reason to balance them against the need for affordable housing on whatever geographical unit that need might be measured.¹¹⁶ The court declined to decide the issue in the West Hartford case because the town did not have enough affordable housing even within its

considered affordable under the Act. See Letter from Sandy Bergin, Supervisor Research Unit, Department of Housing, to All Interested Parties (Mar. 13, 1993) (on file with the author).

¹¹² See *id.* at 1348.

¹¹³ *Christian Activities Council*, 735 A.2d at 241.

¹¹⁴ See *id.* at 250 ("Th[e] legislative history compels the conclusion that the legislature intended the need for affordable housing to be determined on the basis of the need for such housing in the local community, as opposed to a regional or statewide basis.") (footnote omitted).

¹¹⁵ See *id.* at 249.

¹¹⁶ See *Kaufman v. Zoning Comm'n of Danbury*, 653 A.2d at 821 n.25.

own borders. Hence, the need for affordable housing existed both in the region *and* in the town.¹¹⁷ The same is true of Glastonbury, only more so. In 1999, it had less affordable housing than did West Hartford.

By adopting a local frame of reference for measuring the need for affordable housing, the court undermined one of the Act's primary mechanisms for achieving its purpose of having more affordable housing constructed. The court required towns to specify the interests that they believed were more important than affordable housing. Glastonbury had defended its rejection of the affordable housing application by asserting that its members knew of other sites for affordable housing available in the town, although the town offered no proof for that assertion.¹¹⁸ The majority of the court correctly held—pursuant to traditional zoning rules in Connecticut—that zoning commission members are entitled to take into account their personal knowledge of the town.¹¹⁹ But the effect of allowing commission members to rely on unsupported beliefs when rejecting an application is equivalent to requiring the *applicant* to prove that there are no other sites in town.¹²⁰ By requiring the *municipality* to prove its lack of need for additional affordable housing, the Act sought to eliminate pretextual reasons for denying an application.¹²¹ If there is not enough

¹¹⁷ See *id.* at 821 & n.25; see also *West Hartford Interfaith*, 636 A.2d at 1354 n.23.

¹¹⁸ See *Christian Activities Council*, 735 A.2d at 254.

¹¹⁹ See *id.* at 254 (citing *Frito-Lay, Inc. v. Planning and Zoning Comm'n of Killingly*, 538 A.2d 1039 (Conn. 1988), in support of the traditional view a zoning appeal which did *not* involve affordable housing). Interestingly, the Court also cited *West Hartford Interfaith*, 636 A.2d at 1352. See *id.*

¹²⁰ As the dissent pointed out, requiring the applicant to prove that a given parcel of land is the *only* location in town where affordable housing could be built "is exceedingly unlikely. . . . Under the majority's view, therefore, the zoning authority could always reject an affordable housing proposal by pointing to an available piece of property someplace else." *Christian Activities Council*, 725 A.2d at 267 n.22 (Berdon, J., dissenting).

¹²¹ The Second Circuit Court of Appeals in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 941, (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988), considered a similar defense. The town asserted that there were many other sites in town where the plaintiff could have located its affordable housing project, and which would not have conflicted with a town policy on land use. The Court replied that although an applicant is not entitled to compel approval of the site of its choice, the town could not require the applicant to use the site that is the town's choice if the use of that site would impose "undue hardships" on the applicant, whether or not

affordable housing in either the region or the town, the question of a regional or local focus is just as irrelevant in *Christian Activities Council* as it was in *West Hartford Interfaith*.

In addition, the court's newly localist interpretation ignored an *existing* statutory requirement that municipalities' zoning regulations "*shall* also encourage the development of housing opportunities, including opportunities . . . for all residents of the municipality *and the planning region in which the municipality is located* Such regulations shall also promote housing choice and economic diversity in housing, including housing for both low and moderate income households"¹²²

It appears, therefore, that an effective means of broadening Connecticut's municipalities' local perspective on the problem of the availability of affordable housing has been aborted.¹²³ For a time, the Connecticut courts encouraged a wider perspective when analyzing the critical problem of housing availability.¹²⁴ Initially, the Supreme Court had emphasized that the legislature recognized the purpose of the Act was to change traditional zoning so that more affordable housing would be approved.¹²⁵

the town's motives were suspect. *Huntington* was relied on by the Blue Ribbon Commission and cited by *Christian Activities Council*. See *Christian Activities Council*, 735 A.2d at 262 (Berdon, J., dissenting).

¹²² CONN. GEN. STAT. § 8-2 (1999) (emphasis added).

¹²³ See "To All Interested Parties," *supra* note 78 (noting the increase in the number of towns credited with having more than ten percent of their housing stock affordable, an increase of twenty-three percent in five years during a period when housing costs have been rising).

¹²⁴ See also *Vodola*, *supra* note 5, at 1289 n.271 (citing a 1995 letter from Patricia Downs, Director of Policy and Planning for the Connecticut Department of Housing stating that 114 municipalities have less than five percent affordable housing, 29 have between five percent and ten percent; and 26 have above ten percent).

¹²⁵ See *West Hartford Interfaith Coalition v. Town Council of W. Hartford*, 636 A.2d 1342, 1349 (Conn. 1994) ("Our review of the statute's legislative history reveals that the key purpose of § 8-30g is to encourage and facilitate the much needed development of affordable housing throughout the state."); *Kaufman v. Zoning Comm'n of Danbury*, 653 A.2d 798, 809 (Conn. 1995) (noting that the legislation was remedial and that it was against the statute's policy to increase the cost of affordable housing). The dissent in *Christian Activities Council* quotes the legislative debates over the proposed bill to show that the opponents considered the proposal as the end of traditional zoning and that the bill's proponents agreed with that assessment. *Christian Activities Council*, 735 A.2d at 257-58 (Berdon, J., dissenting). The dissenter had concurred with the majority in the earlier two Affordable Housing Appeals Act cases.

But the legislature had sent mixed signals about its intent,¹²⁶ and in the most recent case, *Christian Activities Council*, a majority of the Court chose to ignore that legislative purpose and instead emphasized statements by the Act's sponsors that a regional approach was not envisaged. This holding ensures the continuation of the slow pace of affordable housing development in the state.¹²⁷ A legislature unable to clearly articulate the premises for a regional consideration of housing needs, a supreme court newly charmed by the complaisance of "steady habits,"¹²⁸ and a planning profession which has allowed its public posture on affordable housing to be established by planners who enthusiastically assert that zoning is really *local law*—this is a powerful coalition of interests working against regionally based solutions to current social problems.

C. Sheff v. O'Neill

The court in *Sheff v. O'Neill*,¹²⁹ offered a more promising step toward an increased regional consciousness.¹³⁰ Arguments have been completed in this latest effort to equalize funding among Connecticut's public school districts. Twenty five years ago, the Connecticut Supreme Court in *Horton v. Meskill*¹³¹ ordered the state to provide more equalized funding for school children, regardless of the *ad valorem* wealth of the town in which the district was located.¹³² Nonetheless, Connecticut's public schools and cities have become more economically (and

¹²⁶ See *Christian Activities Council*, 735 A.2d at 238 n.11 ("Our search of the legislative history has not disclosed any evidence of legislative intent . . .").

¹²⁷ See *id.* at 238 (noting the basis of its decision as the "text and the purpose of the statute" as found in previous cases).

¹²⁸ *Id.* at 243 n.20 (stating the blue ribbon commission rejected the Massachusetts plan as something "too strong and too much of a departure" for Connecticut, which often refers to itself as the land of "steady habits").

¹²⁹ 678 A.2d 1267 (Conn. 1996).

¹³⁰ See *id.* at 1289.

¹³¹ 376 A.2d 359 (Conn. 1977).

¹³² See *id.* at 374-75; see also Roseann G. Padula, Comment, *The Plight of Connecticut's Brightest Students: Bradley v. Meriden Board of Education*, 29 CONN. L. REV. 1319, 1319-20 (1997) (stating that Horton resulted in "reformation of the state system of school financing"). But see Rachel F. Moran, *Milo's Miracle*, 29 CONN. L. REV. 1079, 1095 (1997) (quoting Wesley W. Horton, the father of the plaintiff in *Horton*, who said that there are still many "financial inequities" in 1992).

racially) segregated.¹³³ In the early nineties, the plaintiffs in *Sheff* brought an action claiming that the *de facto* racial segregation in Hartford's public schools prevented them from providing equal education for all of Connecticut's children, as required by the state constitution.¹³⁴

School district boundaries are a major issue in *Sheff*.¹³⁵ Since Connecticut's cities and towns are now rigidly segregated,¹³⁶ municipalities' schools can only be integrated by moving school district boundaries, thereby incorporating sections of the adjoining white suburbs to create multi-town school districts. Since 1910, Connecticut's public school district boundaries have been required by statute to follow municipal boundaries.¹³⁷ The only exceptions are the various regional school districts formed by two or three neighboring municipalities. These rare regional structures are almost entirely in outlying rural areas of Connecticut.¹³⁸ But in general, the effect of the race-neutral statute, under current settlement patterns, ensures that public schools can never become integrated. This fact violates the state constitution.¹³⁹

A majority of the Connecticut Supreme Court affirmed the trial court's holding in *Sheff* that the state's school districting

¹³³ Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1085 (1991) (arguing that the courts should take action to ensure remedies for inequalities the legislature has failed to correct). See also *infra* note 138 and accompanying text.

¹³⁴ See *Sheff*, 678 A.2d at 1271; CONN. CONST. of 1965, art. VIII, § 1 (duty to provide a public education); *id.* at art. I, §§ 1, 20 (guaranteeing equal rights and protection and prohibiting segregation).

¹³⁵ See *Sheff*, 678 A.2d at 1274 ("[The trial court] found that school district lines would have to be redrawn in order to remedy effectively the severe racial, ethnic and socioeconomic isolation that exists in the Hartford public school system.").

¹³⁶ See *id.* at 1272-73 (noting the stipulation of the parties to the fact that while ninety-two percent of the students in Hartford's public schools were minorities, only seven of the twenty-one surrounding suburban towns had more than a ten percent minority enrollment in their public schools).

¹³⁷ See CONN. GEN. STAT. § 10-240 (1999).

¹³⁸ See Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O'Neill—and a Proposed Solution*, 29 CONN. L. REV. 1115, 1163 n.174 (1997) (noting that the legislature increased the number of regions in CONN. GEN. STAT. §§ 10-264a(2), 10-264k to increase public participation, especially in rural areas).

¹³⁹ See *Sheff*, 678 A.2d at 1273, 1289 (recognizing the finding of the trial court—whose decision it reversed—that racial isolation in the Hartford public schools is likely to worsen); see also CONN. CONST. of 1965, art. 1, § 20 (providing for equal protection and thereby prohibiting segregation).

statute was the “*single most important factor*”¹⁴⁰ contributing to the current *de facto* school segregation,¹⁴¹ and that the districting scheme violated the state constitution.¹⁴² The state, therefore, had a constitutional duty to correct the inequality of educational opportunity. The court issued a declaratory judgment in favor of the plaintiffs yet “stay[ed its] hand”¹⁴³ to provide the General Assembly and the executive branch with an opportunity to take the necessary steps to correct the constitutionally impermissible isolation of minorities.¹⁴⁴ The superior court was directed to retain jurisdiction in order to supervise the carrying out of an appropriate remedy.¹⁴⁵ A vigorous¹⁴⁶ dissent argued that the constitutionally deficient education the plaintiffs were receiving in Hartford’s public schools was not due to racial or ethnic isolation, but instead was the product of poverty “and all of the social pathologies that are closely associated with poverty and its concentration.”¹⁴⁷

Necessarily, *any* remedial steps will have to break down the impermeability of inter-town political boundaries as applied to school districts, given the stark racial identification of those boundaries. The State did respond to the Connecticut Supreme Court decision in *Sheff* by increasing the funding for magnet schools, charter schools, lighthouse schools, and several other interdistrict cooperative programs¹⁴⁸ which draw children from a district whose boundaries are not within the political jurisdiction in which the school is located. But in March 1998, nearly two years after the decision in *Sheff*, the same plaintiffs asked the

¹⁴⁰ See *Sheff*, 678 A.2d at 1289.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ *Id.* at 1290.

¹⁴⁴ See *id.* at 1290–91 (adapting the *Horton I* method of granting declaratory relief while maintaining jurisdiction).

¹⁴⁵ See *id.* at 1291.

¹⁴⁶ See *id.* at 1298 (Borden, J., dissenting). The ninety-one page dissent at one point characterized the majority opinion as “long on rhetoric and short on reasoning.” *Id.*

¹⁴⁷ *Id.* at 1334. The dissent would have held that the overwhelming weight of the evidence before the trial court supported its conclusion that poverty, not racial and ethnic isolation, was the cause for the sub par achievements of Hartford public school children. See *id.* at 1313.

¹⁴⁸ See *Sheff v. O’Neill*, 733 A.2d 925, 928–34 (Conn. Super. Ct. 1999) [hereinafter *Sheff II*] (discussing the interdistrict cooperative programs in Connecticut).

superior court to declare that the state was not proceeding fast enough or effectively enough to provide the proper relief.¹⁴⁹ The superior court has recently rebuffed their arguments, holding that the state should be given more time to implement the remedies called for in a report commissioned by the legislature.¹⁵⁰

The superior court's description of the programs that have been undertaken since the Connecticut Supreme Court's decision in *Sheff* holds some promise that the legislature is recognizing a need to deal with district boundary lines. The superior court described the Choice program as an interdistrict program that more than quadrupled the participation level of its predecessor program.¹⁵¹ The Choice program requires the receiving district to keep the student in its system at least until the student has graduated from the particular school building to which he or she had been assigned.¹⁵² Suburban school districts committed 1400 openings statewide for the 1998-99 school year.¹⁵³ "Lighthouse Schools" is a new program funding improvements in urban schools so that they can attract students from outside their districts and, at some point, become "magnet schools."¹⁵⁴ The original Lighthouse School in New Haven attracted "approximately 500 children from outside New Haven"¹⁵⁵ for the 1998-99 school year.¹⁵⁶ State funding for 1900 students to enroll outside their districts in these two programs represents a mere token of the need for breaking down municipally based school districts. It should be noted, however, that Choice pays for urban children to attend suburban schools, and Lighthouse Schools pay to bring suburban children to urban schools. Both programs recognize that a long term commitment to regional interaction is necessary to break down the invisible, yet

¹⁴⁹ See *id.* at 938.

¹⁵⁰ See *id.* (noting that "the plaintiffs failed to wait a reasonable time and that their return to court was premature").

¹⁵¹ See *id.* at 932-33 (discussing the benefits that have thus far resulted from the implementation of the project).

¹⁵² See *id.* at 933 ("The student is also the responsibility of the receiving district for all disciplinary purposes.").

¹⁵³ See *id.* (discussing the "Lighthouse Schools" program).

¹⁵⁴ See *id.* at 933-34.

¹⁵⁵ See *id.* at 933

¹⁵⁶ See *id.* at 932-33 (reviewing the text of P.A. 97-290 § 3, which had a provision for lighthouse schools).

substantial, barriers that continue to exist between racial, ethnic, and economic groups in Connecticut.¹⁵⁷ The true test is whether the effort will continue, or fade out as *Sheff* falls into the background of political consciousness. One hopeful sign is the creation of Regional Education Service Centers. Each school district in the state is required to report to its Center evidence of the district's progress in reducing racial, ethnic, and economic isolation.¹⁵⁸ The superior court viewed this requirement as one of the reasons for the "increased interest in interdistrict programs."¹⁵⁹

Conversely, one cannot be too optimistic about seeing the way to separating school boundaries from political boundaries. It is this failure to separate these boundaries that is the fundamental cause of the isolation of racial, ethnic, and economic minorities.¹⁶⁰ The lack of openness to changed conditions, the basis for Connecticut's motto, "The Land of Steady Habits," is dramatically illustrated by the fact that while Connecticut still has a law requiring school district boundaries to track municipal boundaries, "[m]ore than seventy-five percent of school districts in the United States are not contiguous with any other local boundary; only about one in ten tracks city boundaries."¹⁶¹

D. Regional Asset Districts

Regional Asset Districts are the latest regional cooperation idea to attract significant attention among regionalists in Connecticut.¹⁶² The idea is to have elected officials in each region of the state come to a consensus identifying their Regional Assets—including cultural facilities (like the Wadsworth

¹⁵⁷ See *id.* at 932–34 (discussing both the "Choice Program" and the "Lighthouse Program").

¹⁵⁸ See *id.* at 934–35 (discussing the functions of the regional centers).

¹⁵⁹ *Id.* at 935; see also CONN. GEN. STAT. § 10-4b (1999) (concerning filing of complaints against the State Board of Education).

¹⁶⁰ See *Sheff II*, 733 A.2d at 935 (noting evidence that the changes were not begun until an "ineffectual board of education" had been dissolved).

¹⁶¹ Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 53 (1998) (*emphasis added*).

¹⁶² See Editorial, *Don't Give Up On Asset Districts*, HARTFORD COURANT, June 8, 1998, at A8 (listing among the Regional Assets Districts supporters—mayors, the Connecticut Conference of Municipalities, the Metro Hartford Millennium Project, several regional chambers of commerce, and a large number of state business leaders), available in LEXIS, News & Information Library.

Atheneum), athletic fields, and transportation facilities (such as walking trails).¹⁶³ The designated Assets would be eligible for public funding to help sustain them, although the level of funding in any of the proposal's three legislative manifestations would be insufficient to pay any one Asset's costs of operation. The rationale is that Regional Assets are used by people throughout the region, regardless of an Asset's location and the user's home town, yet any public support the Assets presently enjoy comes almost entirely from the town in which the Asset is located. Most of the Regional Assets used to exemplify the activities that would be supported are either in the central cities or in the outer suburbs and rural areas where the property tax base available to support public activities is lower than the state's average.¹⁶⁴ The proposed legislation would reduce some of the inequality between the location of Regional Assets and the location of public support for them.¹⁶⁵

A bill to create Regional Assets Districts was first introduced in the legislature in 1997.¹⁶⁶ It would have authorized Regional Councils of Governments (COGs) and Regional Councils of Elected Officials (CEOs) to issue bonds and levy taxes to provide the funding for the Regional Assets, but it failed to pass.¹⁶⁷ This was because legislators were concerned that towns would lose control over the use of those Assets in their town.¹⁶⁸ A substantially modified version was reintroduced

¹⁶³ See *Regional Asset Districts; Let's Borrow a Good Idea*, HARTFORD COURANT, Mar. 22, 1998, at C2 (listing examples of possible amenities such as theatres, stadiums, natural history museums, and zoos), available in LEXIS, News & Information Library.

¹⁶⁴ See Mike Swift, *Proposals Offer Aid to Ailing Cities*, HARTFORD COURANT, Mar. 3, 1996, at A1 (noting that the Regional Asset Districts could solve the tax and revenue problems because the program would make it possible to connect the people who use the properties to the financing of the properties), available in LEXIS, News & Information Library.

¹⁶⁵ See Mike Swift, *Regionalism Runs into Opposition*, HARTFORD COURANT, Nov. 30, 1997, at D1 (Senator Jefferson Davis, co-chair of the legislature's Planning and Development Committee, supporting the measure: "remember the far more important issue . . . you need to have a vibrant central city in order to have a vibrant regional economy."), available in LEXIS, News & Information Library.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See S. Proc. Apr. 7, 1999, pp. 00907-09. Senator Herlihy, an opponent of the Bill, discussed its history, concluding it was just one more example of the "big government philosophy" which would lead to more taxes eventually. *Id.*; see also Mike Swift, *The New Wave of Regional Cooperation; Local Leaders Shifting Focus*,

in 1998,¹⁶⁹ but it again failed to pass despite significant additional legislative and business support.¹⁷⁰ This second version called for an allocation of state sales tax revenues to provide the funds for the support of the regionally designated Assets. Its supporters also emphasized, to no avail, that no new taxes were being authorized, and that the COGs and CEOs were not afforded any new taxing or bonding powers.¹⁷¹ "We in Connecticut do not need [n]or want regional government."¹⁷² A third effort was made in the spring of 1999, and it did not provide for any funding at all.¹⁷³ The COGs and CEOs would, as in previous versions, have designated the Regional Assets, but they were not required to participate in the program. Any financial support would have been voluntary. Yet for a third time the bill died, despite the lack of any required public financial support. Although it passed in the Senate, it never came to the floor for a vote in the General Assembly.¹⁷⁴

III. WHY REGIONALISM, ANYWAY?

As the discussions above illustrate, Connecticut does not qualify as a state that is leading the way toward regionally oriented thinking or acting. The Affordable Housing Appeals Procedure, our most developed effort to openly confront municipal self-orientation, has not been wildly successful in either the number of affordable housing units developed under its aegis, or in breaking down the ideology of "my town first, last, and always."¹⁷⁵ The fact that the procedure is far from

HARTFORD COURANT, May 25, 1997, at A1 (statement of Senator Martin Looney stating that the measure failed because of legislators' fear of losing local control), available in LEXIS, News & Information Library.

¹⁶⁹ See Mike Swift, *Regional Asset Idea Builds Momentum*, HARTFORD COURANT, Feb. 3, 1998, at A3, available in LEXIS, News & Information Library.

¹⁷⁰ See Editorial, *Don't Give up on Asset Districts*, HARTFORD COURANT, June 8, 1998, at A8, available in LEXIS, News & Information Library.

¹⁷¹ See *supra* notes 163, 170.

¹⁷² Flyer distributed by supporters of the proposed legislation in 1998, "What You Should Know About The Regional Assets Bill (H.B. 5683)" (n.d.).

¹⁷³ See ACT OF APR. 1, 1999, CH. 107, 1999 CONN. LAWS 1076 (authorizing regional assets investments).

¹⁷⁴ See Christopher Keating et al., *Lawmakers Toss Adriaen's Landing a Lifeline*, HARTFORD COURANT, June 10, 1999, at A1 (noting that the General Assembly failed to consider the Regional Asset Districts after the Senate had approved the measure), available in LEXIS, News & Information Library.

¹⁷⁵ See *supra* notes 117-19 and accompanying text.

developing greater cooperation among metropolitan area towns is best illustrated by the fact that its most vocal and vehement opponents are the municipal planners themselves. With planners like that, one is tempted to say, who needs planners?

The one bright spot for regional thinking in Connecticut is *Sheff v. O'Neill*, which successfully raised the question of whether inter-town boundaries should be as sacrosanct as our political rhetoric would have them be.¹⁷⁶ The implication of the success of *Sheff*, thus far, is that regional land use planning is not succeeding in breaking down the rigid physical and mental boundary lines between our towns. In fact, it is localized land use planning in the form of zoning regulations that have been largely responsible for creating and maintaining the racially and economically segregated housing patterns in Connecticut. These housing patterns are at the heart of the racial, ethnic, and economic isolation of the children who were the plaintiffs in *Sheff*.

On the other hand, despite the fact that a proposal to create Regional Assets Districts would simply empower towns to create completely voluntary inter-town districts that could support amenities to benefit the participating towns, such a proposal could not pass the state legislature.¹⁷⁷ The money to provide the benefits would not require any new taxes at any level, because it would come from existing town resources—voluntarily, so that the towns could determine what they would get for their contributions. Even this relatively toothless tiger is threatening, and one really must have faith in the legislative strategy of incrementalism to see anything promising from Regional Assets Districts.

¹⁷⁶ See Warren Woodberry, Jr., *Sheff vs. O'Neill Topic of NAACP Conference Talks*, HARTFORD COURANT, Oct. 31, 1998, at B3, available in LEXIS, News & Information Library. The NAACP Conference's subject was the current state of desegregation in Hartford, looking at the efforts taken since *Sheff*. "Since the *Sheff* ruling, desegregation efforts have included millions of dollars of state educational aid, a host of school programs and greater minority staff recruitment efforts." *Id.*; see also Rosalinda DeJesus, *Plan Would Integrate Area School Districts*, HARTFORD COURANT, Apr. 8, 1999, at B1 (describing one of over twelve forums held by the Connecticut Center for School Change in order to hear a variety of opinions about ways to desegregate Connecticut schools in light of the *Sheff* decision of 1996), available in LEXIS, News & Information Library.

¹⁷⁷ See *supra* notes 162–174 and accompanying text.

What is one afraid of? No one "lives" in one town anymore, in the sense that their home, their place of employment, the stores where they shop, the places they get their cars and appliances repaired, and the movie theatres they go to are all in one town. In fact, most of us are concerned with what happens in at least three towns and for most of us many more.¹⁷⁸ An old solution to the problem of living in this multi-town environment was to consolidate the metropolitan area towns and to create a regional mini-legislature. That "solution" was last tried, to my knowledge, in the 1950s and 1960s, when Nashville was joined to surrounding Davidson county, Indianapolis with its surrounding towns, Metropolitan Toronto was created, and one or two other mega-mergers were carried off.¹⁷⁹ No one proposes such solutions now, at least not with an expectation that they will be adopted.¹⁸⁰ These days, metropolitan reformers turn out to support (some quite strongly) the values of localism at the same time as they condemn its short-sightedness.¹⁸¹ The current prevailing idea is that one should find methods for "softening" the boundaries between towns in areas where the externalities between towns in close proximity to each other are particularly pervasive, but without impairing local autonomy "too much."¹⁸²

A few years ago, Connecticut was perhaps one of the leaders in trying to find regionally oriented ways for confronting the extremely difficult social problems of affordable housing and effective public schools; Connecticut General Statute § 8-30g and

¹⁷⁸ One of the streets in the author's neighborhood in Hartford is a through street from West Hartford east into Hartford and is heavily used by traffic going east in the morning, and west in the afternoon. For several years the street deteriorated into a seamless pothole, while Hartford repaved the local streets that crossed the through street. Since the through street was almost entirely used by West Hartford residents, it was widely thought that Hartford officials did not feel any need to use city resources to repair it.

¹⁷⁹ See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1118 (1996).

¹⁸⁰ See *id.* at 1115, 1118-23, 1165-68 (1996); see also Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1077-78 (1996).

¹⁸¹ See, e.g., *supra* note 179, at 1163-65.

¹⁸² See Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1187-95 (1996) (proposing that residents of metropolitan area should be allowed to vote in the elections held by any of the municipalities within that metropolitan area).

the supreme court's decision in *Sheff* were beacon lights.¹⁸³ Our leadership is no longer apparent, because the Affordable Housing Appeals Act has been critically crippled, and the remedies for the boundary problem described in *Sheff* put on hold. Our capacity for confronting the difficult affordable housing and effective public schools problems may be waning.

One alternative to thinking of these problems as city vs. suburb, or urban vs. rural, may be to discard the political boundary basis for thinking about these problems. For example, the latest buzz word in planning and political circles is "sprawl," which no one seems to favor.¹⁸⁴ But can any of us describe or define the much disliked sprawl. Is it that living patterns are spread out "too much?" Is it that development has leapfrogged over undeveloped land, causing unnecessary spreading out? Or is it the unending stretch of low-density or single-use development that defines sprawl? Or is it the traffic congestion that seems endemic to new developments (as well as old)? Or is it the lack of a crowded center that makes a community sprawl? Or is it the result of competition between towns for economic development assets, broadly defined as a range of activities from cultural attractions like a summer home for the Hartford

¹⁸³ See *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996) (holding that the state legislature has an affirmative duty to remedy segregation in public schools); CONN. GEN. STAT. § 8-30g (1999) (Affordable Housing Land Use Appeals Act).

¹⁸⁴ The author has heard a lawyer-academic active in historic preservation defend sprawl and has read a paper by two economists who ardently support the sprawl approach to land development. Not surprisingly, the preservationist is from Arizona, and the two economists teach at the University of Southern California in Los Angeles. Conversation with Grady Gammage, Jr., Adjunct Professor at the Arizona State University Colleges of Architecture and of Law, Washington, D.C. (Apr. 1998); see also Peter Gordon and Harry W. Richardson, *Are Compact Cities a Desirable Planning Goal?*, 63 J. THE AM. PLANNING ASSOC. 95, 99 (1997) ("But that suburbanization itself should be an object of attack is amazing, given the expressed preferences of the majority of Americans for suburban lifestyles and the supposed sanctity of consumer sovereignty."); Scott A. Bollens, *Concentrated Poverty and Metropolitan Equity Strategies*, 8 STAN. L. REV. & POL'Y REV. 11, 16 (1997) (defining sprawl as "excessive land consumption and destruction of natural resources and farmland [which] results in region-wide inefficiencies in public facilities and infrastructure, and places unnecessary fiscal pressures on suburban governments."); Tom Condon, *Sprawling Our Way Into Oblivion*, HARTFORD COURANT, Sept. 10, 1995, at B1 (criticizing sprawl in Connecticut and listing several harms resulting from sprawl), available in LEXIS, News & Information Library.

Symphony, to more mundane job producing enterprises such as a Staples warehouse?¹⁸⁵

These are the most common definitions of sprawl as used by the major critics of the phenomenon who have written since the publication of William H. Whyte's *The Last Landscape* in 1968.¹⁸⁶ It seems that many people consider otherwise acceptable physical development patterns to be sprawl because of their unacceptable impacts in a given areas.¹⁸⁷ It is not a particular development pattern itself that is labeled "sprawl," but rather the perception that a particular area is not so nice anymore, that growth in a specific location regardless of its shape has been bad. It is the over-crowdedness of the old town center, or its loss of character that constitutes sprawl, not the fact that open land is being subdivided.¹⁸⁸ Or it could be the subdividing of an old farm that had captured the loyalty of area residents with an outlet store that sold fresh milk, home made ice cream, etc. This is perhaps why so many of the people complaining about sprawl live in areas that are zoned for minimum lot sizes of one acre or more, and are not sewered or do not have a public water supply.¹⁸⁹ For if sprawl referred primarily to the spreading of widely scattered single family homes over a broad landscape, some of the residents out there would surely recognize that *they* are the "sprawlers." In the view of Vermont's Governor Howard Dean, speaking at an Environmental Protection Agency conference in Boston earlier this year, "[S]prawl is more a problem of maintaining communities than it is a problem of wanton development.

¹⁸⁵ Testimony of Lisa Santacroce before the Planning and Development Committee, Mar. 1, 1999, p. 000568.

¹⁸⁶ See Reid Ewing, *Is Los Angeles-Style Sprawl Desirable?*, 63 J. AM. PLANNING ASSOC. 107-08 (1997); see generally WILLIAM H. WHYTE, *THE LAST LANDSCAPE* (1968).

¹⁸⁷ See Ewing, *supra* note 186, at 107-08.

¹⁸⁸ See Daniella Altimari & Carolyn Moreau, *EPA Steps in to Curb Development Sprawl*, HARTFORD COURANT, Feb. 3, 1999, at A6 (discussing the recent call for federal action by the EPA and quoting a Hartford architect: "Ultimately you lose your sense of neighborhood and community!"), available in LEXIS, News & Information Library.

¹⁸⁹ Cf. ROBERT YARO ET AL., *DEALING WITH CHANGE IN THE CONNECTICUT RIVER VALLEY: A DESIGN MANUAL FOR CONSERVATION AND DEVELOPMENT* (1988), *passim*.

Working with developers and our communities, we can maintain our traditional villages and rural landscapes."¹⁹⁰

Governor Dean's message does not view sprawl as a strictly traditional regional planning problem. His view is concerned with focusing on the best locations for various land uses depending on physical characteristics of the landscape and the infrastructure available to serve it—transportation networks, the location of the best land for farming, open space preservation, the existence of sewers, etc. An alternative to sprawl-control does not necessarily require town by town adoption of a no-growth model of development. If sprawl refers to the destruction of favorite places and familiar buildings, or at least the important ones, or too many of them, the sprawl problem is one of local planning where there should be a recognition that local favorites are now, in our multi-town society, regional favorites as well. Favorite sites may also spread across several towns, of course, the most common being natural formations such as the Housatonic River valley, the mountain ranges listed in § 8-1aa of the Connecticut Statutes,¹⁹¹ or the Appalachian Trail. The preservation of these sites requires cooperation among the municipalities sharing the resource. At the same time, many of the examples used by the proponents of Regional Assets Districts reflect the concern for the familiar and the old favorites. This concern is only one more example of the need to find a basis for intermunicipal cooperation, be it institutional or simply resting on a new perception of how increasingly interrelated everyone's life and activities are. But these favorite and familiar places need to be accessible to all; not simply in that they are open to the public, but that *all* may become members of the public supporting community. In this effort, one must depend on leaders to point the way. The Connecticut Supreme Court has accepted some of this responsibility (at least until its recent *Christian Activities Council* decision on Glastonbury's affordable housing application), and the legislature has also taken responsibility,

¹⁹⁰ *Fighting Sprawl: The Feds Step In*, CONN. PRESERVATION NEWS, Mar./Apr. 1999, at 6.

¹⁹¹ CONN. GEN. STAT. § 8-1aa (1999) (authorizing town zoning commissions to regulate buildings and structures within a statutorily defined ridgeline protective area on forty-four listed mountains in Connecticut).

albeit with more half-heartedness. One wishes that more of the land use planning professionals in Connecticut would join them so that the promise of regional land use planning can be fulfilled.