

CHANGES IN THE 40B LANDSCAPE: ASSESSING THE NEED FOR REFORM

I. INTRODUCTION

The lack of affordable housing in Massachusetts impacts all but the wealthiest residents.¹ A survey conducted by MassINC in 2003 found that one in four Massachusetts residents have considered leaving the state solely because of the high cost of living.² According to the National Low Income Housing Coalition, Massachusetts is now the least affordable state for rental housing³ and, in terms of home-ownership, the third highest affordability problem.⁴ Historically, much of the blame for the chronic housing crunch has been placed on the zoning laws of suburban and rural communities that have had the effect of excluding low- and median-income individuals.⁵

Chapter 40B of the General Laws of Massachusetts was enacted in 1969 to encourage developers to build affordable housing units by giving them the ability to override the exclusionary zoning practices of local governments.⁶ A town's zoning regulation is deemed exclusionary if it precludes the development of affordable housing by imposing such

1. BONNIE HEUDORFER ET AL., TAKING THE INITIATIVE: A GUIDEBOOK ON CREATING LOCAL AFFORDABLE HOUSING STRATEGIES, 5 Citizens' Housing and Planning Association, Prepared for the Annual Massachusetts Housing Conference, Nov. 22, 2002.

2. Raphael Lewis, *Economic Issues Gnaw at Mass. Quality of Life*, BOSTON GLOBE, May 28, 2003, at A1.

3. See Winton Pitcoff et al., *Rental Housing for America's Poor Families, Farther Out of Reach than Ever*, 2002, National Low Income Housing Coalition, Sept. 18, 2002, available at <http://www.nlihc.org/oor2002/index.htm> (last visited Nov. 19, 2003). In Massachusetts a person has to earn \$21.14 per hour—more than three times the minimum wage—to be able to afford a modest two-bedroom apartment. See *id.*; see also U.S. Dep't of Labor, *Minimum Wage Laws in the States*, at <http://www.dol.gov/esa/minwage/america.htm#Massachusetts> (last visited Nov. 19, 2003).

4. See Andrew Sum et al., *Homeownership in Massachusetts: A New Assessment*, MassINC, Winter 2003, at http://www.massinc.org/publications/reports/PolicyBrief3/policy_brief3.html (last visited Nov. 19, 2003).

5. MARK BOBROWSKI, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW 664 (Little, Brown and Company 1993). Another reason for the skyrocketing prices is supply and demand; the number of households in Massachusetts increased by 8.7 percent in the 1990s while production of new housing fell by sixty percent in comparison to the 1980s. See HEUDORFER ET AL., *supra* note 1, at 5.

6. See 1969 Mass. Acts 774 (codified at MASS. GEN. LAWS ch. 40B, §§ 20-23).

restrictions as requiring lot sizes in excess of one acre or disallowing multi-family units.⁷ According to its proponents, Chapter 40B was an innovative response to zoning laws enacted by snobs motivated by racial and economic bias.⁸

Chapter 40B is not a direct mandate requiring communities to maintain a prescribed number of affordable units that would force towns to take a proactive approach to addressing the problem.⁹ Instead, it is an override tool that allows developers to apply for a single building permit that bypasses any restrictive local zoning laws, thereby placing communities on the defensive.¹⁰ Controversial since its inception, Chapter 40B, also known as the “Anti-Snob Act,”¹¹ has increasingly been the center of an intense debate. Communities and residents have felt besieged by comprehensive permit proposals and object to the method by which the state promotes the development of affordable housing—replacing the municipality’s discretion with its own.¹² This widespread dissatisfaction culminated in a legislative push to amend or even repeal Chapter 40B¹³ despite the fact that many suggested reforms had already been enacted by way of regulatory changes.¹⁴ Faced with a deluge of bills filed with the state legislature that

7. See Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 540-41 (1992).

8. See *id.* at 537. Massachusetts was the first state to “exempt affordable housing development from unreasonable local zoning requirements.” Clark Ziegler, *Introduction*, 2 INCLUSIONARY ZONING: LESSONS LEARNED IN MASSACHUSETTS, NATIONAL AFFORDABLE HOUSING POLICY REVIEW 1 (Jan. 2002) (on file with author). The 40B model developed in Massachusetts was later enacted in Rhode Island, New Jersey, and Connecticut with minor variations. See Sam Stonefield, *The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323, 327-28 (2001).

9. See generally MASS. GEN. LAWS ch. 40B, §§ 20-23 (1969).

10. See Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 382 (2001).

11. See BOBROWSKI, *supra* note 5, at 664. Opposition to the enactment of 40B was based on the ability of the state housing committee to override local zoning board decisions to deny comprehensive permits. See *id.*

12. See Thomas M. Keane, *Affordable Housing on Shaky Foundation*, BOSTON HERALD, Aug. 25, 2002, at E4. According to one town’s planning board chairman, 40B is “a piece of legislation that allows a developer to rape and pillage a community under the guise of affordable housing.” Steve Bailey, *Poor Cohasset*, BOSTON GLOBE, Dec. 6, 2002, at C1.

13. See Chapter 40B Task Force Findings and Recommendations, Report to Governor Mitt Romney, May 30, 2003, at 1, available at <http://www.state.ma.us/dhcd/Ch40Btf/> (last visited Nov. 19, 2003) [hereinafter Chapter 40B Task Force Findings and Recommendations].

14. See Press Release, Commonwealth of Massachusetts Department of Housing and Community Development, Swift Announces Major Changes to Affordable Housing Statute, at 1 (Oct. 7, 2002) [hereinafter Swift Press Release], available at <http://www.state.ma.us>

would take away the law's effectiveness, a Task Force was appointed in February of 2003 "to ensure that the need to create affordable . . . rental and homeownership housing is balanced appropriately with other municipal concerns."¹⁵ Clearly, 40B needed to be made more palatable to the constituents pushing to eviscerate the venerable law.¹⁶

The Task Force was successful in dampening the ardor of 40B's opponents, but is compromise at any cost truly the cure for the affordable housing crisis?¹⁷ Reform of 40B must be implemented in such a way that *valid* municipal concerns are addressed without hindering the ability to increase the Commonwealth's housing stock. Perpetuating confrontation by weighing local and state interests against each other has only resulted in a proud tradition of resistance to 40B projects and an expenditure of resources that could be better put to use elsewhere.¹⁸

The purpose of this Note is to encourage readers to think critically about public resistance to 40B and the effectiveness of recent regulatory changes and proposed legislative amendments both in protecting the ability of the law to facilitate the construction of affordable housing, and in balancing state and local interests.¹⁹ Public outcry has resulted in reforms that have eased the burden on communities trying to reach the "safe harbor"²⁰ where they will no longer be forced to accept 40B applications. These conciliatory changes, however, do not further the goal of increasing the housing supply.²¹ Instead of reducing opposition by making it easier to avoid 40B

/dhcd/Temp/02/Regs_40b/02.pdf (last visited Nov. 19, 2003). Regulatory changes were announced by the Massachusetts Department of Housing and Community Development in October 2002 "to balance the need of increased affordable housing . . . while also protecting communities from the strain of rapid housing growth." *Id.*

15. Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 1.

16. *See id.* Over seventy bills were before the legislature that would have softened or even repealed 40B outright. *See id.*

17. Brenda J. Buote, *Lowering the 40B Threshold Communities Cheer Task Force Proposals*, BOSTON GLOBE, June 15, 2003, at GlobeNorth 6. The Task Force sought to make 40B more "community-friendly" by putting "state mandated goals for lower-cost housing within the grasp of many suburbs. . . ." *Id.* "Among the recommendations [of the Task Force] is a proposal that would drop the state's annual production requirement for lower-cost housing. . . ." *Id.*

18. *See* Marshfield Action, Inc., at <http://www.marshfieldaction.com> (listing a community of 40B critics formed on the internet in the form of web-sites dedicated to fighting specific 40B projects).

19. *See* MASS. REGS. CODE tit. 760, §§ 30-31 (Rev. 2002) (prescribing the procedures and criteria for decisions of the Housing Appeals Committee in regulations issued by the Massachusetts Department of Housing and Community Development).

20. Eric J. Gouvin, *Rural Low-Income Housing and Massachusetts Chapter 40B: A Perspective from the Zoning Board of Appeals*, 23 W. NEW ENG. L. REV. 3, 53 (2001).

21. *See infra* text accompanying notes 222-26.

proposals, the way the statute is implemented should be changed to reduce the “not in my backyard” reaction to individual developments and the general animosity towards the law itself.²² Taking the confrontation out of the comprehensive permit process is imperative; over the course of its thirty-four years, 40B has only seen the affordable housing shortage worsen.²³

Part II of this Note briefly describes the background of Chapter 40B.²⁴ Part III explains the process local zoning boards should follow in reviewing a comprehensive permit.²⁵ This section includes a discussion of Housing Appeals Committee (HAC) decisions that upheld denials of 40B permits in an attempt to identify which municipal concerns comprise a valid local interest.²⁶ Part IV explores the controversy surrounding 40B and the competing state and local public policies at stake.²⁷ Part V discusses the legislative push to modify 40B and how the recent regulatory reforms reflect the competing interests.²⁸ Finally, Part VI of this Note will explore programs that could be incorporated into Chapter 40B to better serve the state’s interest in providing affordable housing by reducing local resistance to projects built in its name.²⁹

II. AN OVERVIEW OF CHAPTER 40B

A. How the Comprehensive Permit Works

Developers interested in building a project under Chapter 40B apply for a comprehensive permit from the Zoning Board of Appeals (ZBA) of the

22. Peter W. Salsich, *Can NIMBYISM Be Transformed into OKIMBYISM?*, 19 ST. LOUIS U. PUB. L. REV. 453, 458 (2000). The NIMBY reaction could be alleviated by changing the public perception of the law as neighbors realize how the projects benefit their communities. *See id.*

23. *See* Sum et al., *supra* note 4, at 2. In 1980, Massachusetts was twenty-sixth among the states (with the first being the *least* affordable state when calculating the ratio of median housing price to median household income), but by 2000 the Commonwealth ranked third. *See id.*

24. *See infra* text accompanying notes 30-72. Recent law review articles have given the history of 40B a more comprehensive treatment. *See* Krefetz, *supra* note 10, at 384-89; *see also* Kenneth Forton, *Expanding the Effectiveness of the Massachusetts Comprehensive Permit Law by Eliminating the Subsidy Requirement*, 28 B.C. ENVTL. AFF. L. REV. 651, 653-58 (2001).

25. *See infra* text accompanying notes 73-130.

26. *See infra* text accompanying notes 97-130.

27. *See infra* text accompanying notes 131-88.

28. *See infra* text accompanying notes 189-233.

29. *See infra* text accompanying notes 234-82.

municipality where they intend to build.³⁰ In order for a project to be eligible, at least twenty-five percent of the units in the proposed development must be affordable.³¹ Unless the community has met the statutory minimum for affordable housing, with affordable units making up ten percent of all housing units in the town,³² the ZBA is required to evaluate the application and hold a public hearing.³³

Although the town may deny the permit, denials in the vast majority of cases have been overturned and the permits ordered issued when the developer appeals the local board's decision to the HAC.³⁴ As long as the town has not met the ten percent statutory minimum, the presumption is that the denial is not consistent with the local need for affordable housing.³⁵ This statutory approach to affordable housing has been described as voluntary or "passive" in that developers may choose whether to include affordable housing when planning developments and towns do not face sanctions from the state for failure to meet the ten percent goal.³⁶

In another sense, though, the construction of affordable housing is not voluntary on the part of the municipalities. The law is set up to override local growth controls, replacing the discretion of town and city planning boards with that of the state's HAC under the presumption that, with few exceptions, the need for affordable housing outweighs local concerns.³⁷

B. A Brief History of Chapter 40B

Chapter 40B was enacted in 1969 to "open up the suburbs" to socioeconomic diversity.³⁸ Although this piece of legislation was heavily

30. See MASS. GEN. LAWS ch. 40B, § 20 (1969). The developer may apply to any designated "local board" including, but not limited to, the "board of health, board of subdivision control appeals, planning board, building inspector . . . city council or board of selectmen." *Id.*

31. See *id.* The language of the statute does not define affordable housing, understood as available only to individuals who earn eighty percent of the area's median income, or set the requirement that twenty-five percent of the total proposed units be affordable in order to obtain a comprehensive permit; these standards have been read into the meaning of the Comprehensive Permit Law by the Housing Appeals Committee. See *id.*; see also *Hastings Vill., Inc. v. Wellesley Zoning Bd. of Appeals*, No. 95-05 slip op. at 8-9 (Mass. Hous. Appeals Comm. Mar. 21, 1996).

32. See MASS. GEN. LAWS ch. 40B, § 20 (1969).

33. See *id.* § 21.

34. See Krefetz, *supra* note 10, at 397.

35. See MASS. GEN. LAWS ch. 40B, § 20 (1969).

36. See Forton, *supra* note 24, at 657-58.

37. See MASS. GEN. LAWS ch. 40B § 20. A town's decision to deny a comprehensive permit will be upheld if it is "consistent with local needs" as described in the statute. *Id.*

38. Stockman, *supra* note 7, at 537.

contested at the time, the state legislature was dominated by Democrats and under the control of urban leadership. Consequently, the legislature passed the Anti-Snob Act by a narrow margin, in part as retribution for the Racial Imbalance Act, legislation passed in 1965 that would lead to the busing conflicts of the 1970s.³⁹ Thus, although the impetus for 40B was a push by housing activists to address the social harms caused by exclusionary zoning practices, the motivation for passing the Act was political “retaliation against the suburban ‘armchair liberals.’”⁴⁰ Chapter 40B was intended to be unpopular in suburban and rural communities which, like the Greater-Boston communities during the busing era, would lose the ability to protect local interests.⁴¹ Placing a thorn in the side of the suburbs was a legislative aim that has clearly been achieved, although perhaps at the expense of creating the very housing that it was ostensibly enacted to provide.⁴²

C. The Conflict Between Overriding Local Decisions and a History of Local Control

The provision of 40B that allows the HAC to override local decisions has been viewed as a complete disregard of the strong tradition of local control in Massachusetts.⁴³ That tradition is reflected in the Home Rule Amendment of the Massachusetts Constitution.⁴⁴ In *Board of Appeals of Hanover v. Housing Appeals Committee*,⁴⁵ the local zoning board argued that 40B was unconstitutional according to the Home Rule Amendment passed several years prior to the Act.⁴⁶ The Supreme Judicial Court of Massachusetts ultimately rejected that argument, but provided a concise

39. See Krefetz, *supra* note 10, at 385; see also MASS. GEN. LAWS ch. 71, § 37C-D (1965). The Racial Imbalance Act primarily impacted urban communities by mandating that districts with racially unbalanced schools integrate through busing of students to other schools within the district. See Krefetz, *supra* note 10, at 385.

40. Krefetz, *supra* note 10, at 385.

41. See *id.*

42. See Buote, *supra* note 17. The adversarial nature of the permitting process has towns and developers on opposing sides instead of encouraging them to work together. See *id.*

43. See Krefetz, *supra* note 10, at 387.

44. See BOBROWSKI, *supra* note 5, at 666. The Home Rule Amendment states that, “[a]ny city or town may . . . exercise any power . . . which is not inconsistent with the constitution or laws enacted by the general court . . . and which is not denied, either expressly or by clear implication, to the city or town by its charter.” *Id.* at 667-68 (citing MASS. CONST. art. LXXXIX, § 6 (amended 1966)).

45. 294 N.E.2d 393 (Mass. 1973).

46. See *id.* at 407 (addressing the issue of whether, as the town argued after refusing to issue 40B permits, the power to override local zoning regulations was conferred on the HAC and, if so, whether such an exercise of power was constitutional).

discussion of the evolution of municipal power under the state constitution.⁴⁷

Prior to the Home Rule Amendment, although municipalities had traditionally been granted certain powers by the state, including the authority to enact zoning laws, they did not have “inherent or independent rights” of self-determination.⁴⁸ Therefore, the state could freely abridge a power previously granted.⁴⁹ The passage of the Home Rule Amendment effectively gave municipalities independent power, with the limitation that the exercise of local power must not be expressly prohibited by direct conflict with state law.⁵⁰ The court held in *Hanover* that, although the zoning power is one of the “independent municipal powers included in Art. 89, §6,” Chapter 40B does not violate Home Rule because the zoning laws it was enacted to override conflict with the state’s interest in supplying affordable housing.⁵¹ This holding paved the way for developers previously unsure of the validity of 40B to begin filing permits.⁵² But the holding of *Hanover* is not only interesting as an historical note, it also raises an interesting question: *should* local interests be weighed against state interests as they have been in the recent 40B debate?⁵³ Perhaps not if the SJC was correct in deciding that state law must supersede local law in instances where there is direct conflict, even in areas where independent municipal power exists.

D. The Evolution and Significance of Chapter 40B’s Subsidy Requirement

One of the requirements for obtaining a comprehensive permit under 40B is that the developer must be eligible to receive financial assistance through a subsidy.⁵⁴ Although this does not sound like a provision that would particularly generate controversy, it has, in fact, been responsible for 40B becoming the issue du jour. In the 1990s, Chapter 40B garnered little attention until a further broadening of the “subsidy” requirement caught the attention of national developers and applications began to flood in.⁵⁵

47. *See id.* at 407-10.

48. *Id.* at 407.

49. *See id.*

50. *See id.* at 408.

51. *Hanover*, 294 N.E.2d at 409.

52. *See* Stockman, *supra* note 7, at 573. Prior to this decision, very little housing was built under 40B as all parties, including developers and the HAC itself, were unsure of the Act’s constitutional legitimacy. *See id.*

53. Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 1.

54. MASS. REGS. CODE tit. 760 § 30.02 (2002).

55. *See infra* text accompanying notes 66-69. “The increase in large 40B projects has caused a firestorm in some Bay State communities. . . .” Paul Restuccia, *Mass. Affordable*

Chapter 40B itself does not contain a definition of “subsidy,” stating only that in order to qualify under the statute, housing can be subsidized under “any” program of the state or federal governments.⁵⁶ At the time of the statute’s inception, proposals were submitted under 40B with direct subsidies under both state and federal programs that covered the majority of the developers’ costs.⁵⁷ Under “conventional housing subsidy programs . . . a state or federal agency administers and approves every aspect of financing, design and construction.”⁵⁸

The move away from traditional subsidies began in the late 1970s as a variety of agencies introduced housing programs that did not involve a direct payment of funds, and the HAC began to interpret the project eligibility requirements “quite liberally.”⁵⁹ Among the new subsidies were the Farmers Home Administration (FmHA), a rental program for the elderly, and the Homeownership Opportunity Program (HOP) that grants below-market mortgages for certain units.⁶⁰

The HAC broadened the definition of subsidy further in 1987 when the Local Initiative Program (LIP) was put in place.⁶¹ The LIP provided the funding for over forty percent of 40B proposals between 1990 and 2001.⁶² This program is an example of how municipalities can work with the developers in order to create mutually acceptable 40B developments.⁶³ LIP gives significant bargaining power to the municipalities because it requires developers to work with the ZBA in order to get a letter of support prior to filing an application.⁶⁴ LIP is not a direct subsidy, as the only incentive it

Housing Bill Sparks Debate, BOSTON HERALD, Sept. 21, 2001, at 52.

56. MASS. GEN. LAWS ch. 40B, § 20 (1969).

57. See *Hastings Vill., Inc. v. Wellesley Zoning Bd. of Appeals*, No. 95-05 slip op. at 4 (Mass. Hous. Appeals Comm. Mar. 21, 1996). “The field was dominated by two actors: the Massachusetts Housing Finance Agency (MHFA) and the Federal Housing Administration.” *Id.* This form of subsidy gave the subsidizing agency regulatory control over the resulting affordable housing units. See Forton, *supra* note 24, at 664.

58. *Guidelines for Housing Programs in Which Funding is Provided Through a Non-Governmental Entity*, Massachusetts Department of Housing and Community Development, at 2 (Feb. 18, 2003), available at <http://www.state.ma.us/dhcd/Ch40B/NEFguide.pdf> (last visited Nov. 19, 2003) [hereinafter *Guidelines for Housing Programs*].

59. *Hastings*, No. 95-05 at 4.

60. See Forton, *supra* note 24, at 663.

61. See *id.* This program “allows affordable units built under local control to count toward the municipality’s affordable housing inventory.” *Id.*

62. See *Recommendations to Improve Chapter 40B, the Massachusetts Comprehensive Permit Law*, at 2, Citizens’ Housing and Planning Association, Jan. 2001, available at <http://www.chapa.org> (last visited Feb. 10, 2003) [hereinafter *Recommendations*].

63. See Forton, *supra* note 24, at 663.

64. See *id.* at 671.

offers to the developer is the profit from the market-rate housing; this method has been losing popularity in the face of skyrocketing land prices.⁶⁵

The real change to the 40B scene came with the introduction of the New England Fund (NEF), a program of the Federal Home Loan Bank of Boston.⁶⁶ Use of NEF as a subsidy for 40B purposes is the reason for the sharp increase in proposals over the last few years, resulting in the current debate.⁶⁷ When first introduced, a developer using the NEF did not need to obtain a site approval letter from the state Department of Housing and Community Development (DHCD) or any other state agency.⁶⁸ This lack of oversight overwhelmed towns unprepared to deal with the sudden influx of proposals, and claims that rapacious developers were taking advantage of the zoning override tool became commonplace.⁶⁹

The Housing Appeals Committee originally considered the eligibility of the NEF as a subsidy in *Hastings Village, Inc. v. Wellesley Board of Appeals*.⁷⁰ In *Hastings*, the NEF failed the subsidy requirement because the “affordability levels and lock-in period [were] both flexible and ambiguous.”⁷¹ However, in the landmark decision of *Stuborn Ltd. Partnership v. Barnstable Board of Appeals*, the HAC found that the defects identified in *Hastings* had been remedied, and approved the NEF as

65. *Id.* at 664.

66. *See id.* at 672. The NEF provides developers with below market interest-rate construction loans to build housing. *See id.*

67. *See Guidelines for Housing Programs, supra* note 58, at 2.

The real estate market in the late 1990s and thereafter made real estate development financially attractive. Developers seeking to overcome local barriers to low or moderate-income housing turned to the flexibility offered by the Comprehensive Permit Law. . . . [T]he NEF became a funding source and NEF member banks began issuing site approval letters This resulted in multiple applications to many ZBAs for comprehensive permits.

Id.

68. *See Recommendations, supra* note 62, at 3.

69. *See Keane, supra* note 12. “Most municipalities did not have local standards that detailed reasonable requirements for low or moderate-income housing development, and many did not have the capacity to undertake the responsibilities of administering such housing once built.” *Guidelines for Housing Programs, supra* note 58, at 2.

70. No. 95-05 (Mass. Hous. Appeals Comm. Mar. 26, 1996) (holding that the NEF was not a valid subsidy but also providing guidelines for how the Federal Home Loan Bank of Boston could change the program to make it eligible under the Comprehensive Permit law).

71. *Id.* at 9. There are four components of the subsidy requirement that must be met: (1) the program must be for the construction of housing; (2) the housing must be affordable, defined as being reserved for those who earn eighty percent of area median income; (3) a minimum of twenty-five percent of the units must be for low-income residents; and (4) the housing must be affordable for at least fifteen years. *See id.* at 8-9.

a subsidy program for 40B projects.⁷²

III. THE PROCESS OF REVIEWING A COMPREHENSIVE PERMIT PROPOSAL

A. Overview

The vast majority of municipalities in the state have not reached the statutory goal for affordable housing units.⁷³ Therefore, in order to justify the rejection of a 40B proposal most local boards must overcome the presumption that the denial of a comprehensive permit is not “consistent with local needs.”⁷⁴ Outright denial of 40B projects will be overturned by the HAC, unless the town can demonstrate that a valid local interest was at stake that outweighed the regional need for affordable housing.⁷⁵ Local boards intending to deny a permit would be well advised to “prepare their strategies on an assumption that a HAC appeal is likely to follow.”⁷⁶

The following discussion describes the factors a ZBA may legitimately consider in determining whether to issue a comprehensive permit. Before a developer can submit an application to the ZBA, the proposal “must meet three jurisdictional requirements.”⁷⁷ First, the applicant must be a limited dividend organization, meaning that the developer has agreed to limit its profits to no more than “twenty percent of total allowable development costs.”⁷⁸ Second, the proposed housing development must be subsidized under a state or federal program.⁷⁹ Finally, the developer must own the site he proposes to develop.⁸⁰ In order to submit a proposal to a ZBA, the developer must submit proof that those requirements have been met, usually in the form of either a Project Eligibility or Site Approval letter

72. See *Stuborn Ltd. P’ship v. Barnstable Bd. of Appeals*, No. 98-01 (Mass. Hous. Appeals Comm. Mar. 5, 1999).

73. See Press Release, Commonwealth of Massachusetts Executive Dept., Romney Convenes Affordable Housing Task Force (Feb. 18, 2003), available at http://www.clf.org/hot/20030218_Romney.htm (last visited Nov. 19, 2003) [hereinafter Press Release]. “[O]nly 31 of the Commonwealth’s 351 cities and towns meet the 10 percent threshold.” *Id.*

74. BOBROWSKI, *supra* note 5, at 703.

75. See *id.* at 704.

76. *Id.* at 694.

77. BRIAN C. LEVEY ET AL., OBTAINING COMPREHENSIVE PERMITS 9 (Mass. Continuing Legal Educ. 2002).

78. MASS. GEN. LAWS ch. 40B, § 21 (1969); see also Werner Lohe, *Guidelines for Local Review of Comprehensive Permits*, in OBTAINING COMPREHENSIVE PERMITS 9-10 (Mass. Continuing Legal Edu. 2002).

79. See MASS. REGS. CODE tit. 760, § 30.02 (2002).

80. See LEVEY ET AL., *supra* note 77, at 10.

from the applicable subsidy program.⁸¹

The DHCD published Model Guidelines that, although non-binding, provide a framework for local boards to follow in reviewing 40B proposals.⁸² According to the guidelines, after receiving a permit application the ZBA may seek input from other town boards such as the Board of Health, the Conservation Commission, the Historical Commission, Water and Sewer Boards, and even the fire, police, and school departments.⁸³ The next step is to schedule a public hearing “to ensure that local concerns are properly addressed” including “health, safety, environmental, design, open space, and other concerns raised by town officials or residents.”⁸⁴ Following the public comment period, the ZBA will decide whether to approve the permit as proposed, deny the permit completely, or approve the permit on the condition that particular changes are made to the developer’s plan depending on whether the proposal is “consistent with local needs.”⁸⁵ This process of review is time-consuming, especially in light of the fact that many local boards are made up of volunteers who may not have the time or experience required to deal with the complex issues 40B developments often present.⁸⁶

Before approving a comprehensive permit, the ZBA considers whether the proposed development would negatively impact the community.⁸⁷ The guidelines provided by the HAC list the types of information that the ZBA can legitimately request from the developer and then consider in making the decision of whether or not to issue the permit.⁸⁸ The ZBA may request information that was not included in the developer’s application if it relates to health and safety interests of the future residents of the proposed developments or residents of the community at large, but “may not require

81. See *Guidelines for Housing Programs*, *supra* note 58, at 3. The DHCD and the Massachusetts Housing Finance Agency (MHFA) are responsible for issuing site approval letters. See *id.* “Besides checking the physical site, architect’s plans, and financial feasibility of the project, the site approval letter provide[s] assurance that the project met the comprehensive permit requirements.” Forton, *supra* note 24, at 668.

82. See *Guidelines for Housing Programs*, *supra* note 58, at 5.

83. *Overview of the Massachusetts Comprehensive Permit Law*, Massachusetts Department of Housing and Community Development, Housing Appeals Committee, available at <http://www.state.ma.us/dhcd/components/hac/4summ-mc.htm> (last visited Nov. 11, 2003).

84. *Id.*

85. MASS. GEN. LAWS ch. 40B, §§ 20-21 (1969).

86. See Brenda J. Buote, *Seeking Counsel, Clarity on 40B*, BOSTON GLOBE, Aug. 29, 2002, at GlobeNorth 1. “Some of the towns just don’t have a lot of experience with Chapter 40B and many don’t have professional staff. They don’t know what they’re entitled to require, what they’re entitled to ask.” *Id.*

87. See BOBROWSKI, *supra* note 5, at 694.

88. See Lohe, *supra* note 78, at 11.

information that is too broad in scope, irrelevant to the specific project, or not required of similar developments.”⁸⁹ Examples of overly broad or burdensome requests by a ZBA are those requiring a developer to provide information on issues affecting an entire community, such as regional wetlands studies, water supply studies, or citywide sewer capacity reports.⁹⁰ Case law arising out of ZBA denials, discussed below, demonstrates that the HAC has historically accorded little weight to the local interest cited as grounds for the denial of a comprehensive permit.

B. Denying a Comprehensive Permit Due to Impact on Local Interests

If the ZBA denies the permit outright, or if the permit is approved but the ZBA has modified the proposal in such a way that the developer believes the proposal is no longer economically feasible, the developer may appeal the decision to the state HAC.⁹¹ The ZBA must demonstrate that a valid local interest was threatened by the proposed development: a valid health, safety, environmental, design, open space, planning, or other local concern.⁹² The HAC typically has not allowed the ZBA to base its decision on the impact a proposed development would have on town municipal services.⁹³

The ZBA must also convince the HAC that the local interest outweighed the regional interest in increasing the supply of affordable housing.⁹⁴ As a general rule, the HAC has ruled in favor of developers over the objections of local ZBAs and residents.⁹⁵ More than three hundred appeals have been heard by the HAC as of 2001, and, between 1970 and 1999, ZBA decisions to deny permits were upheld in only eighteen cases.⁹⁶ In order to explore how this balancing of interests has played out in the past, and provide

89. *Id.*

90. *See id.* at 12.

91. *See* MASS. GEN. LAWS ch. 40B, § 22 (1969). In the case of a resident aggrieved with the ZBA’s decision to grant the Comprehensive Permit, the case may be appealed to the Land Court. *See* MASS. GEN. LAWS ch. 40B, § 21 (1969).

92. MASS. GEN. LAWS ch. 40B, § 20 (1969).

93. *See* BOBROWSKI, *supra* note 5, at 704. Denying a permit, or significantly reducing the number of units that can be built, based on the strain the development would place on municipal services, is not the best approach for a board seeking to avoid seeing its decision overturned on appeal, but is one that is very often cited. Christine McConville, *Housing Case in Judge’s Hands*, BOSTON GLOBE, Nov. 3, 2002, at NorthWest 2 (discussing a private suit challenging a 40B project based on the prospective risk West Nile virus would pose to residents, an argument proposed by Citizens for a Safe Bedford).

94. *See* BOBROWSKI, *supra* note 5, at 703.

95. *See* Krefetz, *supra* note 10, at 396-97.

96. *See id.*

guidance for future board decisions, a discussion of cases that serve as exceptions to the general rule that the HAC overturns local zoning board comprehensive permit denials is provided below.

There are two categories of local interests, health and safety factors and planning factors, that could make the denial of a comprehensive permit consistent with local needs.⁹⁷ Denials based on health and safety factors can be further divided into two subsets of cases: those where the proposed development would jeopardize the health and/or safety of the residents of the community, and those that would pose a threat to the future occupants of the development.

In *Todino v. Board of Appeals of Woburn*,⁹⁸ the local board denied a comprehensive permit for reasons including: violation of the city's master plan; the access road to the development was too narrow and created a fire hazard; the local school would be overburdened; the city had alternative, and more appropriate, sites where large developments could be built; and filling the site for construction would flood the surrounding area where the land in question was a natural water retention area.⁹⁹ In its decision, the HAC does not address the burden placed on the school system or the width of the adjacent road, and makes only cursory reference to the developer's argument that the existence of alternative sites was "meaningless" where nearly all applications for multi-family developments were denied.¹⁰⁰

A major factor cited in the decision is the lack of a site approval letter from the subsidy provider, in this case the Massachusetts Housing Finance Agency (MHFA).¹⁰¹ The absence of an approval letter was most likely the decisive factor where its existence would have shifted the presumption in favor of the developer.¹⁰² Instead, the HAC assessed the validity of the "water problem," finding that the construction of the proposed apartment building would in fact pose a threat to the health and safety of both occupants and neighboring residents.¹⁰³ This was not the first case where the local zoning board could validly argue that the proposed development posed a real risk of flooding.¹⁰⁴ In prior cases, though, the appellant developers either provided detailed drainage plans or otherwise

97. See BOBROWSKI, *supra* note 5, at 703.

98. No. 72-04 (Mass. Hous. Appeals Comm. Feb. 13, 1974).

99. *See id.*

100. *See id.* at 3.

101. *See id.* at 16.

102. *See id.*

103. *See id.* at 18.

104. See BOBROWSKI, *supra* note 5, at 703; Concord Homeowning Corp. v. Bd. of Appeals of Concord, No. 71-01 (Mass. Hous. Appeals Comm. Nov. 19, 1971); Bedford Town, Inc. v. Bd. of Appeals of Hanover, No. 73-05 (Mass. Hous. Appeals Comm. Aug. 27, 1973).

demonstrated that the proposed development would not worsen the existing drainage situation of the area.¹⁰⁵ In contrast, the developer in *Todino* offered no evidence that his proposal would not pose a drainage problem.¹⁰⁶

A viable threat to the health or safety of the residents of the proposed development has been a successful ground for denial in other cases as well.¹⁰⁷ In denying a 40B project proposed by Forty-Eight Company, the town of Westfield emphasized the high volume of traffic that passed the site and the industrial nature of the area that would combine to “effectively isolate the inhabitants from social integration with the rest of the neighborhood.”¹⁰⁸ This type of argument, by itself, would probably not be sufficient to convince the HAC that denial of the permit was necessary, but in this case the local board further demonstrated a quality of life threat that a neighboring rail yard would pose.¹⁰⁹ The HAC ultimately decided that the combination of risks to the health and safety of the development’s potential occupants outweighed the regional need for affordable housing.¹¹⁰

*Sherwood Estates v. Board of Appeals of the City of Peabody*¹¹¹ provides another example of a denial that was deemed “consistent with local needs” where the tenants’ safety would be placed at risk.¹¹² The local board in this case asserted such a wide variety of grounds to justify the denial of a permit for an elderly housing development that its arguments seem completely frivolous.¹¹³ However, the HAC upheld the local board’s denial based on the danger that the ten percent grade of the access road would pose to the elderly residents of the development.¹¹⁴ As the cases demonstrate, health and safety factors must meet a high threshold to

105. See *Todino*, No. 72-04, at 10-11.

106. See *id.* at 8.

107. See generally *Forty-Eight Co. v. Westfield Zoning Bd. of Appeals*, No. 75-06 (Mass. Hous. Appeals Comm. Aug. 23, 1976).

108. *Id.* at 11.

109. See *id.* Not only would the distance of the development to a nearby train yard, located only seventy feet from one of the buildings, have produced noise pollution in excess of HUD regulatory guidelines, but the yard was also used to store propane gas tanks for a distribution facility. See *id.* at 10-12.

110. See *id.* at 14.

111. No. 80-11 (Mass. Hous. Appeals Comm. Apr. 30, 1982).

112. *Id.*

113. See *id.* The Peabody board took a kitchen sink approach to its grounds for denial. The board’s objections based on health and safety included issues related to “sewage, drainage, water supply and the number of parking spaces . . . traffic hazards, [and] the increased traffic pressure. . . .” *Id.* at 6.

114. See *id.* at 8-9 (holding that where the road exceeded by one percent the maximum allowable grade, as restricted by town subdivision law, it posed a risk that outweighed the need for housing).

comprise valid local concerns in the eyes of the HAC.

The HAC has distinguished between meritorious local interests and those that do not justify the denial of a comprehensive permit.¹¹⁵ The town of Raynham was able to demonstrate to the HAC that a sewage issue was a valid concern by pointing to a conflict between the proposal's inclusion of a "pressurized sewage main" and the town's master plan that disallowed the use of such a system in residential developments.¹¹⁶ In *Tetiquet River Village v. Raynham Zoning Board of Appeals*, the HAC upheld the denial not because of the conflict between the town's plan and the developer's proposal, but on the high cost of updating the sewage system.¹¹⁷ Like the developer in *Todino*, the appellant failed to demonstrate that the design of the sewage system was "feasible or [met] minimum standards."¹¹⁸ As *Tetiquet* demonstrates, a local board cannot simply cite the increased burden a development will place on municipal services to overcome the interest in the regional need for housing, but may be successful in denying a permit where the objection is based on an identifiable concern or policy.¹¹⁹

*Harbor Glen Associates v. Board of Appeals of Hingham*¹²⁰ provides an example of a comprehensive permit denial that was upheld based on a local planning concern.¹²¹ The town of Hingham had developed a detailed plan for the development of a 300-acre tract that reserved 85 acres for the development of multi-family housing, of which 27 acres had already been approved for the construction of a 40B development.¹²² The HAC held that the restrictions in the town's master plan deserved consideration as long as the plan was not implemented to make an end-run around the legislative

115. See *Tetiquet River Vill. v. Raynham Zoning Bd. of Appeals*, No. 88-31 slip op. at 7 (Mass. Hous. Appeals Comm. Mar. 20, 1991) (stating that "[c]oncerns about fire access, lot size, density and placement of houses have been largely eliminated" where the proposal was modified to reduce the number of units). The town's concern about increased traffic was held invalid because the proposed site for the 40B project could have been used, according to the town's zoning ordinance, for a commercial development that would have more of an impact on traffic than the potential sixty-two housing units. *Id.* at 8.

116. *Id.*

117. *Id.* at 10.

118. *Tetiquet River Vill.*, No. 88-31, at 11; see also *Todino*, No. 72-04, at 8. Although the evidentiary guidelines provided in the Code of Massachusetts Regulations, title 760, section 31.02 do not provide set requirements for evidence the developer must submit to present its case to the HAC, the burden is on him to show that the 40B proposal "complies with generally recognized standards with respect to aspects . . . in dispute." *Tetiquet River Vill.*, No. 88-31, at 9.

119. See *Tetiquet River Vill.*, No. 88-31, at 7-8.

120. No. 80-06, at 17 (Mass. Hous. Appeals Comm. Aug. 20, 1982).

121. See *id.*

122. See *id.* at 10.

intent of 40B; “an ancient planning exercise . . . now dusted off to frustrate housing for which there is a clearly demonstrated need.”¹²³ The ZBA in *Harbor Glen* was successful for three reasons: the Master Plan included affordable units, a comprehensive permit had already been granted within the tract of land in question, and the community of Hingham did not have a history of opposition to 40B.¹²⁴

The HAC is willing to consider such factors as municipal impact, safety of residents, and conflict between the developer’s proposal and the town’s pre-established plan for growth; however, the threshold for demonstrating a valid local concern is high.¹²⁵ Only under very limited circumstances may a ZBA successfully deny a 40B proposal based on local concerns.¹²⁶ The best strategy for towns, when dealing with 40B proposals, is to focus objections on definable problems, specifically those listed as proper considerations under the Model Guidelines promulgated by the DHCD, instead of making generalized complaints.¹²⁷ In many cases developers will be able to mitigate the negative impact of their plan,¹²⁸ and it is in their best interest to do so as appealing a denial can delay construction (and profit) for years.¹²⁹ Instead of working against developers, towns should try to negotiate and refrain from issuing a denial unless it is clear that mitigation of the town’s objections would make the project uneconomical for the developer.¹³⁰

IV. ASSESSING THE CRITICISMS OF CHAPTER 40B

According to Jane Gumble, Director of the Department of Housing and Community Development, “[o]ne would be hard-pressed today to find an issue in suburbia that stirs as much controversy as affordable housing, and

123. *Id.* at 13.

124. *See id.* at 13-16.

125. *See supra* notes 94-124 and accompanying text.

126. *See* text accompanying notes 94-139. “The lopsided margin of victory for developers . . . gives towns the impression that the deck is stacked against them.” Gouvin, *supra* note 20, at 31.

127. *See Guidelines for Housing Programs, supra* note 58, at 5.

128. *See* Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 21.

129. *See id.* “There is currently a significant backlog at the Housing Appeals Committee.” *Id.* at 7.

130. *See* John Laidler, *Town Prepares for Housing Partners*, BOSTON GLOBE, Jun. 22, 2003, at NorthWest 9. The town of Reading created its own guidelines for 40B proposals in a “proactive attempt to try to work with developers who want to collaborate on good affordable housing, rather than sitting around and waiting for 40Bs to drop out of the sky like anvils – which is kind of what we have experienced.” *Id.*

the state's 33 year-old comprehensive permit law."¹³¹ The debate does not focus on the need for affordable housing, but on the method Massachusetts chose to address that need.¹³² The following discussion will focus on two questions: does the zoning law violate public policy with its disregard for local interests, and is Chapter 40B an effective tool for increasing the supply of affordable housing?

A. Public Policy Conflict: The Demand for Local Control over Local Growth

Critics of 40B insist that their motivation for opposing development under the statute is not snobbery or an intent to discriminate, but instead, that there are legitimate policy reasons underlying their opposition such as environmental harm, the burdening of municipal services, open space concerns, and the need for historical preservation.¹³³ How legitimate are these local concerns? Given the conflict between the need to make 40B more palatable in order to avoid a repeal, and the ever-growing lack of adequate housing, the relative validity of local interests must be carefully weighed.¹³⁴

Critics of the statute argue that growth should be compatible with the character of a community and the local environment.¹³⁵ Chapter 40B allows the developer to build a development without the town's consent and without knowing what is important to a particular community regarding development design, site selection, and what type of affordability is needed: e.g. low or moderate income, family housing, or housing targeted at the growing elderly population.¹³⁶ Those who are in favor of either dismantling 40B, or changing it significantly, insist that their

131. Jane Gumble, *Housing Official Offers the Other Side of the Story on 40B*, BOSTON GLOBE, Aug. 29, 2002, at GlobeNorth 12.

132. See Scott W. Helman, *Affordable Housing Reality Hits Home*, BOSTON GLOBE, Dec. 20, 2002, at B2 (documenting that even towns that have resisted 40B projects recognize that the lack of affordable housing is a growing problem). "We shouldn't lose sight of the long-term-housing issues in town simply because we have to focus immediately on 40B . . . many people . . . simply can't afford to live in a town where the median home price is \$842,000." *Id.*

133. See Thomas M. Stanley, *Chapter 40B Housing Comes with High Cost*, BOSTON GLOBE, Sept. 5, 2002, at GlobeWest 6.

134. See Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 19. This assessment of the impact of 40B projects on local issues was one of the goals of the Governor's Task Force. *See id.*

135. See Brenda J. Buote, *Lawmaker Seeks Local Control for 40B Projects*, BOSTON GLOBE, Dec. 8, 2002, at GlobeNorth 1.

136. See Gouvin, *supra* note 20, at 50-51. There is no mechanism currently in place at the state level to assess local or regional housing need. *See id.*

opposition is directed against a law that strips towns of their ability to plan and profit-seeking developers who often take an unfair advantage.¹³⁷

Chapter 40B has been described as a “club” wielded by developers and used to beat towns into issuing traditional permits for market-rate developments: “[a]pprove my project or else I’ll come back with a 40B-style plan that you’ll really hate but the state will likely OK.”¹³⁸ Developers, according to 40B critics, “have an unfair advantage”¹³⁹ given their ability to build inappropriately large developments as long as a town has not met the ten percent mark. These developers, critics assert, have taken advantage of 40B as a way to build market-rate units in towns that had sought to limit growth by including the statutory minimum amount of subsidized units.¹⁴⁰

The need for greater local discretion over growth has been argued in the past.¹⁴¹ In fact, after the previous push to repeal 40B in the late 1980s, the legislature established a commission to recommend reforms that would make the statute more acceptable to its opponents to avoid losing the state’s only tool for building affordable housing altogether.¹⁴² The Grace Commission, as it was known, found that some of the criticisms of 40B based on local concerns were valid.¹⁴³ The Commission recognized that procedural reform was needed to better balance the interests at stake and decrease the level of local resistance to 40B projects.¹⁴⁴ While the Grace Commission recommended against changing the language of Chapter 40B itself, it did seek to appease towns by slightly expanding the types of affordable units that could be counted toward the ten percent mark through

137. See Michael Westcott, *The Other Facts on 40B, Cohasset*, BOSTON GLOBE, Dec. 15, 2002, at E4 (stating that Cohasset is not against affordable housing, but is instead fighting a proposed development that would add ten percent to the town’s total population while only providing fifty affordable units).

138. Keane, *supra* note 12, at E4. To demonstrate, a developer submitted a proposal to build twenty-five luxury homes on a previously contaminated lot in Norfolk. After the town officials balked at granting the building permit, the developer informed the town that he would file a 40B proposal with 125 units if the original application was not granted. See Lisa Kocian, *Land Use Poses Dilemma for Town*, BOSTON GLOBE, Sept. 26, 2002, at W1.

139. Thomas M. Stanley, *Chapter 40B Housing Comes with High Cost*, BOSTON GLOBE, Sept. 5, 2002, at GlobeWest 6.

140. See Krefetz, *supra* note 10, at 408.

141. See *id.* at 407 (referring to a “backlash against chapter 40B” instigated by developers who took advantage of 40B “because it gave them entry to towns that were ‘ripe for development,’” most often proposing large-scale developments).

142. See *id.* at 408. The Commission, established in 1988, was officially titled the Special Commission Relative to the Implementation of Low and Moderate Housing Provisions. See *id.*

143. See *id.* at 409.

144. See *id.*

a broadened definition of subsidy in the regulations.¹⁴⁵

The same resistance to projects pursuant to 40B that arose in the 1980s resurfaced in 2001.¹⁴⁶ The main complaint is that large developments place a substantial burden on a community's municipal services.¹⁴⁷ Conceivably, this argument could be valid; some towns have seen the number of their total housing units increase by as much as thirty percent in a single year.¹⁴⁸ Where the state's interest in affordable housing is not significantly furthered, as only a quarter of the new residents pay below-market rates, opposition to such sudden, unplanned growth should not be written off as mere snobbery.¹⁴⁹ Decisions to deny comprehensive permits based on the increased burden on municipal services have largely been reversed by the Housing Appeals Committee.¹⁵⁰ As discussed previously in Part III of this Note, the HAC does not consider these arguments to be valid local concerns that would justify denying a permit or reducing the number of units to the point that the project would become uneconomical for the developer.¹⁵¹

It can be argued that limits on the rate of growth serve a real purpose. A determination of the "carrying capacity"¹⁵² of a town's resources can be a

145. See Forton, *supra* note 24, at 663. In response to the Grace Commission's report, the DHCD broadened the definition in the Code of Massachusetts Regulations title 760, section 30.02 to include affordable developments built under local control without a direct subsidy but with the state's "technical assistance." *Id.* The Commission's report also led to the creation of the Local Initiative Program (LIP), which provided for greater local control under 40B by giving communities the opportunity to proactively plan affordable housing in conjunction with developers. *See id.*

146. See Krefetz, *supra* note 10, at 407, 411. The onslaught of 40B proposals and the return of opposition to the statute resulted from the approval of the NEF as a subsidy. *See id.* at 411. The NEF, in its original form, did not require either local input or site approval letters from a government agency. *See* Press Release, *supra* note 73.

147. See BOBROWSKI, *supra* note 5, at 704-07.

148. Paul Restuccia, *Chapter 40B Changes on the Way; Communities Voice Concern*, BOSTON HERALD, Sept. 28, 2001, at 49.

149. See Buote, *supra* note 86. The Executive Director of the Massachusetts Housing Partnership Fund, an agency created by the DHCD to work with communities to increase affordable housing, conceded that, "[t]owns have legitimate concerns when larger developments are proposed, and those concerns need to be addressed." *Id.*

150. See Krefetz, *supra* note 10, at 398.

151. See *supra* Part III. One notable exception is *Sheridan Development Co. v. Tewksbury*, in which the HAC held that environmental concern with regard to ground water was a valid local interest that outweighed the regional interest in affordable housing such that the permit denial by the ZBA was proper. *See generally* *Sheridan Dev. Co. v. Tewksbury*, No. 89-46 (Mass. Hous. Appeals Comm. Jan. 16, 1991).

152. See Jonathan D. Witten, *Carrying Capacity and the Comprehensive Plan: Establishing and Defending Limits to Growth*, 28 B.C. ENVTL. AFF. L. REV. 583, 584-85 (2001). "A carrying capacity analysis assesses the ability of a built resource (such as

valuable tool employed by local planning boards to manage growth.¹⁵³ Although difficult to quantify, carrying capacity can be ascertained in some instances; it has been acknowledged by the United States Congress that there are limits to the number of people a supply of drinking water can reasonably sustain.¹⁵⁴ Particularly in towns that rely on well water, it would seem that an objection to a massive development based on limited water resources would be accepted as a valid local concern.¹⁵⁵

Another local interest that has been cited by opponents of 40B is preservation of community character.¹⁵⁶ To exactly what does this phrase refer? Is this a blatant example of suburbanite discrimination (as suggested by one commentator to the debate)?¹⁵⁷ A desire for municipal control over growth impact is not evidence of discriminatory intent in cases where the local board can point to specific issues such as an overburdened sewer system or an already overcrowded high school.¹⁵⁸ The impact of an additional thousand or even a few hundred housing units can be substantial, and the unwillingness of the HAC to consider municipal strain has produced a general feeling of local powerlessness and resulted in the current push to limit the reach of the override statute.¹⁵⁹

The Task Force members appointed in 2003, like their predecessors on the Grace Commission, assessed the impact of 40B projects in the communities where they were built.¹⁶⁰ After evaluation of municipal concerns, including the increased burden on school systems, water and sewage, public safety, and other services, the Task Force concluded that “[d]espite the perception sometimes portrayed through press coverage, and the assertions made about the onerous burdens of Chapter 40B developments on municipal services and infrastructure, few concrete examples of . . . difficulties faced by a community as a direct result of a

roadways, wastewater treatment plants, municipal swimming pools, [schools]) or natural resource (such as aquifers, surface water bodies, or coastal estuaries) to absorb population growth and related physical development without degradation.” *Id.*

153. *See id.* at 586.

154. *See id.* at 585 n.6.

155. *See id.*

156. *See* Buote, *supra* note 135.

157. *See* Stockman, *supra* note 7, at 540.

158. *See* Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 20-22. However, those examples would not be considered valid health or safety risks under the HAC interpretation of a comprehensive permit denial that is consistent with local needs. *See* BOBROWSKI, *supra* note 5, at 703-07.

159. *See* Buote, *supra* note 135.

160. *See* Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 1-2.

Chapter 40B development were elicited.”¹⁶¹ This statement was not meant as a generalized dismissal of local concerns; the Report recommended that subsidizing agencies consider the impact of proposals on the particular community in terms of density, size, impact on resources, and the impact on concurrent housing proposals.¹⁶²

The second issue raised by critics of 40B is that the law is inherently flawed because it has failed to significantly increase the supply of affordable housing.¹⁶³ It is interesting to note that some of the same individuals who criticized the steamrolling effect of the law combined their complaints regarding the lack of local control with the issue of the law’s relative ineffectiveness.¹⁶⁴

B. The Effectiveness of Chapter 40B

The legislative intent behind the enactment of Chapter 40B was to increase the supply of affordable housing by preventing towns from obstructing the construction of such developments through exclusionary zoning laws.¹⁶⁵ How effective is 40B at creating affordable housing? Despite the existence of 40B over the past three decades, the lack of affordable housing in Massachusetts has only become worse.¹⁶⁶ However, this statistic does not suffice to answer the central question to the 40B debate. It cannot be ignored that “[b]etween 1990 and 1997 about 114,000 housing units were built in Massachusetts. The inventory of units counted as ‘subsidized’ for purposes of Chapter 40B rose by about 20,000 units over those years. About 5,000 of those units were created using Chapter 40B.”¹⁶⁷ A more recent statistic announced by Governor Romney states that 40B has resulted in the addition of close to 30,000 affordable units

161. *Id.* at 20 (adding that towns can charge a fee for service if the municipal burden on services becomes too great).

162. *See id.* at 7.

163. *See id.* at 15. “Critics of the statute suggest that Chapter 40B has not been successful for many reasons, one of which is that after [thirty-four] years . . . Massachusetts still faces a large affordability problem.” *Id.*

164. *See id.*

165. *See* MASS. REGS. CODE tit. 760 § 30.01(2) (2002). The Committee of Urban Affairs proposed 40B to address the short supply of affordable housing for low and moderate income individuals. *See id.*

166. *See* Sum et al., *supra* note 4, at 5. “In 2000, new home prices in Massachusetts were estimated to be [forty-eight] percent higher than the U.S. average. . . . In 2000, the income advantage in Massachusetts continued to be outweighed by the high cost of housing.” *Id.*

167. Philip B. Herr, *Zoning for Affordability in Massachusetts: An Overview*, in 2:1 INCLUSIONARY ZONING: LESSONS LEARNED IN MASSACHUSETTS, NATIONAL HOUSING CONFERENCE AFFORDABLE HOUSING POLICY REVIEW 1, 4 (Jan. 2002).

since the law's inception.¹⁶⁸ Even affordable units that were not directly built under the law with the issuance of a Comprehensive Permit were most likely built by the municipalities in order to work towards the ten percent safety zone where the local board will no longer be forced to accept 40B applications at all.¹⁶⁹ Chapter 40B, according to this view, works as both the "carrot" and the "stick."¹⁷⁰

It is important to realize that 40B has resulted in the production of a significant amount of affordable housing both directly, through developments proposed and approved under the law, and indirectly as communities have initiated their own low and median income developments to avoid the threat of 40B proposals.¹⁷¹ There is, however, room for debate over whether 40B, as implemented, has met its intended purpose. Various critics have argued that the law is inherently flawed, pointing to the inarguable fact that the American dream of home ownership has become less of a reality over the lifetime of the zoning override tool.¹⁷² For example, by 2001, Massachusetts had fallen to forty-sixth in the country for the number of multi-family housing building permits.¹⁷³ The statistics are out there. Massachusetts, for a variety of reasons, has become even less affordable in the past three decades, despite the not insignificant amount of housing 40B produced.

One of the contributing factors is the high cost of land in Massachusetts and its impact on the incentive for developers to propose developments under 40B.¹⁷⁴ As discussed in a previous section, the process of implementing Chapter 40B evolved from a direct subsidy, the "command-

168. See Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 1.

169. Herr, *supra* note 167, at 4. Between 1970 and 1999, the state's affordable housing inventory rose from 85,621 units to more than 205,000 units. See *id.* However, only "[thirty-four percent] of the affordable units constructed in the Commonwealth since 1969 have been built using comprehensive permits." Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 15.

170. Mark Bobrowski, *Bringing Developers to the Table*, in 2:1 INCLUSIONARY ZONING: LESSONS LEARNED IN MASSACHUSETTS, NHC AFFORDABLE HOUSING POLICY REVIEW 7, Presented at the National Housing Conference (Jan. 2002).

171. See Rick Klein, *The Issues, Zoning for Affordable Housing*, BOSTON GLOBE, Oct. 6, 2002, at B6; see also Anthony Flint, *Romney to Unveil Housing Proposals*, BOSTON GLOBE, June 12, 2003, at B1.

172. See Klein, *supra* note 171, at B6. Governor Romney once shared this view, calling the law "flawed beyond repair," although he apparently reconsidered his position after realizing that 40B is one of the few tools currently in place to address the housing crisis. See *id.*; see also Flint, *supra* note 171, at B1.

173. See Paul Restuccia, *Chapter 40B Changes on the Way; Communities Voice Concern*, BOSTON HERALD, Sept. 28, 2001, at 49.

174. See HEUDORFER ET AL., *supra* note 1, at 5.

and-control” approach, to a market-based approach.¹⁷⁵ Generally speaking, 40B allows the developer to realize a profit on the market-rate units by building a high-density development on a smaller than normally allowed plot.¹⁷⁶ This approach of encouraging affordable housing is voluntary on the part of the developer in deciding whether or not to include affordable housing¹⁷⁷ which, given the high cost of land in Massachusetts, often results in the proposal of yet another high-end development of mini-mansions instead of multi-family units, regardless of any density bonus.¹⁷⁸

Another culprit for the lack of results is the questionable efficiency of Chapter 40B’s basic terms. A little discussed regulatory provision allows towns to count the market-rate units in a 40B rental development in their affordable housing inventory.¹⁷⁹ Although implemented to ease the burden on communities, this provision has a negative effect on the real supply of affordable housing units.¹⁸⁰ Another criticism focuses on the number of affordable units that should be required in order for the developer to waive all local restrictions: twenty-five percent is an arbitrarily assigned requirement, and does not go far enough to meet the need for housing, or to bring the community closer to the “safe harbor”¹⁸¹ of ten percent.¹⁸²

175. See Werner Lohe, *Command and Control to Local Control: The Environmental Agenda and the Comprehensive Permit Law*, 22 W. NEW ENG. L. REV. 355, 357 (2001). Mr. Lohe, referring to the Local Initiative Program, feels that the evolution of 40B’s implementation has been toward a more community-based approach. *See id.*

176. See Stonefield, *supra* note 8, at 336. This has been called a “zoning-only approach” to funding where the developer essentially subsidizes the production of the affordable housing himself from the increased profit from the market-rate units. *See id.*

177. *See id.* at 331 (suggesting “that legislatures transform the suburban affordable housing issue from a private right to a local obligation”).

178. Many of the units that have been built over the last decade have been single-family detached homes placed on large lots. This practice consumes what little open space is available and has contributed to the housing crisis. *See HEUDORFER ET AL., supra* note 1, at 5. One solution to this problem has been suggested by proponents of inclusionary zoning, mandating that, as a condition of every building permit, the developer is required to include a prescribed minimum of affordable units. *See Bobrowski, supra* note 170, at 7. Inclusionary zoning is given a brief treatment in Part VI of this Note. *See infra* text accompanying notes 263-67.

179. See Forton, *supra* note 24, at 672. If “the percentage of low or moderate income units and the population and incomes served are comparable to projects developed through another federal or state subsidy program in which all of the units are counted[,]” then all of the units in that project will be counted towards the ten percent standard in the state’s 40B inventory. *Id.*

180. *See id.*

181. See Gouvin, *supra* note 20, at 53. The term “safe harbor” was used to describe the ten percent statutory minimum after which the ZBA need no longer consider 40B proposals. *See id.*

182. See Krefetz, *supra* note 10, at 394. The ten percent that communities are striving

Despite the criticism, without 40B there would be no incentive for suburbs to open their doors to developers proposing high-density multi-family developments.¹⁸³ As one observer succinctly stated, the “hammer belongs in any toolbox.”¹⁸⁴ But perhaps before 40B is assigned all the credit, one should assess whether exclusionary zoning laws deserve all of the blame for the affordable housing shortage. This presumption was questioned by a recent study of local zoning laws across Massachusetts.¹⁸⁵ Although by 1997 nearly one-third of the communities in Massachusetts had implemented inclusionary zoning measures with the intent to facilitate the development of affordable units, such measures were not found to have had a significant impact on the state’s affordable housing supply.¹⁸⁶ Chapter 40B is not necessarily a flawed law, and there are other housing programs currently used in the Commonwealth,¹⁸⁷ but clearly there is a piece missing from the puzzle. More important than any incentive or mandate, there “seems to be a real community intention to do something about broadening access to housing, and ingenuity in carrying it out.”¹⁸⁸ The intended goal of 40B has not been reached, and public resistance to the statute has only intensified. Therefore, in order to determine what the next step should be, it is important to assess the recent reforms to the regulations that control 40B’s implementation, as well as other ways of approaching affordable housing.

to reach is an arbitrary standard. *See id.*

183. *See* Steve Bailey, *Poor Cohasset*, BOSTON GLOBE, Dec. 6, 2002, at C1.

184. *Id.*

185. *See generally* Philip B. Herr & Associates, *Zoning for Housing Affordability*, A Study Prepared for the Massachusetts Housing Partnership Fund (2000) (unpublished) (on file with author). “Zoning is often identified as a major cause of the housing affordability problem. . . . On the other hand, some communities have been innovative in using zoning as a tool for assuring that affordable housing is at least part of what gets produced.” *Id.* at 2.

186. *See id.* at 5. The majority of inclusionary zoning provisions enacted by local governments lacked incentive for developers and, in most cases, could be easily circumvented. *See id.* at 4.

187. Alternatives include federal, and more recently state, low-income housing tax credits (LIHTC). *See* MASS. GEN. LAWS ch. 63, § 31H (2002); *see also* 26 U.S.C. § 42 (1986). Each year the state allocates a limited amount of credits to developers who pass the tax benefits on to corporate investors, directly or through housing syndicated partnerships, who benefit from lower effective tax rates. *See* HEUDORFER ET AL., *supra* note 1, at 66.

188. *See* HEUDORFER ET AL., *supra* note 1, at 66.

V. REFORMING 40B

For the entire thirty-plus years of its existence, Chapter 40B has remained substantially unchanged on the books, but the way it has been implemented has been an evolving process.¹⁸⁹ That implementation must be reformed in such a way that the Commonwealth's interest in providing affordable housing is protected, while reducing the confrontation with local governments seeking to control the manner and extent to which their communities grow.¹⁹⁰ The need for greater local control and the impact large developments have on rural and suburban communities are important considerations, especially if a complete repeal is to be avoided. But in the effort to compromise, policymakers must not lose sight of the true issue – “[t]he lack of affordable housing in Massachusetts continues to be the greatest threat to our economic vitality.”¹⁹¹

The public controversy over 40B began to heat up in 2001, as bills proposing regulatory changes to 40B were debated in both sides of the state house.¹⁹² The major goal of the proposed reforms was to ease the burden on towns.¹⁹³ One reform that received considerable attention was a provision that would allow affordable units that were not built under a comprehensive permit to be counted towards the ten percent goal.¹⁹⁴ The bill also sought to reward those towns that had made significant efforts in increasing their affordable housing supply by granting a grace period in which such communities would not have to accept any 40B proposals despite the fact that the ten percent requirement had not been met.¹⁹⁵

The Senate bill included a provision that would change the permit

189. See Lohe, *supra* note 175, at 355.

190. See Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 15. The biggest problem with 40B identified by the task force was that the process “is often confrontational from the inception[,] . . . is perceived to contain some rules that are unfair, and often leaves good projects behind due to delays.” *Id.*

191. *Id.*

192. See Citizens' Housing and Planning Assoc., *Summary of House and Senate Bills on Chapter 40B*, September 27, 2001 (on file with author) [hereinafter *Summary of House and Senate Bills*].

193. See *id.*

194. See *id.* Suggestions for additional units to be counted in the 40B inventory were local subsidized housing units, housing for the mentally ill or developmentally disabled, and accessory apartments. See *id.*

195. See *id.* That reward would be in the form of a moratorium on accepting additional 40B applications after that town had increased its affordable housing inventory by a prescribed percent over the course of one year. This would prevent developers from overburdening a single municipality by submitting multiple development proposals at one time, and allow for growth to occur more gradually. See *id.*

appeals process dramatically by giving the local boards a much stronger position.¹⁹⁶ The bill sought to shift HAC decisions in favor of the ZBAs by upholding a ZBA denial as “consistent with local needs” where the town had met one of three conditions: 1) “within the year prior to the date of an application for a comprehensive permit, low and moderate income housing units were created in a number equal to or more than [two percent] of the total housing in a municipality;” 2) where the town denies a proposal which would increase total housing units by a set percentage; or 3) the municipality has developed its own plan, approved by the DHCD, to increase the supply of affordable housing by at least one percent annually.¹⁹⁷

In the spring of 2002, a \$508 million housing bill, which would provide tax-free funding for the development of affordable housing, was blocked in the state legislature.¹⁹⁸ Lawmakers intent on passing the Chapter 40B reforms described above held the funding hostage as the legislation was incorporated into the Omnibus Housing Bill in July of 2002.¹⁹⁹ The Omnibus Bill required the HAC to consider factors such as the town’s progress, community planning efforts, and the scale of proposed developments.²⁰⁰ Also included was the “cooling-off period” that would prohibit developers “from filing an application for a comprehensive permit for [twelve] months from the date of a prior application (or denial of application) for a project on the same land.”²⁰¹ The Omnibus Housing Bill, which passed quickly in the legislature, was vetoed by then Acting-Governor Jane Swift.²⁰² Acting-Governor Swift’s move was a relief to housing activists who felt that the proposed measures would have made 40B ineffective, but who had acquiesced to the Omnibus provisions for fear that “the law would be eviscerated.”²⁰³ That relief, however, proved to be short-lived.²⁰⁴ In order to reach a compromise reflecting “that significant

196. See *Summary of House and Senate Bills*, *supra* note 192. Under current procedure, where the HAC clearly does not give much credence to the local board’s version of legitimate local concerns that would justify denial of a permit, the local board’s decision-making process may “seem like an empty exercise.” See Gouvin, *supra* note 20, at 32.

197. See *Summary of House and Senate Bills*, *supra* note 192.

198. See Scott Van Voorhis, *Menino Decries Housing “Snobbery,”* BOSTON HERALD, Apr. 10, 2002, at 30.

199. See *Omnibus Housing Bill: Report of the Committee on Conference*, Committee on Housing and Urban Development, July 29, 2002 (on file with author).

200. See *id.*

201. *Id.*

202. See Keane, *supra* note 12, at E4.

203. *Id.* Swift felt that the bill did not “adequately address the pressing need of working families.” *Id.*

204. Press Release, Commonwealth of Massachusetts Department of Housing and

housing growth can strain local government services,”²⁰⁵ Acting-Governor Swift and Jane Gumble, Director of the Department of Housing and Community Development, sought to “soften” 40B by enacting many of the proposed changes as regulations,²⁰⁶ with modifications.

The first regulatory changes were implemented on a temporary, emergency basis in August of 2002, to give municipalities greater control.²⁰⁷ The most significant aspect of the changes was the new requirement for the NEF to provide oversight for housing built with its financial assistance.²⁰⁸ However, this had the unintended effect of provoking the NEF to pull out of the 40B program altogether.²⁰⁹

On October 7, 2002, the DHCD announced further regulatory reforms.²¹⁰ In towns that met the mark of 0.75% of total units in one year, comprehensive permits could be denied for the rest of that year.²¹¹ This number represented a compromise between suburban lawmakers, who pushed for a lower benchmark of 0.5%, and housing advocates, who wanted towns to increase their affordable housing supply by a full one percent before reaching the end of the grace period.²¹² The second major change in this round of regulatory reforms was that the state, instead of the subsidizing agency, would take over the issuance of site approval letters.²¹³ This step brought the NEF back into the 40B arena, which was an important development since the banking partnership supplies the majority of comprehensive permit subsidies.²¹⁴ State housing officials announced that the cost of the added oversight by the DHCD would be fully covered

Community Development, Swift Directs Changes to Affordable Housing Law (Aug. 13, 2002) (on file with author).

205. *Id.*

206. See Anthony Flint, *Swift Eases ‘Anti-Snob’ Zoning Law Terms*, BOSTON GLOBE, Oct. 9, 2002, at B3.

207. *See id.*

208. *See* Swift Press Release, *supra* note 14, at 1. This change was made in response to community concerns that housing built with funding provided by the NEF was not managed by a government agency, and lacked any type of oversight. *See id.*

209. *Issue: 2002-Chapter 40B: Anti-snob Zoning*, 02133 Massachusetts Politics and Policy Online, Sept. 1, 2002, at <http://www.02133.org/issue.cfm?ID=31&categoryID=13> (last visited Nov. 19, 2003). NEF had “pulled out of the program because it didn’t want to be the arbiter between the developers and local officials who were complaining that the banks were improperly issuing site approval letters.” *Id.*

210. *See id.*

211. *See* Swift Press Release, *supra* note 14, at 2.

212. *See Summary of House and Senate Bills*, *supra* note 192, at 3; *see also* Keane, *supra* note 12.

213. *See Issue: 2002-Chapter 40B: Anti-snob Zoning*, *supra* note 209.

214. *See id.* By 2002, the NEF provided the subsidy for as much as 60 percent of the affordable housing built under 40B. *See id.*

by an added fee charged to the developers.²¹⁵

A summary of the major changes in the Housing Appeals Committee Regulations is as follows: the affordable housing inventory will be updated biennially; developments proposed under the NEF subsidy must adhere to the same standards that are followed by other affordable housing programs; towns that have increased their affordable housing supply by three-fourths of one percent receive a grace period in which they need not approve additional comprehensive permits; and in order to provide more local control and avoid blindsiding local zoning boards, a 30-day comment period has been instituted.²¹⁶ In addition, the revised regulation governing the evidence the HAC will consider on appeal contains an outline communities may follow in drafting affordable housing master plans.²¹⁷

Some critics of 40B believed that the regulatory changes did not fully reflect the legislative intent of the Omnibus Housing Bill, in that the reforms did not go far enough in protecting local control.²¹⁸ Also, there was dissatisfaction that the reforms presented in the Omnibus Bill were enacted in regulations rather than in actual legislation; the fear was that the regulations would be “changeable on the whims” of state agency officials who do not answer to their own constituencies.²¹⁹ On the other side of the fence, housing advocates supported the amendments to the regulations, but only out of fear that without change the law would be repealed altogether.²²⁰

As a whole, the regulatory changes eased the burden of unconstrained growth on towns by making it easier to meet the ten percent goal, with the inclusion of additional units in the inventory, and by slowing the rate of

215. See Michael P. Norton, *Swift Offers Major 40B Changes, Hopes They'll Take Effect by Year's End*, STATE HOUSE NEWS SERVICE, Oct. 7, 2002.

216. See MASS. REGS. CODE tit. 760, §§ 30-31 (2002). In order to provide more local control, after the permit application is presented to the ZBA by the developer, the subsidizing agent must allow the town thirty days to discuss the proposal and must then consider the town's comments prior to issuing a site approval letter. *See id.*

217. See MASS. REGS. CODE tit. 760, § 31.07 (2002). After completing a plan, the town may then submit it to the DHCD for approval. *See id.* Once approved, the local board's decisions to deny or modify comprehensive permits based on compliance with the master plan will be deemed “consistent with local needs” by the HAC, and will be upheld accordingly. *See id.*

218. *See id.* According to Bill Greene, a Democrat state representative, “the changes [are] mere ‘window dressing’ on a flawed law.” *Id.*

219. See Restuccia, *supra* note 55, at 52.

220. See Keane, *supra* note 12. “A year ago, the Citizens' Housing and Planning Association, an umbrella organization of housing advocates, released a report saying no legislative changes were needed to the law. This year, panicked by the fierceness of suburbanites' attacks on 40B. . .[the] housing advocates backed down.” *Id.*

growth with the addition of the grace period.²²¹ But, despite the changes discussed above, opposition to 40B in the name of local control did not abate.²²² Aaron Gornstein, Executive Director of CHAPA, drafted a list of “Housing Policy Initiatives” that he submitted to newly-elected Governor Mitt Romney that included suggestions for approaching the 40B question.²²³ Gornstein suggested that the new administration address the 40B controversy by establishing a commission to “draft consensus legislation that preserves the core principles of 40B while addressing legitimate local concerns.”²²⁴ This advice was well-heeded; the creation of a task force comprising “legislators, local officials, developers, housing advocates and planning board members” was announced in February of 2003, and the approximately seventy bills proposing further change to 40B awaiting consideration were put on hold.²²⁵ The main goal of the Task Force was to “develop improvements to the law itself.”²²⁶

The Task Force recommendations focused on reducing the controversy surrounding the law as well as making procedural improvements.²²⁷ Included in the recommendations is a provision that would make it easier for towns to reach the safe harbor by counting all units in homeownership developments, including those offered at market-rates, towards the ten percent goal of communities.²²⁸ Among the other proposals is a provision that would grant a grace period to those municipalities that have increased their affordable housing in the amount of at least two percent of total housing units.²²⁹ These recommendations directly reduce the burden on a town by making it easier to deny permits outright without fear of an HAC reversal.

In addition to the more conciliatory changes, the Task Force has

221. See MASS. REGS. CODE tit. 760, § 31.07(1)(i).

222. See Brenda J. Buote, *Lawmaker Seeks Local Control for 40B Projects*, BOSTON GLOBE, Dec. 8, 2002, at Globe North 1. Measures in this round of proposed legislation include: the creation of regional nonprofit entities that would support the conversion of existing buildings into affordable housing units; increasing the requirement of affordable units from twenty-five to fifty percent in order for a project to qualify under 40B to override local restrictions; and including mobile homes under the DHCD’s definition of affordable housing. See *id.*

223. Memorandum from Aaron Gornstein, Executive Director, CHAPA, to the Romney-Healy Transition Team on Housing and Transportation, *Suggested Housing Policy Initiatives* (Nov. 25, 2002) (on file with author).

224. *Id.* at 2.

225. See Press Release, *supra* note 73.

226. *Id.*

227. See Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 3.

228. See *id.*

229. See *id.* at 5.

suggested other reforms that would go a long way toward easing the controversy by focusing on providing greater assistance to communities dealing, quite often, with numerous 40B proposals at once.²³⁰ These proposals run the gamut from establishing a fund “to provide technical assistance to help cities and towns review and respond to applications for comprehensive permits,”²³¹ to providing the option for the developer and the community to “utilize the services of a project administrator to facilitate the project in a way that meets the need of both.”²³² Encouraging towns to better understand how they can participate in the planning of 40B projects is the key to increasing the housing supply, and these suggestions have already earned a positive response from communities that had waited for the Task Force’s results.²³³

VI. THE FUTURE OF AFFORDABLE HOUSING LAW IN MASSACHUSETTS

Chapter 40B procedures have promoted confrontation between developers and towns and between towns and the state, with the towns presumptively bulldozed under by the appeals process.²³⁴ The confrontational nature of the comprehensive permit process, due in large part to the political machinations at the time of its enactment, has resulted in a tradition of opposition to both 40B proposals and the statute itself.²³⁵ Although 40B has been softened in the past year to ease the burden on communities, both by making the ten percent statutory minimum easier to reach by counting non-traditional affordable units and by allowing for grace periods²³⁶ (akin to time-off for good behavior from 40B proposals), this may be the wrong approach where even fewer of the much needed affordable units will be produced as a result.²³⁷ Instead, perhaps what

230. *See id.* at 5-8.

231. *Id.* at 5.

232. *Id.* at 8.

233. *See* Caroline L. Cole, *Trying Détente on Development*, BOSTON GLOBE, Aug. 17, 2003, at NorthWest 1. “Selectman Stephen O’Leary is convinced that the best way to protect his community from a glut of apartment and condominium complexes is to work with developers interested in building affordable housing in North Reading rather than fighting them.” *Id.*

234. *See* Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 15. “Even as communities struggle to implement local strategies to address their affordable housing needs, the state’s existing planning framework discourages co-operation. . . .” HEUDORFER ET AL., *supra* note 1, at 7.

235. *See* Krefetz, *supra* note 10, at 387 (stating that 40B’s override provision has been controversial since the law’s enactment).

236. *See* MASS. REGS. CODE tit. 760, § 30.02 (2002).

237. *See* Keane, *supra* note 12. The implementation of the grace period will significantly expand the amount of time it will take communities to reach the ten percent

Massachusetts needs is a new tool that combines the strength of 40B to cut through locally enacted barriers when necessary, with new ideas that could lessen the counterproductive confrontation and truly “open up the suburbs.”²³⁸ The following subsections explore various approaches that could be applied in conjunction with Chapter 40B.

A. Reducing Local Opposition to Affordable Housing

Chapter 40B came about as a valid response to exclusionary zoning practices that effectively kept low-income individuals in the cities and out of the suburbs.²³⁹ Leaving aside the initial motivation behind those zoning ordinances, the main goal should be to lessen the controversy associated with affordable housing proposals.²⁴⁰ An example of a 40B development likely to instigate opposition would be a proposal for three ten-story complexes submitted to a ZBA in a rural community comprised mostly of single-family homes. Opposition to development will never be eliminated completely,²⁴¹ but perhaps it could be reduced through use of more collaborative processes.²⁴²

The first step in the attempt to reduce local opposition would reasonably be to get communities involved in planning for affordable housing generally, not just in connection with a particular application.²⁴³ This is no small task where the local boards in most towns are volunteer, part-time

goal. *See id.*

238. Stockman, *supra* note 7, at 537 (referring to Chapter 40B as one of the first responses at the state level to the exclusion of low-income individuals from the suburbs).

239. *See* MASS. REGS. CODE tit. 760, § 30.01, Background and Purpose.

240. *See* Salsich, *supra* note 22, at 458. The author’s premise is that the “Not in My Backyard” (NIMBY) reaction to affordable housing can be addressed as communities’ perceptions of such developments are changed. *See id.* at 457-58.

241. *See* Lohe, *supra* note 175, at 355. Part of the outcry against 40B developments may not be based on bias against affordable housing in particular, but against development in general. Even Mr. Lohe, Chairman of the HAC, in response to the fervor with which residents have objected to large developments, has commented, “we would normally prefer things to remain the same. It is not necessarily that we do not want to see affordable housing – we would prefer not to see the clubhouse of a country club or even another house just like ours.” *Id.*

242. *See* Buote, *supra* note 17. Part of the automatic NIMBY reaction to 40B proposals may stem from over-sized developments. A review of housing initiatives nationwide has demonstrated that affordable housing does not trigger such a response where the planning process involves those who will live with the results and proposed units do not disrupt the existing neighborhood. *See* Salsich, *supra* note 22, at 471.

243. *See* Salsich, *supra* note 22, at 471. The revised regulation’s inclusion of affordable housing plans as evidence of a local interest that would justify the denial of a comprehensive permit should encourage this type of long-term planning. *See* MASS. REGS. CODE tit. 760, § 31.07(1)(i) (2002).

positions staffed by individuals who generally do not have backgrounds in land use planning.²⁴⁴ However, there are statewide resources that communities can take advantage of such as guidance provided by CHAPA,²⁴⁵ or forming a partnership with the Massachusetts Housing Partnership Fund (MHP).²⁴⁶ Municipalities can request technical assistance from the MHP in developing their own affordable housing projects and in reviewing the feasibility of 40B permit applications received from outside developers. The MHP Fund can pay for the services of “architects, engineers, and development consultants.”²⁴⁷

B. Improving the Clarity of 40B Terminology

Part of the reason for the controversy surrounding 40B is the arbitrariness of its most central terms.²⁴⁸ As demonstrated by the discussion in Part III of this Note, much of the debate on how the statute should be reformed has centered on how the ten percent goal should be reached.²⁴⁹ The disagreement over what types of pre-existing units should be counted in the state’s inventory has taken away from real discussion on how more housing units can be created. Although this list is subject to change with future reforms, “group homes for the developmentally disabled and the mentally ill, as well as in-law apartments, will now be counted as affordable housing. But prison cells and mobile homes [will not] be counted.”²⁵⁰ How often should the state recalculate a town’s inventory? What type of units should be counted? Why should Section 8 units be excluded from the inventory while accessory apartments are included? Why set the standard at ten percent in the first place? Eliminating the ten percent mark would not make the law any more vague than it already is, and would reduce the frustration towns feel as they easily fall below the ten percent threshold as a few market-rate houses are constructed, taking them

244. See Buote, *supra* note 86.

245. CHAPA’s website provides detailed information on community planning that is geared towards communities interested in taking the initiative to develop affordable housing. See generally <http://www.chapa.org>.

246. See HEUDORFER ET AL., *supra* note 1, at 114; see also Massachusetts Housing Partnership, at <http://www.mhp.net/about/about.php>.

247. HEUDORFER ET AL., *supra* note 1, at 114; see also Massachusetts Housing Partnership, at <http://www.mhp.net/about/about.php>.

248. See Gouvin, *supra* note 20, at 50. The ten percent goal was arbitrarily assigned in 1969, an approach that does not even attempt to make a “meaningful needs assessment” of regional or local affordable housing shortfalls. See *id.*

249. See Scott Van Voorhis, *Bond Bill Passage Promises Housing*, BOSTON HERALD, Aug. 2, 2002, at 26; see also Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 3-4.

250. Van Voorhis, *supra* note 249.

back out of the safe-harbor provision.²⁵¹

Chapter 40B has worked as a negative incentive for towns to plan their own affordable housing, sending them scrambling to maintain the ten percent standard or meet the moratorium standard of one-half of one percent.²⁵² Does this incentive produce the type of affordable housing needed for that particular community or region? Currently, there is no state oversight regarding where affordable housing is most needed.²⁵³ Relying on the marketplace may have been a good idea to excuse the state from coming up with funding in a cash-strapped world, but it has not done the housing supply any favors.²⁵⁴

C. Revising Local Zoning Laws to Reflect Master Plans

As discussed in Part II of this Note, municipalities have inherent power over local zoning under the Home Rule Amendment.²⁵⁵ While this constitutional provision makes it impossible for the legislature to mandate statewide enactment of inclusionary zoning laws, the zoning laws and DHCD regulations have provided incentives for doing so.²⁵⁶ The planning board in each municipality in Massachusetts is required, by Mass. Gen. Laws, ch. 40A, § 81, to draw up a master plan for the growth and development of that community.²⁵⁷ Under the revised regulations, a plan that has received the approval of the DHCD will shift the presumption in favor of the local board when an appeal is made to the HAC.²⁵⁸ However, towns still cannot be required to conform zoning regulations to match the goals of their master plans. In the past, such master plans were filed away, and were only dusted off when needed to justify a permit denial.²⁵⁹ With

251. See Flint, *supra* note 206 (explaining that “25 percent of the units must be affordable under Chapter 40B developments . . . [which means] a 32-unit project, and an overall growth in housing of 3.2 percent”). For example, the town of Lincoln, which had reached ten percent affordable housing largely through its own efforts, recently dropped below the standard with the construction of new market-rate homes and found itself open to large 40B developments it would not be able to control. Of course, this is not necessarily a bad thing where the shortfall will force the town to provide additional units in order to avoid 40B. See Helman, *supra* note 132.

252. See Helman, *supra* note 132.

253. See Gouvin, *supra* note 20, at 50.

254. See Forton, *supra* note 24, at 664. During the 1990s, the “model of affordable housing” moved towards “market-driven development.” *Id.*

255. MASS. CONST. art. LXXXIX, § 6 (amended 1966); see also *supra* text accompanying notes 44-52.

256. See MASS. REGS. CODE tit. 760, § 31.07(1)(i) (2002).

257. See HEUDORFER ET AL., *supra* note 1, at 17.

258. See MASS. REGS. CODE tit. 760, § 31.07(1)(i) (2002).

259. See Lohe, *supra* note 175, at 357.

the revised regulations in place, master plans will be vitally important to municipalities in protecting their own interests which should include a provision for affordable housing.

Executive Order 418, entitled “Assisting Communities in Addressing the Housing Shortage” was issued in January of 2000 by then Governor Celucci as a positive incentive to communities for putting their master plans to work.²⁶⁰ Executive Order 418 allows towns whose master plans meet the state requirements for a Community Development Plan to receive technical and financial assistance in implementing those plans.²⁶¹ This program was scheduled to expire in June 2003, but it serves as an example of an approach that focuses on planning and cooperating with communities that can be used in solving the 40B controversy.²⁶²

D. Implementing Inclusive Zoning Regulations

Zoning laws do not result in the production of affordable housing by themselves.²⁶³ However, reforming local zoning laws is still an important step in addressing the twin concerns of controlling sprawl and encouraging the development of affordable housing.²⁶⁴ Throughout this Note, reference has been made to inclusionary approaches in connection with the exclusionary zoning laws that necessitated 40B, but what exactly does “inclusionary” mean? In a broad sense, it means using municipalities’ zoning power to keep affordable housing an available option.²⁶⁵ This can be achieved by not establishing a minimum lot size in excess of one acre (or even half an acre), not requiring huge set-backs, allowing multi-family developments, and requiring that every development, including those proposed under Chapter 40A,²⁶⁶ include a minimum number of low or moderate income units.²⁶⁷

260. See HEUDORFER ET AL., *supra* note 1, at 17.

261. See *id.* The Community Development Plan shows how and where the town will provide affordable housing, focusing on “housing, economic development, transportation, and open space and resource protection.” *Id.*

262. See *id.*

263. See Stonefield, *supra* note 8, at 331. Inclusionary zoning statutes “do not require the states to establish policies, programs, or funding to increase suburban affordable housing. They provide neither incentives for, nor sanctions against, the towns.” *Id.*

264. See Ziegler, *supra* note 8, at 1.

265. See HEUDORFER ET AL., *supra* note 1, at 38. Inclusive zoning is a flexible approach to land use regulation. See *id.*

266. See generally MASS. GEN. LAWS ch. 40A (1960).

267. See HEUDORFER ET AL., *supra* note 1, at 38.

E. Smart Growth

Although not an affordable housing program in itself, smart growth is a development method that could be used in conjunction with current programs in order to ease the 40B controversy.²⁶⁸ The term “smart growth” refers to a “coordinated, environmentally sensitive approach to planning and development. A response to the problems associated with unplanned, unlimited suburban development—or sprawl—smart growth principles call for more efficient land use.”²⁶⁹ In other words, utilizing smart growth methods under 40B would go a long way toward quieting the law’s critics as it would place as much emphasis on planning *where* affordable housing is built as on *how much* is produced.²⁷⁰ The 40B Task Force has recommended that municipalities incorporate “sustainable development objectives” into their individual affordable housing plans.²⁷¹

Smart growth will most likely be incorporated into housing policy statewide in the near future; Governor Romney selected an advocate of smart growth policy, Donald Foy, as the new Chief of Housing, Transportation, and the Environment.²⁷² Although encouraging communities to incorporate smart growth principles into their own plans is a nice idea, “[w]hat’s really needed is to have that integrated approach and agenda setting that has to come from leadership. If you look across the country, all the places where smart growth programs have been put in place to any degree, there’s always been leadership from the governor’s office.”²⁷³ The increase in affordable housing and the protection of open space should not be viewed as competing goals; rather, the two should be incorporated into a single approach to land use, before there is no longer any open land to use.²⁷⁴

F. Open Space Residential Design

Related to the smart growth concept, Open Space Residential Design (OSRD) is a planning method that allows local planning boards and

268. *See id.* at 162.

269. *Id.*

270. *See* Chapter 40B Task Force Findings and Recommendations, *supra* note 13, at 35. The Task Force recognized that smart growth concepts “are an essential component of effective land use planning [and] such objectives should be incorporated [into] the regulation for planned housing production.” *Id.*

271. *See id.*

272. *See* Michael Jonas, *The Sprawl Doctor: Can Doug Foy Cure the State’s Growth Pains?*, COMMONWEALTH MAGAZINE, Spring 2003, at 47.

273. *Id.* at 52.

274. *See id.* “Since 1970, the amount of land developed in the Bay State has increased 180 percent while population has grown less than 30 percent.” *Id.* at 48.

developers to work together to design a development.²⁷⁵ After a particular tract is chosen for development, the town and the developer follow a four-step process.²⁷⁶ First, areas within the proposed development site that should be preserved as open space, for conservation reasons, are identified.²⁷⁷ Then, the maximum number of units that could be built on the site using traditional uniform lot size is calculated.²⁷⁸ Once that is determined the units are sited in such a way that the open space is preserved.²⁷⁹ Finally, access roads and lot lines are drawn.²⁸⁰ Developments built under OSRD that include the requisite number of affordable units can be certified by the state, and counted in the affordable housing inventory.²⁸¹ Although not specifically developed to address affordable housing, this method of planning developments would be a useful tool in reducing opposition to such projects.²⁸²

VII. CONCLUSION

The Comprehensive Permit Law is a valuable tool for providing low and median-income housing; however, the process should be reformed to reduce the controversy inherent in the current procedures. Over the past thirty-three years, the law has resulted in the construction of approximately 30,000 affordable units despite the considerable controversy that it has generated. And yet, despite the existence of Chapter 40B, the shortage of affordable housing has not been alleviated. The process by which Chapter 40B produces affordable housing—overriding local zoning decisions based on local interests—has created a tradition of confrontation between municipalities and the state housing agency. This public resistance is the real barrier to economic integration. However, instead of reducing local opposition by making it easier for municipalities to reach immunity from

275. See MASSACHUSETTS COASTAL ZONE MANAGEMENT, *Green Neighborhoods, Open Space Residential Development of Conservation Subdivision Design (OSRD) Model Bylaw* (2000), available at <http://www.greenneighborhoods.org/site/Index.htm> (last visited Oct. 13, 2003).

276. See *id.* at 2.

277. See *id.*

278. See *id.* at 3.

279. See *id.*

280. See *id.*

281. See MASSACHUSETTS COASTAL ZONE MANAGEMENT, *supra* note 275, at 3.

282. See *id.* at 1. One of the primary purposes of OSRD is “[t]o encourage a less sprawling and more efficient form of development that consumes less open land and conforms to existing topography and natural features better than a conventional or grid subdivision.” *Id.* The secondary purposes include both “[t]o preserve and enhance the community character” and “[t]o provide affordable housing to persons of low and moderate income.” *Id.*

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40B proposals, the state's affordable housing efforts should be concentrated on how to make projects more acceptable. The 40B landscape will certainly be changing; instead of balancing the competing interests at stake, in which case one or the other will win out, policymakers should consider how to combine local interests with the planning of affordable housing in order to take the confrontation out of the comprehensive permit process.

Katherine L. Melcher