



Reviewing Chapter 40B:

What Gets Proposed, What Gets Approved, What Gets Appealed, and What Gets Built?

By Lynn Fisher, Department of Urban Studies and Planning and Center for Real Estate, MIT

For almost 40 years, Chapter 40B, a unique Massachusetts law, has allowed developers to circumvent local land-use regulations for housing projects that include subsidized units in communities that lack such housing. Given well-documented restrictions that many communities impose on multifamily housing, Chapter 40B—officially known as Massachusetts Comprehensive Permit Law¹—has become the primary tool for building multi-family development projects in the state. This, in turn, has made the law extremely controversial and led to repeated but thus far unsuccessful attempts to either repeal or substantially modify it.

Because Chapter 40B is so important for multi-family housing production and because 40B projects often are controversial, it is critical to understand how the law actually works in practice. Which projects are built with little controversy, which are substantially delayed, and which never get built? How much time does the process take? How litigious is the process? What influence, if any, does the process have on the design and location of the projects that ultimately get built?

Until now, it has been impossible to answer such questions because no one had collected comprehensive data on both built and unbuilt projects. To fill this gap, in 2007 and 2008 we contacted officials in 144 cities and towns surrounding the city of Boston to explore their community's experiences with the law between 1999 and 2005. We ultimately received responses from officials in all but two of those communities and information on 404 separate projects in 115 cities and towns. The survey results showed that:

- While about 90 percent of the proposed projects ultimately were approved, only 62 percent had obtained building permits by the second quarter of 2008.
- More than 80 percent of projects were initially approved at the local level and, for over 80 percent of these approved projects, developers did not challenge the conditions of the approvals. As of September 2008 developers had received building permits for about 75 percent of these projects.
- Overall, developers appealed 28 percent of the local decisions on applications. As of the fall

Rappaport Institute Policy Briefs are short overviews of new scholarly research on important issues facing the region. This brief is based on "Chapter 40B Permitting and Litigation: A Report by the Housing Affordability Initiative," a working paper published by MIT's Center for Real Estate that is available online at http://www.mit.edu/cre/research/hai/pdf/40B-report_fisher_07-0618.pdf. Funding for this research was provided by a variety of sources, including the Rappaport Institute for Greater Boston.

Lynn Fisher

Lynn Fisher is an Associate Professor of Real Estate in the Department of Urban Studies and Planning (DUSP) at MIT and at the MIT Center for Real Estate.

Rappaport Institute for Greater Boston

The Rappaport Institute for Greater Boston aims to improve the region's governance by fostering better connections between scholars, policy-makers, and civic leaders. The Rappaport Institute was founded and funded by the Jerome Lyle Rappaport Charitable Foundation, which promotes emerging leaders in Greater Boston.

© 2008 by the President and Fellows of Harvard College. The contents reflect the views of the authors (who are responsible for the facts and accuracy of the research herein) and do not represent the official views or policies of the Rappaport Institute.

Rappaport Institute for Greater Boston
John F. Kennedy School of Government
79 JFK Street, Cambridge, MA 02138
Telephone: (617) 495-5091
Email: rappaport_institute@ksg.harvard.edu
<http://www.ksg.harvard.edu/rappaport>

of 2008 developers had not started construction on over 50 percent of the projects that had secured modified approvals.

- At least 12 percent of all applications were the subject of lawsuits challenging state or local approvals of those projects.
- Rental projects built on the law's provisions were much larger, much denser, and more likely to be challenged than homeownership projects.
- On average, it took local governments 10 months to make a decision on proposed projects and, for built projects, on average it took about an additional year before developers received a building permit that allowed them to start work on an approved project.
- Projects that received comprehensive permits after 2004 were less likely to have been built. Anecdotal evidence suggests this may be due to both the downturn in the housing market and the fact that some of those projects are still being challenged in court by abutters and other opponents.

Building on these initial findings, research is now underway to explore the quality of location afforded by Chapter 40B housing, and to describe who lives in these housing units. Future work is also needed to investigate the potential for indirect impacts of Chapter 40B on other residential outcomes. For example, because we expect developers, local officials, and others affected by new development to behave strategically, the prospect of 40B projects could encourage more permissive local rules (or their enforcement) with respect to non-40B housing development, or it could produce retrenchment against

other development. It could also prompt unanticipated behavior, like local support of subsidized housing rehabilitation as a means of reaching the affordable housing goals established in Chapter 40B.

Background on Chapter 40B

Chapter 40B has two key components. First, it allows both for-profit and non-profit developers (as well as public entities) to seek a single comprehensive permit from a locality's Zoning Board of Appeals (ZBA) for projects in which 25 percent of the units are permanently subsidized at levels that make them affordable for households that make less than 80 percent of the median household income for the area (or, in the case of rental projects, where 20 percent of the units are permanently affordable for households with incomes that are no more than half the area's median household income).

Second, in communities where less than 10 percent of the housing units are in projects with permanently subsidized units, developers may appeal the local ZBA's decision on their comprehensive permit applications to the Housing Appeals Committee (HAC), a state-level administrative court.² In reviewing the appeals, the HAC does not have to allow unlimited density or discretion in project

More than 80 percent of projects were initially approved at the local level and, for over 80 percent of these approved projects, developers did not challenge the conditions of the approvals.

design. However, it must allow developers to build at densities and with designs sufficient to ensure that the proposed project is "economically viable."

Over time, the law has become the major source of new, permanently subsidized housing in greater Boston. The 2006 “Greater Boston Housing Report Card,” for example, estimated that between 2002 and 2005, over half of new subsidized units in greater Boston – and more than 70 percent of the subsidized units built outside of the city of Boston proper – were produced via the 40B process.³ Consequently, the law has become increasingly controversial, particularly in communities where it has been used to build substantial amounts of new, relatively dense, multi-family housing.⁴

As a result of such construction, the number and type of communities that exceed the 10 percent threshold has grown and changed. In 1997, 328 of the state’s 351 cities and towns did not meet the 10 percent threshold that would exempt them from HAC review. Moreover, most of the 23 communities that exceeded the 10 percent threshold were older cities that were home to the state’s poorest residents, such as Boston, Chelsea, Brockton, Lawrence, and Lowell. By 2005, 39 communities exceeded the 10 percent threshold, a figure that increased to 55 communities by September 2008. Many (but not all) the newer additions to the list were in the fast-growing areas near the region’s two ring highways (I-95/128 and I-495), such as Andover, Canton, Framingham, and Marlborough.⁵

Research Design

Despite 40-B’s growing importance, there has been little systematic research on how the law works in practice. To fill that gap, in 2007 we contacted officials in 144 cities and towns surrounding Boston to gather information about their community’s experiences with the law between 1999 and 2005. While most of the communities were below the 10 percent threshold for the entire study period, 10 were

over the threshold before 1999, 12 more passed it by 2005, and 16 more had exceeded it by 2008.⁶

The initial survey yielded data on 369 projects in 95 cities and towns. Follow-up work done in 2008, yielded information on 35 more projects in 20 communities. Combined, the two efforts have produced data on 404 proposals in 115 communities (as well as confirmation that during the study period, no 40B projects were proposed in another 27 communities).⁷

The surveys asked for information in the three main areas:

- The timing of Chapter 40B comprehensive permit applications;
- The nature of projects proposed and granted in comprehensive permits;
- Whether projects were appealed to the HAC or involved in other litigation, and the outcomes of HAC appeals.

In addition, we collected data on the nature and relative success of applications for projects with owner-occupied units and those with rental units, the location of proposed projects, and the actual number of affordable units generated via the 40B permitting process.

For-profit developers organized as limited dividend companies in order to engage in the 40B process submitted 338 of the 369 comprehensive permits identified in our original survey.

Who Applies and For What?

For profit-developers organized as limited dividend companies in order to engage in the 40B process submitted 338 of the 369 comprehensive permits identified in our original survey. Non-profit entities proposed 25 of the projects and public agencies submitted six applications.

Fifty of the 369 applicants—all but three of them for-profit, limited dividend entities—sought approval via a Local Initiative Program (sometimes called a “friendly” 40B) in which the developer first gains approval of a locality’s legislative body (e.g. the board of selectmen, the city council) before submitting a comprehensive permit application to the locality’s ZBA.

Proposed projects included both home-ownership and rental units and ranged in size from 1 to 1,750 units on sites that ranged in size from 1/10th of an acre to 240 acres. The average site size was 16 acres; the median was 7.6 acres. While less than 10 projects were proposed in 1999 and just over 30 were proposed in 2000, more than 65 were proposed annually from 2001 through 2005.

Life Histories of 40B Applications

On average, localities held seven public hearings about proposed projects during the application process and took 10 months to make their decisions about those applications. However, the time it took ZBAs to rule on the applications ranged from as little as one month to as long as six years. After the local ZBA’s decision, a 40B application can generally take one of three different routes through the

Figure 1: “Life Histories” of Chapter 40B Applications

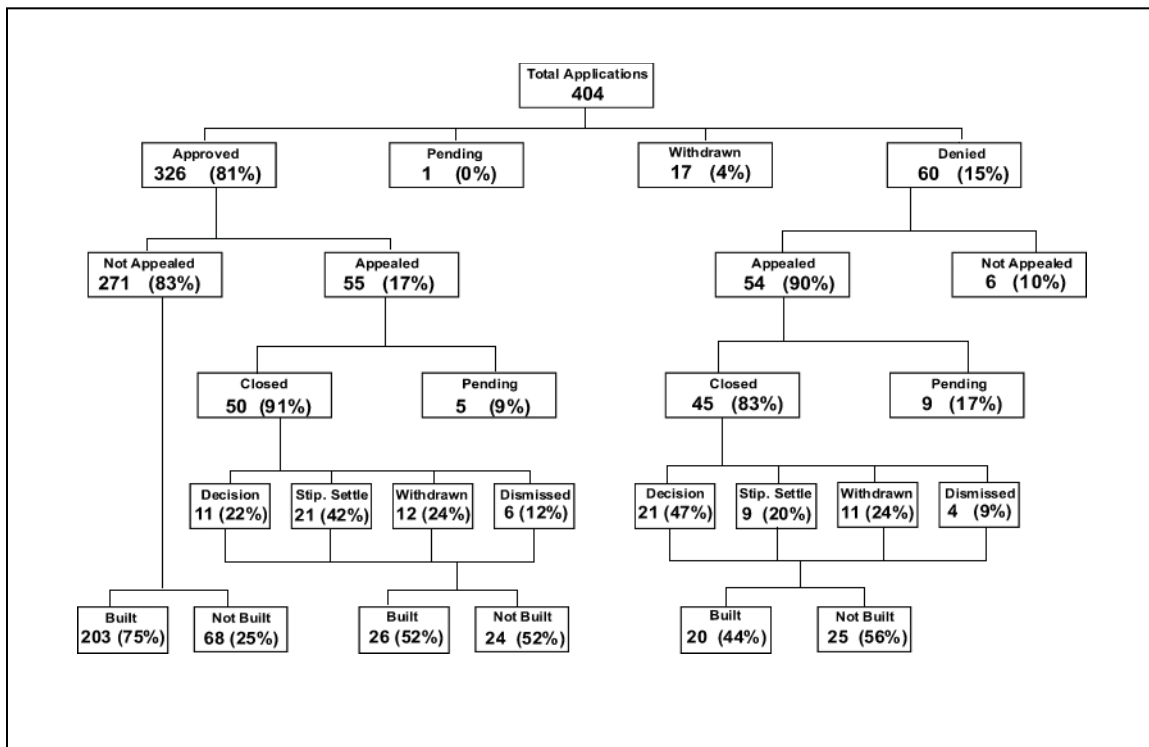


Figure 2: Outcome for Projects Approved by Local ZBAs

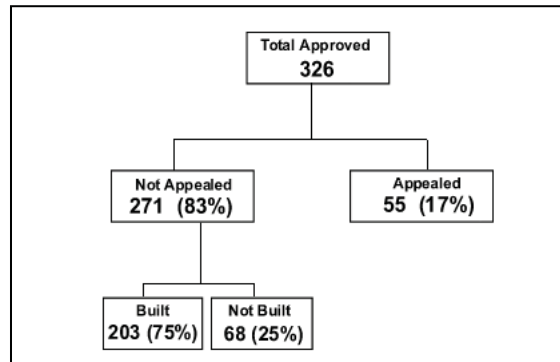


Figure 3: Housing Permitting for Locally Approved Projects that Were Not Appealed to the HAC

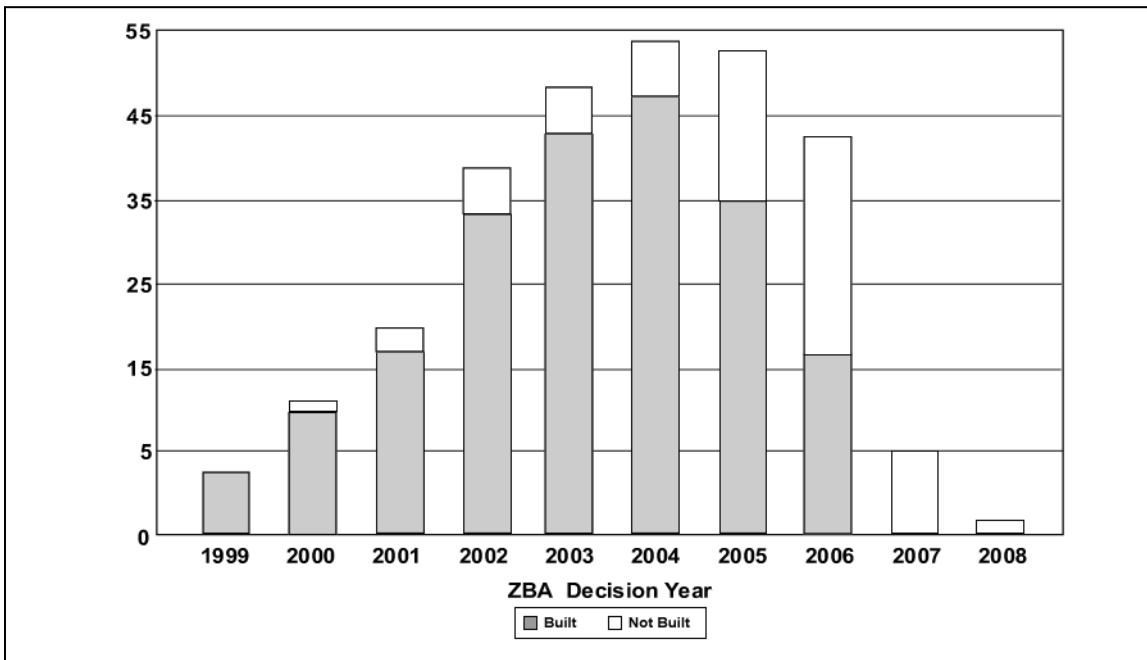
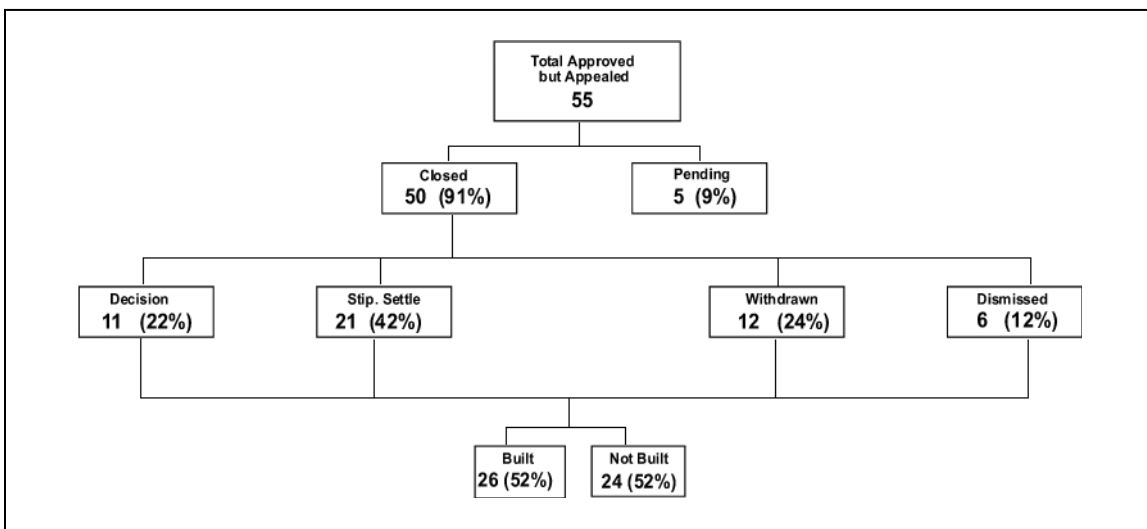


Figure 4: Approved Cases Which Developers Appealed to the HAC



permitting process: ZBA approval with no appeal to the HAC, a ZBA approval appealed to HAC, or a ZBA denial, appealed to HAC. (See Figure 1.)

ZBA approval with no appeal to the HAC

The overwhelming majority of projects are approved by local ZBAs with conditions that are acceptable to those who proposed the projects. Specifically, local ZBAs approved 81 percent of the 404 applications in the entire study group and developers did not appeal the conditions for 83 percent of the 326 applications approved by a local ZBA. As of September 2008, developers had sought building permits for only 75 percent of the 271 projects approved with conditions they did not appeal to the HAC. (See Figure 2.)

Many of the unbuilt projects were approved after 2004. Illustratively, building permits have not been issued for 46 of the 98 projects approved since 2005 that were not appealed. In contrast, building permits have not been issued for only 22 of 173 projects approved before 2005 and not appealed. (See Figure 3.)

ZBA approval appealed to the HAC

In the study group, 17 percent (55) of the projects received approval from the ZBA and the developer subsequently decided to appeal to the HAC on the grounds that the ZBA imposed conditions that made the project “uneconomic.”⁸ (See Figure 4.)

As of fall 2008, only 5 of these cases were still open. The HAC, however, had only ruled in 11 of the remaining 50 cases. Most the remaining cases were resolved via agreements reached during the HAC process. In 21 cases, the parties agreed to modify the comprehensive permit and asked the HAC to approve the new agreement via a legally binding decision or stipulation. In 12 other cases the developer withdrew the appeal, without presenting a settlement to the HAC. Finally, six cases were dismissed.

Building permits have been issued for 26 of the 50 projects that have concluded the HAC appeals process. Of projects that received a ZBA approval after 2004, but which were subsequently appealed and resolved (15), only 1 project has received a building permit.

Figure 5: Denied Cases Where Developer Appealed to the HAC

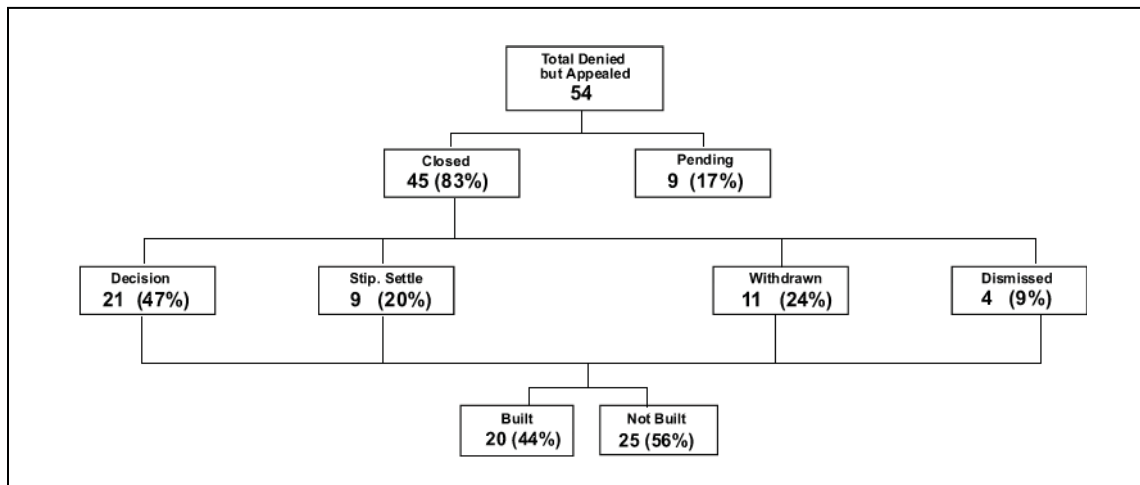


Table 1: Comparisons of Owner-Occupied and Rental Projects

All Proposals					Prop. Rcv. Comprehensive Permit			
Project Type	Number of Projects	Number of Units in Project (average)	Density (Units/Acre)	Number of Projects	Number of Units in Project (Average)	Density	Received Building Permit (%)	
Full Sample								
Owner	284	55	9	248	47	8	68%	
Rental	119	156	19	104	141	18	75%	
Total	403	84	12	352	75	11	69%	
By ZBA Decision and HAC Appeal								
Not Appealed	Owner	209	50	8	192	45	8	73%
	Rental	85	152	21	79	140	20	78%
	Total	294	80	12	271	73	12	75%
Approved and Appealed	Owner	45	71	12	41	54	10	49%
	Rental	10	143	11	9	131	10	67%
	Total	55	83	12	50	68	10	52%
Denied and Appealed	Owner	30	64	8	15	46	4	57%
	Rental	24	176	13	16	153	14	63%
	Total	54	110	10	31	101	9	55%

ZBA denied, appealed to HAC

Developers appealed 90 percent of the 60 applications that were turned down by local ZBAs and over two-thirds (69 percent) of those appeals result in issuance of a comprehensive permit, either via an HAC ruling or an agreement between the developer and the local community. However, as of September 2008, building permits had been issued for just under half of the projects that received a comprehensive permit approved via the appeals process. (See Figure 5.)

Rental vs. Owner-Occupied Projects

There are significant differences between owner-occupied and rental projects. (See Table 1.) Most notably, on average, rental projects (as finally permitted) are almost three times the size of owner-occupied projects and over twice

as dense.⁹ As a result, while 70 percent of the 386 40B applications that had received ZBA decisions in the study sample were proposed as owner-occupied projects,¹⁰ the over 32,000 proposed units in our sample were split almost equally between owner-occupied and rental units.

The average time between application and ZBA decision is similar for rental and owner-occupied projects. However, ZBAs are twice as likely to deny permits for rental projects. And while the rate of developer appeal to the HAC is about equal for the two types of projects, (29 percent of rental projects and 27 percent of owner-occupied ones), rental projects are almost twice as likely as owner occupied projects to be involved in other litigation.

Table 2: Existing Zoning on Sites for Proposed 40B Projects (Initial Sample)

Zoning	Applications	
Residential and Agricultural	266	
Large Lot Single Family Residential and Agricultural		120
Single Family Residential (<1 acre)		135
Multi-family		11
Business/Commercial	66	
Industrial	37	
Total	369	

Location and Land-use Considerations

Twelve percent of the projects in the original sample of 369 applications are located within one-half mile of an MBTA rail, trolley, or subway station and nine percent are within one-half mile of a highway exit. Projects that were close to both transit stops and highway exits were more likely to be rental, not owner occupied, projects.

Overall, 72 percent of the proposed projects were on sites zoned for residential or mixed residential and agricultural uses. (See Table 2.) Of these residentially zoned sites, only four percent were zoned for multifamily residential development. In contrast, 45 percent of the 266 sites were zoned for residential uses that either called for minimum lot sizes greater than an acre or called for a mix of residential and agricultural uses. About 18 percent of the projects were proposed for sites zoned for business/commercial uses and 10 percent were on land zoned for industrial uses. Finally, regardless of zoning, 25 percent of the applications approved by ZBAs were within 1,500 feet of the locality's border.

Total 40B Units

Nearly 19,000 units of new housing obtained building permits resulting from 40B comprehensive permit applications in the study group. To put that number in perspective, we estimate (using tax assessor records) that 40B

units represent over 25 percent of all housing production in the 144 towns in the study between 2000 and 2006. We also calculate that 46 percent of all new multifamily housing units, and nearly 70 percent of all rental housing units produced in the region are 40B units.¹¹

Conclusions

Chapter 40B has created a process that developers and towns, among other actors, play with increasing sophistication. Most notably, both local officials and developers seem to understand the conditions that the HAC will — and will not — accept when reviewing developer appeals of local ZBA decisions. Consequently, the overwhelming majority of projects are approved with conditions that developers do not appeal and even when local rulings are appealed, parties often settle before the HAC makes a formal ruling on those appeals. In contrast, the appeals process is a higher-stakes game because while developers are more likely to gain a favorable ruling (particularly when local ZBAs turn down the requests for comprehensive permits), the delays associated with the appeals process — and likely lawsuits challenging some HAC approvals as well — reduce the odds of projects moving (at least for awhile) from planning to construction. Further investigation is needed to determine what, if any, influence Chapter 40B exerts on non-40B housing.

The current real estate downturn, which has included a downturn in 40B-related activity, has tempered some of the controversy associated with the law. However, when the economy and the housing market begin to rebound, there will be new 40B applications, new controversies, and new calls to modify or even repeal the law. By providing data on how the 40B process actually works—particularly insights into what kinds of projects get built with a minimum of controversy—studies such as this can help policymakers find better ways to provide needed affordable housing in ways that do not greatly damage the character (and finances) of the state’s existing communities.

Endnotes

¹ The law is Chapter 40B, §§ 20-23 of the General Laws, enacted as Chapter 774 of the Acts of 1969.

²In order for a unit to be counted towards a municipality’s 10 percent Subsidized Housing Inventory (SHI) it must: 1) be a part of a subsidized development which is operated by a non-profit, government agency, or limited dividend organization, 2) include at least 20-25 percent of the units in the development which are restricted to families with 80 percent of median area income and provide rent and sales prices that are affordable for at least 30 years (if it is new construction), 3) be in a development that it is monitored by a non-profit or government agency and is subject to a regulatory agreement, and 4) be in a development where the owners meet affirmative marketing requirements. For a good overview of the law, see “Fact Sheet on Chapter 40B: The State’s Affordable Housing Zoning Law,” (Boston: Citizen’s Housing and Planning Association), online at <http://www.chapa.org/pdf/40BFactSheetOctober2007.pdf> [last accessed on July 16, 2008].

³ See Bonnie Heudorfer and Barry Bluestone, “The Greater Boston Housing Report Card 2005-2006: An Assessment of Progress on Housing in the Greater Boston Area,” (Boston: The Center for Urban and Regional Policy, The Boston Foundation, and Citizens’ Housing and Planning Association, 2006), pp. 49-50. Online at <http://www.curp.neu.edu/pdfs/HRC%202005-2006.pdf> [last accessed on July 16, 2008].

⁴ See, for example, the discussion about Chapter 40B in Christina Rosan and Lawrence Susskind, “Land-Use Planning in the Doldrums: Growth Management in Massachusetts’ I-495 Region,” (Cambridge: Rappaport Institute for Greater Boston, 2007), pp. 17-20. Online at http://www.hks.harvard.edu/rappaport/downloads/doldrums_final.pdf [last accessed on July 15, 2008].

⁵ For the 1997 figures, see “Analysis of the 2005 Subsidized Housing Inventory,” (Boston: Citizen’s Housing and Planning Association, 2005). Online at <http://www.chapa.org/pdf/0540banalysis.pdf> [last accessed on November 4, 2008]. For 2008 figures, see “Department of Housing and Community Development, Chapter 40B Subsidized Housing Inventory (SHI) as of September 9, 2008,” online at <http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm> [last accessed on November 4, 2008].

⁶ The communities that exceeded the 10 percent threshold in 1997 are Beverly, Brockton, Cambridge, Chelsea, Lawrence, Lincoln, Lowell, Lynn, Malden, and Salem. (Boston, which was not part of the survey, exceeded it as well.) The 12 additional communities that exceeded it by 2005 are Andover, Braintree, Burlington, Canton, Framingham, Georgetown, Holbrook, Hudson, Marlborough, Middlefield, Raynham, and Westborough. Due to new construction, however, Lincoln, which exceeded the threshold in 1997, no longer exceeded it in 2005. By September 2008, 16 more communities (including Lincoln)

exceeded the threshold. The others are: Amesbury, Bedford, Boxborough, Danvers, Dedham, Franklin, Lexington, Mansfield, Peabody, Pembroke, Quincy, Randolph, Revere, Stoughton, and Wilmington. However, Andover, Braintree, Middlefield, and Westborough, which all exceeded the threshold in 2005, no longer exceeded it in 2008. *Ibid.*

⁷ We lack specific information on only two of the 144 cities and towns we contacted: Sharon (with more than two projects during our study period, but with project details unconfirmed) and Maynard (no response).

⁸ In summarizing the number of appeals to the HAC, we count only those appeals that directly followed the initial ZBA decision (or in some cases result from the lack of a ZBA decision). In eight instances, appeals were the result of attempts to amend the original comprehensive permit.

⁹ Density is calculated here as the number of units permitted divided by the total acreage of the project (unadjusted for water or other features).

¹⁰ Ten projects were proposed with both rental and owner-occupied units. Since these projects tended to be of a scale similar to other all-rental projects, we classified these projects as rental projects. There are also a handful of projects for which the tenure of the project changed between the developer's application and the ZBA permit, and those projects are classified as they were finally permitted.

¹¹ These estimates are similar to those in the biannual Greater Boston Housing Report Card. See Heudorfer and Bluestone, *op cit*, p. 54 and Heudorfer and Bluestone, "The Greater Boston Housing Report Card 2004: An Assessment of Progress on Housing in the Greater Boston Area," (Boston: The Center for Urban and Regional Policy, Northeastern University; The Boston Foundation; and Citizen's Housing and Planning Association, 2005), p. 20. Online

at www.curp.neu.edu/pdfs/Housing%20Report%20Card%202004.pdf [last accessed on November 4, 2008].

RECENT POLICY BRIEFS

"Reducing Youth Violence: Lessons from the Boston Youth Survey," by Renee M. Johnson, Deborah Azrael, Mary Vriniotis, and David Hemenway (Harvard School of Public Health) June 2008.

"The Greenness of Cities," by Edward L. Glaeser (Harvard University) and Matthew Kahn (UCLA) March 2008.

"The Seven Big Errors of PerformanceStat" by Robert D. Behn (John F. Kennedy School of Government) February 2008.

"Boston Bound: A Comparison of Boston's Legal Powers with Those of Six Other Major American Cities," by Gerald E. Frug and David J. Barron (Harvard Law School) December 2007.

"Hard Choices for the Next Governor" September 2006.

"The Impacts of Commuter Rail in Greater Boston" by Eric Beaton (MUP, 06, Graduate School of Design, Harvard University) September 2006.

"The Economic Impact of Restricting Housing Supply" by Edward L. Glaeser (Harvard University) May 2006.

"Why Are Smart Places Getting Smarter?" by Edward L. Glaeser (Harvard University) and Christopher Berry (University of Chicago) March 2006.

"Regulation and the Rise of Housing Prices in Greater Boston" by Edward L. Glaeser, Jenny Schuetz and Bryce Ward (Harvard University) January 2006.

"Local Services, Local Aid and Common Challenges" by Phineas Baxandall (Rappaport Institute for Greater Boston) November 2005.