

## The Truths of 40B

Citizens' Housing and Planning Association (10/09)

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## **The Truths of 40B**

With the proposed repeal of Chapter 40B potentially on the ballot in November 2010, it is important to provide factual information on the law and its accomplishments. Recently, some misinformed residents have distributed false and misleading information in editorials and on web sites. This document seeks to clarify some of the common misconceptions about Chapter 40B.

Chapter 40B was enacted in 1969 to address local zoning and land use restrictions that make it impossible or economically infeasible to build affordable housing under existing local zoning. Numerous studies have found that it is these types of restrictions (e.g. large-lot zoning and the prohibition of multifamily housing) that are responsible for high housing costs, low levels of housing production, increasing sprawl, and population declines in Massachusetts.<sup>1</sup> Today, less than 1.5% of the land area in eastern Massachusetts is zoned for multi-family housing development as of right. On average, more than an acre of land is now required for every new housing unit produced in eastern Massachusetts (the equivalent to a football field).<sup>2</sup> The law also provides for a goal of 10% affordable housing in each community. Communities below this threshold are subject to the provisions of Chapter 40B.

Some people assume Chapter 40B involves all affordable housing in the Commonwealth. Chapter 40B has always been viewed as one important tool among many to expand housing choices for Massachusetts residents. Non-profit and for-profit developers produce most of the affordable housing in the larger cities using an array of state and federal government subsidy programs, as has been the case for decades.<sup>3</sup> These cities, such as Boston, Cambridge, New Bedford, Worcester, and others, do not use Chapter 40B because their local zoning enables affordable housing to be built. In fact, these same cities exceeded the 10% affordable housing threshold *prior to* the passage of Chapter 40B.

Therefore, Chapter 40B is primarily a tool that is needed for suburban communities that have very restrictive local zoning. Even in the suburbs, Chapter 40B is one option among many that is needed. Housing experts have long advocated for a variety of strategies, such as inclusionary zoning, adaptive reuse of existing buildings, revitalization of public housing, passage of the Community Preservation Act, rental assistance for tenants, homebuyer education and counseling, and many others.<sup>4</sup>

What follows are some of the most common myths about Chapter 40B.

**Myth #1: 40B hasn't created much affordable housing.**

**Reality: Over 1,000 developments with more than 56,000 units (including over 29,000 for low and moderate income households) have been built or begun construction using 40B. Another 160+ plus projects with 10,900 units with approved CPs are in the pipeline (have not yet begun construction).<sup>5</sup>**

**Additional Facts:**

- Chapter 40B has been critical to the production of affordable housing, particularly outside cities. In communities below 10%, it was responsible for 83% of all new units added to the state's subsidized housing inventory between 1998 and 2002.<sup>6</sup> This trend has continued, with 40B accounting for 71% of the new units added in Greater Boston (excluding Boston) between 2003 and 2006.<sup>7</sup>
- 40B has also played an important role in expanding the supply of market rate housing, accounting for 34% of *all* new permitted units outside of Boston in the 160 communities comprising Greater Boston between 2002 and 2006, including nearly 80% of all new rental housing.<sup>8</sup>
- Ninety percent (90%) of all municipalities that have permitted affordable housing have used the comprehensive permit at least once (excluding 8 cities that have never used 40B, 32 small communities with no subsidized housing and 25 with subsidized inventories consisting entirely of home rehabilitation projects and group homes).
- Opponents try to minimize the importance of 40B production by saying that it has created only 3 units per year, per town. This misuse of statistics is a typical way to transform a big number into a small number (55,000 divided by 40 years divided by 351=4). Using that same approach, we might say that all affordable housing programs (starting with federal public housing in the late 1930s) have only produced 11 units per year per city or town (about 263,000 units divided by 70 years divided by 351).

**Myth #2: Massachusetts is 49<sup>th</sup> out of 50 states in housing affordability, which means that 40B has not worked.<sup>9</sup>**

**Reality: Massachusetts is widely considered to be the one of the leading states in the country in addressing the housing needs of low and moderate income residents and Chapter 40B is a valuable tool that gives our state this distinction.<sup>10</sup> Housing is expensive in Massachusetts for many reasons, including the fact that housing supply has not kept pace with housing demand—particularly for working families.**

**Additional Facts:**

- Economists have shown that Massachusetts is one of the highest cost states for housing because our production of new housing has lagged behind the demand for housing, especially during the decade of the 1990s.<sup>11</sup>
- Opponents of 40B often cite a 2006 study by the National Low Income Housing (NLIHC) about high housing costs in Massachusetts and then try to confuse people by asserting that Massachusetts is the worst in the country in *providing* affordable housing. The National Low Income Housing Coalition has issued a letter requesting that this misleading information be corrected.<sup>12</sup> As the NLIHC noted in their letter, the “49<sup>th</sup> place” assertion is based on the state’s “housing wage,” which measures the state’s *market rate* rental housing costs, *excluding units with below market rents and newly developed units, and is not adjusted for local income levels*. It points out, however, that “to correctly assess the affordability of the state’s core rental market” one must compare local housing costs with local income levels. On that basis, Massachusetts is more affordable for renters than many jurisdictions.<sup>13</sup> The NLIHC states: “The conclusion you are drawing, however, that Massachusetts low income housing policies, including 40B, are a failure, is not supported by the data you cite.”
- Despite high housing costs, 2005 Census data demonstrates that Massachusetts is doing a superior job in producing affordable housing for low income renters. A recent analysis of 2005 Census data found that Massachusetts was the fourth best state nationwide in terms of housing affordability for extremely low income renters (those with incomes at or below 30% of area median) and was above the national average in providing affordable housing for very-low income renters as well.<sup>14</sup>
- In 2006, the U.S. Department of Housing and Urban Development recognized Chapter 40B as a “national model” for reducing barriers to affordable housing.<sup>15</sup> A number of other studies have also concluded that programs such as Chapter 40B “offer the best hope for overcoming land use regulatory limitations on affordable housing.”<sup>16</sup> A June 2009 study highlighted Chapter 40B as an important tool for communities trying to meet smart growth and smart energy goals.<sup>17</sup>

**Myth #3: 40B doesn't serve the people who really need affordable housing.**

**Reality: 40B serves households with a broad range of needs, including the elderly, people with disabilities, municipal employees and households with and without children. Most of the affordable units are accessible to households with incomes well below \$52,000.<sup>18</sup>**

**Additional Facts:**

- A recent survey of households purchasing affordable homeownership units found that typical occupations include: health care (nurses, medical assistants, therapists, dental assistants), educators (teachers, counselors), retail employees, construction trades (carpenters, plumbers, mechanics), office management (administrative assistants), financial services (book-keepers, payroll managers, accounting), human services, and other occupations critical to our state's workforce. Additionally, a significant portion of the homeowners are retirees.<sup>19</sup>
- 40B regulations allow a 70% local resident preference, and communities use this provision to provide housing for municipal employees, current residents, displaced former residents, and renters who want to own their home.
- Just under 70% of the 24,400+ affordable *rental* units created or under construction using 40B to date are reserved for or affordable to households with incomes at 50% of median or lower (\$40,600 or below for a household of three in Greater Boston) and just under 80% are reserved for or affordable to households with incomes at or below 60% of median (\$48,720 or below for a household of three in Greater Boston).<sup>20</sup>
- Similarly, most of the almost 4,600 new affordable *homeownership* units built or under construction are priced to be affordable to households with incomes equal to 70% of area median income (or approximately \$52,100 for a family of three in Greater Boston). This translates into a *maximum* sale price of approximately \$170,000 for a three bedroom home, which is 44% below the July 2009 statewide median sale price (\$305,000) for a single family home (new or old).<sup>21</sup>
- While 40B regulations and various subsidy programs set *minimum* affordability requirements, some towns have negotiated greater affordability from developers. Towns can increase affordability by making land available at little or no cost or by expediting development approvals in exchange for deeper affordability. A number of communities have used these options.
- 40B market rate units *also* expand housing opportunities within communities. A 2007 study found that the market rate ownership units in 40B developments are typically priced at \$280,000 to \$450,000, often making them among the most affordable new housing in the community.<sup>22</sup> Similarly, 40B developments have

played an important role in maintaining or increasing the supply of rental housing in suburban communities, many of which have lost units to condominium conversions in recent years.

**Myth #4: 40B is a waste of taxpayer dollars.**

**Reality: In recent years, most 40B developments have provided affordable housing without the use of any taxpayer dollars and these developments provide substantial property tax revenue to local cities and towns.**

**Additional Facts:**

- To date, 40% of the 40B units built or under construction have been developed without state or federal housing funds, but the percentage has risen dramatically in recent years as the availability of state and federal subsidy funds has fallen. While all units built prior to the mid-1980s used state and federal grants and loans, today the majority do not. For example, approximately 90% of the 40B units produced in Greater Boston between 2003 and 2006 were built without state nor federal grants or loans, relying primarily on density bonuses and other regulatory waivers, combined with income mixing, to create affordability.<sup>23</sup>
- In most cases, 40B developers pay for the cost of constructing and maintaining public infrastructure associated with their developments.
- Many 40B developers also contribute funds for local improvements and amenities unrelated to their projects (e.g. donating conservation land, providing unrestricted funds for town use, funding water conservation programs), effectively subsidizing local taxpayers. These contributions are negotiated during the 40B application process and become permit conditions.
- Without 40B, we would need more tax dollars to produce affordable housing.

**Myth #5: The level of affordability in 40B developments has fallen over the years so 40B should be repealed.**

**Reality: During the early years of 40B's existence (1970s and early 1980s), deep subsidies were available from the federal government to build housing for very low income families and were often 100% low income developments. For the most part, these subsidies are no longer available and policymakers and housing experts believe that a mixed income approach is generally preferable.**

### **Additional Facts:**

- Because of the lack of deep government subsidies, in more recent years 40B developments are mostly mixed-income (for example, 75% market rate and 25% affordable) and rely on a combination of smaller subsidies and revenues from the market rate units to make it economically feasible to create the affordable units.
- The older federal subsidy programs that led to 100% very low income developments have not been active for decades. This includes funding to build new public housing and Section 8 developments.

**Myth #6: Towns would provide affordable housing on their own without 40B.**

**Reality: Local land use restrictions mean most towns have no effective mechanism to permit the construction of new affordable housing without 40B. Local planners report that rezoning sites for affordable housing uses, which requires two-thirds vote at town meeting, has been extremely difficult to achieve.**

### **Additional Facts:**

- Less than 1.5% of the land area in the region is zoned for multi-family housing development by right and much of that land is already developed. The vast majority of Massachusetts communities have “down-zoned” and the amount of land required for each new housing unit is now triple what’s required in southern and western states. As a result, more than an acre of land is required on average for every new housing unit produced in eastern Massachusetts.<sup>24</sup>
- 40B regulations have encouraged many towns to develop housing plans, adopt inclusionary zoning, and create local funding mechanisms such as the Community Preservation Act (CPA). This renewed interest largely occurred because of the increased activity under 40B. Since 2003, 89 communities have created housing plans - 71 are still current.<sup>25</sup>
- The state’s Planned Production Program illustrates the challenge of developing affordable housing without 40B. Despite plans to use a variety of approaches to create affordable units, 32 of the 34 communities that have met annual production goals at any time since 2002 have done so entirely through 40B (one town used 40B and inclusionary zoning and one used a housing rehabilitation program).

**Myth #7: Inclusionary Zoning is a better alternative to 40B.**

**Reality: Chapter 40B is, in effect, a form of inclusionary zoning, but is more effective than local programs because it is more flexible and has led to significantly more affordable housing.**

**Additional Facts:**

- National studies have found that inclusionary zoning can be a useful tool for producing affordable housing in strong markets but *alone* cannot produce the number and types of affordable units that states and regions need.<sup>26</sup>
- While over 118 cities and towns in Massachusetts<sup>27</sup> have inclusionary or incentive zoning programs (broadly defined to include optional programs and special negotiated arrangements), many for over 20 years, to date these programs have produced fewer than 1,800 units<sup>28</sup> statewide for households with incomes at or below 80% of median. This is equal to 6% of the number of affordable units (29,000+) permitted under Chapter 40B to date. Over 60% of the inclusionary production has occurred in just six municipalities: Boston and Cambridge (about 800 units), Newton, Lexington, Brookline, and Somerville (over 300 units). About 35 other communities have used optional or mandatory inclusionary zoning to authorize another 700 affordable units (including at least four communities with programs limited to age-restricted projects) and communities re-using state hospital sites.
- The relatively low number of units produced under these programs in most communities to date is due in part to the design of the local programs. Many make the provision of affordable units optional and others allow cash payments in lieu of units. Some are limited to just a handful of locations or have very large minimum land requirements (e.g. 30 acres, 100 acres). Some are limited to senior housing. Most set the percentage of affordable units required at 10% or less and some serve higher income groups than 40B.

**Myth #8: Now that towns are adopting 40R, we don't need 40B.**

**Reality: Like inclusionary zoning, Chapter 40R provides yet another way to create affordable housing through the reduction of zoning barriers. However, the number of affordable housing units produced through this method is likely to be very limited if Chapter 40B is repealed and municipalities lose the incentive to support new production.**

**Additional Facts:**

- As of August 2009, twenty seven (27) communities have adopted 40R ordinances or bylaws and received final approval from the State for 40R districts. At full build-out, these 27 districts allow the development of about 9,800 housing units including about 2,100 affordable units. To date, however, only 1,027 units (including 521 affordable units) have been built or are in construction. Other projects have been approved but delayed by market conditions.
- Chapter 40B has played an important role in stimulating the creation of many of the approved 40R districts. At least 10 of the 27 districts involve projects where the developer initially filed (or considered filing) for approval under Chapter 40B. While the agreement by developers to switch from 40B to 40R provides significant financial benefits to municipalities, it comes at a significant cost to the State treasury and taxpayers. In the first 27 districts, the 40R zoning payments alone for the units associated with five former 40B projects will exceed \$5 million, costs that the State would not have incurred under 40B.
- Much of 40R's attractiveness lies in the promise of payments to municipalities, but a reliable funding mechanism for 40R has yet to be established.

**Myth #9: Buy-downs of existing homes are a much more effective way to create affordable housing than 40B.**

**Reality: Buy-downs of existing homes are one strategy to increase affordable housing, but it has many limitations, can be expensive, especially in high-cost states like Massachusetts, and does not replace the need to increase the housing supply.**

**Additional Facts:**

- First, in most communities it will cost \$100,000 per unit or more in government subsidy, not \$20,000-\$30,000 as some claim.<sup>29</sup> In either case, we would need additional revenue from taxes to achieve this goal. Second, it is difficult to achieve scale and create enough housing opportunities. Third, many municipalities are not in

the position to purchase and hold the properties and perform renovations before conveying them to first-time homebuyers. Fourth, it doesn't address the need to expand our overall housing supply during tight market periods.

**Myth #10: Developers make huge profits on 40B developments.**

**Reality: 40B differs from conventional development in that developers are subject to legally binding profit restrictions which limit their return on investment on rental developments and limit profits in excess of costs for home ownership.**

**Additional Facts:**

- Developers must provide audited financial statements to the subsidizing agency, which must be conducted by an independent Certified Public Accounting firm using standards of the American Institute of Certified Public Accountants.<sup>30</sup>
- The state issued extensive new guidelines in 2005 and again in 2007 and 2008 to provide specific procedures for conducting audits after the developments have been completed and for reviewing these audits when they are submitted to the state. There are now specific rules regarding allowable project costs and revenues, such as land value, related party construction expenses, direct construction costs, developer's overhead, brokerage commissions, lotteries, or sales of market rate units to related parties.
- Developers must use a pre-qualified accounting firm from a published list maintained by DHCD<sup>31</sup> and a pre-qualified appraisal company.

**Myth #11: 40B is not needed in moderately priced towns that are already densely built.**

**Reality: Restrictive zoning exists in moderately priced towns, not just in wealthy towns.**

**Additional Facts:**

- A study of zoning restrictions in place in 2004 in 187 communities within 50 miles of Boston found many of the towns with the most restrictive zoning are moderate income communities.<sup>32</sup> For example, six of the ten communities that do not allow multifamily housing as of right had median household incomes below the area average, as did two-thirds of the communities that don't allow cluster zoning.<sup>33</sup>

**Myth #12: Most 40B Projects are Proposed in Less Affluent Communities**

**Reality:** While opponents to 40B often claim that most projects are proposed in “blue collar” communities, citing communities such as Billerica, Chelmsford and Milford, analysis does not support that claim. The reality is that projects are proposed in locations where there is job growth and housing demand and where projects are feasible based on land costs and going rents or housing prices, but as of right zoning precludes affordable development. These locations often have household incomes above the state or metro area median.

- Since 40B began, the 40 most affluent communities in Greater Boston (top quartile in terms of median household income in 2000) have approved at least 230 comprehensive permits for over 13,800 units, while the 40 communities in the third income quartile have approved 179 permits for about 12,350 units.
- The same holds true for permits and units approved in the past 10 years (over 140 CPs approved for 9,800 units in the top quartile compared to 119 permits for about 8,800 units in the third quartile communities) even though the more affluent communities are smaller on average (about 5,200 year round housing units in 2000 compared to about 6,500 in the third income quartile communities).

**Myth #13: 40B hasn’t done much to provide affordable housing in the wealthy towns with large lot zoning.**

**Reality:** Since the enactment of 40B, every one of the 10 most affluent towns<sup>34</sup> in Greater Boston (Weston, Dover, Carlisle, Sherborn, Sudbury, Wellesley, Wayland, Concord, Winchester and Lincoln) has approved the construction of low-income housing, through either 40B (46 projects approved, two more in litigation) or local zoning adopted as an alternative to 40B.

**Additional Facts:**

- The 33 cities and towns in the top quintile in Greater Boston, in terms of median household income, have an average of 6 approved comprehensive permit projects each (the average for all communities statewide is less than 3 and the average for the other 229 communities with approved projects is 3.5).
- Every community within I-495 now has some affordable housing as a direct result of 40B. Thirty five years ago, only 61% of these towns had some affordable housing (63 of 161 had no affordable housing).

**Myth #14: 40B subverts local planning.**

**Reality: Housing Appeals Committee decisions have always respected local zoning and master plans that legitimately provide for affordable housing (e.g. the Hingham, Pembroke and Barnstable decisions).<sup>35</sup>**

**Additional Facts:**

- There is nothing stopping communities from developing master plans to manage growth in their communities and many have done so in recent years.
- Recent regulations give additional weight to local master plans and in recent years the State has provided funding and technical assistance to dozens of communities to develop comprehensive plans.
- Projects initiated locally and approved by local elected officials under the Local Initiative Program (LIP) have accounted for (22%) of all 40B projects since 1990.
- Planned production regulations adopted in 2002 also give towns a way to control 40B approvals as long as they increase their affordable housing supply at a reasonable pace. Since 2003, 89 communities have received DHCD approval for their housing production plans and 34 have been “certified” one or more times, meaning they produced enough affordable housing in a year to be “appeal-proof” for 1-2 years. (Seventy one communities currently have approved plans as of mid-September 2009.)

**Myth #15: 40B allows inappropriate development on environmentally-sensitive land.**

**Reality: 40B developments are subject to the same state environmental rules as all other developments, such as the Wetlands Protection Act and Title V septic regulations, and local conservation commissions must review all 40B developments.**

**Additional Facts:**

- 40B developments may request waivers only from local environmental rules that are stricter than state requirements and Massachusetts is recognized as having excellent environmental laws and enforcement in place.
- Exemptions from local environmental rules must be justified on a case-by-case basis; 40B projects are not automatically exempt. If there are septic or wetlands concerns, separate approvals may be required from the local Conservation Commission or

Board of Health. For larger developments with private sewage treatment facilities, the state Department of Environmental Protection is the permitting entity.

- 40B projects are typically subject to more environmental review than conventional subdivision developments. Any legitimate planning, public health, or safety issue may be addressed in the local public hearing process and can be the subject of permit conditions regardless of whether that issue is addressed by local bylaws.
- Many 40B developments in recent years have actually helped towns increase their supply of permanently protected open space, as developers have agreed to permit conditions that put permanent restrictions on undeveloped portions of their properties and require land donations for conservation purposes.<sup>36</sup>

**Myth #16: 40B creates unfair financial burdens on towns.**

**Reality: Local budget and growth management pressures result from many factors that are completely unrelated to 40B, ranging from municipal health and pension costs to increases in school-age population due to the turnover of existing housing stock from older homeowners to younger families with children.**

**Additional Facts:**

- Recent studies<sup>37</sup> have shown that the “population growth associated with new housing is not inevitably followed by increased demand for services and higher municipal costs” and the marginal cost of adding demand to some service systems, particularly those with excess capacity, can be very low.
- In the case of school costs, a 2007 UMass Donahue Institute study<sup>38</sup> found that “enrollment is not the most significant factor driving increases in school costs”, with costs rising steeply both in communities with declining enrollments and increasing enrollments. (Statewide, enrollment fell by 2.9% between fiscal year 2000 and 2009, while net school spending rose by 51%).<sup>39</sup>
- This same UMass Donahue Institute study (2007), which examined 40B homeownership developments concluded: “In general, the eight case study projects did not have measurable marginal impacts on public services in their municipalities. There were no discernable public safety and general municipal service impacts from the developments.”<sup>40</sup>

**Myth #17: The Housing Appeals Committee almost always sides with the developer.**

**Reality: The Housing Appeals Committee (HAC) is a state administrative agency, not a court. The vast majority of cases are withdrawn or settled without a decision. It has ruled in favor of the developer in only 23% of the decided cases.**

**Additional Facts:**

- Between 1970 and 2006, the Housing Appeals Committee received 534 appeals. Of those, approximately 70% were withdrawn or settled without a HAC decision. It ruled in favor of the developer in 128 cases (23%) over this 36-year period.
- The percentage of local decisions appealed to the HAC has fallen steadily over the years. Of the 480 developments built statewide under 40B since 2000, only 12% (56) were approved after appeals to the HAC.<sup>41</sup>
- In Greater Boston, 77 HAC cases were filed and closed between 1999 and 2005. Of those, 27 were withdrawn or dismissed. Of the remaining 50 cases, the HAC upheld the ZBA in 20 cases (including 13 cases where the ZBA denied the permit) and settlements were reached in the other 28 (including 24 denials). Ultimately, only 10 projects initially denied by the locality were built.<sup>42</sup>

**Myth #18: Towns have plenty of affordable housing - it's just not counted on the state's housing inventory.**

**Reality: Even moderately-priced suburbs have experienced huge increases in housing few towns in Eastern Massachusetts have median home prices below \$225,000 and the median price exceeds \$350,000 in most Greater Boston communities.<sup>43</sup>**

**Additional Facts:**

- The median gross rent in Massachusetts has risen by 36% since 2000 and rents for new movers in Greater Boston have increased 55% since 1998, with the 40<sup>th</sup> percentile fair market rent for a two bedroom now exceeding \$1,350.<sup>44</sup> (The FY2009 fair market rent of \$1,345 is scheduled to rise to \$1,357 on October 1, 2009.)
- Older, existing homes are not necessarily occupied by lower income households. Census data indicates that almost half (46%) of the state's 232,000 owner-occupied single family homes, mobile homes and condominiums valued below \$200,000 in 2005 were occupied by households with incomes above \$50,000, including 24% by households with incomes above \$75,000.<sup>45</sup> Even when lower cost units are occupied

by low and moderate income households, without use restrictions there is no assurance that they will continue to be affordable.

- Towns that want to make their lower cost units “count” on the Subsidized Housing Inventory can do so by acquiring those units (or entering agreements with landlords) and renting or selling them to low and moderate income households under long-term use restrictions that meet DHCD affordability and fair housing requirements. A number of communities have begun such programs, but it is difficult to create affordable housing this way absent subsidy funding and municipal capacity.

**Myth #19: It’s impossible to meet the 10% affordable housing goal under 40B.**

**Reality: Currently, 101 communities have reached or are close to reaching the 10% goal or are temporarily appeal-proof.**

**Additional Facts:**

- Currently, 51 communities are above the 10% threshold, more than double the number in 1997 (24).
- Another 3 are appeal proof under the 1.5% general land area minimum standard
- Seven more communities are temporarily appeal proof (for 1-2 years) because they have increased their subsidized housing count by a number equal to at least 0.5% of their year round housing count in the past year or two.
- Another 40 communities are close to reaching the 10% goal, with current 40B percentages ranging from 8% to 9.9%.
- The 51 communities that have passed the 10% threshold include 32 that were below 10% in 1997<sup>a</sup> (including 24 in Greater Boston). They include cities and towns in every county in the state except Barnstable and Nantucket.
- Most of the 32 communities that reached 10% within the past ten years are suburbs; a few are small cities. They include Bedford, Boxborough, Burlington, Canton, Concord, Danvers, Dedham, Framingham, Franklin, Georgetown, Hadley, Holbrook, Hudson, Lexington, Mansfield, Marlborough, Natick, North Reading, Peabody, Pembroke, Quincy, Raynham, Revere, Stockbridge, Stoughton, Templeton and Westborough.
- Almost all of the communities with very low percentages are small rural communities in central and western Massachusetts.<sup>46</sup>

**Myth #20: Because of the way 40B units are counted, towns aren't able to make any progress towards the 10% goal.**

**Reality: Since 1997, 27 towns have increased their percentages of affordable housing by more than five percentage points and another 32 have raised their percentages by 3-4.99 points.**

**Additional Facts:**

- Among the towns with the greatest percentage increases are: Abington, Acton, Ayer, Bedford, Boxborough, Chester, Chesterfield, Concord, Danvers, Dedham, Georgetown, Hadley, Marlborough, Marlborough, Middlefield, North Reading, Oak Bluffs, Pembroke, Plainfield, Randolph, Raynham, Savoy, Stockbridge, Templeton, Tewksbury, Wales, Westborough and Wilmington.
- Over the years, numerous changes have been made to 40B regulations which allow for the counting of more units on the subsidized housing inventory. This includes: market rate units in rental developments; DMH and DMR group homes; accessory apartments; homeowner rehabilitation units; locally initiated units such as Habitat for Humanity homes; the ability to count units prior to issuance of a building permit; and many others.

**Myth #21: The “Expiring Use” problem shows 40B doesn't work. Virtually all of the affordable units built under 40B will be lost by 2010.**

**Reality: The expiring use problem (the end of long-term use restrictions) stems from the design of federal housing programs in the 1960s through the mid-1980s and has very little to do with 40B.**

**Additional Facts:**

- Less than 8% of the 953 developments in the state's expiring use database used comprehensive permits, as many were built before 40B's constitutionality was established in 1973 or were built in cities that don't use comprehensive permits.
- Rather than creating an expiring use problem, Chapter 40B has been a legal tool to *prevent* expiring use properties from becoming market rate. In 2002, the State Supreme Judicial Court ruled that when a comprehensive permit does not specify the length of time housing units must remain below market, by law, 40B projects must remain affordable for as long as the housing does not comply with local zoning. This means most expiring use projects that used 40B will be required to remain affordable even after their subsidy restrictions expire.<sup>47</sup>

- Current 40B practices limit the likelihood that newer projects will lose their use restrictions. ZBAs began requiring affordability in perpetuity as a condition in their comprehensive permit decisions in the mid-1990s and now most do so routinely.
- The State has also taken steps to ensure that projects approved under 40B are not lost through foreclosure. In 2006, it developed a standard deed rider for homeownership units that survives foreclosure.<sup>48</sup> The state has also instituted procedures to help ensure that homeownership units remain deed restricted upon resale to a new owner.

**Myth #22: Towns don't get any help navigating the 40B process.**

**Reality: Towns are automatically offered grants from the Massachusetts Housing Partnership (MHP) and other assistance when site approval letters are issued.**

**Additional Facts:**

- MHP provides technical assistance grants to make expert consultants available to help cities and towns review and respond to applications for comprehensive permits. To date, over \$1.3 million in grant funds has helped over 110 communities review 215 proposed developments. Other communities have received payments from 40B developers to fund a professional consultant outside the MHP process.
- With this aid, many municipalities and developers have successfully negotiated positive outcomes. Reasonable conditions based on legitimate local concerns are generally upheld by the Housing Appeals Committee.

**Myth #23: 40B violates Proposition 2-1/2 because it is an "unfunded mandate."**

**Reality: 40B developments are subject to the same property tax assessment rules as projects with affordable units that are built without comprehensive permits.**

**Additional Facts:**

- The Local Mandate Law, passed as part of the Proposition 2 1/2 ballot initiative, requires the State to reimburse cities and towns for any new state laws, rules or regulations that impose any direct service or cost obligation upon a city or town, unless the municipality votes to accept the aforementioned law, rule or regulation. The law is triggered if a review by the State auditor, at the request of a locality, determines that a law imposes un-reimbursed costs. It only applies to laws that took

effect on or after January 1, 1981. Chapter 40B is “exempt” from this law because, like hundreds of other state laws, it was enacted prior to 1981.

**Myth #24: 40B is unregulated and developers can get away with whatever they want.**

**Reality: 40B is a highly regulated process.**

**Additional Facts:**

- Over 300 pages of 40B regulations and guidelines were developed over the years covering all aspects of the permitting process and post-construction review and monitoring.
- In February 2008, DHCD codified and consolidated these in a single regulation (760 CMR 56) that also incorporated many of the hundreds of Housing Appeals Committee and court decisions that have shaped 40B policies. In July 2008, it issued updated and consolidated guidelines (84 pages). The regulations and guidelines are available online, and the guidelines contain links to additional explanatory materials.
- The application and approval process for 40B involves an extensive public hearing process. The developer must pay for “peer review” studies of engineering, site planning, traffic impact, environmental review, and other areas. If a permit is issued, it will typically contain 30-50 conditions, far more than typical subdivision permits.
- The updated regulation and guidelines reflect the many additions and updates to the program that occurred between 2000 and 2007, including:

HAC regulations (16 revisions adopted 2001-2003)	25 pages
New England Fund Guidelines (2003)	20 pages
Standard Regulatory and Monitoring Agreements (2003)	49 pages
HAC Guideline changes (2004)	3 pages
MHP Local Review and Decision Guidelines (2005)	24 pages
MassHousing Site/Final Approval Checklists (2003-2006)	13 pages
Smart Growth Guidelines (2006)	6 pages
Universal Deed Rider (2006)	16 pages
Planned Production Guidelines (2006)	6 pages
Lottery Guidelines (2003, 2006)	6 pages
Cost Certifications Guidelines (2007)	55 pages
Updated LIP Guidelines (2007)	112 pages
Application for LIP comprehensive permit (2007)	19 pages

- 40B opponents claim that “once the land is 40B permitted, developers can do almost anything they want, for instance changing the plan from rental to owner-occupied, thus boosting their profits.”<sup>49</sup> This is untrue. Any material change in permit conditions must be approved by the Zoning Board of Appeals. After receiving a

comprehensive permit, the developer must obtain a building permit from the local building inspector and a certificate of occupancy prior to residents moving into the development.

**Myth #25: Two-thirds of what has been added to the subsidized housing inventory has not been done through Chapter 40B.**

**Reality: Since 2001, excluding the cities over 10% that do not use 40B, 57% of the housing units added to the subsidized inventory were the direct result of 40B. The other units primarily include group homes (Department of Mental Health and Mental Retardation), the rehabilitation of existing homeownership units, and the conversion of existing properties to affordable housing.**

**Additional Facts:**

- At the urging of many municipalities, in 2003 the state allowed group homes to count on the subsidized housing inventory. If these group homes are excluded (most of which were added retroactively), 80% of the units added to the subsidized housing inventory since 2001 outside the cities over 10% were the direct result of 40B.<sup>50</sup>

**Myth #26: Communities are being told there is no funding for projects that would consist entirely of 100% affordable units to lower income families earning below 50% of median income.**

**Reality: The Department of Housing and Community Development holds competitive funding rounds each year to create and preserve more affordable housing for low income households. Therefore, it is highly unlikely that state officials would say “there is no funding for projects consisting of 100% affordable units” because these types of developments are funded on a regular basis.**

**Additional Facts:**

- Funding from the following programs are available each year: Affordable Housing Trust Fund; federal low income housing tax credit program; state low income housing tax credit program; Housing Innovations Fund; Facilities Consolidation Fund; Housing Stabilization Fund; Capital Improvement and Preservation Fund; Community-Based Housing Program; Commercial Area Transit Node Program; Transit Oriented Development Bond Program; Project-Based Section 8 Vouchers; and many others.

- Several federal agencies, including the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Agriculture's Rural Housing Service (RHS) also hold annual funding rounds.

**Myth #27: 40B drives up the price of land.**

**Reality: State guidelines require that land value be limited to the appraised value of the property under the existing zoning without a 40B permit. The appraisal must be done by an independent appraiser approved by the state.<sup>51</sup> There is absolutely no evidence that 40B developments have driven up the price of land.**

**Myth #28: The American Planning Association has called 40B “the most regressive planning legislation in the nation.”**

**Reality: The APA has referred to the Chapter 40A zoning law as one of the most regressive in the country, not Chapter 40B.<sup>52</sup> Chapter 40A is a completely different zoning statute. The Massachusetts APA issued a letter requesting that the Coalition to Repeal 40B remove this false information from its web site.**

**Myth #29: The 40B statute doesn't require communities to make 10% of their housing affordable.<sup>53</sup> This was just made up by DHCD through regulations.**

**Reality: Chapter 40B states that local decisions on comprehensive permit applications can be appealed to the Housing Appeals Committee (HAC) if a community is below 10% and hasn't met other land area thresholds. Specifically, it allows developers to appeal local decisions on a comprehensive permit application to the HAC if there is a question as to whether the local decision is “consistent with local needs”.**

Section 20, Paragraph 3, of Chapter 40B clearly states that the local decision “shall be consistent with local needs...in a city or town where (1) low or moderate income housing exists *which is in excess of ten percent* of the housing units (italics added) reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use, or (2) the application before the board would result in the commencement of construction of such housing on sites composing more than three tenths of one percent of such land area, or ten acres, whichever is larger, in any one calendar year...”

**Myth #30: DHCD Regulations Allow Chapter 40B to be Used to Build a Wal-Mart, liquor store or movie theatre within a comprehensive permit project**

**Reality: Under DHCD regulations adopted in response to a State Supreme Judicial Court decision<sup>54</sup> in November 2007, a comprehensive permit project “may contain *ancillary* (italics added) commercial, institutional, or other non-residential uses, so long as the non-residential elements of the Project are planned and designed to: (a) complement the primary residential uses, and (b) help foster vibrant, workable, livable, and attractive neighborhoods *consistent with applicable local land use plans* (italics added) and state sustainable development principles.**

#### **Additional Facts**

- Planners define ancillary use as “a subsidiary or secondary use or operation connected to the main use of a building or piece of land. For example, an ancillary use may be an office supply store (retail) in an area otherwise zoned for offices.”<sup>55</sup>
- Legal analyses<sup>56</sup> of the SJC decision clearly outline its limits, describing it as permitting “limited mixed-use elements in 40B developments”. They note that the Ipswich development proposed a day-care center, a bank and a coffee shop as well as housing. In this case, the commercial elements were all allowed uses as of right and the Ipswich ZBA extended only extended dimensional (setback) relief to those uses as well as the housing. The SJC noted that the legislature intended 40B to be applied with more “flexibility” and that “[e]xtending that flexibility to allow an incidental commercial component under the umbrella of the comprehensive permit...serves to further the development of needed affordable housing.” (Emphasis in the decision). Accordingly, the SJC concluded that “when commercial use is permitted on the property to be developed under the local zoning bylaw... the board...has [the] authority” to override dimensional requirements for an incidental commercial use that is to be part of the 40B project.
- These legal analyses point out that the SJC also stated that “[i]f the proposed housing development were a pretext for commercial development, there would have been a reason to challenge the board’s decision.”

**Myth #31: Each 40B Unit Costs Local Taxpayers \$30,000-\$50,000 over Ten Years<sup>57</sup>**

**Reality: Studies of 40B developments have found that many such projects provide a net fiscal benefit to municipalities. When opponents of 40B claim that each unit developed under Chapter 40B imposes municipal costs that exceed the taxes and fees generated by the unit by \$30,000-50,000 a year, they cite two organizations.<sup>58</sup> One authored a 2000 study<sup>59</sup> for a conservation group in the State of Washington on the incremental cost of providing public facilities when a single family home is developed that found that it is**

**impossible to generalize about such costs because every location is unique. That study also found that “compact development should result in fewer costs to local government over the sprawling alternative” and cited a study by the second group urging zoning reform, especially around density, and a streamlined approval process for compact projects, to reduce sprawl.** <sup>60</sup>

**Additional Facts:**

- A 2007 study by the University of Massachusetts Donahue Institute looking at the impact of eight 40B mixed-income homeownership developments found that in general they “did not have measurable marginal impacts on public services in their municipalities. There were no discernable public safety and general municipal service impacts from the developments.”<sup>61</sup> (As noted earlier, developers are generally responsible for developing and maintaining local roads, building school bus stops, etc.)
- The 2007 University of Massachusetts study also found that an accurate accounting of fiscal impacts requires an assessment of marginal, rather than average costs, over time. Rather than looking at schools costs associated with a given unit at one point in time, school costs should be recognized as applying to all units, as the number of students in a given unit fluctuates as children age.
- A 2004 study for the Town of Plymouth also points out that in discussions of municipal costs associated with residential development, that “average costs” disguise the differences between different types of residential growth and that “sprawling growth of single family homes on large lots bring higher costs in town services...”<sup>62</sup>

## ENDNOTES

- <sup>1</sup> Executive Office for Administration and Finance, Commonwealth of Massachusetts, “Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts”, Boston, MA (October 2000), page iii; Amy Dain, “Housing and Land Use Policy in Massachusetts: Reforms for Affordability, Sustainability, and Superior Design”, Pioneer Institute for Public Policy Research, Boston, MA, February 2007, executive summary and pages 7-9. [http://www.pioneerinstitute.org/pdf/070201\\_wp\\_dain.pdf](http://www.pioneerinstitute.org/pdf/070201_wp_dain.pdf); See also Edward L. Glaeser, Jenny Schuetz and Bryce Ward, “Regulation and the Rise of Housing Prices in Greater Boston”, the Rappaport Institute for Greater Boston, Cambridge MA, January 2006, at [http://www.ksg.harvard.edu/rappaport/downloads/housing\\_regulations/regulation\\_housingprices.pdf](http://www.ksg.harvard.edu/rappaport/downloads/housing_regulations/regulation_housingprices.pdf); See also MIT Center for Real Estate and Massachusetts Housing Partnership, “Housing Affordability Initiative – Land Use Research”, January 2006, at <http://web.mit.edu/cre/research/hai/land-use.html>, including map of changes in historic density at <http://web.mit.edu/cre/research/hai/pdf/relative-density.pdf>.
- <sup>2</sup> Ed Moscovitch, “Open Space, Housing Construction, and Home Prices: What’s the Payoff from Smart Growth?” Massachusetts Housing Partnership, September 2005, page 2.
- <sup>3</sup> Bonnie Heudorfer, “Greater Boston Housing Report Card 2005”, p.48.
- <sup>4</sup> See Citizens Housing and Planning Association and the Massachusetts Housing Partnership, “Taking the Initiative – A Guidebook on Creating Local Affordable Housing Strategies”, Boston, MA (2003) for a comprehensive description of strategies to increase affordable housing [http://www.mhp.net/uploads/resources/taking\\_the\\_initiative\\_guidebook\\_ch\\_111.pdf](http://www.mhp.net/uploads/resources/taking_the_initiative_guidebook_ch_111.pdf).
- <sup>5</sup> [CHAPA](#) analysis.
- <sup>6</sup> Bonnie Heudorfer, “The Record on 40B: The Effectiveness of the Massachusetts Affordable Housing Zoning Law”, Citizens Housing and Planning Association, Boston, MA, June 2003, p.25.
- <sup>7</sup> Bonnie Heudorfer and Barry Bluestone, “The Greater Boston Housing Report Card 2005-2006”, prepared by The Center for Urban and Regional Policy (CURP), Northeastern University, September 2005, page 49. <http://www.curp.neu.edu/pdfs/HRC%202005-2006.pdf>.
- <sup>8</sup> Bonnie Heudorfer and Barry Bluestone, “The Greater Boston Housing Report Card 2006-2007”, prepared by The Center for Urban and Regional Policy (CURP), Northeastern University, for The Boston Foundation and Citizens’ Housing and Planning Association, October 2007, pages 34, 55 and 56 <http://www.chapa.org/pdf/HousingReportCard20062.pdf>, and “The Greater Boston Housing Report Card 2005-2006”, page 50. <http://www.chapa.org/pdf/HousingReportCard2005.pdf>.
- <sup>9</sup> Municipal Coalition for Affordable Housing web site <http://www.mcahinfo.org>.
- <sup>10</sup> Peter W. Salsich, “The Impact of Land Use Laws on Affordable Housing”, see page 28 <http://www.ewgateway.org/pdf/BluePrintDocs/LandUseLaws.pdf>. See also: Dennis Keating, “Regional Fair Share Housing in the United States: The Case of the Massachusetts Anti-Snob Zoning Act (1969-2003), ASCP-AESOP Joint Congress, Leuven, Belgium, (12 July 2003); Stuart Meck, “Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change, American Planning Association, 2002, page 4-76. See also Rusty Russell, “Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?”, Boston College Environmental Law Review, available through HUD’s website: <http://www.huduser.org/rbc/search/rbcdetails.asp?DocId=813>
- <sup>11</sup> Bonnie Heudorfer and Barry Bluestone, “The Greater Boston Housing Report Card 2006-2007”, page 67.
- <sup>12</sup> Letter from Danilo Pelletiere, National Low Income Housing Coalition to Kevin Welch, Municipal Coalition for Affordable Housing, dated June 20, 2007.
- <sup>13</sup> Keith Wardrip, Danilo Pelletiere and Sheila Crowley, “Out of Reach 2009”, National Low Income Housing Coalition, Washington, D.C. , April 2009. Their data on the ratio of estimated market rate rents to average renter household incomes by state shows that Massachusetts is only 2% above the national average despite our high energy costs. Report and data available online at <http://www.nlihc.org/oor/oor2009/>

- <sup>14</sup> Danilo Pelletiere and Keith Wardrip, “Housing at the Half: A Mid-Decade Progress Report from the American Community Survey”, National Low Income Housing Coalition, Washington, D.C., (February 2008). [http://www.nlihc.org/doc/Mid-DecadeReport\\_2-19-08.pdf](http://www.nlihc.org/doc/Mid-DecadeReport_2-19-08.pdf) The study found that 75% of extremely low income renter households paid more than 30% of income for rent, compared to 85% nationwide and that 68% of very low income renter households in Massachusetts paid more than 30% compared to 74% nationwide.
- <sup>15</sup> “HUD Honors Four Communities with Robert L. Woodson, Jr. Award for Reducing Regulatory Barriers to Affordable Housing”, HUD Press Release 06-067, June 15, 2006  
<http://www.hud.gov/news/release.cfm?content=pr06-067.cfm>.
- <sup>16</sup> Peter W. Salsich, “The Impact of Land Use Laws on Affordable Housing”, see page 28  
<http://www.ewgateway.org/pdf/BluePrintDocs/LandUseLaws.pdf>. See also: Dennis Keating, “Regional Fair Share Housing in the United States: The Case of the Massachusetts Anti-Snob Zoning Act (1969-2003), ASCP-AESOP Joint Congress, Leuven, Belgium, (12 July 2003); Stuart Meck, “Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change, American Planning Association, 2002, page 4-76.
- <sup>17</sup> Susan Jones Moses Associates and Goody Clancy, “South Coast Rail Corridor Plan: Appendix D: New Tools for the Smart Growth/Smart Energy Toolkit”, prepared for the Massachusetts Executive Office of Transportation, June 2009
- <sup>18</sup> Based on 70% of the 2007 U.S. Department of Housing and Urban Development (HUD) area median income for Greater Boston for a household of three.  
<http://www.mass.gov/dhcd/components/housdev/HUDincme.pdf> The income limits for affordable units vary by household size, geographic region and program. Some programs are limited to households with incomes at or below 30% while others may serve households with incomes up to 80% of median. Even at the upper income limit of 80%, however, state regulations require that units be priced to be affordable at 70% of median.
- <sup>19</sup> CHAPA database of 40B homebuyers since 1999.
- <sup>20</sup> Income figures based on HUD 2007 Income limits for Greater Boston household of three. Numbers of units affordable at 50% and 60% of median based on CHAPA database of 40B developments.
- <sup>21</sup> See DHCD guidelines on setting 40B sale prices, available online at  
[http://www.mass.gov/?pageID=eheadterminal&L=3&L0=Home&L1=Community+Development&L2=Chapter+40B+Planning&sid=Ehed&b=terminalcontent&f=dhcd\\_cd\\_ch40b\\_saleprices&csid=Ehed](http://www.mass.gov/?pageID=eheadterminal&L=3&L0=Home&L1=Community+Development&L2=Chapter+40B+Planning&sid=Ehed&b=terminalcontent&f=dhcd_cd_ch40b_saleprices&csid=Ehed)
- <sup>22</sup> Bonnie Heudorfer, “Update on 40B Housing Production”, Citizens Housing and Planning Association, Boston, MA, March 2007, p.22. <http://www.chapa.org/pdf/40BUpdate2007.pdf>.
- <sup>23</sup> Bonnie Heudorfer and Barry Bluestone, “The Greater Boston Housing Report Card 2006-2007”, Table 5.2, page 52.
- <sup>24</sup> Ed Moscovitch, “Open Space, Housing Construction, and Home Prices: What’s the Payoff from Smart Growth?” Massachusetts Housing Partnership, September 2005, page 2.
- <sup>25</sup> DHCD regulations adopted in 2008 require plans to be updated every five years. Seventeen communities with recently expired plans have not yet updated them (some have reached 10% or are temporarily appeal proof).
- <sup>26</sup> Housing Policy Brief: “The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the San Francisco, Washington D.C. and Suburban Boston Areas”, Center for Housing Policy – Furman Center for Real Estate and Urban Policy, New York University, March 2008.  
[http://furmancenter.org/files/IZPolicyBrief\\_LowRes.pdf](http://furmancenter.org/files/IZPolicyBrief_LowRes.pdf) “Inclusionary Housing: Lessons Learned from Massachusetts”, NHC Affordable Housing Policy Review, Washington, D.C., January 2002.  
[http://www.mhp.net/uploads/resources/inclusionary\\_zoning\\_lessons\\_learned.pdf](http://www.mhp.net/uploads/resources/inclusionary_zoning_lessons_learned.pdf); Minnesota Housing

- Finance Agency, “Study of Inclusionary Housing Initiatives: Report to the Legislature”, February 2002, see p. 11 and p. 23. <http://www.mhfa.state.mn.us/about/InclusionReport.pdf>.
- <sup>27</sup> Clark Ziegler “Inclusionary Zoning: Lessons Learned in Massachusetts - Introduction” page 1 and Philip B. Herr, “Zoning for Affordability in Massachusetts: An Overview, page 3, NHC Affordable Housing Policy Review, Volume 2, Issue 1, January 2002  
[http://www.mhp.net/uploads/resources/inclusionary\\_zoning\\_\\_lessons\\_learned.pdf](http://www.mhp.net/uploads/resources/inclusionary_zoning__lessons_learned.pdf)
- <sup>28</sup> CHAPA analysis, based on the Pioneer Institute’s Housing Regulation Database (2004) spreadsheet on inclusionary zoning, updated to reflect data from other sources including zoning decisions when available online. Supplementary data sources include DHCD’s August 2007 Subsidized Housing Inventory and its April 2007 LIP Units Only pipeline, as well as reports from the cities of Brookline (July 2007), Newton (2007), Cambridge (2006) and Boston (March 2007).
- <sup>29</sup> “How much does it cost to “buy down” and properly deed-restrict an existing unit of housing”, Massachusetts Affordable Housing Education Initiative, Frequently Asked Questions  
<http://www.affordable-housing-initiative.com/faq.html>
- <sup>30</sup> Under regulatory agreements governing each 40B development, any profit in excess of the profit limit must be paid to the town, but the town must use these funds for affordable housing production or other affordable housing programs. The town is not allowed to use these funds for other town expenses, such as police, fire, or schools.
- <sup>31</sup> <http://www.mass.gov/Ehed/docs/dhcd/legal/cpaprequalifiedlist.doc>
- <sup>32</sup> Amy Dain, “Residential Land Use Regulation in Eastern Massachusetts”, A Joint Project of the Pioneer Institute and the Rappaport Institute, December 2005, page 32.  
[http://www.pioneerinstitute.org/municipalregs/pdf/land\\_use\\_regulation.pdf](http://www.pioneerinstitute.org/municipalregs/pdf/land_use_regulation.pdf).
- <sup>33</sup> Pioneer Institute Land Use database matched with State DOR 1999 average per capita income data by community.
- <sup>34</sup> Rankings are based on the 2000 Census per capita income.
- <sup>35</sup> *Stuborn Ltd. Partnership v. Barnstable Board of Appeals*, No. 98-01 (September 18, 2002); *Harbor Glen Assoc. v. Hingham*, No. 80-6, slip op. at 12-14 (Mass. Housing Appeals Committee August 20, 1982); *KSM Trust v. Pembroke*, No. 91-02, slip op. at 5-8 (Mass. Housing Appeals Committee November 18, 1991).
- <sup>36</sup> Susan Jones Moses, “Affordable Housing and Open Space: Creative Partnership for Success.” Powerpoint presentation. Includes numerous 40B developments.
- <sup>37</sup> Community Opportunities Group, Inc. “Housing the Commonwealth’s School-Age Children: The Implications of Multi-Family Housing Development for Municipal and School Expenditures”, prepared for Citizens’ Housing and Planning Association, Boston, MA (August 2003), see Executive Summary.  
<http://www.chapa.org/pdf/HousingSchoolAgeChildren.pdf>.
- <sup>38</sup> Eric Nakajima et al., “The Fiscal Impact of Mixed Income Housing on Massachusetts Municipalities,” UMass Donahue Institute, May 2007, page 2.
- <sup>39</sup> Massachusetts Department of Education, “long Term Trends in Enrollment FY1999 to FY2009”, see <http://finance1.doe.mass.edu/schfin/statistics/enrollment.aspx?mode=L&ID=83> and “Chapter 70 Trends, FY99 Through FY09”, see <http://finance1.doe.mass.edu/schfin/Chapter70/profile.aspx?ID=999>
- <sup>40</sup> Eric Nakajima, et al, “Mixed Income Housing and the Municipal Bottom Line,” MassBenchmarks 2007, Volume Nine, Issue 2, page 10.
- <sup>41</sup> Bonnie Heudorfer, “Update on 40B Housing Production”, page 19.
- <sup>42</sup> MIT Center for Real Estate, “Chapter 40B Permitting and Litigation”, May 2007, Cambridge, MA, see “Total Application Tree”. [http://web.mit.edu/cre/research/hai/pdf/timeline\\_bw%20\(2\).pdf](http://web.mit.edu/cre/research/hai/pdf/timeline_bw%20(2).pdf).

- <sup>43</sup> Bonnie Heudorfer and Barry Bluestone, “The Greater Boston Housing Report Card 2006-2007”, Appendix A.
- <sup>44</sup> The median gross rent (all bedroom sizes) for Greater Boston rose by 18% between 2001 and 2006 to \$933. HUD’s fair market rent (the 40<sup>th</sup> percentile rent for a recently occupied, non-luxury unit in a building at least two years old) for a two-bedroom unit in Greater Boston rose by 55% between FY 1998 and FY 2008, from \$874 to \$1,352.
- <sup>45</sup> U.S. Census, American Community Survey 2005, Massachusetts, Table B25121 and Table B25122.
- <sup>46</sup> A total of 64 communities are currently “appeal proof” under Chapter 40B. In addition to the 55 that have reached 10%, three have met the 1.5% land area standard (Weymouth, Somerville, Watertown) and 5 others have one to two-year exemptions because they met their planned production goals in recent years. These 64 communities include 41 of the 161 cities and towns in Greater Boston.
- <sup>47</sup> Zoning Board of Appeals of Wellesley v. Ardmore Apartments Limited Partnership.
- <sup>48</sup> See <http://www.mass.gov/Ehed/docs/dhcd/hd/lip/lipdeedrider.pdf>
- <sup>49</sup> See <http://www.repeal40b.com/Summary-Repeal40B-Petition.pdf>.
- <sup>50</sup> DMR/DMH group homes and homeowner rehabilitation loan programs accounted for approximately 15,300 of the 240,079 “40B” units in the August 2007 Subsidized Housing Inventory (SHI) count. Almost all of 10,666 DMR/DMH units were added after 2001, as a result of the policy decision to include them in the count, though many were developed prior to 2001.
- <sup>51</sup> See “Guidelines for Housing Program in Which Funding is Provided Through a Non-Governmental Entity,” page 14 and “Local 40B Review and Decision Guidelines,” Massachusetts Housing Partnership, November 2005, page 13.
- <sup>52</sup> Letter from Peter Lowitt, Chair of the American Planning Association, Massachusetts Chapter (10/31/07).
- <sup>53</sup> Craig Chemaly, director of the Slow Growth Initiative, “Chapter 40B is Misguided and Beyond Repair, Commentary, The Patriot Ledger, July 8, 2009.
- <sup>54</sup> *Jepson v. Zoning Board of Appeals of Ipswich*, 450 Mass. 81 (November 20, 2007) Available online at <http://masscases.com/cases/sjc/450/450mass81.html>
- <sup>55</sup> Retrieved from "[http://planningwiki.cyburbia.org/Ancillary\\_use](http://planningwiki.cyburbia.org/Ancillary_use)"
- <sup>56</sup> see Martin Fantozzi, Kevin O’Flaherty and David Weiss, “New SJC Ruling Extends 40B Provisions to Commercial Aspects of Mixed-Use 40B Projects” <http://www.goulstonstorrs.com/portalresource/lookup/wosid/contentpilot-core-6-3105/pdf.pdf> and Mintz Levin Housing Advisory, “SJC Rules That Chapter 40B Allows Commercial Use Within An Affordable Housing Development” [http://www.mintz.com/newsletter/2007/Housing\\_1217\\_Adv\\_40B-Jepson/index.htm](http://www.mintz.com/newsletter/2007/Housing_1217_Adv_40B-Jepson/index.htm)
- <sup>57</sup> Massachusetts Slow Growth Initiative mailing in Duxbury, Marblehead and other communities in 2009 “What Does 40B Mean for You”
- <sup>58</sup> The groups cited are (1) Fodor and Associates and the Columbia Public Interest Policy Institute (a nonprofit in located in Bellevue, Washington), which collaborated on a study of the cost of new development in the state of Washington, and (2) the American Farmland Trust.
- <sup>59</sup> Fodor and Associates and the Columbia Public Interest Policy Institute, “The Cost of Growth in Washington State – Executive Summary”, Columbia Public Interest Policy Institute, Bellevue, WA, 2000, page 1. [http://www.fodorandassociates.com/Reports/COG\\_WA\\_2000\\_Exec\\_Sum.pdf](http://www.fodorandassociates.com/Reports/COG_WA_2000_Exec_Sum.pdf) (executive summary). The full report is available online at [http://www.fodorandassociates.com/Reports/COG\\_WA\\_2000\\_Full\\_Rpt.pdf](http://www.fodorandassociates.com/Reports/COG_WA_2000_Full_Rpt.pdf)
- <sup>60</sup> Fodor and Associates and the Columbia Public Interest Policy Institute, pages 3-4. See also, Steven Moss for the American Farmland Trust, “Smart Growth Versus Sprawl in California: How State and Local Public Policies Perpetuate Inefficient Development in the World’s Most Productive Agricultural Valleys”, May

1999, page 22. Available online at  
[http://www.farmlandinfo.org/documents/30391/SMART\\_GROWTH\\_VERSUS\\_SPRAWL\\_IN\\_CALIFORNIA\\_MAY\\_1999.pdf](http://www.farmlandinfo.org/documents/30391/SMART_GROWTH_VERSUS_SPRAWL_IN_CALIFORNIA_MAY_1999.pdf)

<sup>61</sup> Eric Nakajima, et al, "Mixed Income Housing and the Municipal Bottom Line," MassBenchmarks 2007, Volume Nine, Issue 2, page 10.

<sup>62</sup> Plymouth Planning Board Master Plan Committee, "Growing Smarter in Plymouth's Fifth Century: A Strategic Action Plan", Town of Plymouth, MA, October 2004, page 5.