

Chapter 40B Task Force

Findings and Recommendations

Report to Governor Mitt Romney
May 30, 2003

The Chapter 40B Task Force Website:
<http://www.state.ma.us/dhcd/Ch40Btf/>

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Executive Summary

Purpose of the Task Force

Governor Romney established the Chapter 40B Task Force in February 2003. The Task Force is composed of members of the Legislature, state-housing officials, municipal and regional officials, and stakeholders representing development and environmental interests.

The Governor, in announcing the creation of the Task Force, noted that MGL Chapter 40B, enacted in 1969 to create affordable housing for low- and moderate-income residents of the Commonwealth, has facilitated the development of approximately 30,000 homes in Massachusetts. In addition, he noted that the statute and its regulatory framework are in need of comprehensive review in order to ensure that the need to create affordable (as well as market-rate) rental and homeownership housing is balanced appropriately with other municipal concerns.

The Governor acknowledged that there are approximately 70 bills filed with the Legislature that would significantly weaken or repeal Chapter 40B. He requested that the Legislature delay its review of those bills until the Task Force has completed its mission in evaluating the statute and its impacts, and made recommendations to improve the law and its implementation. He further asked that the Task Force deliver a report of its findings and recommendations to him by May 30, 2003.

In order to allow stakeholders to keep apprised of the Task Force proceedings, a central web page was established (<http://www.state.ma.us/dhcd/Ch40Btf/default.htm>) that included all minutes, agendas, presentations and information submitted to the Task Force. In addition, the web page contained an opportunity for visitors to disseminate relevant information to Task Force members and have additional information posted on the website.

The Task Force has completed its mission in the time frame requested by the Governor and promised to the Legislature, and has achieved consensus on a comprehensive group of recommendations that will balance the need to mitigate Massachusetts' housing crisis with other municipal objectives, and will help to ensure the Commonwealth's future economic viability and vitality.

Questions Presented

The Governor provided the framework for a focused discussion of the issues related to Chapter 40B in order to provide guidance to him and to the Legislature on how to evaluate the numerous bills that have been filed to change the Comprehensive Permit Law. The purpose of the Task Force was to:

1. Reaffirm the need to increase the supply of housing, a portion of which should be affordable to households earning less than 80% of area median income.

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2. Assess the effectiveness of Chapter 40B to address the aforementioned need.
3. Identify the impacts created by Chapter 40B and determine whether they are commensurate with the public benefit.
4. Propose modifications that would mitigate harmful impacts or that would improve the effectiveness of Chapter 40B.

Findings

The Task Force determined that while Chapter 40B was enacted 34 years ago, only a small number (31) of the Commonwealth's 351 communities have reached their affordable housing goals. While some communities have been very active in reaching (or nearly reaching) their affordable housing goals, many communities have done very little. Indeed, 230 communities have attained less than five percent (5%) on the subsidized housing inventory, and very few communities have taken active steps to create affordable housing through local programs. The reasons for this performance include: that provision of such housing has not been considered a central function of local government; there are many barriers to housing production including restrictive land use practices and the high cost and limited availability of developable land; and a desire on behalf of communities' residents to maintain the characteristics of the communities in which they live.

Nonetheless, the Task Force has reaffirmed the need to increase the supply of housing, a portion of which should be affordable to households earning less than 80% of area median income. The Task Force consistently noted that Massachusetts has among the highest housing costs in the nation, and housing development, for a multitude of reasons, is extremely difficult to permit in Massachusetts. In particular, multifamily housing is rarely permitted, and Chapter 40B is effectively the only tool to create multifamily housing in many cities and towns in the Commonwealth.

In its deliberations, and based upon data and expert testimony, the Task Force assessed the effectiveness of the statute. Since it is undisputed that the statute has facilitated the production of nearly 30,000 units of housing in nearly 500 developments, most, but not all, members agreed that the statute has been an effective means to address housing need, although there still exists tremendous excess demand for housing in the Commonwealth. Thirty-four percent (34%) of all affordable units constructed in the Commonwealth since 1969 have been built using comprehensive permits while nearly 30,000 total units have been developed under this law. There was unanimous agreement on the Task Force that there is significant unmet demand for housing in Massachusetts.

Furthermore, the Task Force received hours of verbal testimony from representatives from community groups (as well as volumes of written testimony) and deliberated at length on the impacts of housing, including, but not limited to fiscal, school (capital and operational), water, sewer, and public safety impacts, as well as impacts on neighbors to proposed housing developments. Generally, there was acknowledgement among the

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members that impacts can be balanced with the public benefits that accrue when a community's housing needs are met, but that each type of impact should be evaluated by the Task Force to determine the appropriate means of mitigation. Municipal officials serving on the Task Force acknowledged that the incremental costs of new housing development may be overestimated, noting that increased operational costs associated with new students are not great, but increased capital costs to build new schools when existing schools reach capacity is exorbitant.

The Task Force, by consensus, proposed seventeen modifications to mitigate legitimate impacts of Chapter 40B and its implementation, as well as recommendations to improve its effectiveness. Generally, the recommendations fall into the following categories, with examples of each:

Consistency and Equity: It is important to recognize that communities are differently situated with respect to available land, the physical and geographic constraints of available land, as well as existing housing stock, housing need, and the degree to which the community has engaged in planning to meet its housing need. Therefore, it is essential that such differently situated communities be treated consistently and equitably with respect to attainment of their housing goals on the subsidized housing inventory. The Task Force identified the following issues and made recommendations to achieve greater consistency and equity:

1. Issue:

Rental and homeownership units are not counted consistently on the subsidized housing inventory although both types of developments receive zoning relief from communities. In order to provide an incentive to create rental housing, (which is typically extremely difficult to permit) all rental units count toward a community's affordable housing goals on the subsidized housing inventory if at least 25% serve low- or moderate-income households. In homeownership developments, only units serving low- or moderate-income households count toward a community's affordable housing goals.

Recommendation:

Because housing units authorized pursuant to Chapter 40B have been granted zoning relief by the community, such units developed under a comprehensive permit should count more equitably toward a community's affordable housing goals. In order to achieve greater equity while preserving an incentive to create multifamily rental housing (which is typically difficult to permit), in homeownership developments, two times the number of deed-restricted units serving low- or moderate-income households will count toward the community's housing goals, not to exceed the total number of homeownership units authorized by the comprehensive permit. This recommendation also provides an incentive for communities to negotiate with developers to increase the number of affordable homeownership units within a development (since the units will be credited toward

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the community's housing goals at twice the current rate) thereby potentially increasing the total number of new affordable homeownership units.

2. Issue:

Manufactured housing (also known as mobile homes) may present a safe, decent, affordable housing opportunity for low- or moderate-income households.

Recommendation:

Manufactured housing and the opportunity it presents as a relatively low-cost housing option is an issue in need of further study. The Task Force acknowledged that it requires further study by DHCD and the Legislature's Joint Committee on Housing and Urban Development in consultation with the Manufactured Housing Commission.

3. Issue:

It is sometimes impracticable or impossible to issue a building permit within one year from the date a comprehensive permit is issued. The regulation that requires a building permit be issued within one year from a comprehensive permit's finality (at which time units authorized by the comprehensive permit count toward a community's housing goals) could be waived by DHCD if a site requires improvements that would make it impracticable for a building permit to be issued within one year, or for other demonstrated good cause.

Recommendation:

Units authorized by a comprehensive permit should count on the subsidized housing inventory when the comprehensive permit becomes final, provided that building permits are issued within 1 year, but DHCD may waive this provision to allow such units to count for a longer period of time if good cause is evidenced.

This recommendation provides protection for communities which are seeking to permit and build affordable housing in good faith, but are constrained in their ability to issue permits by factors outside their control.

Local Capacity and Technical Assistance: Different communities have different capacity with respect to planning and other professional staff as well as other volunteer boards to evaluate Chapter 40B proposals. Therefore, it is reasonable to respect these limitations and provide increased technical assistance for communities reviewing housing proposals under Chapter 40B in order to balance these constraints with the intent of the statute. Therefore, the Task Force identified the following issues and made recommendations to address local capacity constraints and increase technical assistance:

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4. Issue:

In some communities, zoning boards are inundated with multiple comprehensive permit applications at a particular time.

Recommendation:

If applications for comprehensive permits are pending during the prior nine-month period which would authorize the production of low- or moderate-income housing equal to or greater than two percent of the total year-round housing units within the municipality, a zoning board could deny (or condition) a comprehensive permit application.

Alternatively, in municipalities which have affordable housing plans that have been approved pursuant to the "Planned Production" Regulation (760 CMR 31.07(1)(i)), the number of required low- or moderate-income housing units proposed in the pending applications would be reduced to 0.5% of total housing units. This would provide an additional incentive for communities to plan to meet their affordable housing goals. If, however, a community which has denied a comprehensive permit (or granted one with conditions) based on this new regulation later fails to meet its annual affordable housing goals as identified in its plan, it would no longer be able to use this newly created provision to deny comprehensive permits (or grant them with conditions).

This recommendation addresses the capacity of local boards to evaluate a large number of comprehensive permits concurrently, while encouraging them to evaluate a more limited number of applications expeditiously, and also encourages communities to plan for and build housing that meets their needs.

5. Issue:

Not all communities have experience with Chapter 40B and require technical assistance to fully understand their rights and responsibilities under the law.

Recommendation:

A fund should be established and managed by the Massachusetts Housing Partnership to provide technical assistance to help cities and towns review and respond to applications for comprehensive permits. All Massachusetts state agencies that qualify projects to apply for comprehensive permits shall collect fees to support this fund prior to issuing a determination of Project Eligibility. The Department of Housing and Community Development shall approve the fee structure and monitor the effectiveness of the program.

This recommendation provides a funding source to assist communities in evaluating comprehensive permit applications in an informed manner, which improves the process for both the community and the developer.

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6. Issue:

Communities and developers must seek information from a multitude of sources in order to make informed decisions about all aspects of housing development in general, and affordable housing development under Chapter 40B in particular.

Recommendation:

DHCD will provide a comprehensive online "Planning and Housing Development Toolkit." At a minimum, the Toolkit will contain a complete listing and criteria for public financial resources for housing development, guidance for communities and developers with respect to the development process including lottery and marketing procedures, income guidelines, model documents including deed riders and regulatory agreements, a consultant database to facilitate the development process, tools for community planning including housing needs assessment tools and examples of zoning bylaws through which communities' housing needs can be met, examples of how communities can achieve their planning and housing goals outside the Chapter 40B process, a calendar of trainings and other events, and links to useful websites. Contact information for local boards will also be made available. This resource will be enhanced and updated regularly. Print materials will be made upon request to accommodate parties without online access.

Improving the Chapter 40B Process: The Task Force deliberated at length with respect to the Chapter 40B process, with particular emphasis on the early part of the process, prior to the determination of project eligibility. Members agreed that sharing information early in the process, together with developing a complete understanding of the rights and responsibilities of local boards, subsidizing agents, and project administrators is essential to ensure the best possible outcome for all parties involved. The Task Force identified the following issues and recommendations to improve the process:

7. Issue:

Once a developer applies for a determination of Project Eligibility, it is sometimes difficult for local boards and other interested parties to provide meaningful comments on the project to the subsidizing agency. In addition, it is essential that local boards and interested parties develop an understanding of the Chapter 40B process.

Recommendation:

Improve the Chapter 40B process to ensure an efficient process in which the needs of the developer and municipality are met. This can be achieved by: encouraging local housing partnerships to endorse a proposal before it is submitted to the zoning board; informing all local boards when a development is proposed and encouraging them to submit written comments that the subsidizing agent must address before a determination of project eligibility can be made; allowing the municipality to require a meeting with the developer during the public comment period to informally discuss

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the preliminary proposal with representatives of local boards; and increasing the amount of information about the project that is contained in the determination of project eligibility so that the proposal is well understood early in the process.

8. Issue:

Principles of sustainable development and "smart growth" are not a prominent factor in determinations of project eligibility.

Recommendation:

Subsidizing agencies, in making a determination of project eligibility, shall take into consideration the following factors to ensure the project is appropriate to the site: density and size; degree of affordability; principles of sustainable development and "smart growth"; community impact and consistency with housing need; impact on historical resources; and the impact of other pending applications for housing development.

9. Issue:

There is currently a significant backlog at the Housing Appeals Committee.

Recommendation:

Noting that there is a significant backlog at the Housing Appeals Committee which may be partially attributable to its hearing procedures and staffing and capacity constraints, the Task Force recommends that the Director of Department of Housing and Community Development appoint an *ad hoc* Housing Appeals Committee Regulations Advisory Committee. The committee shall evaluate the current Housing Appeals Committee hearing procedures, (and model guidelines) and recommend regulatory changes to be promulgated by the Director to improve and expedite those procedures. In addition, the committee will consider whether abutter appeals should be adjudicated by the Housing Appeals Committee. The committee shall consist of a cross-section of experienced legal practitioners and others representing municipalities, developers, non-profit organizations, and housing advocates. The Task Force recommends that the Director establish and describe the mission of the advisory committee, and identify its members by July 1, 2003, and further recommend that the committee deliver a report of its findings and recommendations to the Governor no later than November 1, 2003.

In addition, the Director of DHCD shall evaluate methods by which staffing and capacity of the Housing Appeals Committee could be increased.

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This recommendation is intended to improve the Chapter 40B Appeals process, which could expedite the permitting and building of a significant number of housing units while dismissing projects which are not consistent with local needs.

Technical Improvements to Chapter 40B: The Task Force agreed that certain technical improvements could be made to improve administration of the statute. These include the following:

10. Issue:

Currently, changes to the official subsidized housing inventory are published biennially, while a community's actual progress toward affordable housing goals should be updated publicly as progress is achieved.

Recommendation:

DHCD shall update a specific community's attainment on the official subsidized housing inventory at the community's request and shall make the updated inventory available on the Department's website and in print upon request.

This recommendation will allow communities to demonstrate progress toward their housing goals at an earlier point in the development process, which fosters local control over housing development.

11. Issue:

Developments financed by the New England Fund which received determinations of project eligibility prior to the 2002 regulatory changes (which require a project administrator to issue those determinations, as well as final approval, and ensure compliance with program guidelines) could benefit from the assistance of a project administrator if both the developer and the municipality agree that such assistance would be beneficial.

Recommendation:

DHCD will develop a mechanism by which a developer and a community may, at their option, utilize the services of a project administrator to facilitate a project in a way that meets the objectives of both the developer and the community. The project administrator responsibilities may include, but may not be limited to, conducting project review meetings, ensuring that minimum design and construction and environmental standards are met, as well as the requirements for proper regulatory agreements, use restrictions, income limitations, affordability, and marketing.

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This recommendation would facilitate and expedite the permitting of developments which are currently under consideration by zoning boards of appeals, and could also improve the development process and long-term monitoring of the use restrictions.

Community Impact and Community Needs: Noting that different communities have different infrastructure, capacity, housing needs, and land characteristics the Task Force made several recommendations to address differently situated communities' needs. These include the following:

12. Issue:

Certain provisions of the State Zoning Act (MLG Chapter 40A) and the Subdivision Control Law (MGL Chapter 41) could limit municipalities' ability to engage in effective land use planning which could encourage "smart growth" within communities and facilitate housing development.

Recommendation:

The Administration should study the potential for reform to these statutes to facilitate effective land use, foster "smart growth," and facilitate housing development. To this end, the Task Force recommends that the Administration further examine this issue, and if it so determines, establish a Chapter 40A Task Force to do so.

13. Issue:

Communities sometimes determine that developments are too dense for the parcel under consideration. In addition, developments should meet "smart growth" objectives and should be appropriate to the site for which they are proposed.

Recommendation:

Determinations of Project Eligibility shall make findings that the density of the proposed development is appropriate to the site.

The Task Force acknowledges that the density guidelines used by MassHousing and the Department of Housing and Community Development for homeownership developments (the greater of 8 units per acre or four times surrounding density) have generally been very effective.

The Task Force recommends that each funding agency in Massachusetts adopt guidelines for considering project design and density for rental developments – under the general oversight of DHCD. Generally these agency guidelines should:

- encourage smart growth in proximity to services, utilities and transportation

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- require rental development in outlying areas to be compact so that it reduces lot area coverage, preserves open space, and minimizes adverse impacts
- not set absolute density limits since that would discourage smart growth development and promote sprawl

14. Issue:

Many municipalities are facing severe budget deficits and are ill equipped to meet existing municipal costs, as well as those associated with new housing growth.

Recommendation:

The Governor and the Legislature should establish a new "growth aid" fund to provide financial assistance to communities commensurate with the costs of housing growth. The fund should provide for the incremental school costs of educating additional children associated with the creation of housing affordable to low- or moderate-income residents. The local aid allocation should be given out over a ten-year period based on the average number of school-aged children per bedroom in the new units. The aid should be calculated based on the community's total per pupil expenditure rate, set by the Department of Education, minus the amount of Chapter 70 assistance a community receives per student. The "growth aid" fund is intended to be a new resource, and is not intended to be a reallocation of existing resources.

This recommendation is intended to assist communities in meeting incremental costs of housing.

15. Issue:

The Commonwealth should encourage municipalities to plan for housing growth in a manner consistent with sustainable development objectives. In addition, it should respect municipalities' abilities to increase their housing stock at a pace that is manageable.

Recommendation:

Recognizing that sustainable development ("smart growth") objectives are an essential component of effective land use planning, such objectives should be incorporated to the regulation for planned housing production.

Further recognizing that the threshold requirement to plan for and produce 0.75% of total housing units each year may be excessive and/or untenable for some municipalities, the threshold production goal should be reduced to 0.5% of total housing units. In addition, communities should be granted a longer period (up to

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three years) of relief from comprehensive permits if they choose to plan for, permit, and build a greater number of units during a particular calendar year.

The Task Force expects that modifying this threshold will increase the number of communities that develop and build housing pursuant to such plans, and ultimately, will result in alleviating the housing crisis in a manner consistent with sustainable development objectives.

16. Issue:

Some contiguous communities share the impacts, but not necessarily the benefits of affordable housing developments.

Recommendation:

Contiguous communities may determine that it is mutually advantageous to share the costs and impacts of developments located near a municipal boundary, or which cross municipal boundaries. Under such circumstances, those communities should be allowed to share in the credit toward their respective housing goals, as long as no unit is counted more than once. Accordingly, such contiguous communities may enter into memoranda of understanding whereby the communities share infrastructure and service costs, and share credit toward their affordable housing goals, subject to approval by DHCD. If such memoranda are approved by DHCD, the credit toward affordable housing goals will be reflected on the subsidized housing inventory pursuant to the approved memoranda.

This recommendation would allow neighboring communities to share equitably in the costs and benefits associated with housing growth.

17. Issue:

To address regional housing needs on a regional basis and to provide communities with an alternative to meeting the statutory minima pursuant to Chapter 40B that reflects local and regional capacity, infrastructure, and housing needs, contiguous communities should be permitted to enter into contractual agreements to achieve their regional affordable housing goals.

Recommendation:

Contiguous communities may collaborate to form a "housing region" to address regional housing needs. Such communities may agree to meet their housing goals under Chapter 40B within the defined region, as long as the goal computed for the region is equal to or greater than the sum of the statutory minimum number of housing units of the member communities. In order to collaborate to form such a region, the following requirements must be met:

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- The contiguous communities must have attained at least 5% and not exceeded 10% toward their affordable housing goals on the subsidized housing inventory.
- The contiguous communities must enter into an intermunicipal agreement and develop a housing plan consistent with sustainable development goals established by the Commonwealth and in regional plans.
- The agreement and plan must address how the communities will share the infrastructure or service costs and benefits of low- and moderate-income housing development, and how credit for such affordable housing development will be reflected on the subsidized housing inventory.
- The plan must address how contiguous communities will achieve their collective housing goals. The total housing goals in the region shall be at a minimum, the sum of the minimum goals (established by MGL Chapter 40B, section 20) of each community participating in the plan.
- The plan must also demonstrate that the communities participating in the regional plan are creating or maintaining zoning districts suitable for the creation of multi-family rental housing.
- DHCD must develop guidelines for all such intermunicipal agreements and plans.
- DHCD must approve all such intermunicipal agreements and plans, after considering comments from the regional planning agency.
- DHCD may limit the number of such intermunicipal agreements it approves each calendar year from 2003-2006 as a pilot program so that such program may be appropriately monitored.
- Under no circumstance will any unit eligible for inclusion on the subsidized housing inventory developed pursuant to such intermunicipal agreements count more than once.

This recommendation would allow regions to collaborate to achieve their collective housing goals in a manner consistent with sustainable development objectives and strategic regional land use planning.

It is important to note that the aforementioned proposals are intended to complement regulatory changes undertaken over the last two years by DHCD. The Task Force received a thorough briefing on the regulatory changes promulgated, including the nature of the issues that precipitated them as well as their intended

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impacts. The Task force endorsed the changes, (with some modifications as contained in this report) and believes that the changes already undertaken by DHCD, together with the proposals contained in this report will provide a comprehensive framework in which to mitigate problems associated with the statute's impact and administration while preserving it as an effective tool to create affordable housing. The regulatory changes that have already been adopted include:

1. Requiring notice to DHCD of application to a subsidy agency for funding.
2. Requiring notice to DHCD of Determination of Project Eligibility (Site Approval) issued by a subsidy agency.
3. Requiring enhanced information in a Determination of Project Eligibility.
4. Counting housing that serves DMH/DMR clients toward a community's housing goals.
5. Counting units toward a community's housing goals when a comprehensive permit becomes final, rather than when building or occupancy permits are issued. This allows communities to demonstrate progress toward their housing goals at an earlier stage in the development process.
6. Zoning Boards of Appeal may deny permits or grant permits with conditions if the municipality has made progress toward its affordable housing goals in the amount of at least two percent (2%) of total housing units in the prior 12 months.
7. Zoning Boards of Appeal may deny permits or grant permits with conditions if the project is too large scale for the community in which it is situated.
8. Zoning Boards of Appeal may deny permits or grant permits with conditions if twelve months has not elapsed between the date of the filing or the disposition of another application on the same land that did not include affordable housing. This substantially limits the possibility that developers use Chapter 40B as a threat to achieve development objectives that do not include affordable housing.
9. Housing serving low- or moderate-income households created under a local housing program will count toward a community's affordable housing goals.
10. Accessory apartments serving households earning 80% or less of median income will count toward a community's affordable housing goals.
11. DHCD will receive copies of Comprehensive Permits when they become final so that it can monitor progress toward affordable housing goals and dispersion of Chapter 40B developments.
12. DHCD will update the subsidized housing inventory every two years.
13. The Housing Appeals Committee may consider municipal housing plans and the municipality's progress with respect to such plans.
14. Zoning Boards of Appeal may deny permits or grant permits with conditions for a period of one year if the town has a housing plan certified by DHCD and has produced a number of affordable housing units that are eligible for the Subsidized Housing Inventory in an amount equal or greater than 0.75% of total housing units.

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15. For projects funded by non-governmental entities, DHCD approved project administrators must make determinations of project eligibility and final approval, and ensure compliance with program guidelines. This change is intended to address inconsistencies in administration of the New England Fund ("NEF") Program. Since NEF developments compose approximately 75% of the caseload pending before the Housing Appeals Committee, DHCD anticipates that this regulatory change (and attendant guidelines that were developed and thoroughly vetted by stakeholders) will eliminate a significant source of controversy with respect to Chapter 40B. In addition, it is expected that the regulations and guidelines will improve the development process and will result in housing development that meets the needs of both the developer and the community.

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Introduction

Context and History

The lack of affordable housing in Massachusetts continues to be the greatest threat to our economic vitality. Massachusetts will continue to lose population and fail to attract and retain highly skilled labor if our housing affordability crisis continues. The Chapter 40B Task Force established by Governor Mitt Romney agreed that it is an economic imperative to increase the supply of housing, a portion of which should be affordable to households earning less than 80% of area median income. Further, they agreed that all communities should share in promoting the expansion of affordable housing.

Chapter 40B, the Comprehensive Permit Law, has been a central tool in building affordable housing in the Commonwealth since its enactment in 1969. Undisputedly, the comprehensive permit is the "most powerful state subsidy" available to build affordable housing in Massachusetts. This statute allows local zoning to be overridden if a percentage of units developed are deed restricted to assist low- or moderate-income households in municipalities that have not achieved the statutory minima for affordable housing. Thirty-four percent (34%) of all affordable units constructed in the Commonwealth since 1969 have been built using comprehensive permits while nearly 30,000 units have been developed under this law.

Critics of the statute suggest that Chapter 40B has not been successful for many reasons, one of which is that after 34 years and nearly 30,000 units created under the statute, Massachusetts still faces a large affordability problem. Chapter 40B does face significant controversy and could be improved, but a significant portion of the 30,000 housing units built under comprehensive permits would not have been created in the absence of the statute. Today, most housing built under Chapter 40B is developed without any monetary subsidy from the state. Undoubtedly, without this powerful and innovative tool to create affordable housing, the affordability crisis in Massachusetts would be exacerbated. Almost invariably, housing created under Chapter 40B is very well received after the development has been completed.

If this is true, why are Chapter 40B developments so widely feared by communities? These problems stem from a process that changes the expectation of neighborhood residents, is often confrontational from the inception of the process, is perceived to contain some rules that are unfair, and often leaves good projects behind due to delays.

DHCD's Response

During the past few years, these problems with the statute were brought to light by citizens, municipal officials, legislators, and developers. In 2001, DHCD took action to address many of these concerns by promulgating regulatory changes designed to address the legitimate concerns that were raised. These include:

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1. Requiring notice to DHCD of application to a subsidy agency for funding.
2. Requiring notice to DHCD when a Determination of Project Eligibility (Site Approval) is issued by a subsidy agency.
3. Requiring enhanced information in a Determination of Project Eligibility.
4. Counting housing that serves DMH/DMR clients toward a community's housing goals.
5. Counting units toward a community's housing goals when a comprehensive permit becomes final, rather than when building or occupancy permits are issued. This allows communities to demonstrate progress toward their housing goals at an earlier stage in the development process.
6. Zoning Boards of Appeal may deny permits or grant permits with conditions if the municipality has made progress toward its affordable housing goals in the amount of at least two percent (2%) of total housing units in the prior 12 months.
7. Zoning Boards of Appeal may deny permits or grant permits with conditions if the project is too large scale for the community in which it is situated.
8. Zoning Boards of Appeal may deny permits or grant permits with conditions if twelve months has not elapsed between the date of the filing or the disposition of another application on the same land that did not include affordable housing. This substantially limits the possibility that developers use Chapter 40B as a threat to achieve development objectives that do not include affordable housing.

Based upon further information from stakeholders, and in response to the Omnibus Housing Bill that was adopted by the Legislature in the summer of 2002 and subsequently vetoed by Governor Jane Swift, DHCD undertook further regulatory changes to respond to communities' needs. These include:

1. Housing serving low- or moderate-income households created under a local housing program will count toward a community's affordable housing goals.
2. Accessory apartments serving households earning 80% or less of median income will count toward a community's affordable housing goals.
3. DHCD will receive copies of Comprehensive Permits when they become final so that it can monitor progress toward affordable housing goals and dispersion of Chapter 40B developments.
4. DHCD will update the subsidized housing inventory every two years.
5. The Housing Appeals Committee may consider municipal housing plans and the municipality's progress with respect to such plans.
6. Zoning Boards of Appeal may deny permits or grant permits with conditions for a period of one year if the town has a housing plan certified by DHCD and has produced a number of affordable housing units that are eligible for the Subsidized Housing Inventory in an amount equal or greater than 0.75% of total housing units.
7. For projects funded by non-governmental entities, DHCD approved project administrators must make determinations of project eligibility and final approval,

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and ensure compliance with program guidelines. This change is intended to address inconsistencies in administration of the New England Fund ("NEF") Program. Since NEF developments compose approximately 75% of the caseload pending before the Housing Appeals Committee, DHCD anticipates that this regulatory change (and attendant guidelines that were developed and thoroughly vetted by stakeholders) will eliminate a significant source of controversy with respect to Chapter 40B. In addition, it is expected that the regulations and guidelines will improve the development process and will result in housing development that meets the needs of both the developer and the community.

While the impact of the many changes adopted in the last two years cannot yet be fully appreciated, many stakeholders, including the Governor and DHCD, agreed that the statute and its impact (and the impact of the recent changes) should be evaluated comprehensively before further changes are made. This need for review is exemplified by the fact that approximately 70 bills were filed in the current legislative session to propose further changes to the law. While many of these bills directly or indirectly propose to eliminate or severely weaken the statute, some offer constructive proposals to address its shortcomings.

The Task Force received a thorough briefing on the regulatory changes promulgated, including the nature of the issues that precipitated them as well as their intended impacts. The Task Force endorsed the changes (with some modifications as contained in this report) and believes that the changes already undertaken by DHCD, together with the proposals contained in this report, will provide a comprehensive framework in which to mitigate problems associated with the statute's impact and administration while preserving it as an effective tool to create affordable housing.

The Chapter 40B Task Force

Membership of the Task Force

The Task Force was diverse and was composed of Democratic and Republican members of the House of Representatives and the Senate, state housing officials, municipal and regional officials, and stakeholders representing development and environmental interests. Biographical information on the Task Force members, including the members' areas of expertise and the interests they represent is included as Appendix K of this report.

Task Force Proceedings

The process included input from many individuals outside of the official Task Force membership. Verbal and written testimony was solicited from community leaders most affected by controversial Chapter 40B projects. In addition, representatives from neighborhood groups and individuals who have been directly affected by Chapter 40B developments (including abutters) were invited to testify and share their experiences.

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In addition, the Task Force received expert testimony from developers, municipal officials, attorneys, and housing consultants. Economic, fiscal, housing, environmental, demographic, and Census data were presented. Parties testifying before the Task Force responded to questions posed by Task Force members. Issues presented and questions posed are contained in the minutes of each meeting, which are included as appendices to this document.

A central web page was established (<http://www.state.ma.us/dhcd/Ch40Btf/default.htm>) that included all minutes, agendas, presentations and information submitted to the Task Force. This enabled concerned citizens to be informed about the deliberations and progress of the Task Force. In addition, the web page contained an opportunity for visitors to disseminate relevant information to Task Force members and have additional information posted on the website.

The Task Force was conducted as an open public meeting. DHCD Director and Task Force Chairwoman Jane Wallis Gumble ensured that the questions and issues posed by members were addressed first, but allowed questions and issues raised by non-member attendees to the extent time permitted. All Task Force meetings were well attended by the public, with some meetings attended by as many as 75 people. All written information submitted by attendees (and other concerned citizens not in attendance) was disseminated to Task Force members to ensure all stakeholders had an opportunity to fully express their views for consideration by the Task Force.

Purpose of the Task Force

Recognizing the importance of the issue and the need to provide thoughtful investigation of the problems and possible solutions, Governor Mitt Romney met with the Senate President and the House Speaker and they jointly developed a plan. Governor Romney established the Chapter 40B Task Force in February 2003. This Task Force was asked to report its findings to the Governor by May 30, 2003, in order to provide guidance to him and to the Legislature on how to evaluate the numerous bills that have been filed to change the Comprehensive Permit Law. The Senate President and the House Speaker agreed to withhold action on the bills until the thorough examination of the statute and its impacts were conducted, and the findings and recommendations of the Task Force were finalized.

The purpose of the Task Force was to:

- Reaffirm the need to increase the supply of housing, a portion of which should be affordable to households earning less than 80% of area median income.
- Assess the effectiveness of Chapter 40B to address the aforementioned need.
- Identify the impacts created by Chapter 40B and determine whether they are commensurate with the public benefit.

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- Propose modifications that would mitigate harmful impacts or that would improve the effectiveness of Chapter 40B.

The Task Force sought and achieved consensus on a broad range of issues, and has made recommendations to improve Chapter 40B's administration and impact. In instances where consensus was not reached, a summary of the issue and discussion is included in Appendix L of this report in order to help inform future debate.

With respect to the four questions posed by the Governor, the Task Force readily and quickly agreed to reaffirm the need to increase the supply of housing, a portion of which should be affordable to households earning less than 80% of area median income. In addition, it assessed the effectiveness of Chapter 40B to address the aforementioned need. While it was undisputed that the statute has facilitated the production of approximately 30,000 units of housing, and thus has been a key tool in promoting housing production, demand for housing still far exceeds the supply of housing. The following sections address the remaining two questions posed by the Governor, namely assessing the impact of the statute to determine whether it is commensurate with the public benefit, and recommending proposals to improve its implementation.

Step One: Identifying the Impacts

In its deliberations, the Task Force learned about the impacts of Chapter 40B in order to ascertain whether the impacts are commensurate with the public benefit that attends affordable housing production. This report categorizes these impacts into two general categories: local impacts (including fiscal, water/sewer, public safety, and other impacts) and land use impacts (including regulatory and zoning issues that impact housing development).

Local Impacts Of Chapter 40B Developments

The Chapter 40B Task Force included several municipal officials; in addition, one Task Force meeting was devoted to municipal concerns about the permit issuance process, and one meeting featured the local perspective on Chapter 40B. The Task Force members actively sought the viewpoints of local leaders on what they viewed as impediments to and consequences of Chapter 40B developments. The Task Force noted that all local fiscal impacts are at least partially offset by increased property tax revenue when new housing is developed.

Two key local impacts were noted with respect to new housing development. They include:

- School capital costs (i.e. building or expanding new schools when existing schools reach capacity); and

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- Incremental school operating costs – (i.e. the incremental operating costs associated with each new student – this was distinguished from per capita student costs, since the per capita student costs are not entirely borne by local government.)

Other local impacts were noted, but were of secondary significance. They include:

- Water and sewer impacts;
- Public safety impacts; and
- Service impacts such as trash collection, recreation, inspections, and road maintenance.

Despite the perception sometimes portrayed through press coverage, and the assertions made about the onerous burdens of Chapter 40B developments on municipal services and infrastructure, few concrete examples of service or infrastructure difficulties faced by a community as a direct result of a Chapter 40B development were elicited. It is interesting to note that negative public perception about Chapter 40B developments often disappears once they are built and occupied by individuals and families who become an integral part of the community.

It was universally acknowledged among Task Force members and those who testified (including expert, and other verbal and written testimony) that the process involved in Chapter 40B developments is extremely contentious. All parties agreed that it is essential to minimize the adversarial nature of the process in order to improve the statute's administration and preserve it as a tool to create affordable housing in the Commonwealth.

Fiscal/School Impacts:

Assertion:

Housing Developments bring more children into the school system; property tax revenues are insufficient to support both the education and service needs of these new homes.

Task Force Finding:

A host of factors affects the municipal cost of public education, notably the formula for education aid. It is interesting to note that in the late 1990s, both the Administration and Legislature supported the inclusion of "enrollment aid" for those school districts experiencing student growth. While the state budget has been pared in recent years, including education aid, the Task Force did not hear from any community that "Chapter 40B" students were the sole, or even primary, cause of the local public education budget shortfall.

It is possible, even likely, that local revenues from affordably priced homes alone would not offset the cost of a child's public school education. However, in most instances,

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local public education budgets are supported by both local and state revenues to varying degrees, and there would be few instances where the cost of students' education would be borne completely by the local government. Local officials noted that while the incremental operating costs associated with new students may be overestimated, the capital costs associated with building new schools once existing schools reach capacity places could place extraordinary burdens on local budgets.

Additional data presented to the committee illustrated the correlation between the number of bedrooms in a given development and the presence of school-age children. Data from three separate studies supported the notion that the likelihood of school-age children tends to increase with the number of bedrooms. Other development characteristics that were thought to correspond to the presence of school-age children included the type of tenancy, the percentage of affordability, the desirability of the school system, and the style of the development (e.g., single-family, townhouse, high-rise). In general, homeownership, affordability, quality school systems and more traditional family dwelling styles/amenities appear to increase the likelihood of school-age children.

Other variables affecting the number of new students include the percentage of local preference given to the affordable units and the percentage of students who attend private schools. Depending on the percentage of local preference, a greater or lesser number of households occupying the affordable units will have relocated from within the community. These households themselves then will not cause a net increase in the local student population, and the question becomes what type of household moves into the original unit.

Statewide, 89.8% of school-age children attend public schools while 10.2% attend private schools. Information on how these percentages compare to actual breakdowns within 40B developments was not available; however, perhaps related data gathered by a rental housing developer suggests that their affordable units are 2.5 times more likely to house school-age children than market rate units.

Water/Sewer Impacts:

Assertion:

Municipalities need to spend more money on infrastructure replacement and/or expansion as a result of Chapter 40B developments.

Task Force Finding:

Water supply concerns and the inability to expand the sewer system were often cited during this discussion, but would most likely be addressed in the Zoning Board of Appeals hearing process considering the issuance of a permit, and mitigation could be a condition of a permit. Such environmental considerations could be grounds to deny the comprehensive permit application as "consistent with local needs" in order to protect the health or safety of the municipality's residents, and would be upheld by the Housing

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Appeals Committee. In addition, many communities operate "enterprise" accounts for water and sewer services, setting rates to guarantee that both the operation and capital costs of these services will be borne by the users. The addition of users thus does not "add" to the cost of providing these services, as these services operate on a "full cost recovery" basis.

Public Safety Impacts:

Assertion:

Increased housing units translate to the need for more police and fire services, whether in number of employees, equipment, and/or patterns of coverage.

Task Force Finding:

While increased population can result in the need for new equipment or increases in the police or fire department workforces, such need is not unique to Chapter 40B development.

Fire chiefs often offer comments on development plans, noting the need for the location of hydrants, and stressing the need for reasonable access to the development (road width, turning radius, etc.). No evidence was presented to the Task Force that public safety concerns, either in the permit issuance process, or after the development was built and occupied, produced any particular strain on municipal public safety services.

Other Local Impacts:

Assertion:

Housing growth can result in increased service costs such as trash collection, recreation, inspections, and road repair and maintenance. However, communities do have options in these areas. Many Massachusetts communities now charge a fee for trash collection, or operate a "pay-as-you-throw" program based on amount of trash and type of household and thus, wholly or partially relieve the municipal budget from this particular expense. Many recreation programs also find it necessary to operate "fee-for-service" programs. The vast majority of communities operate inspection services wholly or partially by charging fees for inspections. Of the services noted here, only road repair/replacement is usually completely borne by the municipal budget. However, towns do receive state and federal aid devoted to road costs, which can be used for design, construction, or significant repair.

Task Force Finding:

Generally, the Task Force agreed that while such impacts are important to consider, it is often possible to mitigate them if the community and developer collaborate to do so.

Land Use Impacts of Housing Development

Assertion:

Early in the Task Force process, one view often expressed was that developers "had" to use Chapter 40B to pursue any development given the onerous strictures of Chapter

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40A (the State Zoning Act) and local zoning bylaws/ordinances limiting development. There were concerns that Chapter 40A needed to be changed to make it possible for more development to take place. Chapter 40B, by providing "zoning relief," often in the form of higher density development, was characterized one of the few options available to developers. We examine some of the issues relating to land use and zoning here:

Task Force Finding:

Development in Massachusetts is often expensive and time-consuming; the major factors contributing to this problem are:

- the high cost of land;
- housing demand; and
- the extent of regulation.

Land is expensive because much of the state's more populated eastern portion and areas adjacent to major highway interchanges (giving reasonable access to jobs located on highway corridors) are increasingly "built-out," driving the supply-demand continuum toward higher prices for the limited available land. Individuals want to live within accessible distance to job opportunities and/or public transit. One example of this phenomenon is the concern about growth and open space protection in southeastern Massachusetts --- one of the factors driving this concern is the extension of commuter rail service to Middleborough/Lakeville.

Land use is regulated at both the state and local levels. The state has an extensive set of codes relative to building construction, building safety, fire protection, road design, employer responsibilities, worker safety, etc. Environmental regulation affects the feasibility and expense of building on "brownfields" (contaminated sites) and near wetlands and/or water bodies. The options for septic systems or alternative treatment systems are also determined in great degree by state regulation. A septic system is the primary waste treatment response in all areas of the state where public sewers are not available. In addition, the state's water policy actively discourages new sewers if the amount of water to be transferred from one watershed to another is determined to be degrading to the watershed that would be losing the water. All of these factors may be employed to protect public health and safety, but in some instances, may intentionally or unintentionally impede development or place limitations on what can be built.

There is further regulation of land use at the local level, as the state's zoning and subdivision laws are enforced and expanded upon at the local level. The state law authorizing the adoption of zoning (Chapter 40A) sets some basic parameters, but cities and towns, through ordinance or bylaw, may set standards or prescribe practices stricter than state law based on local conditions or preferences. Zoning bylaws must be adopted by a two-thirds (2/3) vote of the municipality's legislative body (city or town council or town meeting); this stringent requirement often deters proposals to change zoning, especially if the proposed change is perceived as making it easier to build. In

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addition, the municipality can set standards through its zoning bylaws for special permits (for structures, special permit issuance and/or site plan review), usually for larger projects where there are both design and public safety considerations, and/or a proposed use or density not otherwise allowed by the municipality's zoning. There are consistent complaints by developers that Massachusetts zoning is too inflexible, and that local decisions to adopt "large lot zoning" unduly limit the land available, increase the cost of such land for building, adding to the expense of development. Septic system requirements stricter than state standards have also been characterized in the past as "de facto" zoning, given local requirements for the size of leaching fields, and wetlands protection considerations.

In addition to the perceived impediments of zoning, Massachusetts law gives specific statutory authority to various local boards and commissions for almost all aspects of a building project, but there is no mechanism other than Chapter 40B to mandate, encourage, or support a coordinated permitting system. Thus, for one project, a developer may need clearances from the local water commission, sewer commission, historic commission, board of health, conservation commission, and public works department before being eligible to apply for a building permit from the local building commissioner. While some towns have tried to create more streamlined processes for developers, and have worked with the affected boards and their staffs to encourage greater coordination, this "permitting maze" adds time and expense to almost every development proposal, whether it be a single family home in an established neighborhood, an entire subdivision, or a multi-family complex.

Zoning in some communities becomes "de facto" planning. There have been times in the state's history when planning activities have been strongly encouraged, and even modestly supported by state revenues. Two recent legislative proposals in this vein include the "Livable Communities" and "Sustainable Development" legislative proposals, as well as Executive Order 418 (EO 418), signed by Governor Paul Cellucci in 2000, that provided \$30,000 in planning assistance through a process coordinated by four state agencies -- the Department of Housing and Community Development, MassHighway Department, Department of Economic Development, and the Executive Office of Environmental Affairs. Regional planning agencies have been diligent in periodically producing regional master plans, although the plans produced are advisory only. (Only two regional planning agencies of the thirteen in the state have some measure of independent regulatory power to guide development -- the Cape Cod Commission and the Martha's Vineyard Commission.) While the state statute for master plans sets forth criteria for the production of a plan, and mandates that cities and towns complete them, it does not establish a penalty for failure to do so. For those communities that do, the law provides only that the planning board accepts the plan. There is no requirement of acceptance by the local legislative body or by the voters, or for zoning ordinances to be consistent with master plans.

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Thus, planning activities in the state are very much the product of local choice both to undertake comprehensive planning and commit to periodic re-examination or revision of such plans. While many communities have master plans, local policies are the key determinant of the plan's efficacy. Furthermore, the implementation of such plans depend on other municipal departments, boards, and agencies, and plans must be regularly updated.

Cities and towns may take advantage of grant funds (or through local initiative) take on "single issue" planning -- such as an open space plan or economic development plan. EO 418, referenced above, required that communities complete a housing needs assessment, and for communities seeking housing certification under EO 418, communities need to produce and annually update a housing strategy. However, few communities link either the premise or conclusions of these individual plans into a comprehensive strategic development plan.

There is the additional conundrum that some plans are adopted with only scant consideration of the zoning in place, and new zoning proposals are not always compared to the master plan before being adopted. Thus, zoning has a "supremacy" over planning, given both its regulatory nature, and the lack of any consistent state "message," either in law or policy, to link planning and zoning more closely.

Massachusetts' communities generally cherish this "home rule" authority over land use in the community and guard their local rule-making, bylaw, and enforcement powers. Planning or zoning actions taken at the local level may be reactive -- e.g., a "phased growth bylaw" may be adopted to mitigate the effects of large development, either because the community has already had such an experience or observed a neighboring community experience one. Building caps (limiting the number of building permits issued annually) is another practice. Such actions sometimes demonstrate the lack of planning, and the local perception of the need to "control" development. In the absence of planning tools under the existing Zoning Act and Subdivision Control Law, communities sometimes rely on the on existing tools, such as building caps and moratoria in order to control development.

Step Two: Identifying the Solutions—The Task Force Recommendations

The Task Force, by consensus, proposed a number of modifications to mitigate legitimate impacts of Chapter 40B and its implementation, as well as recommendations which will improve its effectiveness in the context of existing land use practices. Generally, the recommendations fall into the following categories:

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- **Consistency and Equity**
- **Local Capacity and Technical Assistance**
- **Improving the Chapter 40B Process**
- **Technical Improvements to Chapter 40B**
- **Community Impact and Community Needs**

Consistency and Equity

Recommendation:

Because housing units authorized pursuant to Chapter 40B have been granted zoning relief by the community, such units developed under a comprehensive permit should count more equitably toward a community's affordable housing goals. In order to achieve greater equity while preserving an incentive to create multifamily rental housing (which is typically difficult to permit), twice the number of units in Chapter 40B homeownership developments that serve low- or moderate-income households will count toward a community's housing goals if at least one-fourth of the units serve low- or moderate-income households.

Proposal:

760 CMR 31.04 is amended by striking paragraph (1)(a) and replacing it with the following:-

(1) Housing Unit Minimum. For purposes of calculating whether the city or town's low and moderate-income housing units exceed 10% of its total housing units, pursuant to M.G.L. c. 40B, § 20:

(a) There shall be a presumption that the latest Department of Housing and Community Development Subsidized Housing Inventory contains an accurate count of low and moderate-income housing. If a party introduces evidence to rebut this presumption, the Board or Committee shall on a case-by-case basis determine what housing or units of housing is low- or moderate-income housing. In examining particular housing developments or units, it shall first be guided by the intent expressed in the regulations governing the program under which the housing is financed. It shall also be guided by the latest Department of Housing and Community Development Listing of M.G.L. c. 40B Low- or Moderate-Income Housing Programs. Housing units shall be counted if they are subject to building permits, available for occupancy, or occupied. In addition, if at least 25% of housing units in rental developments serve low- or moderate-income households, all units authorized by a comprehensive permit shall be counted when the comprehensive permit becomes final (760 CMR 31.08(4)), provided that any housing units, for which building permits have not been issued within one year of the date when the comprehensive permit becomes final, shall no longer be counted until building permits have been issued. If at least 25% of housing units in homeownership developments serve low- or moderate-income households, two times the actual number of units serving low- or moderate-income households (but not to exceed the total number of homeownership units authorized by the comprehensive permit) which are authorized by a comprehensive permit shall be counted

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when the comprehensive permit becomes final (760 CMR 31.08(4)), provided that any housing units, for which building permits have not been issued within one year of the date when the comprehensive permit becomes final, shall no longer be counted until building permits have been issued. No housing unit shall be counted more than once for any reason. The Department shall update the Subsidized Housing Inventory biennially.

Recommendation:

Manufactured housing (also known as mobile homes) may present a safe, decent, affordable housing opportunity for low- or moderate-income households.

Proposal:

Manufactured housing and the opportunity it presents as a relatively low-cost housing option is an issue in need of further study. The Task Force acknowledged that it requires further study by DHCD and the Legislature's Joint Committee on Housing and Urban Development in consultation with the Manufactured Housing Commission.

Recommendation:

Some developments, particularly large developments, often require site improvements and it is sometimes difficult to prepare a site adequately and obtain building permits within one year.

Proposal:

Units authorized by a comprehensive permit should count on the subsidized housing inventory when the comprehensive permit becomes final, provided that building permits are issued within one year, but DHCD may waive this provision to allow such units to count for a longer period of time if good cause is evidenced.

Local Capacity and Technical Assistance

Recommendation:

Limit the number of 40B proposals a community must review at any one time.

Proposal:

760 CMR 31.07 is amended by adding a new subsection (1)(j):-

A decision by the Board to deny a comprehensive permit or to grant a comprehensive permit with conditions shall be consistent with local needs if recent applications for comprehensive permits are pending before the Board which, if approved, would result in the creation of low- or moderate-income housing units in an amount equal to or greater than two percent of the total year-round housing units within the municipality, as enumerated in the most recent federal decennial census. An application shall be considered "recent" for purposes of this paragraph if it is an application which is complete

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and has been filed within nine months preceding the date the application was filed with the Board which has been denied or granted with conditions.

Alternatively, in municipalities which have affordable housing plans that have been approved pursuant to 760 CMR 31.07 (1)(i), a decision by the Board to deny a comprehensive permit or to grant a comprehensive permit with conditions shall be consistent with local needs if recent applications for comprehensive permits are pending before the Board which, if approved, would result in the creation of low- or moderate-income housing units in a number equal to or greater than one-half of one percent of the total year-round housing units within the municipality, as enumerated in the most recent federal decennial census. If a Board has denied a comprehensive permit or granted a comprehensive permit with conditions in accordance with this paragraph, and subsequently fails to comply with its affordable housing plan in accordance with 760 CMR 31.07(1)(i)(5), a decision by the Board to deny a comprehensive permit or grant a comprehensive permit with conditions on the basis of this paragraph shall not be consistent with local needs.

Recommendation:

A fund shall be established and managed by the Massachusetts Housing Partnership to provide technical assistance to help cities and towns review and respond to applications for comprehensive permits. All Massachusetts state agencies that qualify projects to apply for comprehensive permits shall collect fees to support this fund prior to issuing a Determination of Project Eligibility. The Department of Housing and Community Development shall approve the fee structure and monitor the effectiveness of the program.

Proposal:

Background:

In 1999, the Massachusetts Housing Partnership (MHP) launched the 40B Technical Assistance Program to provide expert consultants free of charge to help cities and towns respond to applications for comprehensive permits.

The program addresses a commonly expressed concern that cities and towns don't have sufficient staff resources or expertise to respond to 40B proposals. In effect, it helps level the playing field. Expert consultants give Zoning Boards of Appeal the confidence to negotiate project conditions that represent good outcomes for the town and the developer.

To date, MHP has provided free consultants' services to 83 cities and towns for the review of 123 comprehensive permit applications. Communities receiving technical assistance from MHP have successfully negotiated comprehensive permits – on terms mutually agreeable to the town and the developer -- in about three-quarters of the cases. In other cases, MHP's technical assistance has helped ensure that inappropriate 40B proposals are withdrawn or has given communities the confidence to deny 40B applications when warranted.

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Communities are awarded up to \$10,000 in free technical assistance in the first instance and \$5,000 for successive projects (since a significant amount of time is devoted to bringing zoning board members and town officials up-to-speed on Chapter 40B). To date MHP has expended or committed nearly \$1 million in technical assistance.

The anticipated fee restructure would combine a flat base fee with an additional amount per unit; this would reduce the fee burden on non-profit developments which are typically smaller than for-profit development proposals.

Recommendation:

Direct DHCD to provide comprehensive online planning and housing resources to serve community officials and housing developers.

Proposal:

DHCD will provide a comprehensive online "Planning and Housing Development Toolkit." At a minimum, the Toolkit will contain a complete listing and criteria for public financial resources for housing development, guidance for communities and developers with respect to the development process including lottery and marketing procedures, income guidelines, model documents including deed riders and regulatory agreements, a consultant database to facilitate the development process, tools for community planning including housing needs assessment tools and examples of zoning bylaws through which communities' housing needs can be met, examples of how communities can achieve their planning and housing goals outside the Chapter 40B process, a calendar of trainings and other events, and links to useful websites. Contact information for local boards will also be made available. This resource will be enhanced and updated regularly. Print materials will be made upon request to accommodate parties without online access.

Improving the Process

Recommendation:

Improve the Chapter 40B process to ensure an efficient process in which the needs of the developer and municipality are met. This can be achieved by: encouraging local housing partnerships to endorse a proposal before it is submitted to the zoning board; informing all local boards when a development is proposed and encouraging them to submit written comments that the subsidizing agent must address before a determination of project eligibility can be made; allowing the municipality to require a meeting with the developer during the public comment period to informally discuss the preliminary proposal with representatives of local boards; and increase the amount of information about the project that is contained in the determination of project eligibility so that the proposal is well understood early in the process.

Proposal:

760 CMR 31.01 is amended by striking paragraphs (1-5) and substituting them with the following:-

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31.01: Jurisdictional Requirements

(1) To be eligible to submit an application for a comprehensive permit or to file or maintain an appeal before the Committee, the applicant and the project shall fulfill the following jurisdictional requirements:

- (a) The applicant shall be a public agency, a non-profit organization, or a limited dividend organization.
- (b) The project shall be fundable by a subsidizing agency under a low and moderate-income housing subsidy program.
- (c) The applicant shall control the site.

(2) Fundability shall be established by submission of a written determination of Project Eligibility (Site Approval) by a subsidizing agency as follows:

- (a) A determination of Project Eligibility (Site Approval) shall include:
 1. the name and address of the applicant
 2. the address of the site and site description;
 3. the number and type (homeownership or rental) of housing units proposed;
 4. the name of the housing program under which Project Eligibility (Site Approval) is sought;
 5. relevant details of the particular project if not mandated by the housing program (including percentage of units for low or moderate income households, income eligibility standards, the duration of restrictions requiring low or moderate income housing, and the limited dividend status of the developer)
- (b) A determination of Project Eligibility (Site Approval) shall make the following findings:
 1. that the proposed project appears generally eligible under the requirements of the housing program, subject to final review of eligibility and to final approval;

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2. that the subsidizing agency has performed an on-site inspection of the site and has reviewed pertinent information submitted by the applicant;
3. that the proposed housing design is generally appropriate for the site on which it is located;
4. that the proposed project appears financially feasible within the housing market in which it will be situated (based on comparable rentals or sales figures);
5. that an initial *pro forma* has been reviewed and the project appears financially feasible on the basis of estimated development costs;
6. that the developer meets the general eligibility standards of the housing program;
7. that the applicant controls the site; and
8. that local concerns about the proposed project, whether raised by the municipality or revealed during the course of the subsidizing agency's review (which must be conducted with due diligence), considered in light of such mitigation as the subsidizing agency may require by condition, do not outweigh the regional need for low and moderate income housing

(c) In addition to the foregoing, a subsidizing agent shall consider the following in making a determination of project eligibility: overall density and size; degree of affordability; environmental impact; principles of sustainable development and 'smart growth'; community impact and consistency with local housing need; impact on historical resources and the impact of other pending applications for housing development.

(d) Within ten days of filing of its application with a subsidizing agency for preliminary approval of a project, the applicant shall serve written notice upon the Director of the Department of Housing and Community Development, One Congress Street, 10th Floor, Boston, MA 02114.

(e) Upon receipt of the application, the subsidizing agency shall provide written notice and a copy of such application to the chief elected official of the involved community. The subsidizing agency shall also provide written notice of the application to local boards, including at a minimum, but not limited to: the planning board, board of health, conservation commission, historical commission, water, sewer, or other district, fire, police, traffic, or other department, building inspector or other similar official or board, city council, or board of selectmen. Within 30 days after such notice, the chief elected official may schedule a meeting at a location within the involved community. Notice of the meeting shall be provided in accordance with open meeting laws. The meeting shall be chaired by the municipality's chief elected official, and shall be attended by the applicant or its representative. Representatives

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from local boards are encouraged to attend the meeting and provide written comment. The purpose of the meeting is to allow the applicant and the community representatives to informally discuss the preliminary proposal so that the parties involved can develop an understanding of the proposal and to respond to concerns raised in an effort to achieve an outcome that meets the needs of the involved community as well as the applicant. In addition, a representative from a public or quasi-public housing agency, or a regional planning agency or their designee knowledgeable with respect to Chapter 40B will provide technical assistance on topic including, but not limited to, site design and density, open space, marketing, use restrictions, allowable costs and profit limitations. Following the close of the meeting the chief elected official of the community, all local boards, and the regional planning agency shall be given a 14-day review period to issue written comments to the subsidizing agency, and the subsidizing agency shall consider any such comments prior to issuing a determination of Project Eligibility (Site Approval).

(f) Within ten days of receipt of a written determination of Project Eligibility (Site Approval) from the subsidizing agency, the applicant shall serve a copy of that determination upon the Director of the Department of Housing and Community Development, One Congress Street, 10th Floor, Boston, MA 02114.

(g) After issuance of a determination of Project Eligibility (Site Approval), the project shall be considered fundable unless there is sufficient evidence to determine that the project is no longer eligible for a subsidy.

(h) If project funding is provided through a non-governmental entity, a public or quasi-public entity authorized by the Department shall make the determination of Project Eligibility (Site Approval). The designated entity that issued the Project Eligibility (Site Approval) determination shall administer the project thereafter as specified in program guidelines issued by the Department.

(3) An applicant must establish that it controls the site and has adequate means of access thereto. Either a preliminary determination in writing by the subsidizing agency that the applicant has sufficient interest in the site, or a showing that the applicant, or any entity 50% or more of which is owned by the applicant, owns a 50% or greater interest, legal or equitable, in the proposed site, or holds any option or contract to purchase the proposed site, shall be considered by the Board or the Committee to be conclusive evidence of the applicant's interest in the site.

(4) No determination of Project Eligibility or Site Approval shall be issued for a project sooner than 30 days after the filing of its application with the subsidizing

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agency for preliminary approval of the project. A determination of Project Eligibility or Site Approval shall be for a particular financing program. A change in the program under which the applicant plans to receive financing shall require a new determination, and may be deemed a substantial change pursuant to 760 CMR 31.03. An applicant may proceed under alternative financing programs if the application to the Board or appeal to the Committee so indicates and if full information concerning the project under the alternative financing arrangements is provided.

(5) Failure of the applicant to fulfill any of the requirements in 760 CMR 31.01(1) may be raised by the Committee, the Board, or a party at any time, and shall be cause for dismissal of the application or appeal. No application or appeal shall be dismissed, however, unless the applicant has had at least 60 days to remedy the failure.

Recommendation:

Improve the Appeals Process through the Housing Appeals Committee and increase staffing and capacity for the Committee.

Proposal:

Noting that there is a significant backlog at the Housing Appeals Committee which may be partially attributable to its hearing procedures and staffing and capacity constraints, the Task Force recommends that the Director of the Department of Housing and Community Development shall appoint an *ad hoc* Housing Appeals Committee Regulations Advisory Committee. The committee shall evaluate current Housing Appeals Committee hearing procedures, (and model guidelines) and suggest regulatory changes to be promulgated by the Director to improve and expedite those procedures. In addition, the committee will consider whether abutter appeals should be adjudicated by the Housing Appeals Committee. The committee shall consist of a cross-section of experienced legal practitioners and others representing municipalities, developers, non-profit organizations, and housing advocates. The Task Force recommends that the Director establish and describe the mission of the advisory committee, and identify its members by July 1, 2003, and further recommend that the committee deliver a report of its findings and recommendations to the Governor no later than November 1, 2003. In addition, the Director of DHCD shall evaluate methods by which staffing and capacity of the Housing Appeals Committee could be increased.

Technical Improvements

Recommendation:

Require DHCD to update a community's official subsidized housing inventory attainment at the community's request.

Proposal:

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760 CMR 31.04 is amended by adding the following sentence at the end of paragraph (1)(a):-

The Department shall also update a specific community's attainment on the official subsidized housing inventory at the community's request and shall make the updated inventory available on the Department's website and in print upon request.

Recommendation:

Provide a mechanism by which New England Fund projects which have received determinations of project eligibility and that are not subject to the recently developed regulations and guidelines may, at the developer's and community's request, adhere to a similar process by which a public or quasi-public agency acts as a project administrator.

Proposal:

DHCD will develop a mechanism by which a developer and a community may, at their collective option, utilize the services of a project administrator to facilitate a project in a way that meets the objectives of both the developer and the community. The project administrator responsibilities may include, but may not be limited to, conducting project review meetings, ensuring minimum design and construction and environmental standards are met, as well as the requirements for proper regulatory agreements, use restrictions, income limitations, affordability, and marketing.

Community Impact & Community Needs

Recommendation:

Certain provisions of the State Zoning Act (MGL Chapter 40A) and the Subdivision Control Law (MGL Chapter 41) could limit municipalities' ability to engage in effective land use planning which could encourage "smart growth" within communities and facilitate housing development.

Proposal:

The Administration should study the potential for reform to these statutes to facilitate effective land use, foster "smart growth" and facilitate housing development. To this end, the Task Force recommends that the Administration further examine this issue, and if it so determines, establish a Chapter 40A Task Force to do so.

Recommendation:

Recognizing that different communities have different infrastructure, capacity, housing needs, and land characteristics, it is necessary to establish density guidelines and consider "smart growth" objectives for Chapter 40B developments.

Proposal:

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760 CMR 31.01 is amended by striking paragraph (3) and substituting it with the following:-

(3) that the proposed housing design and density are generally appropriate for the site on which it is located, taking into account surrounding land uses, proximity to transportation, services and public utilities, and compactness of design to minimize land use impacts;

The Task Force acknowledges that the density guidelines used by MassHousing and the Department of Housing and Community Development for homeownership developments (the greater of 8 units per acre or four times surrounding density) have generally been very effective.

The Task Force recommends that each funding agency in Massachusetts adopt guidelines for considering project design and density for rental developments – under the general oversight of DHCD. Generally these agency guidelines should:

- encourage smart growth in proximity to services, utilities and transportation
- require rental development in outlying areas to be compact so that it reduces lot area coverage, preserves open space, and minimizes adverse impacts
- not set absolute density limits since that would discourage smart growth development and promote sprawl

Recommendation:

Recommend to the Governor and Legislature the creation of a new "growth aid" fund to provide commensurate financial assistance to cities and towns.

Proposal:

The fund shall provide for the incremental school costs of educating additional children associated with creation of housing affordable to low- or moderate-income residents. The local aid allocation shall be given out over a ten-year period based on the probable number of school-aged children per bedroom in the new units. The aid shall be calculated based on the community's total per pupil expenditure rate, set by the Department of Education, minus the amount of chapter 70 assistance a community receives per student.

Recommendation:

Recognizing that sustainable development ("smart growth") objectives are an essential component of effective land use planning, such objectives should be incorporated to the regulation for planned housing production.

Further recognizing that the threshold requirement to plan for and produce 0.75% of total housing units each year may be excessive and/or untenable for

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some municipalities, the threshold should be reduced to 0.5% of total housing units. In addition, communities should be granted a longer period of relief from comprehensive permits if they choose to plan for, permit, and build a greater number of units during a particular calendar year.

Proposal:

760 CMR 31.07 is amended by striking paragraph (1)(i) and substituting it with the following:-

(i) Planned Production - A decision by the Board to deny a comprehensive permit or grant a permit with conditions shall be consistent with local needs if the municipality has adopted an affordable housing plan approved by the Department pursuant to which there is an increase in its number of low or moderate income housing units (which are eligible for inclusion on the subsidized housing inventory) by at least one-half (½) of one (1%) percent of total units every calendar year until that percentage exceeds ten (10%) percent of total units.

1. The affordable housing plan shall be based upon a comprehensive housing needs assessment, which must include an analysis of the most recent federal decennial census data of the municipality's demographics and housing stock; of development constraints and limitations, as well as of the municipality's ability to mitigate them; and of the municipality's infrastructure.

2. The affordable housing plan shall address the matters set out in guidelines adopted by the Department, including:

- a. a mix of housing, such as rental and homeownership opportunities for families, individuals, persons with special needs, and the elderly that are consistent with local and regional needs and feasible within the housing market in which they will be situated;
 - b. the strategy by which the municipality will achieve its housing goals established by its comprehensive needs assessment;
 - c. the characteristics of the types of projects the municipality prefers that are consistent with the principles established by the state and regional plans for sustainable growth (examples include redevelopment and adaptive reuse, cluster housing, higher-density housing, transit- or pedestrian-oriented development which provides access to jobs and services, resource efficient buildings, and development in locations with existing infrastructure).
 - d. a description of the use restrictions which will be imposed on low or moderate income housing units to ensure that each unit will remain affordable long term to and occupied by low or moderate income households.
3. The affordable housing plan shall address one or more of the following, but shall not be limited to:

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- a. the identification of zoning districts or geographic areas which permit residential uses which the municipality proposes to modify for the purposes of low and moderate income housing developments;
 - b. the identification of specific sites for which the municipality will encourage the filing of comprehensive permit applications pursuant to M.G.L. c. 40B, section 21;
 - c. municipally owned parcels for which the municipality commits to issue requests for proposals to develop low or moderate-income housing.
4. Upon submission to the Department, the plan will also be submitted to the regional planning agency, which will have 30 days to comment on the implications of the plan for housing need, "smart growth" concerns, and other relevant matters. Within 90 days after its submission to the Department by a municipality's chief elected official, and after duly considering the comments of the regional planning agency, the Department shall approve the plan if it meets the requirements specified herein, otherwise, it shall disapprove the plan. The Department shall notify the municipality of its decision to either approve or disapprove a plan in writing. If the Department disapproves a plan, the notification shall include a statement of reasons for the disapproval. A municipality that originally submitted a plan that had been disapproved may submit a new or revised plan to the Department at any time. A municipality may amend its plan from time to time if the Department approves the amendment. If the Department fails to mail notice of approval or disapproval of a plan or plan amendment within 90 days after its receipt, the plan or plan amendment shall be deemed to be approved.
5. The Department shall certify annually whether a municipality is in compliance with an approved plan. The Department shall determine whether a municipality is in compliance within 30 days of receipt of the municipality's request for such a certification. If the Department determines the municipality is in compliance with its plan, the certification shall be retroactive to the date the certification was requested.
6. Units which are created and which are eligible to be counted toward a municipality's low or moderate income housing stock between August 1, 2002 and December 31, 2002 shall be credited toward the municipality's increased low and moderate income housing stock for the first year of planned production, regardless of the date the plan is submitted to or certified by the Department. An approved plan shall take effect for the purpose of the definition of "consistent with local needs" in M.G.L. c. 40B section 20 only when the Department certifies that the municipality has approved permits resulting in an initial annual increase in its low or moderate income housing units of at least one-half of one percent (0.5%) of total housing units in accordance with its plan. It is the responsibility of the municipality to request such certification from the Department. If a zoning board of appeals grants a comprehensive permit, the units will be

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credited toward the municipality's low and moderate income housing when the comprehensive permit becomes final in accordance with 760 CMR 31.04(1)(a). In order for the units authorized under the comprehensive permit to be credited toward the municipality's low and moderate income housing for the duration of the use restriction, the municipality must submit evidence of and certify to the Department that building permits have been issued for those units.

7. Once the Department has made such a certification of initial compliance and subsequent annual certifications of compliance:

- a. The Board may, in its discretion, choose to deny or approve with conditions any comprehensive permit applications for the period of one year from any certification, and such denial or approval with conditions shall be deemed consistent with local needs; or, alternatively,
- b. The Board may, in its discretion, choose to deny or approve with conditions any comprehensive permit applications for the period of two years from any certification, if, in the year for which certification is sought, the municipality has increased its low and moderate income housing stock by at least 1.0% of total housing units in a manner consistent with the plan, or alternatively,
- c. The Board may, in its discretion, choose to deny or approve with conditions any comprehensive permit applications for the period of three years from any certification, if, in the year for which certification is sought, the municipality has increased its low and moderate income housing stock by at least 1.5% of total housing units in a manner consistent with the plan.

Recommendation:

Since contiguous communities often share the infrastructure costs associated with housing growth, they should have the opportunity to collaborate to share the benefits of housing growth, as reflected in their attainment of their housing goals.

Proposal:

Contiguous communities may determine that it is mutually advantageous to share the costs and impacts of developments located near a municipal boundary, or which cross municipal boundaries. Under such circumstances, those communities should be allowed to share in the credit toward their respective housing goals, as long as no unit is counted more than once. Accordingly, such contiguous communities may enter into memoranda of understanding whereby the communities share infrastructure and service costs, and share credit toward their affordable housing goals, subject to approval by DHCD. If such memoranda are approved by DHCD, the credit toward affordable housing goals will be reflected on the subsidized housing inventory pursuant to the approved memoranda.

Recommendation:

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To address regional housing needs on a regional basis and to provide communities with an alternative to meeting the statutory minima pursuant to Chapter 40B that reflects local and regional capacity, infrastructure, and housing needs, contiguous communities should be able to enter into contractual agreements to achieve their regional affordable housing goals.

Proposal:

Contiguous communities may collaborate to form a "housing region" to address regional housing needs. Such communities may agree to meet their housing goals under Chapter 40B within the defined region, as long as the goal computed for the region is equal to the sum of the goals of the member communities. In order to collaborate to form such a region, the following requirements must be met:

- The contiguous communities must have attained at least 5% and not exceeded 10% toward their affordable housing goals on the subsidized housing inventory.
- The contiguous communities must enter into an intermunicipal agreement and develop a housing plan consistent with sustainable development goals established by the Commonwealth and in regional plans.
- The agreement and plan must address how the communities will share the infrastructure or service costs and benefits of low- and moderate-income housing development, and how credit for such affordable housing development will be reflected on the subsidized housing inventory.
- The plan must address how contiguous communities will achieve their housing goals. The total housing goals in the region shall be at a minimum, the sum of the goals (established by MGL Chapter 40B, section 20) of each community participating in the plan.
- The plan must also demonstrate that the communities participating in the regional plan are creating or maintaining zoning districts suitable for the creation of multi-family rental housing.
- DHCD must develop guidelines for all such intermunicipal agreements and plans.
- DHCD must approve all such intermunicipal agreements and plans, after considering comments from the regional planning agency.
- DHCD may limit the number of such intermunicipal agreements it approves each calendar year from 2003-2006 as a pilot program so that such program may be appropriately monitored.
- Under no circumstance will any unit eligible for inclusion on the subsidized housing inventory developed pursuant to such intermunicipal agreements count more than once.

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Additional Strategies

In addition to the specific recommendations discussed above, there were some other suggestions by Task Force members that if implemented, could serve to improve the Comprehensive Permit process and facilitate the production of affordable housing outside the Comprehensive Permit process.

Development of a "best practices" guide that could be distributed to local officials could provide assistance on the various parts of the process from the perspective of a broad range of local officials, developers, attorneys, and housing professionals. This guide could provide information on how to promote local settlements and create a mechanism whereby municipalities' chief elected officials could designate municipal officials or boards to represent the community in discussions and informal negotiations on 40B proposals outside of the legally-mandated process before the Zoning Board of Appeals.

Strategies to make the local permitting process less adversarial would be welcomed by all parties involved. It is generally agreed that 40B negotiations are most productive and achieve the best results when they begin early in the process. Representatives of state and local government, housing developers, housing advocates and the legal community could jointly undertake a pilot effort to fund, implement and evaluate alternative methods of achieving negotiated agreements on 40B projects. This effort may involve the use of an independent mediator or facilitator and it may involve abutters as parties to the decision-making process. Based upon the results of this pilot effort state funding agencies should consider whether to encourage or to require participation in such a non-adversarial process as a condition of project approval.

As stated earlier in the report, there was universal agreement by the Task Force members that the lack of housing supply available for low, moderate and middle-income households was a serious problem in Massachusetts. In addition to the specific recommendations relating to Chapter 40B discussed above, a number of other ideas, tools and strategies were raised by members of the Task Force that could also serve to facilitate housing production outside of the Chapter 40B process. The Task Force acknowledged that having adequate state resources available for the production and preservation of affordable housing development is essential, and expressed its strong support for the continued funding of the state's housing programs, especially the Affordable Housing Trust and for annual bond cap sufficient to support housing programs.

Since Community Development Corporations and non-profit housing developers are a significant component of the affordable housing delivery system, the Task Force agreed that financial support for their activities is also important.

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An Act Returning Tax Title Properties to Productive Use (Chapter 2 of the Acts of 2002) is another resource that can be used to produce affordable housing. This new statute allows communities that choose to do so the opportunity to use tax title properties for affordable housing. A local option allows communities to abate, with Department of Revenue (DOR) approval, up to 75% of taxes owed and 100% of interest and penalties owed on property that will be turned into housing that is affordable to families and individuals who make no more than 120% of the area median income if the city or town treasurer certifies that the taxes and penalties owed on a piece of property exceed the assessed value of the property. The city or town can then proceed to foreclosure on these properties without the usual 6-month waiting period between the taking and the foreclosure. Once the Land Court has issued a final decree, the former owner would have 90 days (rather than one year) to request that the Land Court vacate the decree. Communities may, if there are no liens on the property other than those of the community, accept a deed-in-lieu of foreclosure and account for the unpaid real estate taxes and other municipal charges and liens as if a tax title foreclosure had been completed, rather than having to take the funds from the overlay account. The administrative foreclosure process, rather than the more cumbersome judicial process, may be used if the property's value is \$15,000 or less.

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Conclusion

The Task Force has concluded that the needs of communities can be balanced with the need for affordable housing. The recommendations of the Task Force represent significant changes and are responsive to the concerns identified by legislators, cities and towns. They represent the culmination of three years of reform to improve the framework that exists within Massachusetts to address the need to increase the housing supply. The comprehensive changes contained in the recommendations represent bold initiatives to increase equity, promote planning and sustainable development objectives throughout the Commonwealth's 351 communities, and respect the unique characteristics and capacity of each community. The changes further improve the Chapter 40B process by improving the flow of information among the parties central to housing production, providing increased technical assistance to communities, and providing a comprehensive source of information for communities and developers. They will expedite housing production by creating incentives for communities to plan and permit housing, and improving the appeals process.

The members of the Task Force achieved consensus on each recommendation contained in this report after thoughtful deliberation. At the conclusion of the Task Force proceedings, the membership, (including Democratic and Republican members of the House of Representatives and the Senate, state housing officials, municipal officials, and stakeholders representing development and environmental interests) collectively agreed that the recommendations contained herein, together with the regulatory changes promulgated by DHCD over the past two years, achieve the balance sought by municipalities.