

The Record on 40B:

**The Effectiveness of the Massachusetts
Affordable Housing Zoning Law**

A Report by Citizens' Housing and Planning Association
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Acknowledgements and Notes

This analysis of Chapter 40B's use and impact builds on the work of many organizations and individuals who have studied the law over its thirty-four year existence. Much of what is known about 40B's contribution to expanding and dispersing the supply of affordable housing is the direct result of their research. Until recently, no official attempt had been made to develop a complete inventory of the state's subsidized housing developments which were approved under the comprehensive permit provisions of MGL Chapter 40B. This study supplements and updates earlier research by incorporating current and proposed activity and analyzing the 40B activity in the context of the overall subsidized housing inventory.

In particular, two people generously shared with Citizens' Housing and Planning Association (CHAPA) and the Massachusetts Department of Housing and Community Development (DHCD) information they had amassed over many years of painstaking research: Sharon Krefetz, Professor of Government and Dean of Clark University in Worcester, MA and Ann Verrilli, a Belmont-based housing consultant. CHAPA and the author owe them a debt of gratitude. Analysis, interpretation of the data and conclusions are solely the responsibility of the author.

Appendix A provides links to the statute, relevant regulations and other resources on 40B for those who seek additional information. Appendix B includes the current working list of developments believed to have been approved under 40B. Officials in every community included on the list have been asked, several times over, to verify the completeness and accuracy of this information. There may still be errors and omissions, however. DHCD is currently in the process of updating the Subsidized Housing Inventory. It is hoped that by disseminating this information broadly, interested parties and the responsible local officials will bring any corrections or additions to DHCD's, or CHAPA's, attention so that the 2003 Inventory will be complete and accurate.

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A Word About Terminology

The affordable housing lexicon is confusing. It is imprecise and inconsistently applied. Familiarity with the following terms as they are used in this report should assist the reader:

Chapter 40B, comprehensive permit, 40B, CP, comp permit

- These terms are used interchangeably to describe housing proposed or developed under the comprehensive permit provisions of MGL Chapter 40B, Sections 20-23.

Chapter 40B authorizes a housing agency or developer to obtain a single comprehensive permit for the construction of subsidized low or moderate income housing. If a community in which less than 10 percent of the total year round housing units qualify as low and moderate subsidized housing denies a comprehensive permit request, or imposes conditions that make a project uneconomic, the developer may appeal to the state Housing Appeals Committee for review of the local action.

- Examples: *40B* has been used in 60 percent of the communities..., the Housing Authority used the *CP* in both cases..., production under 40B totaled..., a *40B* request..., the ZBA is hearing four *comp permit* requests..., etc

40B Subsidized Housing Inventory, SHI, state subsidized housing inventory, 40B list, inventory

- These terms are used interchangeably to describe the official list of housing units that count toward the 10 percent goal. The Department of Housing and Community Development is responsible for maintaining the inventory for purposes and determining each community's percentage of subsidized low and moderate income housing.

The SHI counts and reports units two ways:

- *Total development units*
 - This is the total number of units in a qualified development.
- *40B units*
 - This is the number of units that count as low or moderate income toward the community's 10 percent goal. In rental developments, all units count as low or moderate income, even the market rate units, so the number of 40B units is the same as the number of total development units. In homeownership developments, only those units that are affordable and restricted to low or moderate income occupancy count.
- *Low and moderate income, or affordable, units*

These are units that are restricted to occupancy by households earning no more than 80% of the HUD published area median income at a cost that is no more than 30% of total household income. Such households are called *low and moderate income households* in this report. Affordable units are not reported on the State Housing Inventory but are important to track, and were for this analysis.

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EXECUTIVE SUMMARY

In 1969, Massachusetts enacted a law that was intended to increase the supply and improve the distribution of housing for low and moderate income families by making it easier to develop affordable housing, especially in communities where local zoning and other restrictions hindered its construction. The law established a streamlined process for qualified developers to use when proposing subsidized housing and provided for a limited override of local regulations that impeded its development.

In the 34 years since passage of Chapter 40B, nearly 30,000 units of housing in more than 200 communities have been built using its provisions. Of these units, 65% are restricted for households earning less than 80% of the area median income.

The Current Climate

Rents and home prices have risen dramatically, outstripping income growth. High housing costs are undermining the state's economic competitiveness and have made affordable housing a concern for people at all income levels. There has been some softening in the rental market, but rent levels and home prices remain among the highest in the nation while construction starts are among the lowest. Against this backdrop, Chapter 40B remains one of the few tools available to expand the state's affordable housing supply.

Whenever 40B utilization increases, so does the public debate surrounding it. Requests for comprehensive permits are now at an all-time high. A growing number of communities have raised concerns regarding the size and density of proposed 40B developments and their land use, environmental, and fiscal impacts. In response, more than seventy bills have been filed in the Legislature to amend, alter, or abolish the statute. And for the second time in fifteen years, a governor has appointed a special committee to review the statute's implementation.

While the fiscal impact of new housing development dominates much of the housing debate, it is the turnover of the existing stock, and the attendant demographic and economic shifts that is fueling the growth pressures in many Massachusetts cities and towns. For every new housing unit that is built, three existing homes are sold to new owners. Increasingly, the transfer is from an empty nester to families with young children.

What has happened is that 40B has become the lightning rod in a much larger debate over land use and growth management because it is one of the only tools currently available to overcome local obstacles to building new housing of any type in communities where demand and land exist. High land and development costs, restrictive zoning, and fragmented land use decision-making have all contributed to the challenge of developing new affordable housing.

Legacy of Lagging Production

Since the 1991-92 recession, housing production in Massachusetts has not kept pace with demand, especially in areas of job growth. The number of households increased by 9 percent during the 1990s, but the number of housing units increased by only 6 percent. Most of the new households were accommodated in existing vacant units, driving the rental vacancy rate down from 6.9 percent in 1990 to 3.5 percent a decade later, and the homeowner vacancy rate from 1.7 percent to 0.7 percent. Statewide, the median price of a single family home has doubled since 1994.

The number of housing units permitted annually in Massachusetts has declined significantly over the past several decades: from 31,000 units per year during the 1970s to 28,000 per year in the 1980s to only 17,000 per year since. The decline in multi-family units (units in structures of 5+ units) has been even more dramatic, dropping from an average of 14,000 units per year in the 1970s to 7,000 per year in the 1980s to only 1,300 per year for much of the 1990s, before picking up in the past five years.

Many of the Commonwealth's towns have large lot zoning (in excess of one acre per unit) and make no provision at all for multi-family or higher density housing--even where their historical development patterns did. The units that do get built, mostly detached single-family construction, represent the high end of the market in nearly every community. An analysis of housing units permitted between 1995-2001 revealed that nearly half of the municipalities in the Commonwealth permitted only single-family construction during those seven years. In three quarters of the communities, 90 percent of the units permitted were single family.

40B's Role in Expanding Affordable Housing Production

Chapter 40B has contributed substantially to expanding the state's supply of affordable housing for low and moderate income people. Nearly 500 housing developments, totaling nearly 30,000 units have been built under its provisions. Another 30 developments containing 3,600 units have been approved and are expected to begin construction during the first half of 2003.

Overall, comprehensive permits represent almost 20 percent of all units added to the State's Subsidized Housing Inventory since Chapter 40B took effect and more than one-third of the new units built in communities that were not already at the 10 percent threshold. In recent years, 40B's role has become even more prominent. Since 1997, more than 80% of the affordable housing production in communities under the 10% goal used 40B to build this housing.

While many communities have been able to add "qualified" units to their inventory without using 40B, most have used it at least once. Some 285 communities have added new subsidized units since 1972, and comprehensive permits were used for more than half the production in 85 of these. In 22 communities, comprehensive permits were required 100 percent of the time.

40B's Role in Distributing Affordable Housing More Equitably

More than 200 communities had no subsidized housing at all in 1972. Today that number is down to 42, and most of these are small, rural towns served by regional housing authorities. In 1972, the state's 15 most populous cities accounted for 69 percent of all subsidized housing. Even though these municipalities have nearly doubled their number of subsidized units, they now account for only 53 percent of the state's subsidized housing as more smaller cities and towns have added units.

Types of Housing Created and Populations Served Under 40B

- There are more than 4,000 units of locally owned and managed public housing in 135 developments in 93 communities, all of which house low and moderate income residents
- There are 18,000 units of privately-owned rental housing in more than 200 developments in 114 communities, two thirds of which are available for low and moderate income occupancy.
- There are homeownership developments in 84 communities, with more than 5,000 units, nearly one third of them affordable to homebuyers earning less than 80 percent of the area median income.

Chapter 40B developments have been built by a mix of developers: 55 percent by limited dividend corporations, 32 percent by local housing authorities and 15 percent by nonprofit organizations. The housing has served a variety of local needs: approximately 57 percent of the developments (45 percent of the units) were built for families, 33 percent (52 percent of the units) for the elderly and 10 percent (3 percent of the units) for populations with special needs.

Housing Appeals Committee

Two-thirds of the developments that have been built under the comprehensive permit were approved at the local level, and one-third were built after the developer appealed a local decision to the Housing Appeals Committee (HAC). Through 2002, 419 appeals had been filed with the HAC, half between the years 1986-1989 and 2001-2002.

The disposition of Housing Appeals Committee cases are as follows:

- 45% of the cases were withdrawn, dismissed, or settled independently of HAC
- 24% of the cases involved a negotiated settlement
- 31% of the cases resulted in an actual decision by the Housing Appeals Committee. Of these rulings, 84% were ruled in favor of the developer and 16% were ruled in favor of the municipality.

Recent Progress

More communities are developing affordable housing strategies and timetables to expand housing options and attain the 10 percent goal, and DHCD has issued guidance to other communities that wish to do likewise. There are now 32 communities that have already exceeded the 10 percent goal, up from 23 in 1997. There are 8 other communities at 8 or 9 percent and another 15 at 6 or 7 percent. Fifty-five communities need to produce or preserve 200 units or less to reach the 10 percent goal.

Below is a list of some communities that have made significant recent progress:

<u>Community</u>	<u>Last 4 Yrs</u>	<u>Previous 30 Yrs</u>
Marlboro	588 units	488 units
Westborough	543 units	195 units
Peabody	476 units	711 units
Danvers	443 units	253 units
Wilmington	331 units	119 units
Abington	330 units	72 units
Raynham	275 units	193 units
Tyngsboro	266 units	116 units
Georgetown	210 units	140 units
Hadley	160 units	37 units

Much has changed in the decades since 40B's enactment. The magnitude of the housing crisis has grown, the resources available to address it have been reduced significantly, and many of the players and rules have changed. But by any objective standard, Chapter 40B has compiled an impressive record of increasing the supply and improving the distribution of low and moderate income housing in the Commonwealth.

1. INTRODUCTION

Thirty-four years ago, Massachusetts enacted a law that was intended to increase the supply and improve the distribution of housing for low and moderate income families¹ by making it easier to develop affordable housing, especially in communities where local zoning and other restrictions hindered its construction. The law established a streamlined process for qualified developers to use when proposing subsidized housing and provided for a limited override of local regulations that impeded its development.

Chapter 774 of the Acts of 1969—officially titled “An Act Providing for the Construction of Low or Moderate Income Housing in Cities and Towns in Which Local Restrictions Hamper Such Construction,” but known simply as “40B,” for the section of the law that implements it—passed by a vote of 115-100 in the House and 15-13 in the Senate.² It was signed into law by former Governor Frank Sargent on August 23, 1969.

Legislative History

Chapter 40B was enacted amid widespread debate about fair housing and economic segregation. On a national level, the Kerner Commission had issued a report the previous year that underscored how lack of access to suburban housing effectively locked-out low income families from job markets and opportunities for economic advancement. In Massachusetts, a statewide commission had concluded that municipal land use regulations determined, “in substantial degree, the extent to which additional modest income housing is possible in relation to the local supply of ‘buildable’ land.”³

And on Beacon Hill, urban legislators and their suburban counterparts had been at odds since the Legislature had passed a racial imbalance law four years earlier that made it illegal to have more than 50 percent nonwhite children in a classroom. Because the state’s minority population was heavily concentrated in just a handful of cities, primarily Boston, the suburbs were spared the brunt of enforcing this law. Chapter 40B was viewed by some urban legislators as an opportunity to level the playing field.

The proposal was given little chance of passage originally because of the state’s strong tradition of home rule and local control. Anticipating this, the Committee on Urban Affairs drafted a more passive bill than many housing advocates had wanted, of which it said: “...while not permitting cities and towns to unreasonably obstruct the construction of a limited amount of

¹ Income definitions have changed over time and are not consistently applied across programs. As used in this report, the terms low and moderate income refer to households earning no more than 50 percent and 80 percent respectively of the area median income, adjusted for family size. This is the standard that has been used over time to determine whether a project is eligible to use the comprehensive permit provisions of MGL Chapter 40B.

² Robert Engler, quoted in *Using 40B to Create Affordable Housing in Suburban and Rural Communities of Massachusetts: Lessons Learned and Recommendations for the Future*, by Ann Verrilli, Citizens’ Housing and Planning Association, 1999

³ Report of the Legislative Research Council Relative to Restricting the Zoning Power to City and County Governments (1968), quoted by Michael Danielson and cited by Rachel Bratt and Langley Keyes in *The 1965 Massachusetts Special Commission on Low-Income Housing: Looking Back, Looking Forward*, Citizens’ Housing and Planning Association, 2003

adequate low cost housing...provides the least interference with the power of a community to plan for its own future...”⁴

The Massachusetts Supreme Judicial Court unanimously upheld the law in 1973, and nearly 30,000 units of housing in more than 200 communities have been built under its provisions. Two thirds of these units serve low and moderate income families and individuals. Another 3,600 units will break ground this year. While many of the developments were controversial at the outset, the results often reflect collaboration between communities and developers. Once constructed and occupied, most of the nearly 500 housing developments built under Chapter 40B have blended comfortably into their surroundings. They provide good, affordable housing and are recognized as important community assets.

Current Climate

The housing problem that state leaders sought to address in 1969 with the enactment of Chapter 40B—opening up suburban communities with good schools and job opportunities to low income families—was a much more focused one than the challenge confronting Massachusetts today. The problems associated with concentrated poverty and separation by income and race persist, public funding for housing assistance at all levels has been cut, production has not kept pace with demand, and the inventory of low rent units—both subsidized and unsubsidized—continues to shrink.

Rents and home prices have risen dramatically, outstripping income growth. High housing costs are undermining the state’s economic competitiveness and have made affordable housing a concern for people at all income levels. The latest economic downturn has hurt, not helped, those with low and moderate incomes. There has been some softening in the rental market, but rent levels and home prices remain among the highest in the nation while construction starts are among the lowest. Against this backdrop, Chapter 40B remains one of the few tools available to expand the state’s affordable housing supply.

Whenever 40B utilization increases, so does the public debate surrounding it. Requests for comprehensive permits are now at an all-time high, and there are nearly as many units proposed as existing. More than seventy bills have been filed in the Legislature to amend, alter or abolish the statute, and, for the second time in fifteen years, a governor has appointed a special committee to review the statute’s implementation. Governor Romney has charged the current Chapter 40B Task Force with four key tasks:

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

⁴ Report of the Committee on Urban Affairs (June 1969), quoted by Verrilli in *Using Chapter 40B to Create Affordable Housing in Suburban and Rural Communities of Massachusetts: Lessons Learned and Recommendations for the Future*, Citizens’ Housing and Planning Association, 1999

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

Purpose and Organization of Report

This report was prepared to help inform the evaluation of 40B's effectiveness and limitations by reviewing its use and impact over time. It is intended to be descriptive, not prescriptive. It provides an overview of the Massachusetts housing context and documents 40B's role in expanding the state's affordable housing inventory. It traces 40B's evolution over thirty years, and examines how current activity mirrors and/or differs from past activity. It examines the role of the Housing Appeals Committee and recent progress being made at the local level to expand affordable housing opportunities for low and moderate income families and individuals. The report does not describe the 40B process other than to summarize key provisions and clarify some definitions. For detailed information on 40B regulations and procedures, see **Appendix A**.

The remainder of the report is organized as follows:

- Section 2 offers an overview of Chapter 40B, briefly describing the provisions of the statute, who can use it, and what counts toward a community's 10 percent goal.
- Sections 3 and 4 provide a framework for understanding the accomplishments and limitations of 40B. Section 3 describes important aspects of the larger Massachusetts housing market: the economic and demographic shift that is taking place as the state's population ages and properties turnover, the current supply/demand imbalance resulting from lagging production, and the disparate impact of new development. Section 4 discusses the changing nature of the state's subsidized housing inventory, including the shift in focus from production to preservation and from deep public subsidies to market incentives and the erosion of the affordable stock in general.
- Section 5 examines 40B's record of accomplishment: its role in expanding the supply of subsidized housing and the types of housing created and populations served. It also discusses 40B's contribution to expanding market rate housing, particularly rental housing.
- Section 6 traces the evolution and use of 40B over its 33-year history, and offers a look at the current caseload and pipeline.
- Section 7 probes the question of how and why a law that was enacted to increase the supply and improve the distribution of housing for poor families came to be at the center of an acrimonious debate about growth and land use management.
- Section 8 discusses the role of the Housing Appeals Committee, and
- Section 9 reports on the progress being made by Massachusetts cities and towns toward the goal of expanding their supply of affordable housing that is available for low and moderate income households.

2. 40B OVERVIEW

Provisions of the Statute

Chapter 40B⁵ created two tools to facilitate the development of subsidized housing. First, it created the comprehensive permit (CP) process, under which developers of subsidized housing in any municipality can apply for approval under a single permit from the local Zoning Board of Appeals (ZBA) rather than having to receive separate approvals from a variety of permitting agencies (e.g. planning board, board of health, conservation commission). Under the comprehensive permit, a developer may request waivers of zoning and other local requirements if he believes such waivers are necessary to ensure the economic feasibility of the project (e.g., density limits, dimensional requirements, setbacks).

Second, it established an appeals process. In communities where less than 10 percent of the year-round housing⁶ meets the statutory definition of low or moderate income, a developer may appeal a ZBA denial, or an approval with conditions that the developer believes render the project “uneconomic,” to a state Housing Appeals Committee (HAC). The HAC, an appointed five-member, autonomous body within the Department of Housing and Community Development (DHCD), can overrule an adverse decision or an approval with conditions unless the proposed development presents serious health or safety concerns that cannot be mitigated. In rendering its decision, the HAC weighs local planning concerns against the regional need for housing. Though fewer than half the cases appealed between 1969 and 1999 were built, most were decided or settled in the developer’s favor. The courts have consistently upheld HAC decisions on appeal.

Who Can Use Chapter 40B

A developer who wishes to build housing under the provisions of Chapter 40B must meet three threshold requirements. The applicant must demonstrate:

- site control, usually through ownership or option to purchase;
- that it is a public agency, nonprofit or “limited dividend”⁷ developer; and
- that the proposed project is approvable under an eligible low and moderate income housing program

The statute defines low or moderate income housing as “any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income

⁵ Chapter 40B is the state’s regional planning law, enacted in 1955. Sections 20-23, which established the comprehensive permit process, were added in 1969. It is these four sections that are now generally referred to as “40B.”

⁶ There are two other standards that may be applied to determine whether a community has met its fair share of the local and regional need for low and moderate income housing: 1.) low and moderate income housing exists on sites comprising one and one-half percent or more of the total land area zoned for residential, commercial or industrial use, or 2.) the application before the board would result in the commencement of construction of such housing on sites comprising more than three-tenths of one percent of such land area, or ten acres, whichever is larger, in any one calendar year. Since these standards are rarely applied, the 10 percent threshold is used in this report to refer to all three statutory minima.

⁷ Most subsidy programs require developers to enter into regulatory agreements that limit their profits.

housing...”⁸ Government policies, programs and funding sources change over time, however, and these changes affect who uses the comprehensive permit and the type, location and amount of housing that gets built.

In the early years of 40B’s existence, it was used almost exclusively by local housing authorities and a limited number of private developers who specialized in the construction and management of low income rental housing under financing programs that were deeply subsidized and highly regulated by federal or state agencies. Today, it is used by a much more diverse group of builders, including many with no ties to the earlier subsidy programs. Some of the early participants, notably the housing authorities, are now on the sidelines because of lack of funding. (See **Appendix B** for a listing, by municipality, of developments that have been permitted under Chapter 40B.)

Chapter 40B is used now for both ownership and rental housing.⁹ It is limited to developments in which at least 25 percent of the units will be affordable by, and restricted to, households earning no more than 80 percent of the area median income. (Some rental projects are eligible with only 20 percent of the units affordable if those units serve households earning less than 50 percent of the area median.)¹⁰ In addition to “housing subsidized by the federal or state government,” two other programs—the Local Initiative Program and the New England Fund—have been deemed by DHCD and the HAC to be eligible to use the comprehensive permit process.¹¹

What Counts

All of the units in rental developments count toward the 10 percent threshold that enables a community to preempt adversarial comprehensive permits. In homeownership developments, only the restricted units count (called affordable units in this report). This inconsistency in the counting of rental and homeownership units has been a source of controversy for many years, but more so recently because nearly three-quarters of the pipeline projects (half the units) are homeownership.

⁸ MGL Chapter 40B, Section 20

⁹ Including assisted living and supportive housing

¹⁰ 80 percent of the median income for a family of four in the state’s most expensive metro area, Boston, is \$62,650; for two people it is \$50,100. The 50 percent ceiling is \$40,400 for four and \$32,300 for two in Boston. In New Bedford, the state’s lowest income metro area, the corresponding figures are \$48,250 for four and \$38,600 for two (80 percent) and \$30,150 for four and \$24,100 for two (50 percent).

¹¹ DHCD and the HAC have also approved two other initiatives as exceptions to the normal 40B guidelines: an accessory dwelling unit program, being administered by the Town of Barnstable on a pilot basis, and a retirement community proposed for Hingham. The Barnstable initiative had generated 47 applications by year-end 2002; the Hingham proposal calls for approximately 1,300 units. Neither of these cases has been included in this analysis.

3. THE MASSACHUSETTS HOUSING CONTEXT

Chapter 40B's contribution to expanding and dispersing the supply of affordable housing needs to be examined in the context of the state's overall housing market as well as its subsidized housing inventory.

Housing Market Overview

There are about 2.6 million housing units in Massachusetts. Sixty-two percent of the state's households own their homes; 38 percent rent, most (55 percent) in small structures of 1-4 units. Approximately 8 percent of the stock is subsidized, almost twice the national average. The low income households who live in subsidized housing have been sheltered from the high rents and steep increases that burden other tenants, especially recent movers, but housing subsidies reach only small percent of the eligible households.

Long-term homeowners have seen the value of their homes skyrocket in recent years, but high prices have hurt those who want to buy. Many homeowners are house rich and cash poor, but they stay put because of a lack of appropriate housing alternatives in or near their communities. As the population ages, an increasing number of households are "overhoused:" one third of the state's homeowners are over age sixty and 54 percent of them live alone or with just one other person. While the fiscal impact of new housing development dominates much of the housing debate, it is the turnover of the existing stock, and the attendant demographic and economic shifts, that is fueling the growth pressures in many Massachusetts cities and towns. For every new housing unit that is built, three existing homes are sold to new owners. Increasingly, the transfer is from an empty nester to families with young children to educate.¹

Legacy of Lagging Production

Since the 1991-92 recession, housing production in Massachusetts has not kept pace with demand, especially in areas of job growth. The number of households increased by 9 percent during the 1990s, but the number of housing units increased by only 6 percent. Most of the new households were accommodated in existing vacant units, driving the rental vacancy rate down from 6.9 percent in 1990 to 3.5 percent a decade later, and the homeowner vacancy rate from 1.7 percent to 0.7 percent. Statewide, the median price of a single family home has doubled since 1994. (See **Figure 1**) In the eastern part of the state, especially, rents and home prices have risen sharply in response to the imbalance between household growth and new production.

Figure 2 illustrates the number of housing units permitted annually in Massachusetts since 1968. It records a decline from an average of nearly 31,000 units per year during the 1970s to 28,000 per year in the 1980s to only 17,000 per year since. The decline in multi-family units (units in structures of 5+ units) has been even more dramatic, dropping from an average of 14,000 units per year in the 1970s to 7,000 per year in the 1980s to only 1,300 per year for much of the 1990s, before picking in the past five years. Since 1998, permits for multi-family construction have averaged 2,600 per year.

¹This does not include turnover in the rental market.

The multi-family development is highly concentrated in a handful of cities and towns. Many of the Commonwealth's towns have large lot zoning (in excess of one acre per unit) and make no provision at all for multi-family, or higher density, housing even where their historical development patterns did. The units that do get built, mostly detached single-family construction, represent the high end of the market in nearly every community. An analysis, by community, of housing units permitted between 1995-2001 revealed that nearly half of the municipalities in the Commonwealth permitted only single-family construction during those seven years. In three quarters of the communities, 90 percent of the units permitted were single family.

If housing production had kept pace with household growth during the 1990s, the state would have created an additional 7,000 new units per year. As it is, rents and home prices are high, stock is limited, and variety is lacking in many of the state's fastest growing areas. The flagging economy has caused some softening in the rental market, but rent levels and home prices remain out of reach of many of the state's residents and workers.

Disparate Impact of New Development

Even though Massachusetts has lagged in the area of housing production, many communities—particularly in the Route 495 corridor, southeastern Massachusetts and Cape Cod—have experienced substantial growth,² and are now feeling the fiscal and environmental pressures associated with that growth. Because the housing that is being built is not evenly distributed, even within regions, the costs and benefits of growth are not equitably shared. Consider, for example, the divergent 10-year growth rates for these neighboring towns:³

Pembroke, 21%	Cohasset, 3%
Brewster, 21%	Chatham, 1%
Kingston, 32%	Duxbury, 6%
Berkley, 35%	Mattapoisett, 13%
Bolton, 34%	Lancaster, 5%
Northborough, 19%	Berlin, 8%
Canton, 20%,	Dedham, 2%
Ashland, 20%	Sherborn, 5%

There are many reasons that communities grow at different rates and in different ways, but with 351 separate municipalities responsible for land use decisions and for providing a host of critical public services, fiscal considerations often dominate land use decisions to the detriment of regional needs.

² While many smaller communities in the western part of the state experienced high *rates* of growth, the impact of increased development has been more pronounced in the areas experiencing substantial *absolute* growth.

³ Based on the increase in year round homes, 1990-2000 (Source: U.S. Census, SF1)

Figure 1: Median Single Family Home Prices in Massachusetts

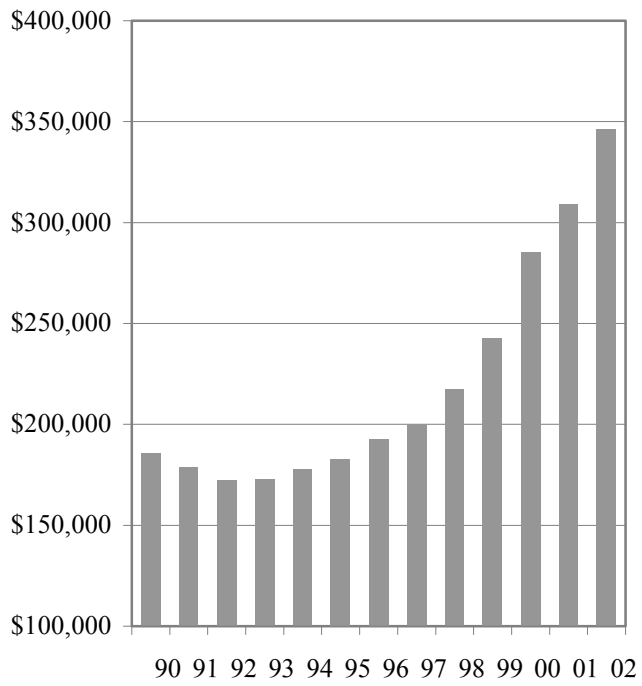
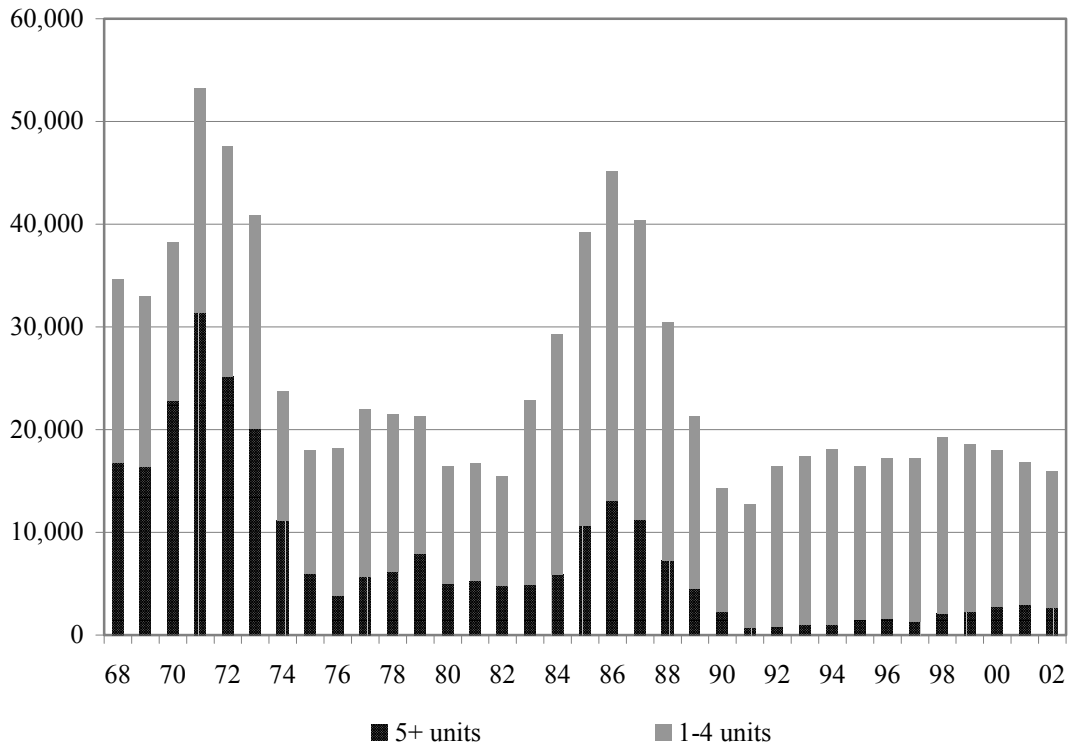


Figure 2: Housing Units Permitted



4. THE CHANGING FACE OF SUBSIDIZED HOUSING

Massachusetts had established itself as a leader in low and moderate income housing production well before the enactment of Chapter 40B. It had a large inventory of state and federally funded public housing, an ambitious pipeline of projects under the new Great Society programs that provided incentives to the private sector to build and operate affordable housing, and a newly created state housing finance agency to support the development of low, moderate and mixed income housing.

The Massachusetts Inventory Then and Now

At the time 40B became law, nearly 5 percent of the state's housing stock was subsidized. **Figure 3** shows the distribution of the state's subsidized housing in 1972,⁴ and **Table 1** compares today's subsidized housing leaders and most populous cities with those of thirty years ago. Both illustrate how highly concentrated in the state's older urban centers the inventory was:

- 84 percent of all subsidized housing units were located in the state's 39 cities. Today 70 percent are.
- The state's 15 most populous cities accounted for 69 percent of all subsidized housing. Even though these municipalities have nearly doubled their number of subsidized units, they now account for only 53 percent of the state's subsidized housing as more smaller cities and towns have added units.
- The 15 municipalities with the most subsidized units in 1972 still have the most units today. Their total numbers have nearly doubled, though individual rankings have shifted, but they now account for only 55 percent of the state total, down from 72 percent in 1972.

More than 200 communities had no subsidized housing at all in 1972. Today that number is down to 42, and most of these are small, rural towns served by regional housing authorities. Nearly 100 other communities had just started to build low and moderate-income rental units, using the State's public housing programs. Most of these had a single elderly housing development; a handful had small family developments, built for returning World War II and Korean War veterans. Today there are 50,000 units of state-aided public housing, locally owned and managed by housing authorities in more than 240 communities.

The number of subsidized units statewide has increased 150 percent in thirty years, from the 85,000 units enumerated on the first Subsidized Housing Inventory in 1972 to 216,000 today. Roughly half of the additional units resulted from new construction (including units gained through the adaptive reuse of non-residential properties). The remainder represent existing units that were acquired, rehabilitated, preserved, and/or improved for continued low and moderate income occupancy. Nearly every unit that counted on the first inventory served a low or moderate income household. All were rental, and 90 percent represented new construction. Units added to the inventory since that time include market rate units in mixed income rental developments, owner occupied housing, and group homes and supportive environments for special needs populations.

⁴ Comparisons are drawn from the first subsidized housing inventory of record (1972) and the most recent inventory (2002). Although 40B became operational in 1970, the first approval of a project that got built came in 1972.

Table 1: Subsidized Housing Leaders and Most Populous Cities, 1970 and Present

1972 Rank	2002 Rank	Municipality	Subsidized Units in 1972	2002 Rank	1972 Rank	Municipality	Subsidized Units in 2002
1	1	Boston	29,821	1	1	Boston	49,146
2	7	Fall River	4,070	2	5	Springfield	10,879
3	4	Cambridge	3,216	3	4	Worcester	9,356
4	3	Worcester	2,693	4	3	Cambridge	6,884
5	2	Springfield	2,517	5	8	Lowell	5,312
6	6	New Bedford	2,380	6	6	New Bedford	4,690
7	11	Quincy	2,283	7	2	Fall River	4,410
8	5	Lowell	2,043	8	13	Lynn	4,400
9	10	Lawrence	1,909	9	12	Brockton	4,258
10	12	Holyoke	1,859	10	9	Lawrence	3,821
11	14	Somerville	1,699	11	7	Quincy	3,429
12	9	Brockton	1,682	12	10	Holyoke	3,330
13	8	Lynn	1,653	13	14	Malden	2,875
14	13	Malden	1,587	14	11	Somerville	2,843
15	15	Framingham*	1,274	15	15	Framingham*	2,705
16	16	Chicopee	940	16	16	Chicopee	2,353
17	19	Brookline*	892	17	31	Salem	2,262
18	34	Waltham	877	18	23	Chelsea	2,098
19	21	Haverhill	843	19	17	Brookline*	2,028
20	25	Medford	806	20	21	Revere	2,025
21	20	Revere	782	21	19	Haverhill	1,961
22	33	Everett	672	22	27	Peabody	1,755
23	18	Chelsea	634	23	26	Pittsfield	1,671
24	27	Newton	615	24	37	Beverly	1,669
25	26	Fitchburg	600	25	20	Medford	1,589

1970 Rank	2000 Rank	Municipality	1970 Population	2000 Rank	1970 Rank	Municipality	2000 Population
1	1	Boston	641,071	1	1	Boston	589,141
2	2	Worcester	176,572	2	2	Worcester	172,648
3	3	Springfield	163,905	3	3	Springfield	152,082
4	7	New Bedford	101,777	4	7	Lowell	105,167
5	5	Cambridge	100,361	5	5	Cambridge	101,355
6	8	Fall River	96,898	6	10	Brockton	94,304
7	4	Lowell	94,239	7	4	New Bedford	93,768
8	11	Newton	91,066	8	6	Fall River	91,938
9	9	Lynn	90,294	9	9	Lynn	89,050
10	6	Brockton	89,040	10	12	Quincy	88,025
11	12	Somerville	88,779	11	8	Newton	83,829
12	10	Quincy	87,966	12	11	Somerville	77,478
13	13	Lawrence	66,915	13	13	Lawrence	72,043
14	21	Chicopee	66,676	14	16	Framingham*	66,910
15	20	Medford	64,397	15	17	Waltham	59,226
16	14	Framingham*	64,048	16	25	Haverhill	58,969
17	15	Waltham	61,582	17	18	Brookline*	57,107
18	17	Brookline*	58,886	18	20	Malden	56,340
19	27	Pittsfield	57,020	19	26	Taunton	55,976
20	18	Malden	56,127	20	15	Medford	55,765
21	22	Weymouth*	54,610	21	14	Chicopee	54,653
22	29	Arlington*	53,524	22	21	Weymouth*	53,988
23	35	Holyoke	50,112	23	78	Plymouth*	51,701
24	24	Peabody	48,080	24	24	Peabody	48,129
25	16	Haverhill	46,120	25	70	Barnstable*	47,821

* town

This where Figure 3 goes

Shift from Production to Preservation

Figure 4 illustrates the changing composition of the Commonwealth's subsidized housing inventory and the shift away from new production to rehabilitation and preservation. It compares the base year (1972) with activity over the next twenty-five years (1972-1997) and the most recent activity (1998-2002). Public housing represented two thirds of the units on the 1972 inventory, but only 24 percent of the additions over the next twenty-five years and virtually none of the recent activity includes new public housing, reflecting the withdrawal of federal, and later state, funding. Newly constructed rental housing, built by private developers, represented 24 percent of the inventory that existed in 1972, 46 percent of the additions over the next twenty-five years, and 35 percent of the recent activity.

New production of homeownership units and housing to accommodate a wide range of special needs (notably assisted living facilities) represents a small but increasing share of the inventory. The most significant growth has come from qualifying existing units that were acquired, rehabilitated and/or preserved for occupancy by low and moderate income residents. Such units represented only 10 percent of the base year inventory, but they accounted for 25 percent of the units added between 1972-1997 and 53 percent of the recent additions. Group homes for mentally retarded or mentally ill clients of the State's Departments of Mental Retardation and Mental Health, which DHCD qualified for inclusion on the inventory in 2001 are included in this category. Owner occupied housing units improved under publicly funded homeowner repair programs represent nearly 20 percent of the recent gain. While these home repair programs fill an important housing need in many communities, they do little to increase the supply or improve access to, or the distribution of, affordable housing.⁵

Shift from Subsidies to Market Incentives

Shifts in public policy and funding levels for low and moderate income housing have led to major changes in the way new affordable units are created. These changes have affected the types of projects being developed, the participants, and their roles and responsibilities. In the years leading up to and following the passage of Chapter 40B, the production was entirely rental and deeply subsidized. Most, if not all, of the units served low and moderate income households. Developers and property managers were subject to a high degree of regulation and oversight by the government agencies that funded them; subsidized housing was a very specialized business.

Recent developments, both ownership and rental, have received modest interest rate subsidies through MassHousing, the Federal Home Loan Bank of Boston's New England Fund, or one of the State's quasi-public housing entities, and have relied on density bonuses and rent skewing to achieve 20-25 percent affordability. They are essentially market rate developments, with an affordable component, and operate with market discipline and generally under less government regulation.

⁵ Many of the units so gained qualified on the basis of five-year affordability restrictions and will be ineligible by the time the Subsidized Housing Inventory is updated later this year. DHCD has now issued new guidelines that require affordability restrictions of at least fifteen years on rehabilitated units if they are to be counted on the inventory.

In the Housing Appeals Committee's landmark 1999 decision, which qualified the NEF as an eligible subsidy program under Chapter 40B, HAC chair Werner Lohe described this sea change:

Shallow subsidies and market-driven development have replaced the deep subsidies of the 1970s and 1980s. In the past, large grants or loans that constituted significant proportions of total development costs were provided...under a 'command and control' model. That is, in return for the subsidies, state or federal officials through their regulatory authority, retained considerable control over the design and operation of the housing. Today, however, there has been a significant shift...toward market driven...programs in which cash subsidies and bureaucratic supervision are minimized.⁶

During the transition, 40B went from being a *vehicle* that allowed the government subsidized programs to work in more locations to *being* the production program.

Erosion of the Affordable Stock

Another trend that is changing the composition of the state's subsidized housing stock, although it is not evident in Figure 4, is the loss of affordable units and their removal from the inventory. This can occur for any of a number of reasons but the three major ones are:

- Subsidized units are removed from the affordable inventory after their use restrictions expire. This includes individual homeowner units and small rental properties as well as the so-called "expiring use" projects (rental developments built during the 1960s to the 1980s with federal and/or state subsidies that are converted from low income to market rate housing).
- Low income units are lost when older public housing developments are reconfigured and rehabilitated to meet current needs.⁷
- Edits and corrections to the inventory

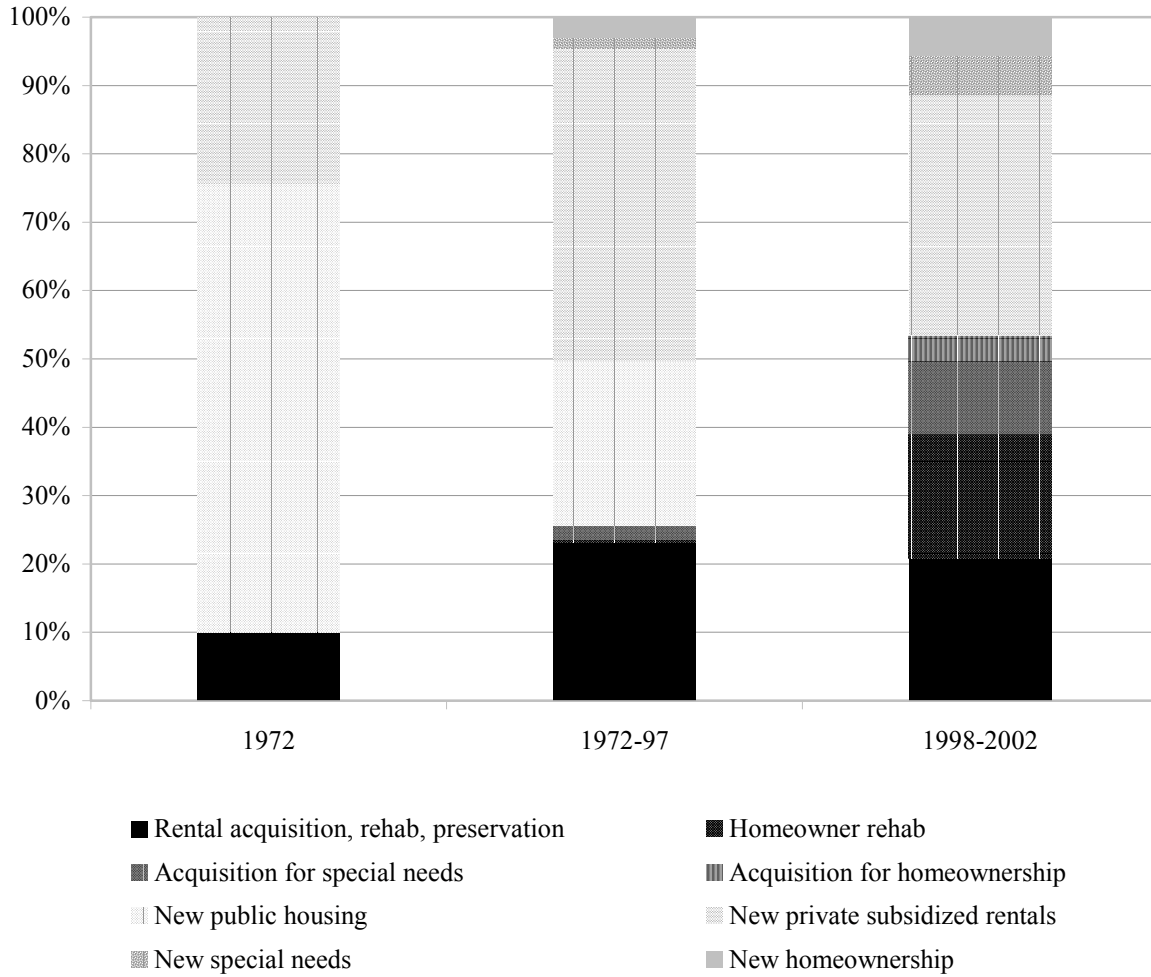
Approximately 4,500 units were removed from the Subsidized Housing Inventory in recent years, more than half as the result of edits and corrections (e.g., deleting projects that were double counted, those that were never built, incorrect unit counts, etc.). Expiring Use properties represented about 34 percent of the units deleted; public housing losses about 8 percent,⁸ and expiring Section 8 Moderate Rehabilitation and Homeowner Rehabilitation restrictions about 6 percent.

⁶ *Stuborn Ltd. Partnership v Barnstable Board of Appeals*, March 5, 1999, pages 6-7.

⁷ Planning is underway to demolish public housing developments in Lowell and Fall River entirely, but these changes will not be reflected on the inventory until the units are demolished.

⁸ Some of the public housing deletions may reflect corrections, not actual unit losses.

**Figure 4: Changes to the Subsidized Housing Inventory
by Type of Production**
(New Construction v Rehab/Preservation)



5. THE 40B RECORD

40B's Role in Expanding the Subsidized Housing Inventory

Chapter 40B has contributed substantially to expanding the state's supply of affordable housing for low and moderate income people. Nearly 500 housing developments, totaling more than 28,000 units, have been built under its comprehensive permit provisions. Another 30 projects containing 3,600 units have been approved and are expected to begin construction during the first half of 2003. **Table 2** (next page) summarizes the 40B portfolio and pipeline:

- 87 percent of the units built under 40B count toward the host community's 10 percent goal.
- 64 percent serve low and moderate income households (those earning less than 80 percent of the area median income).
- 81 percent of the units (74 percent of the developments) are for rental, 19 percent for homeownership; two thirds of the rental and one third of the homeowner units are affordable to low and moderate income households.

Overall, comprehensive permits represent almost 20 percent of all units added to the State's Subsidized Housing Inventory since Chapter 40B took effect and more than one third of the new units built in communities that were not already at the 10 percent threshold. As subsidized housing moved outward from the urban core, the use of 40B increased. An analysis of development under the major production programs documented this progression⁹ (See **Table 3**):

Table 3: Increasing Use of 40B Over Time

<u>Period</u>	<u>% of Projects Using CP</u>	<u>% of Units Using CP</u>
Early 1970s	19 %	15 %
Late 1970s	34%	36%
Mid 1980s	63%	63%
Mid 1990s to Present	70%	81%

Table 4 summarizes 40B's contribution to expanding the state's affordable housing inventory and illustrates how much more substantial its role has become in recent years. Comprehensive permits represent 83 percent of all newly constructed units added to the inventory in the past five years and 76 percent of those designated for low and moderate income occupancy.

⁹ Programs included in analysis were: public housing, 221(d)(3), 236 (early 1970s); Section 8 New Construction (late 70s); HOP, SHARP, TELLER (mid 80s); NEF, MassHousing and MHP (mid 90s to present)

This is where Table 2 goes

Table 4: Contribution of 40B to Expanding Subsidized Housing Inventory

Total Production Since Chapter 40B Was Enacted	Number of Units*	% Using CP	New Construction in Communities < 10%**	% Using CP
Total Development Units	137,400	21%	68,600	37%
SHI Units (also called 40B units)	131,800	19%	64,200	34%
Affordable Units	115,900	16%	54,300	28%

Recent Production: Units Added Since 1997	Number of Units*	% Using CP	New Construction in Communities < 10%**	% Using CP
Total Development Units	15,100	46%	8,300	82%
SHI Units (also called 40B units)	12,700	42%	6,300	83%
Affordable Units	7,500	31%	2,900	76%

Notes: The Subsidized Housing Inventory (SHI) is also called the State’s “40B list.” It includes all qualified subsidized housing, not only units that used the comprehensive permit provisions of MGL Chapter 40B. It reports the total number of units in mixed income developments as “total development units” and the number of units that count toward a community’s 10% goal as “40B” units.” Units that are restricted to occupancy by households earning no more than 80% of area median income are considered “affordable.” The number of affordable units is not reported on the inventory. *Numbers are rounded **At time of construction

40B has been used to create affordable housing in every county of Massachusetts, from the Berkshires to Nantucket. While many communities have been able to add qualified units to their inventory without resorting to 40B, most have used it at least once, as **Table 5** illustrates. Some 285 communities have added new subsidized units since 1972, and comprehensive permits were used for more than half the production in 85 of these. In 22 communities, comprehensive permits were required 100 percent of the time.

Many observers believe that the existence of the comprehensive permit option has also increased the number of units approved under more traditional methods—variances, special permits or rezoning—by encouraging communities to negotiate with affordable housing developers. (For detailed information on the subsidized housing performance of individual communities and their use of the comprehensive permit, see **Appendix C.**)

Table 5: Distribution of Communities that Used 40B to Add Subsidized Housing Units*

<u>% of Units Added</u>	<u># of Communities</u>	<u>% of Communities</u>
100%	22	8%
90-99.9%	15	5%
80-89.9%	13	5%
70-79.9%	9	3%
60-69.9%	15	5%
50-59.9%	11	4%
40-49.9%	14	5%
30-39.9%	18	6%
20-29.9%	23	8%
10-19.9%	21	7%
under 10%	29	10%
None**	95	33%

Notes:

* 305 communities reported increasing their subsidized housing stock since 1972 but in 20 cases the increase was entirely attributable to home fix-up programs or conversion of existing units.

** Among the communities where the comprehensive permit was never used are 17 cities.

Types of Housing Created and Populations Served

The housing created under the comprehensive permit provisions of Chapter 40B includes:

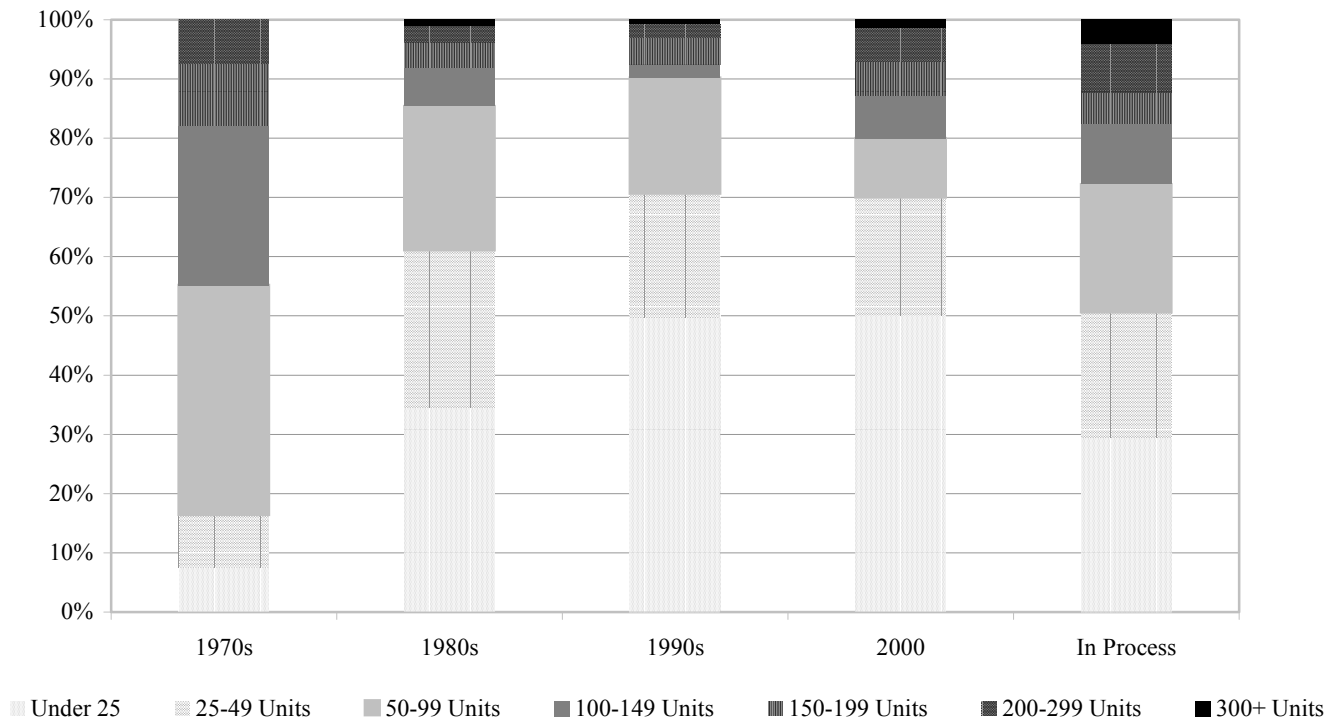
- More than 4,000 units of locally owned and managed public housing in 135 developments in 93 communities, all of which house low and moderate income residents
- 18,000 units of privately-owned rental housing in more than 200 developments in 114 communities, two thirds of which are available for low and moderate income occupancy
- Homeownership developments in 84 communities, with more than 5,000 units, nearly one third of them affordable to homebuyers earning less than 80 percent of the area median income.

Chapter 40B developments have been built by a mix of developers: 55 percent by limited dividend corporations, 32 percent by local housing authorities and 15 percent by nonprofit organizations. The housing has served a variety of local needs: approximately 57 percent of the developments (45 percent of the units) were built for families, 33 percent (52 percent of the units) for the elderly and 10 percent (3 percent of the units) for populations with special needs.¹⁰

¹⁰ Earlier studies of 40B (Krefetz, Verrilli) have reported similar findings, but with some variation in the percent of units assigned to each of the categories. The differences reflect recent additions and corrections to the DHCD inventory. Communities have never been required to identify which units on the inventory used the comprehensive permit so the database may be incomplete. As the inventory is updated, and 40B comes under greater scrutiny, errors and omissions continue to be identified and corrected. Appendix B identifies developments that are currently identified on the state inventory as having used 40B. Corrections, additions or deletions should be reported to Kristen Olsen at DHCD (www.Kristen.Olsen@ocd.state.ma.us)

Developments come in many sizes, averaging 57 units: 16 percent contain 10 or fewer units; 22 percent contain between 11-25 units; 24 percent have between 26-50 units; 21 percent between 51-100 units; 13 percent between 101-200 units; and 4 percent over 200 units. Size is a function of financing and subsidy programs. Developments built under 40B in the 1970s tended to be larger than those built in the 1980s and 90s, but the pipeline again includes a number of larger developments. (See **Figure 5**)

Figure 5: Size of 40B Developments Over Time
(by date of approval)



40B’s Contribution to Overall Housing Production

Chapter 40B also contributes to expanding the supply of market rate housing. New subsidized housing development has represented about 10 percent of all Massachusetts housing starts over the past thirty years, and more than one third of these units used the comprehensive permit. The Comprehensive Permit’s contribution to the state’s overall construction activity varies from year to year, but it has increased over time, from about 3 percent in the 1970s to more than 7 percent since 2000. As it has become more difficult to finance affordable housing without deep subsidies and “of right” development opportunities have become more scarce, 40B’s role has become more prominent, especially its role in promoting rental housing.

The state’s rental production had fallen to record low levels during the 1990s (refer to Figure 2), but in the last few years interest in apartment construction has revived, spurred by the entry into

the market of several prominent national development firms. Building permits were issued for more than 10,000 new rental units¹¹ in greater Boston between 1998 and 2002, 12 percent of which will be restricted for low and moderate income occupancy. Nearly 30 percent of the new units, and more than 70 percent of the affordable units, were approved under Chapter 40B. Excluding production in cities that were already above the 10 percent threshold, comprehensive permits accounted for almost half the production and more than 96 percent of the affordable units.¹² Twenty-eight percent of the units in comprehensive permit developments, but less than 4 percent in the others, are affordable. The only mechanism for achieving affordability in “non-40B” developments has been inclusionary zoning mandates, used effectively by the cities of Boston and Cambridge.

¹¹ Excludes units preserved or rehabbed, units in 1-4 unit structures, units for special needs populations, SROs, assisted living units, etc.

¹² Thirty-six percent of the new rental development is taking place in Boston, Cambridge, Salem, Lawrence, and Malden, cities already at the 10 percent threshold. Most of the remaining production has been concentrated in a handful of smaller cities, notably Quincy, Peabody and Woburn.

6. EVOLUTION AND USE OF 40B¹³

Use of the Comprehensive Permit has fluctuated over time, responding to shifts in public policy, the availability of public subsidies and incentives for the development of low and moderate income housing, and market conditions. **Figure 6**, which charts the number of units built with comprehensive permits by year of filing, illustrates this fluctuation. This chart also documents the shift over time to more mixed income housing, a shift driven by economic considerations as well as public policy.

1970s-Early 80s

It took several years for Chapter 40B to become fully operational. Fifteen of the first 17 comprehensive permit applications were turned down by the local ZBAs, and none was built.¹⁴ In the decade that followed the 1973 Supreme Judicial Court ruling upholding the constitutionality of the law, 40B was used primarily by local housing authorities and developers using MHFA (now MassHousing) funding to build subsidized rental housing in which all or most of the units were reserved for low income tenants. Other users included nonprofit organizations developing housing for the elderly and disabled, usually under HUD subsidy programs, and developers of small rental properties, using the federal Farmers Home Administration (now Rural Housing Services) programs.

Almost half of the roughly 200 communities with no subsidized housing in 1972 added units by 1983 (although the cities still accounted for 63 percent of the production), and the overall inventory nearly doubled. Comprehensive permits were used in a number of small cities as well as suburban towns during this period, accounting for about 10-15 percent of all new units.

Mid-Late 1980s

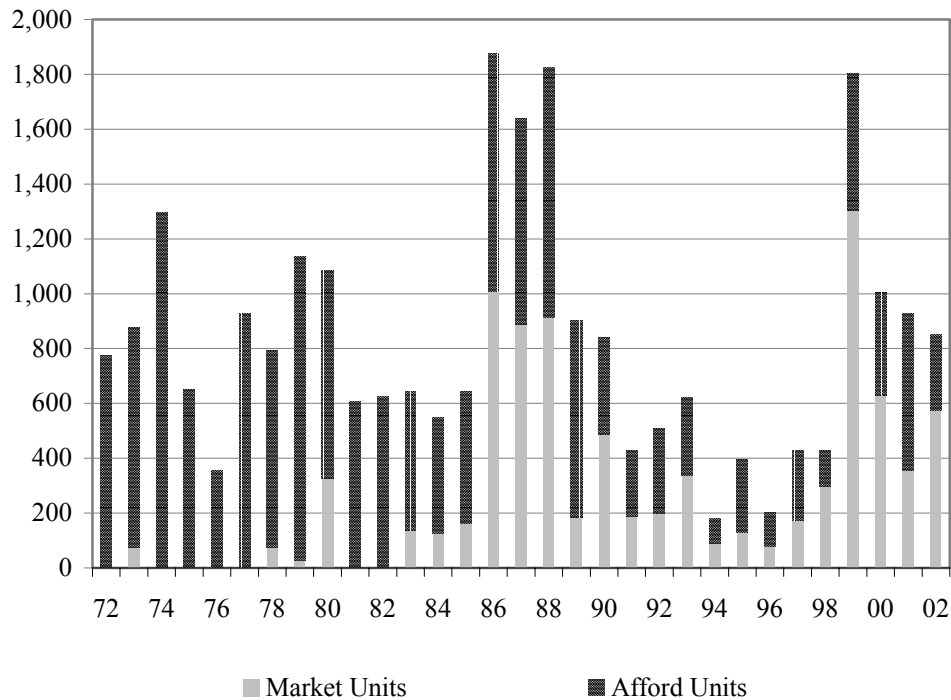
Beginning in the mid-1980s, developers began to use 40B for rental projects that included significant numbers of market rate units,¹⁵ and also for homeownership under a new State program created to help low and moderate income families purchase homes in the rapidly rising Massachusetts housing market. The Homeownership Opportunity Program (HOP) was launched in 1986, and opened up the comprehensive permit process to homebuilders for the first time, if they agreed to make 25 percent of their units available to low and moderate income homebuyers. HOP provided low-interest mortgages to income eligible participants, but it did not provide financing to the developers so most relied on density bonuses under the CP process to make

¹³ See Verrilli, pages 7-14 for a more complete description of the history of Chapter 40B's implementation and its use over time.

¹⁴ Ibid, page 8

¹⁵ These included the State's TELLER (Tax Exempt Local Lending to Encourage Rental Production) and SHARP (State Housing Assistance for Rental Production) programs and MassHousing's 80/20 program, in which a minimum of 20 percent of the units could be reserved for low income households (those earning less than 50 percent of area median). These programs were designed to stretch limited subsidy dollars and achieve a desired public policy goal by building mixed income housing wherever possible. In a 1981 decision, the HAC ruled that all the units in these mixed income rental developments should count toward a community's 10 percent goal since the subsidized financing covered the entire project

Figure 6: Units Built Under 40B by Year
 (by year of filing; includes only those 1999-2002 filings that are
 in construction or are expected to be in 2003*)



projects feasible. Unlike rental developments, only the affordable units in HOP projects were counted on the State’s Subsidized Housing Inventory.

Note* The number of units built as the result of applications filed between 1999 and 2002 is expected to increase substantially as applications still in process move into construction in coming years.

Activity increased in suburban communities during this period—the cities’ share of the production fell from 63 percent to 55 percent—and 40B played a major role in the increase. It is estimated that more than 30 percent of the new units added to the inventory during this period were permitted under 40B. Chapter 40B played an even more prominent role in the State’s two major production programs of that era: SHARP and HOP. The Comprehensive Permit process was used for nearly three quarters of the suburban and rural production under these programs.¹⁶

In 1987, a Special Legislative Commission was established after twenty-four bills were filed to amend or abolish 40B. The petitions were prompted, in large part, by the proliferation of 40B requests under the Homeownership Opportunity Program. A number of communities faced several comprehensive permit petitions simultaneously, overwhelming their volunteer ZBAs. Local concerns expressed at that time involved the adverse impact on municipal services of large numbers of new units, specifically the impact on schools, the environment, and infrastructure (traffic, water and sewer, etc.).

¹⁶ Two thirds of the production, under both programs, took place in the cities.

The Commission conducted hearings throughout the state in 1988, and issued its report and recommendations in 1989. The recommendations, intended to respect local planning concerns and encourage production by enabling communities to address their housing needs with greater flexibility, included:

- Creation of a new, locally sponsored program that could access the Comprehensive Permit process without utilizing conventional state or federal subsidy programs and would count toward a community's 10 percent threshold;
- Establishment of a process by which communities were encouraged to create and implement local housing plans;
- Regulatory changes intended to make the CP process clear and consistent, and a provision for increasing technical assistance to municipalities;
- A directive to the Governor to improve coordination among the various cabinet secretaries and to prioritize discretionary grants to communities that are increasing their affordable housing stock.

Early 1990s

The Commission's report was released just as the state's economy went into a tailspin, resulting in falling home prices and deep cuts in state funding for housing programs. With a lack of activity in the early 1990s, 40B dropped from the legislative radar screen. For much of the remainder of the decade, production under the comprehensive permit consisted of locally initiated homeownership developments and small rental projects, often developed by nonprofit organizations. The latter were concentrated in communities with an existing affordable housing infrastructure: activist governments with established housing and community development programs, community development corporations, regional nonprofits, etc.

Between 1990 and 1997, nearly 40 percent of the state's towns added no new subsidized units or lost existing ones. The cities again dominated the production, accounting for two-thirds of the net gain, and there was a corresponding drop in the use of 40B. The comprehensive permit was used for only about 15 percent of the units added to the inventory during this period, but it was widely used for locally supported projects developed in suburban towns under the Local Initiative Program (LIP). LIP was established by DHCD in 1990 on the recommendation of the Special Legislative Committee, and 57 communities have since used the program to create affordable housing, most during this time period. Nearly 80 percent of these local initiatives used 40B.

1998-Present

With the economic recovery of the late 1990s, rents and home prices escalated dramatically, but housing production did not keep pace with demand. Deep subsidy programs from the state and federal governments had been curtailed years earlier and new production increasingly involved multiple layering of shallow subsidies and/or incentives for the inclusion of affordable units in market rate developments.

Beginning in 1998, lending institutions that were members of the Federal Home Loan Bank of Boston (FHLBB) became active in construction and permanent financing of rental and ownership housing using the FHLBB's New England Fund. Under NEF, the FHLBB advances low-cost funds to its members, and those institutions make loans at favorable interest rates for projects that qualify under 40B.¹⁷ When the Housing Appeals Committee ruled in its 1999 *Stuborn* decision that the NEF qualified as a subsidy program under 40B, there was a surge in applications. Shortly thereafter, MassHousing re-entered the market with a new array of financing options for mixed income ownership and rental development.

The impact of the introduction of NEF, coupled with the HAC's decision in *Stuborn*, was immediate and dramatic. Developers and homebuilders who had been stymied in their efforts to get projects through the local approval process became eligible to use the expedited permitting that 40B provides on projects funded by local lenders if 25 percent of the units were reserved for low or moderate income households. Following nearly a decade of lagging production, demand was pent up for new housing, both rental and ownership, in all price ranges. The combination of market strength and increases in allowable scale or density under 40B induced more builders and developers to include affordable units in their market rate developments.

Comprehensive permit applications were filed for more than 2,000 units in 1999, up from just over 400 the previous year. Over 40% of the applications were for projects with more than 100 units. **Table 6** documents the increasing number and size of applications submitted under 40B during the past four years.

Table 6: Increasing Number and Size of 40B Proposals Post-1999

<u>Year</u>	<u># of Projects</u>	<u># of Units</u>	<u># with 100-299 units</u>	<u># with 300+ units</u>
1998	12	430	0	0
1999	19	2233	6	2
2000	45	3134	10	1
2001	97	8462	26	3
2002	103	8251	25	4

In response to growing community concerns, the state issued a series of new regulations starting in August, 2001. These regulations were designed to give communities greater control over the process and improve its efficiency. (See **Appendix D** for a summary of the 16 regulatory changes DHCD has put forth since August, 2001.)

In late 2002, the Department of Housing and Community Development issued a new regulation, which requires a state agency to issue site letters and monitor projects under the NEF Program rather than local banks. Prior to this new regulation, the NEF Program was suspended for seven

¹⁷ NEF may be used to fund projects that benefit households earning up to 140 percent of area median income without long-term affordability restrictions or profit limitations. However, to be eligible to use the comprehensive permit, a developer must agree to comply with 40B's stricter affordability, income and profit limitations.

months. At the time the FHLBB suspended NEF in the summer of 2002, the program accounted for more than two-thirds of the 40B pipeline. Three quarters of the larger (100+ unit) development proposals were NEF, as were many of the most controversial ones. Criticism of the NEF, and 40B policies and procedures in general, led to renewed legislative efforts to amend or overturn the statute. Major legislative debate took place in 2002, which resulted in passage of 40B reforms as part of an omnibus housing bill. Former Governor Swift vetoed this legislation—largely because of concerns about non-40B aspects of the omnibus bill. However, most of the 40B reforms contained in the omnibus housing bill were implemented through new regulations. More than 70 bills to change 40B were introduced into the Legislature for the 2003-2004 legislative session.

Pipeline

Fewer than one-third of the 1999-2002 proposals, and only 21 percent of the units, have moved into construction. As of December 31, 2002, 165 developments that had applied for comprehensive permits under Chapter 40B were still in process, either at the local level, the HAC or in the courts (a total of close to 15,000 units). More than 100 others (6,400 units) had applied to MassHousing or the New England Fund for site eligibility letters. History suggests that about 60 percent are likely to be built.

If every one of the 21,000 units that are currently under review were to move into construction over the next three years—a highly unlikely scenario—it would add 7,000 new housing starts per year. This would bring statewide housing production up to 24,000 units/year. While greater than the average production level of the 1990s (less than 17,000 units per year), this would still fall short of the 28,000 unit average annual production of the 1980s, or the 30,000 unit average reported during the 1970s.

7. WHY ALL THE ATTENTION TO 40B NOW?

Twice in its 30+ year history the 40B debate has spilled out of the realm of housing and planning practitioners and onto the public stage. In both cases, the late 1980s and the present, two factors were in play that precipitated a surge in 40B filings: 1.) an overheated housing market, and 2.) the introduction of a new funding source/program that increased the use of 40B by new players and in locations where it had not previously been used.

What's Different About the Current Activity?

Increased Level of Activity

The number of 40B filings in the past four years has exceeded even the level of activity of the late-1980s construction boom. Fewer requests are being denied outright by local ZBAs, but the process has become more contentious. Thirty-eight appeals were filed with the Housing Appeals Committee in 2002, nearly as many as were filed in the late 1980s (31 in 1987, 39 in 1988 and 48 in 1989).

As more communities have gained experience with the comprehensive permit process, 40B has grown as a public issue. Even if the process is a positive one, it still represents an override of local rules and regulations, and that has left many local officials and residents resentful. At least two-thirds of the Commonwealth's cities and towns have now dealt with requests for comprehensive permits.¹⁸ **Figure 7** maps this expanding use of 40B:

- 67 projects were built during the 1970s in 50 communities
- 188 projects were built during the 1980s in 113 communities, including 89 communities that had no prior experience with 40B
- 139 projects were built during the 1990s in 92 communities, including 42 new communities
- 248 projects have filed for comprehensive permits since 1/1/2000 in 121 communities, including 29 new ones, and
- 110 projects have applied for site eligibility letters in 71 communities, including 15 new ones

The increase in size and scale of many of the recent proposals represented the reversal of a twenty-year trend toward smaller development. (This concern was addressed by DHCD in a 2001 regulatory change that imposed size limits on developments, from 150-300 units, depending on size of the community). As was the case in the late 1980s, a number of towns are processing multiple applications at the same time. At year-end 2002, a dozen communities were processing three or more comprehensive permit applications.

Declining Levels of Affordability

At the same time, the ratio of affordable units to total units built under 40B has dropped:

- Average percent affordable during the 1970s 97 percent
- Average percent affordable during the 1980s 67 percent

¹⁸ This includes communities with projects already built, or under construction, under comprehensive permits as well as those communities with CP requests currently pending (filed with ZBA through 2002). It also includes 29 communities where CP cases were appealed to the HAC, but never built. It does not include projects that have been proposed but have not filed with local ZBAs.

This is where Figure 7 goes

- Average percent affordable during the 1990s 54 percent
- Average percent affordable during the 2000s 27 percent

This has led some to suggest that the public benefit does not justify the cost. Others argue that it only makes sense to take advantage of the high rents/prices realized on a development's market rate units, combined with reasonable density bonuses under Chapter 40B, to internally subsidize affordable units, especially in the absence of deep government subsidies.

New Players, New Programs, New Rules

The current activity involves new players, new programs and new rules. For the most part, the state's established low income housing developers, both for-profit and nonprofit, have been succeeded by more traditional homebuilders and national apartment developers. Ten percent of the pending 40B applications, accounting for nearly 30 percent of the units, were submitted by large national or regional developers. After thirty years of evolutionary changes in the implementation of 40B, the rules governing everything from "what counts" to "who can play" have undergone some major changes in recent years as the administrative apparatus governing 40B has caught up with the political and economic realities of affordable housing development.

The Larger Land Use Debate

These factors alone don't explain the current controversy, however. Chapter 40B has never been popular. It has been called the anti-snob zoning law since its narrow passage by the Legislature in 1969, but communities and developers have managed to live with it and make it work for more than thirty years. It has an established, credible track record.

What has happened is that 40B has become the lightning rod in a much larger debate over land use and growth management *because it is one of the only tools currently available* to overcome local obstacles to building new housing of any type in communities where demand and land exist. High land and development costs, restrictive zoning and fragmented land use decision-making have all contributed to the challenge of siting new housing. *Bringing Down Barriers-Changing Housing Supply Dynamics*, a report prepared by the Executive Office for Administration and Finance in 2001, identified numerous impediments to efficient and sound development, examples of which include:

- Large lot zoning – In 95 of 155 communities for which build out analyses had been performed, current regulations required more than an acre per unit.
- Building moratoria - About 50 communities had [at that time] established growth controls or building moratoria.
- Excessive regulations - Many communities had Title V and other regulations far in excess of State mandates.
- Inadequate or inappropriate zoning - Many communities have only large-lot zoning and make no provision for multi-family, or higher density housing, even where their historical development patterns did.

Until Massachusetts rationalizes the process by which it makes decisions about how to use its land, and other resources, for the “commonwealth,” 40B—which, by design, works as an exception to the existing rules—is likely to remain a source of controversy.

The Cost of Growth

Chapter 40B did not create the pressures that many high growth suburban communities are now feeling—fiscal stress, increased traffic congestion, changing community character, loss of open space—but there is concern that it may aggravate them if it allows development that runs counter to responsible and balanced planning. The growth has been driven by job creation, good schools, development of larger market rate family housing, and shifting demographics (the turnover of the existing inventory and the replacement of smaller, older households by younger families). The issue of who pays for growth is one that the state needs to address.

Table 7, which presents key housing statistics for communities that have experienced dramatic

Table 7: A Look at Communities with High Growth in School Age Children

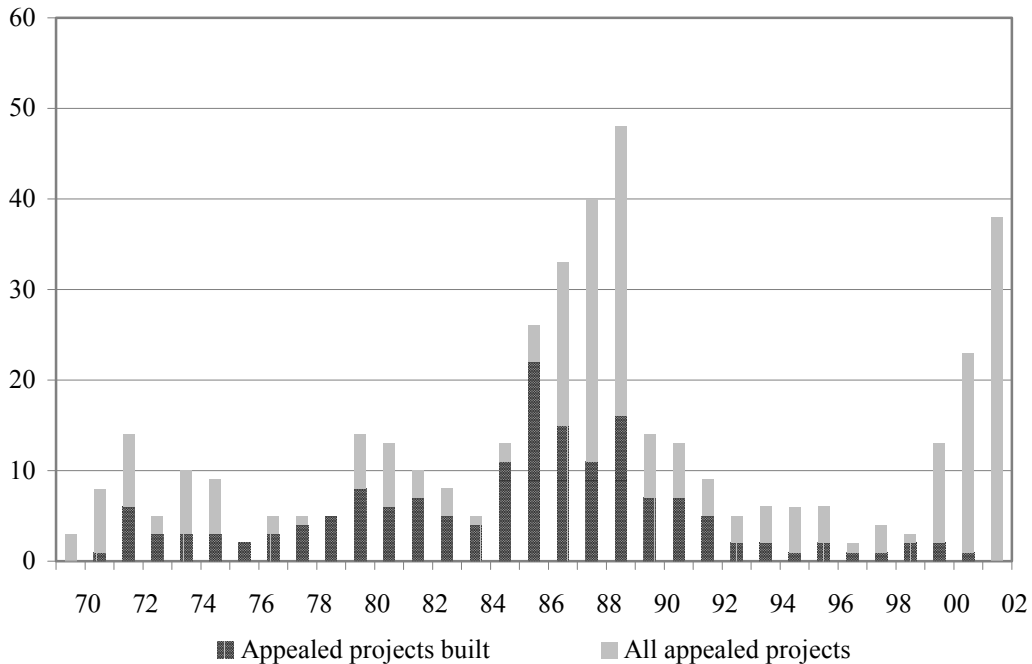
City/town	% Increase in School Age Pop. 90-00	% Increase in Total Pop. 90-00	% Increase in Year Rnd Housing	4&5 BR/All New Const	New Subsidized Family Units 90-00	% Subsidized (2000)	CPS as % of Subsidized Units	Median Single Family Home Price 2002	Change in Income Rank from 90-00
Middleton	125%	57%	24%	75%	12	3%	62%	\$417,500	97th - 37th
Boxborough	99%	46%	29%	63%	0	1%	100%	\$483,000	59th - 28th
Hopkinton	73%	45%	38%	76%	8	3%	29%	\$465,500	42nd - 23rd
Westborough	63%	27%	17%	86%	9	11%	76%	\$362,000	120th - 59th
Southborough	62%	33%	27%	64%	4	2%	0%	\$440,000	21st - 9th
Franklin	61%	34%	34%	64%	34	6%	22%	\$320,000	62nd - 64th
Dover	60%	13%	11%	88%	17	1%	100%	\$736,000	3rd - 2nd
Medfield	60%	16%	15%	85%	0	5%	68%	\$430,000	12th - 13th
W Boylston	59%	13%	8%	87%	8	3%	89%	\$182,000	136th - 180th
Weston	58%	12%	9%	90%	12	3%	10%	\$923,000	1st - 1st
Groton	56%	27%	25%	83%	5	3%	98%	\$352,500	39th - 36th
Boxford	53%	26%	26%	81%	15	1%	100%	\$543,000	7th - 7th
Medway	49%	25%	25%	72%	0	5%	66%	\$316,300	40th - 53rd
Westford	45%	27%	26%	89%	11	2%	57%	\$397,000	25th - 12th
Norfolk	43%	13%	14%	89%	20	3%	24%	\$379,900	16th - 32nd
Bolton	43%	32%	36%	76%	14	1%	100%	\$435,000	17th - 10th

increases in school age population, illustrates the modest impact 40B has had relative to other factors. Nonetheless, many communities resist the development of new affordable housing, family housing in particular, for fear that it will not pay its own way.

8. ROLE OF THE HOUSING APPEALS COMMITTEE

Two-thirds of the developments that have been built under the comprehensive permit were approved at the local level, and one-third were built after the developer appealed a local decision to the Housing Appeals Committee (HAC). Through 2002, 419 appeals had been filed with the HAC, half between the years 1986-1989 and 2001-2002. **Figure 8** illustrates the HAC's caseload over time.

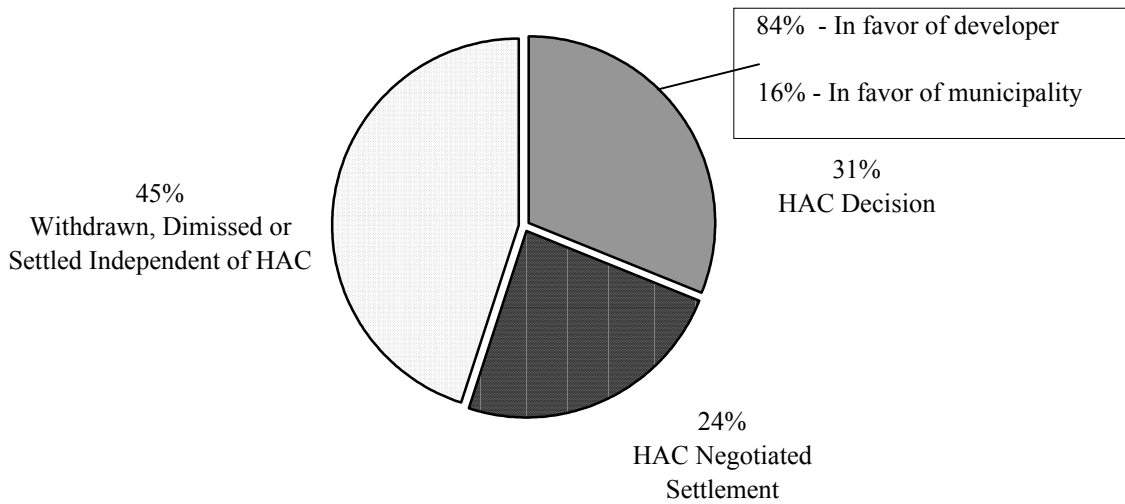
Figure 8: Housing Appeals Committee Caseload Over Time



The Appeals Process

The appeals process is time-consuming, and 64 cases are still in progress, or on appeal to the courts. This includes 9 cases from 2000, 18 from 2001, and 37 from 2002. The Committee issued rulings in 108 cases (31 percent), with the balance settled through negotiation or abandoned by the developer. It upheld local denials in 16 percent of its decisions, and ruled in favor of the developer in 84 percent. **Figure 9** shows the disposition of those HAC cases where the outcome has been determined. The HAC negotiated settlements in 24 percent of the cases appealed to it, but the developers and communities independent of HAC settled many others. These are included in the 45 percent of appeals that were withdrawn or dismissed.

Figure 9: Disposition of HAC Cases
(415 Appeals, 1970-2002)



Not only is the HAC process itself a protracted one, but also appellants have the right to appeal its decision to the courts, and many do, adding to the expense and delay. Although several of the appealed cases have been remanded to the HAC for further proceedings, no comprehensive permit issued by the Committee has ever been overturned by the courts.

Abutters aggrieved by the issuance of a comprehensive permit have two forums in which they can seek redress, and they often avail themselves of both. In all cases, they can appeal to the Superior Court. In addition, if the developer has filed an appeal with the HAC, the abutters may request permission to intervene as parties with an interest in the appeal. It has been the HAC's practice to permit abutters to participate, either with full intervener status or as *amici curiae*.

Outcomes of HAC Appeals

Fewer than half of the cases that get appealed to the Housing Appeals Committee ever get built, despite rulings or settlements that are generally favorable to the developer. There are reasons for this: the power of delay, the vagaries of financing, and market forces.¹⁹ The impact of these factors is evident in **Table 8**, which details the outcome of appeals by year. This table shows that, overall, 62 percent of the cases ruled in favor of the developer were built, as were 56 percent of those in which the HAC facilitated a settlement, and 35 percent of the cases that were withdrawn or dismissed. In some years, however, the number of appeals that result in construction is much lower. The variability in both volume of appeals and fallout—cases appealed but never built—reflects market conditions and funding availability.

¹⁹ Other reviews of 40B cases and HAC decisions dating back to the 1970s have arrived at the same conclusion. (Ruben and Williams, 1979; Krefetz, 1998; and Verrilli, 1999)

Table 8: Outcomes of HAC Appeals: Percent Resulting in Construction

Year	Notes	# of HAC Appeals	Approved (ZBA denial overturned)		Negotiated decision/settlement		Denied (ZBA denial upheld)		Other (dismissal, withdrawal, in process etc.)		Total Built	
			# Cases	# Built	# Cases	# Built	# Cases	# Built	# Cases	# Built	#	%
1970		3	1	0					2	0	0	0%
1971		8	4	0					4	1	1	13%
1972		14	10	6			1	0	3	0	6	43%
1973		5	4	3					1	0	3	60%
1974		10	6	3	2	0	1	0	1	0	3	30%
1975	1	8	2	1	3	2	1	0	2	0	3	38%
1976		2							2	1	1	50%
1977		5	1	1	1	1			3	1	3	60%
1978		5	1	1					4	2	3	60%
1979		5	1	1	3	3			1	1	5	100%
1980		14	4	2	5	4	3	0	2	0	6	43%
1981		14	1		2	2			11	2	4	29%
1982		10	2	2	4	3	1	0	3	1	6	60%
1983		8	4	2	1	0			3	3	5	63%
1984		5	2	2	1	1			2	1	4	80%
1985		13	3	3	5	4			5	2	9	69%
1986		26	6	5	6	4			14	12	21	81%
1987	2	31	7	5	7	4	1	0	16	6	15	48%
1988	3	39	5	4	4	1	1	0	29	7	12	31%
1989	4	48	10	7	15	4	1	1	22	4	16	33%
1990	5	14	4	3	3	2	3	1	4	1	7	50%
1991		13	7	4	3	1			3	2	7	54%
1992	6	9	1	0	4	4	2	0	2	1	5	56%
1993		5	1	0	2	1			2	1	2	40%
1994	7	6			3	1	1	0	2	1	2	33%
1995		6	1		2	1			3	2	3	50%
1996	8	6			3	2	1	0	2	0	2	33%
1997		2			1	1			1	0	1	50%
1998		4	2	1	1				1	1	2	50%
1999		3	1		1				1		0	0%
2000	9	13	Too soon to tell									
2001	9	23										
2002	9	38										
Subtotal 1970-1999		341	91	56 (62%)	82	46 (56%)	17	2 (12%)	151	53 (35%)	157	46%
Distribution		100%	27%		24%		5%		44%			

See notes on following page

Notes to Table 8: Outcomes of HAC Appeals

419 total appeals through 2002, including 4 duplicates

- 1 9 filed, 1 duplicate
- 2 33 filed, 2 duplicates
- 3 40 filed, 1 duplicate
- 4 denial of amendment upheld, project was completed as originally approved
- 5 denial of 1 condition upheld (perpetuity issue), project was completed anyway
- 6 denials based on jurisdictional issues
- 7 denial based on jurisdictional issues
- 8 denial upheld because applicant didn't prove conditions made project uneconomic
- 9 Of the 13 appeals filed in 2000, at the time of this review (January 2003), only 3 have been decided. Two, where a settlement was negotiated, have been built; a third, in which the ZBA denial of a CP was overturned, has not yet been built.
- 9 Of the 23 appeals filed in 2001, 5 have been decided. Denials were upheld in two (one of which is being appealed in court) and overturned in two, one of which is under construction. The fifth case, where a settlement was negotiated, is still in the planning stages.
- 9 Only one of the 38 appeals filed in 2002, has been decided. In this case, ZBA conditions were overturned and the project is expected to break ground in the spring.

9. GETTING TO 10 PERCENT

Much of the discussion about 40B's effectiveness has focused on the number of communities that have achieved the 10 percent goal, but that is not the best indicator of success. The more appropriate measure is to look at the number of communities that have built subsidized housing for low and moderate income residents over the past thirty years and how many of them required the comprehensive permit to get that housing constructed. Section 5 documents the important role that 40B has played, and continues to play, as measured by this standard. Figure 10 is a map showing the current subsidized housing inventory.

There are 32 communities currently at 10 percent, an increase of nine in just the past five years. However, construction on the developments that put two of these communities over 10 percent has not commenced and four others only reach 10 percent by qualifying existing, occupied units that were rehabilitated with public funds.

How the 10 Percent Communities Got There

Most of the communities that are at or near the 10 percent threshold got there by having a substantial inventory of public housing. Three of the 10 percent communities have exceeded that threshold since the law's enactment. Another seven that were not at 10 percent at the time of the first subsidized housing inventory in 1972 had sufficient units planned or under construction at that time to put them over 10 percent by the early 1980s. These include most of the Commonwealth's largest cities. By 1983, nineteen communities were at 10 percent and the number of communities with no subsidized housing had been cut almost in half. Also included on the list of 10 percent communities are the small, rural towns of Chester, Middlefield and Wendell, which have created few or, in some cases, no new qualified units during the past 30 years, but operate substantial homeowner rehabilitation programs.

Communities were aggressive in reporting progress during the 1980s construction boom, adding units to the inventory as soon as they were approved. By 1988, 28 communities were listed as being at or above 10 percent, but by 1990 it had dropped back to only 18. Most communities do lose ground in the count following the decennial census because growth in market rate housing outpaces progress on the subsidized inventory. The backslide between 1988 to 1990, however, was largely due to HOP and other proposals that were approved but later abandoned when the market turned down.

Recent Progress

More communities are developing affordable housing strategies and timetables to expand housing options and attain the 10 percent goal, and DHCD has issued guidance to other communities that wish to do likewise. (See Appendix A). In addition to the 32 communities that have already exceeded the 10 percent goal, 18 others are at 8 or 9 percent and another 15 are at 6 or 7 percent. Fifty-five communities need to produce or preserve 200 units or less to reach the 10 percent goal.

Table 9 documents the significant progress made by several communities in just the past few years.

Table 9: Communities Making Significant Progress Toward the 10 Percent Goal

<u>Community</u>	<u>Last 4 Yrs</u>	<u>Previous 30 Yrs</u>
Marlboro	588 units	488 units
Westborough	543 units	195 units
Peabody	476 units	711 units
Danvers	443 units	253 units
Wilmington	331 units	119 units
Abington	330 units	72 units
Raynham	275 units	193 units
Tyngsboro	266 units	116 units
Georgetown	210 units	140 units
Hadley	160 units	37 units

The most recent additions include the suburban and rural communities of Georgetown, Hadley, Raynham, Tyngsborough, and Westborough.

This is where Figure 10 goes