ZONING LITIGATION AND AFFORDABLE HOUSING PRODUCTION IN MASSACHUSETTS

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I. INTRODUCTION AND KEY FINDINGS

In February 2002, when the Amherst Zoning Board of Appeals (ZBA) unanimously approved his application for a comprehensive permit to build a 26-unit family rental housing development (Butternut Farm), Peter Gagliardi never imagined he was in for a five-year legal battle. Gagliardi is executive director of a regional nonprofit housing agency (HAP, Inc.) that has developed 40 projects in Western Massachusetts, usually with little or no opposition. In this case, however, neighbors immediately filed suit in Land Court, seeking to annul the zoning approval.

The abutters argued that the ZBA lacked the authority to approve a comprehensive permit because the town had surpassed the 10% subsidized housing threshold. They also claimed injury due to the permit requirement that 20% of the units be set aside for minority households.

Gagliardi knew that the litigation would delay his project for at least a year. In August 2003, however, after a Land Court judge upheld the permit, the abutters appealed the decision. When the Appeals Court panel also upheld the ZBA, the abutters filed for further review by the state Supreme Judicial Court (SJC). The litigation finally ended in June 2007, when the SJC ruled that the Amherst ZBA had the authority to issue the permit and dismissed the abutters' arguments regarding injury due to the minority set-aside as "unsubstantiated claims or speculative personal opinions" that did not provide a basis for standing.

The litigation delayed the production of 26 units of affordable family housing by more than five years. It also imposed heavy costs on HAP. Even with significant pro bono legal assistance, the litigation cost HAP $150,000 ($100,000 in legal fees and $50,000 in carrying costs on the land). Construction costs also rose significantly during this five-year period. HAP is now seeking additional funding so that it can maintain the project's affordability.

* * *

HAP's experience in Amherst is one example of more than 80 cases that have been tied up in the courts for years, thwarting the development of much-needed affordable housing. In over half of these cases, the zoning or planning boards had approved the developments locally, but individual abutters subsequently filed suit. Court appeals of zoning decisions have been identified as an area of public policy concern because anyone can file a lawsuit asking that a decision be overturned. (Even if a plaintiff lacks the legal standing to permit it to prevail, the question of standing itself must be litigated and is subject to the full range of appeals.) However, a lack of information on the volume and nature of such appeals has made it difficult to determine whether new policy responses are warranted. This study of appeals related to affordable housing developments serves as a first step in laying out some dimensions of the problem.

This study began as an effort to determine how many residential zoning approvals for low and moderate income housing are challenged in the courts each year by abutters, municipal boards or other parties, the legal arguments made by appellants, and the outcomes of these lawsuits. However, because there is no easy way under current court record-keeping systems to identify these kinds of cases, we generally limited the scope of our study to projects that sought zoning approvals under "Chapter 40B", the state law enacted for the express purpose of streamlining the local approval process.[1] We used a proprietary database on comprehensive permit applications, along with news clips, to identify cases and used court and municipal records, and discussions with attorneys and municipal staff to learn how the litigation turned out.

Key Findings

1. Since 2000, abutter and municipal lawsuits have delayed at least 84 developments with just over 9,700 units (including over 2,500 affordable units)[2] by an average of two years and as long as six years. This long period of delay is measured from the time that the developer received local approvals and does not include the permitting process itself, which often exceeded one year. As of December 2007, at least 31 of these 84 projects were still in litigation (over 4,200 units proposed, including over 1,000 affordable units).

These 84 litigated projects represent a significant fraction of the affordable housing developments proposed in recent years. They include 81 projects that sought permits under "Chapter 40B", including 15% of all 40B applications approved or appealed to the state Housing Appeals Committee or HAC (499) between 2000 and 2006.[3] That percentage may rise as 27 projects from that period are still before the HAC and some may result in decisions that will be challenged in the courts. (Currently, in addition to projects in this study, there are 37 proposed projects with 3,100 units before the HAC, including 27 approved or initially appealed in 2000-2006.)[4]

2. To date, almost no appellants have succeeded in overturning a local or HAC zoning approval on the merits of their case in court. That is, they have been unable to prove that zoning boards or the state Housing Appeals Committee erred in their approvals.

In 51 of the 84 projects we identified, the zoning litigation is known to have been resolved by December 2007.[5] Information on court outcomes was available for 50. Of these:

- Twenty eight (28) projects went through the entire litigation process and <u>all but one</u> ultimately had their zoning approval upheld in court. The one exception involved a 2001 project overturned on technical grounds. The judge ruled the approval invalid because the ZBA decision inadvertently omitted language specifically referencing certain regulatory requirements not spelled out in the eligibility letter submitted by the developer and lender under the then-new New England Fund subsidy program.[6]

- Twenty two (22) cases were settled or voluntarily withdrawn by the appellant and <u>in every case</u>, the resolution sustained the original form of zoning approval (e.g. comprehensive permit or special permit), though sometimes with changes in conditions. In one-third (7) of these cases, the developer settled *after* abutters who lost in Land or Superior court filed for further review. Most of the settlement agreements involved changes in layout, or design or landscaping. Ten of the 22 settlements included a reduction in project size (including five where the developer settled after winning in the lower court); one resulted in an *increase*.

3. Litigation can delay projects for years, imposing heavy costs and risks, especially when opponents appeal an adverse lower court decision.

Delays due to litigation – calculated as the length of time between the initial approval of a permit by the ZBA (or the issuance of a HAC decision, if later) and the date the zoning litigation was resolved – ranged from a six months to six years with an average of two years.

- The median delay for cases resolved at Land or Superior Court (and not further appealed) was 11 months, whether by court decision or settlement, and the average delay was 14 months.
- In the 40% of resolved cases (22 of 51) where opponents sought further review of an adverse Land or Superior court decision, the average delay was 36 months and the median 37 months. In some cases, the delay exceeded four years.

- The average delay was 15 months *less* for developers who settled after lower court decisions were appealed than for those who did not settle (26 vs. 41 months).
- Delays have been equally long or longer for projects still in litigation. Of the 31 cases known to still be in litigation, 16 involve court appeals filed before 2007. The average and median delay to date (December 1, 2007) has been 27 months.

4. The delays inherent in litigation mean that even as appellants have consistently lost their court cases, they have succeeded in postponing almost every project and reduced the likelihood that projects will ultimately go forward.

While most appellants litigate because of environmental, design or other concerns, they recognize that even if they are likely to lose in the courts, the delay imposed by litigation may help stop a project. A few appellants have even stated that delay, rather than preventing a project, is the primary goal.

5. Over half of the 51 projects that won or settled their zoning litigation have not started construction or have built only a few units. In some cases, this is may be because the litigation was resolved relatively recently (13 of the 27 that have not yet begun were settled in 2007). In at least two cases, developers decided not to proceed (in one case, the developer's purchase option expired during the litigation and the owner declined to extend it in light of his neighbors' opposition) and a third seems unlikely (the cost of the legal battle left the non-profit without funds to proceed). Others have been delayed due to changes in market conditions during the litigation period, the need to seek additional subsidy funding to cover the cost of delay, or new legal challenges (at least three have been delayed by abutter or municipal challenges to their State environmental approvals).

6. A small number of attorneys have represented a significant fraction of the abutters and municipal entities who have appealed local and HAC zoning approvals. While we lack information on the attorneys representing appellants in almost half (39) of the 84 litigation cases to date, it is noteworthy that three attorneys have handled almost half of the cases for which we have information (19 of 44). Their specialized experience presumably gives them a good sense of the odds of winning an appeal in the courts. To date, these attorneys have lost three cases, settled eight cases (including three cases that were on further appeal after their clients did not prevail in Land or Superior Court), and have eight cases still in litigation. Seven of their eight current litigation cases are at the Appeals Court (3) or the SJC (4), making up 70% of the ten litigation cases currently before those two courts.

7. Because this study examines only the delays related to *zoning* litigation, it does not capture the full extent of delays related to litigation. Some projects encounter delays as a result of other administrative appeals and litigation, especially challenges to environmental approvals. In some cases, developers challenge those approvals; in other cases, project opponents do (as in a recent Cambridge decision affecting another 2,500 units).

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This study begins with a brief description of zoning approval processes and procedures for appealing zoning approvals. It describes the challenges in collecting information on the volume of appeals, the arguments raised by litigants, and the outcomes of the appeals. It summarizes the characteristics of the 84 cases identified as filed since 2000 and concludes with a description of a dozen projects that illustrate the varied nature of such appeals.

II. THE ZONING APPROVAL PROCESS AND AFFORDABLE HOUSING

Numerous studies have documented the growth in the restrictiveness of local land use requirements in Massachusetts in recent decades (e.g. higher minimum lot sizes, lower allowed densities and a reduction in or elimination of multifamily housing as an as-of-right use) and the regional problems that have resulted.[7] This trend has raised land and housing costs to the detriment of economic competitiveness and encouraged sprawl.

These same land use restrictions – primarily outside of cities – have made it almost impossible to develop low- and moderate-cost housing "as-of-right" in recent years. As a result, most developers of affordable housing in the suburbs must use special zoning tools. The tools available vary by community, depending on their zoning ordinance. Some communities allow multi-family housing or small-lot homes to be built by special permit or variance in certain districts, on parcels over a certain size or for certain populations (generally senior or 55+ housing). Some have created overlay districts where higher density development is allowed as of right in exchange for certain public benefits (which may include affordable housing). Some also have inclusionary zoning ordinances.

Not all communities offer the special zoning tools described above, however, and where they are available, they frequently come with geographic and other restrictions that limit their utility. As a result, the most widely-used tool in Massachusetts for receiving zoning approvals for affordable housing development is the "comprehensive permit" process created under a state law (Chapter 40B). Since 2001, it has been used for 80% of the suburban units added to the state's subsidized housing inventory.

A. Zoning Approvals under Chapter 40B

Chapter 40B was enacted in 1969 to address local zoning and regulatory barriers that made it difficult or impossible to build state- and federally-subsidized housing in many suburban and rural communities. It addressed these permitting problems in 3 ways:

- It created a streamlined review and approval process for "subsidized" projects (by allowing developers to apply for a single "comprehensive permit" from the zoning board of appeals rather than a series of separate approvals by various local boards).
- It allowed flexibility by authorizing zoning boards to grant waivers of local zoning and regulatory requirements if requested and needed to make projects economically feasible. Projects must still meet *state* environmental requirements and localities can deny a permit request if the project raises significant health or safety issues.
- It authorized the State to override adverse local decisions (denials of permits or the imposition of uneconomic conditions) in communities with little subsidized housing (i.e., less than 10% of its year-round housing is subsidized and it has not met alternative thresholds regarding the percentage of land area used for subsidized housing and recent progress toward the 10% goal). Local decisions in cities and towns that have reached those thresholds can not be appealed to the State (i.e. are "appeal-proof") as long as the community continues to meet the thresholds.

<u>Local Approval Process Under Chapter 40B</u> Chapter 40B can only be used in connection with developments in which at least 20%-25% of the units will be affordable under a federal, state or local "subsidy" program. Applicants can be public agencies, non-profit developers or "limited dividend" developers. The application describes the proposed development and must specify any zoning and regulatory waivers requested.

Prior to filing an application for a comprehensive permit with the zoning board of appeals (or city council),[8] applicants must obtain a project eligibility letter (also called a site approval letter) from the state or federal agency expected to subsidize or monitor the development, to demonstrate that the proposal is fundable under a subsidy program. The funding/monitoring agency issues a letter only after finding that the proposed site appears appropriate and that the proposed project is eligible for subsidy funding and appears financially feasible. Before issuing a letter, the agency gives the chief elected local official 30 days to review and comment on the developer's proposal.[9]

The zoning agency must open a public hearing on the application within 30 days and solicit input from all relevant local boards and departments. While there is no time limit regarding the length of the hearing[10], once it is concluded, the zoning agency has 40 days to render a decision to either: (1) approve the permit as requested; (2) approve it with conditions (requirements the project must meet); or (3) deny it outright. If the agency fails to meet the hearing and decision deadlines, the applicant can ask the State to deem the application constructively approved.

B. Local Approval Process for Projects Using Other Affordable Zoning Tools

Projects using other affordable housing zoning tools, such as inclusionary or incentive zoning, cluster zoning or overlay districts, usually must go through the local special permit process as well as receive signoffs from the Fire Department, Board of Health, Conservation Commission, and other local boards. As with comprehensive permits, the special permit application can be approved as submitted, approved with conditions, or denied.

III. PROCESS FOR APPEALING ZONING DECISIONS

Because most new affordable housing developments outside cities use comprehensive permits, this report begins with and focuses primarily on the appeal process laid out under Chapter 40B. As detailed below, a developer whose comprehensive permit application has been denied or approved with conditions he/she feels are "uneconomic" can first appeal that decision to a special state quasi-judicial body. A citizen or abutter who is unhappy with an approval (whether involving 40B or another zoning approval) must appeal the decision in the courts. Both types of appeals must be filed within 20 days after the ZBA decision is filed with the city or town clerk.

- Developers can appeal an adverse local decision (denial or approval with conditions the developer wishes to contest) to a state quasi-judicial body called the Housing Appeals Committee (HAC) if the proposed development is in a city or town where less than 10% of the year round housing is subsidized and other thresholds[11] have not been met.

- Any other "person aggrieved" by the local decision on a comprehensive permit can appeal that decision but must file their appeal in the state court system following the procedures of Chapter 40A (described below). *This same right to appeal local decisions in state court pursuant to Chapter 40A applies to persons aggrieved by all other types of local zoning decisions as well*, including decisions under inclusionary housing bylaws.[12]

In cases where a decision is appealed by both the developer (through the HAC) and by citizens and/or abutters (through the courts), the citizen/abutter appeal is generally stayed until the HAC has rendered a decision, recognizing that the plaintiffs may decide to drop the appeal if the HAC appeal results in a negotiated settlement or otherwise makes pursuit of the appeal impractical or unnecessary.

A. Developer Appeals to the Housing Appeals Committee (40B decisions only)

A developer can ask the Housing Appeals Committee to overturn a permit denial or, in the case of an approval, to strike conditions that they believe make the project uneconomic. The HAC encourages developers and zoning boards to settle their differences through negotiation, but if parties are unable to reach agreement, the HAC hears the appeal.

The HAC conducts its review of the ZBA decision *de novo* within two very specific statutory standards – whether a decision is consistent with local needs[13] (i.e. based on valid of health, safety, environmental, design, open space or other concerns that cannot be mitigated) and if so, whether those needs outweigh the regional need for subsidized housing. Chapter 40B sets out separate review standards, depending on whether the ZBA denied the application or approved it with conditions.

- In cases where the ZBA denied an application on the basis of local concerns (health, safety, etc.), the Board must prove that its concerns are valid. If it does, the HAC must decide if those concerns outweigh the regional need for affordable housing. If not, the HAC will direct the locality to issue the permit within 30 days.
- In cases where the ZBA approved the permit with conditions that the developer believes make the project "uneconomic" (prevent realization of a "reasonable return" as defined by the subsidy program), the developer can ask the HAC to overturn or modify the objectionable conditions (e.g. a reduction in project size). The developer must prove that the conditions are uneconomic and that economic ways exist to protect local concerns. The ZBA must prove that the conditions are justified by health and safety concerns and that mitigation is technically or financially infeasible. The HAC decides whether the local concerns outweigh the regional need for housing. If not, or if it determines that the local concerns can be addressed with modified conditions, it will vacate or modify the conditions and direct the ZBA to issue a revised permit within 30 days.

If a ZBA refuses to comply with a HAC order, the order becomes the comprehensive permit (though opponents can delay issuance by challenging the HAC decision in the courts).

Remands In some cases, the HAC sends a case back to the ZBA for a rehearing rather than issuing a decision, usually because new facts have arisen or it identifies previously unaddressed issues. It also may remand the case if a developer proposes changes to a project after they have filed an appeal with HAC and HAC decides that the changes are "substantial", such as increases of project size of more than 10%, changes in tenure or building type. (If HAC deems the changes insubstantial, it accepts the proposed changes and continues with hearing). If the HAC remands a case, it usually limits the scope of the new ZBA hearing to the modifications or identified issues. The subsequent ZBA decision can also be appealed to the HAC and courts.

Project Changes If a developer proposes changes *after* a HAC decision, it must notify the ZBA. If the ZBA decides that the proposed changes are substantial, it must hold a new public hearing and decide whether to modify the permit. Developers can appeal the ZBA decision regarding substantiality to the HAC; if the HAC finds the change insubstantial, it will deem the permit modified. ZBA decisions on permit modifications can also be appealed to the HAC and courts.

B. Court Appeals of HAC Decisions

Any person or appointing authority aggrieved by a HAC decision can appeal it in Superior Court under Chapter 30A (judicial review of administrative agency decisions).[14] Chapter 30A appeals are limited to a review of the HAC proceedings, rather than a *de novo* review of the ZBA approval. As of November 30, 2007, twenty-one (21) such appeals are in the courts.

C. Court Appeals of Local Decisions by Abutters/ Citizens/ Municipalities

Who Can File: Under Chapter 40B, "any person aggrieved" by the local decision to approve a comprehensive permit can appeal to the state court system pursuant to the state's general zoning law (Chapter 40A) to ask that the decision be annulled. (Pursuant to a 2003 court decision, municipal officers and boards cannot appeal local 40B approvals.)[15] Persons aggrieved by non-40B zoning decisions have the right to appeal under 40A as well, as does "any municipal officer or board".

Abutters are automatically entitled to a presumption of standing until it is rebutted in the courts. While ultimately the courts may decide that the appellants in a particular case are not aggrieved (because they have failed to prove that they will suffer injury and that their injury is different from that suffered by the community at large) and thus lack standing, the determination is not made until months after the appeal is filed.

Appeals generally begin in Superior Court or Land Court. If a party is unhappy with the outcome, it can appeal the decision to the State Appeals Court. If unhappy with the Appeals Court decision, it can request further appellate review by the State Supreme Judicial Court (SJC), although only about 10% of such requests are accepted.

Where Cases Can Be Filed Pursuant to Chapter 40A, plaintiffs can choose where to file their appeal. They can file in Land Court, Superior Court, Housing Court or district court (the latter two options apply only to projects in a jurisdiction covered by Housing Court). To date, most appeals have been filed in local Superior Courts as a matter of convenience. With the passage of a new "Expedited Permitting Law"[16] (August 2006), it is possible that more appeals will be filed in Land Court in the future.

The Expedited Permitting Law – enacted to speed permitting processes statewide - created a new division of Land Court – called the "Permit Session" to handle appeals related to land use approvals and permits for *larger projects*.

- The Law gives the Permit Session concurrent jurisdiction with Superior Court over all new and pending appeals in connection to developments with 25 or more residential units or the construction or alternation of 25,000 or more square feet of gross floor area.[17] It also allows any party to a case begun in other courts to request transfer of the case to the permit session.

- The permit session is intended to bring greater expertise and consistency to decisions and to speed up the hearing and decision process. The new law called for an increase in the number of judges at Land Court and provided for sittings in most counties of the state at least once a quarter. Its impact may not be felt for a while, however, as only seven affordable housing cases have been filed or transferred there through December 2007.

Court Procedures Whether in Land, Superior or Housing Court, cases are heard by a single judge who can either annul the local decision or issue an alternative decree. *If opponents to a*

project assert that a project raises health or safety issues, the Court cannot accept the ZBA decision regarding mitigation measures but must hear the evidence anew.

The timetable for hearing a zoning appeal case varies by court.

- Land Court (Permit Session) cases are assigned to one of three processing tracks (Accelerated, Fast or Average) with specific deadlines. Cases must go to trial within 6,9 or 12 months depending on the processing track and judges must reach a decision within 2, 3 or 4 months after the trial ends. Previous standards allowed more time and many cases took years to reach trial.

- Superior Court, under standards adopted in March 2007, assigns zoning appeals cases to the fast track, unless a party to the suit asks for a different track. Cases must go to pre-trial conference within 16 months (unless settled or dismissed earlier) and must be resolved within 22 months. Accelerated Track cases must be resolved within 12 months.

- State Appeals Court A party unhappy with a Superior or Land Court decision has 30 days to decide whether to file a further appeal with the State Appeals Court. The State Supreme Judicial Court (SJC) reviews such filings and may decide to take it up directly if it feels the case raises issues of statewide importance. Otherwise, Appeals Court cases are usually argued before a panel of 3 justices. Many appeals are decided on the basis of arguments presented in briefs rather than through oral argument. The Appeals Court tries to issue decisions within 130 days of argument or submission. Only about 20% of decisions are published.

- State Supreme Judicial Court (SJC) Parties unhappy with the Appeals Court decision have 20 days to file for a rehearing or file for yet a further appeal with the State Supreme Judicial Court, though the SJC accepts relatively few such cases. Usually between 5 and 7 of the justices will hear an argument. The SJC tries to issue decisions within 130 days of argument or submission.

Filing Costs The cost of filing a court appeal varies by type of case. The cost for appeals related to Chapter 40B approvals is low ($255 in Land Court and $240 per plaintiff in Superior Court). In some types of non-40B zoning appeals, courts are allowed to require appellants to post cash or a surety bond to cover owner costs or to pay damages if the zoning approval is upheld, but this right is rarely used. [18] Even when bonds are required, they are rarely used for damage payments because the courts only impose costs on the plaintiff or defendant if they find that either or both of those parties have acted in bad faith or with malice in filing the appeal or making the original decision – a finding almost never made.

Some observers believe that the low cost of filing may encourage litigants with weak arguments to file appeals on the theory that "delay is as good as denial". This led the Legislature to create special rules for appeals when it enacted a new zoning law ("Chapter 40R") in July 2004 that allows municipalities to create "smart growth" zoning overlay districts with a mandatory affordable housing component. Appellants seeking to overturn approvals of projects in a 40R district must post a bond equal to twice the estimated sum of the owner's carrying costs and the developer's legal fees. If the plaintiff does not "substantially prevail on its appeal" [19], the bond is forfeited to the owner in an amount equal to carrying and legal costs.

D. Issue of Two Track System for 40B Appeals

To avoid judicial inefficiency under the two-track system for appeals related to comprehensive permits – with developer appeals handled by the HAC, while citizens appeals are filed in the courts – the courts generally stay the citizen/abutter/municipal appeals if the local decision has also been appealed to the HAC, pending issuance of the HAC decision. This practice recognizes the fact that many appeals filed at the HAC lead to negotiated settlements or otherwise resolve the issues that led to the initial filing of the citizen/abutter appeal.

Until recently, relatively few citizen/abutter appellants pursued their appeal of the local ZBA decision after a HAC decision, especially since the alternative of appealing the HAC decision under 30A existed. In a few cases in recent years, however, appellants have pursued their pre-HAC suits and have had their appeals dismissed as moot. A March 2007 Appeals Court decision, however, suggested that citizen/abutter suits are still entitled to a separate hearing after a HAC decision and the question is now before the SJC.

The facts of the case that was the subject of Appeals Court decision illustrate the potential for delay if that decision is upheld. It involved a project (Rising Tide) proposed in Lexington.

- In February 2003, the ZBA approved a comprehensive permit, but the developer appealed several conditions to the HAC, including a reduction in project size from 36 units to 28. At the same time, abutters filed suit in court asking that the permit be annulled.

- In July 2004, after the HAC directed the ZBA to issue a permit for 36 units, the developer moved to have the original abutter appeal dismissed as moot, arguing that the 2003 permit that was the subject of the appeal was no longer operative and that density and other concerns raised by the abutters had already been reviewed (HAC had also allowed the abutters to participate in its proceedings).

- In December 2005, the Superior Court judge agreed with the developer and granted summary judgment, noting that abutters could appeal the HAC decision under Chapter 30A.[20] The abutters appealed the dismissal, however, and in March 2007, the Appeals Court vacated the lower court decision (*Taylor v. Board of Appeals of Lexington).*

The Appeals Court concluded that 40B should not be read to negate appeal rights under 40A, and sent the case back to the judge for consideration, while also asking the abutters to consider ways to revise their complaint so as not to "jeopardize the important interests of creating affordable housing." It overturned a similar dismissal involving a Scituate project in June 2007.[21]

The Supreme Judicial Court (SJC) has accepted the Lexington developer's request for review of the Appeals Court decision, arguing that forcing de novo review of a case under 40A after a HAC decision (and 30A review) violates the intent of Chapter 40B. (Meanwhile, in April 2007, another Superior Court judge ruled against the abutters' appeal of the HAC decision.)

E. Other Types of Legal Challenges to Affordable Housing Permits

In addition to litigation related to zoning approvals, a number of projects have been delayed by litigation on other fronts. Some opponents have filed suits *before* the local zoning board completed its review of a project or *before* the developer has filed an application. Others have challenged local or state environmental approvals. While the courts have ruled against these

challenges in all cases we've found but one,[22] the litigation has added to the delay these projects have encountered.

Site approval letter challenges In 2003 and 2005, two towns (Norwell and Marion) challenged the validity of the site approval letters issued by MassHousing that enabled developers to file for a comprehensive permit. The courts rejected both appeals. In the first case (involving the application of Tiffany Hill, Inc. in Norwell), the Town filed its suit before the ZBA completed deliberations and the suit was rejected one month after the ZBA approved the comprehensive permit.[23] In the second case, the Town of Marion and the ZBA challenged a HAC decision to allow a developer (Bay Watch Realty Trust and Well-Built Homes, Inc.) to submit an updated site approval letter without a remand. That litigation lasted almost 2 years as the Town appealed the lower court rejection.[24] However, the February 2007 Appeals Court decision in that case is likely to end future municipal appeals of site approval letters.

Easements and Other Land Rights In other cases, comprehensive permit applications or final decisions have been delayed by municipal or abutter lawsuits that challenge the developer's land rights including the validity of easements (in the case of the Town of Bedford's challenge to the application of Princeton Development)[25] or the exercise of the right of owners of land with agricultural restrictions under Chapter 61 to sell (City of Newburyport).[26]

Environmental Approvals *At least f*our of the developments subject to zoning litigation were also subject to abutter, citizen or municipal appeals of state or local environmental approvals (usually wetlands permits).[27] In two of these cases, the appellants in the zoning litigation were also appellants in the environmental appeals. One appeal was initiated by abutters only, two were filed jointly by abutters or a citizen group together with a municipal entity (in one case, the Town filing as an abutter, in case the Conservation Commission), and one was filed by a Town only (contesting a state approval). In a fifth case, an appeal was brought by a developer after the local conservation commission denied his application for a permit.

To date, four of the five appeals have been resolved and in all three of the cases involving challenges to approvals, the approval was upheld (two appeals were dismissed and one was upheld because developer's decision to increase distance of one building from a vernal pool eliminated the only issue found to have possible merit). The appeal filed by the developer who was denied a permit locally was settled and resulted in the issuance of a permit.

Concern about wetland permitting delays led the state to revise its wetlands appeals regulations twice since the start of 2005. The newest Wetlands Appeals Streamlining Regulations[28] went into effect on October 31, 2007. The 2005 and 2007 changes established a pre-screening process for appeals and require abutters to demonstrate that they have standing (are aggrieved) during the pre-screening phase. (Environmental appeals can be brought by conservation commissions, citizens groups and abutters.)

Other Litigation At least one project[29] was delayed by litigation over a Town Meeting vote, over the unanimous opposition of Town officials, to rescind a Town agreement to allow a sewer connection. The article to rescind was proposed by project opponents, including abutters who had already filed zoning litigation, and forced the developers to sue the Town. The rescission was ultimately overturned in court as invalid.

IV. INCIDENCE AND OUTCOMES OF AFFORDABLE HOUSING LITIGATION

It is difficult to fully determine the incidence of zoning litigation related to affordable housing developments and the outcomes of such cases, but we found that at least eighty four (84) proposed developments have been the subject of zoning and permit litigation between 2000 and mid-October 2007. This count should be treated as a minimum, as comprehensive statistics are not available and it is likely that we have missed some cases.

Among the barriers to a full accounting of litigation cases is the fact that most appeals are filed in county Superior Courts and information about lower court cases is available only by visiting record rooms. In addition, while the Land Court maintains information on cases in a database, it does not use a coding system that allows one to easily identify residential zoning appeal cases. Even when one identifies cases involving affordable housing, it is difficult to find information on the legal arguments of appellants and case outcomes since most of the lower court decisions are not published. Cities and towns also often have limited information about local appeals since the litigation is generally handled by outside counsel, results can take years to learn, and several different town boards may be involved.

The passage of the Expedited Permitting Law may improve this situation with regard to larger projects (25 or more units or 25,000 square feet or more) because cases referred to the new Land Court Permit Session are now tracked in a separate database and the new law requires the State court administrator to issue an annual report, listing each permit appeal by type, length of proceedings, and disposition. However, only seven cases involving affordable housing zoning appeals had been filed there through December 2007 (all involving comprehensive permits) and all are still open.

Number and Types of Appeals

The 84 projects we identified as having had their zoning approvals or applications challenged by abutters or municipal boards since 2000 are listed in Appendix 1. As the table below illustrates, there has been no decline in litigation in 2007 despite recent declines in comprehensive permit applications.

Year Initial Litigation Filed	Number of Projects
2000	1
2001	6
2002	12
2003	18
2004	12
2005	13
2006	7
2007	15
	84

We found no simple profile regarding projects likely to be litigated, though larger projects are more likely to face litigation than smaller projects. The 84 developments were diverse in terms of size (ranging from 3 units to one unusually large development of 1,750 units) - the median was 48 units. They also varied in terms of tenure (27 rental projects, 54 ownership projects, 3 mixed), population served (6 were elderly or age-restricted) and developer type (11 non-profit and 73 limited dividend).

Most (81 of 84) of the developments subject to litigation involved zoning approvals under Chapter 40B (though due to the data challenges noted, we are more likely to have missed litigation involving non-40B projects). The three non-40B projects included two approved under special zoning to encourage affordable housing and challenged by abutters and one suit filed by a non-profit developer after the zoning board reversed approval of a building permit to allow a former nursing home to be converted to transitional housing.

Overall, these 84 projects have been subject to over 100 separate lawsuits, with some projects subject to two or three separate lawsuits by various parties. The types of litigation varied.

- 61% were limited to appeals of the local zoning board decision – primarily by abutters;
- 31% involved appeals of HAC decisions only;
- 6% involved appeals of both local and HAC decisions; and
- 2% involved appeals of HAC and subsidy agency decisions.

They also included:

- 50 cases involving appeals by abutters only;
- 5 cases involving appeals of ZBA decisions by municipal boards;
- 26 appeals of HAC decisions only (23 by municipal boards, 1 by abutters, 2 by both);
- 5 projects subject to appeals of both the local and HAC decisions (including 3 involving abutters only, one involving municipal boards only and one involving both); and
- 1 appeal of local reversal of an approval (non-40b) brought by the non-profit sponsor.

Summary of Types of Appeals and Appellants

Type of Appeal	**# Projects**		**Appellant**			
			Abutter	Municipal	Both	Dev
Appeal of Local Approval only	51	61%	45	4	1	1
Appeal of HAC Decision						
HAC decision only	26	31%	1	23	2	0
HAC Decision and Other	2	2%	1	1	0	0
Both ZBA and HAC decisions	5	6%	3	0	2	0
	84	100%	50	28	5	1

Legal Arguments Made by Appellants

The arguments made by abutters and municipal boards seeking to overturn a permit approval or to prevent consideration of a comprehensive permit application varied.

- Since appellants must prove standing, all of the citizen/abutter appeals – including those filed by municipal entities -- included assertions of specific harms the appellants will experience (e.g., project run-off will harm their land, their property values will be harmed). In some cases, these claims appeared frivolous. In one example, abutters argued that a project would put them at risk of encephalitis because the construction would stir up mosquitoes.

  In a few cases, appellant behavior appeared at odds with their expressed concerns. In Edgartown, for example, abutters claimed a site should not have been approved because it was a "priority habitat area", then one member of the group bought part of the site and built an illegal heliport there. The Town of Middleborough spent five years fighting a proposal to develop ten homeownership units on a four acre site, after denying it on the basis of

inadequate street frontage, but approved a casino development on 550 acres of "environmentally sensitive land"[30] in three months.

- In many cases, appellants also argued that approvals should be overturned on the basis of alleged procedural errors (e.g. timing of hearings, notice given to abutters, quality of factual review) and some argued that a zoning board over-reached its authority in approving a project (e.g., in one case, abutters argued zoning boards are not authorized to approve comprehensive permits once a community has passed the 10% threshold for subsidized housing; in another, they argued that comprehensive permits cannot be used for mixed-use projects).
- In at least five cases, appellants also argued that permits approved for projects using one particular subsidy program (the New England Fund) were invalid because they believed that the program did not meet the definition of subsidy established by Chapter 40B (this argument was overturned this year by the SJC).[31]
- Appeals of HAC decisions also tend to challenge HAC interpretations of 40B regulations and procedural requirements. In one case, for example, a town has challenged HAC's finding that 300+ beds at a state facility for the developmentally disabled do not count toward its 10% subsidized housing goal.[32]

  More recently, a number of the municipal appeals of HAC decisions have involved disagreements over the role of subsidizing agencies with regard to project monitoring (including enforcement of profit limitations) and terms of affordability, rather than the design or size of a project. In these cases, municipalities have usually added conditions to the zoning approval seeking a larger town role, such as specifying the language in deed restrictions, adding local reporting requirements, or changing the affordability requirements.

  In a few cases, the issue of local authority has come up after a project has been built. In one case, for example, a developer asked for a permit modification to allow a change in tenure from rental to ownership. The ZBA approved the modification but dramatically increased the percentage of affordable units required to avoid decreasing the number of units that would count toward the Town's 10% subsidized housing goal. The HAC ruled that the increase was outside the authority of the ZBA and the ZBA has appealed.[33]

Outcomes of Appeals

Litigation Outcomes

As of December 2007, the zoning litigation was known to be resolved for 51 of the 84 projects. Of those 51 projects, 22 reached settlement agreements. In the case of the other 28 projects where details on the outcome were known, the courts ultimately upheld the challenged zoning applications or approvals in every case but one. In many of the abutter appeals, the courts decided that the claims did not confer standing because the abutters were unable to prove injury.

Litigation Outcomes by Year Litigation Filed

Year Litigation Filed*	Total Projects	Still in Litigation	Court Upheld Zoning Approval	Settled or with-drawn	Settled or won – need to find out	Court Overturned Zoning Approval	Litigation Status Unknown
2000	1	0	1	0		0	
2001	6	0	4	1		1	
2002	12	0	8	4		0	
2003	18	4	5	7	1	0	1
2004	12	2	4	5		0	1
2005	13	7	2	4		0	
2006	7	3	3	1		0	
2007	15	15	0	0		0	
Total	84	31	27	22	1	1	2

*Date case filed in court. When abutter appeals involve projects also appealed to HAC, disposition is usually stayed pending HAC decision. **includes some projects still at DEP, back at HAC.

Litigation Outcomes by Type of Appeal

Type of Appeal	Total	Zoning Litigation Resolved	Zoning Approval Upheld	Litigation Settled or withdrawn	Settled or won (need info)	Lost
Appeal of Local Approval only	51	36	18	16	1	1
Appeal of HAC decision only	26	12	8	4	0	0
Appeal HAC decision plus other litigation	1	0	0	0	0	0
Appeal of both ZBA and HAC decisions	5	2	0	2	0	0
Other Appeal (land rights)[34]	1	1	1			
Total	84	51	27	22	1	1

Outcomes for Cases Settled or Withdrawn

To date, the zoning litigation has been resolved in 22 cases through a settlement agreement or withdrawal of the complaint by the appellant. None of the resolutions resulted in a rescission of the contested permit, though in some cases, conditions were modified. In 7 of the 22 cases, the settlement or withdrawal occurred after the appellants pursued further appeal of an adverse lower court decision.

In 10 of the 22 cases, developers agreed to reduce the size of their project, with the reductions ranging from 1 to 90 units (1% to 50%) and an average reduction of 19%. In five of these cases, developers agreed to these reductions even though the lower courts had upheld the zoning approval. A sixth case settled with a reduction was brought by a municipality against a developer whose project had not formally received a comprehensive permit before the filing of the suit.

Construction Outcomes

To date, fewer than half (21) of the 51 projects that have successfully resolved their zoning litigation have begun construction. The 30 remaining cases include four in other forms of litigation or environmental appeals and two where the developer has withdrawn plans to proceed. Developers currently plan to proceed in at least 16 of the remaining 24 developments, while the status of eight others is unclear (no building permits have been requested or only a model unit has been built).

Construction Status of Projects where Zoning Litigation has been Resolved

Year Zoning Litigation Filed	Total Projects	Built or under construction	Status pending **	Project dead	In other litigation or environmental appeal
2000	1	0	0	1	0
2001	6	2	3	0	1
2002	12	5	6	0	1
2003	13	6	4	1	2
2004	9	6	3	0	0
2005	6	1	5	0	0
2006	4	1	3	0	0
2007	0	0	0	0	0
	51	21	24	2	4

Average Project Delay due to Litigation As the case studies in the Appendix show, abutter and municipal challenges impose significant delays, especially if parties are unable or unwilling to negotiate a settlement or choose to appeal lower court decisions. To date, forty five percent (30 of 66) of the projects involving litigation filed before 2007 have been appealed to the State Appeals Court and/or the SJC.

- Of the 51 cases resolved to date:
    - Sixty percent (29) were settled, withdrawn, or decided while at Land Court or Superior Court and not further appealed, after an average delay of 14 months (the median was 11).
    - The other forty percent of resolved cases (22 of 51) went to a higher court as opponents appealed an adverse lower court decision. For these projects, the average delay related to the zoning litigation was 37 months and the median 36 months. The average delay was 15 months *less* for the five developers who settled when lower court decisions were appealed than for the 17 who did not settle (26 vs. 41 months).
- Of the remaining 33 projects, 31 are still known to be in zoning litigation. These have been delayed by an average of 18 months from the time their project received its approval from the ZBA or the HAC (whichever was later). Among the 16 projects where litigation began before 2007, the average and median delay to date has been 27 months and four projects have been in litigation for at least three years. Nine of these 16 cases are at either the Appeals Court (4) or the SJC (5), with a median delay to date of 28 months, while seven are still before Land Court or Superior Court, having experienced a median delay to date of 23 months. Two cases are back at the HAC to settle disagreements that arose after the comprehensive permit was issued.

There have been a small number of cases where the Appeals Court overturned a lower court decision that had dismissed a challenge to a zoning approval, but to date none of those Appeals decisions have led to the overturning of the initial zoning approval.

V. Conclusion

Opponents to a zoning approval for an affordable housing development can challenge that approval in court at very little cost and be assured that they will delay the project by at least 6-12 months (and maybe longer, depending on how quickly the case is taken up), even though a review of cases litigated since 2000 suggests that the courts will dismiss the challenge. If opponents choose to pursue further court appeals, they can delay the project for as much as 2-4 more years.

The decision to appeal a local zoning approval is made by a small number of people, but ultimately a number of other parties pay a price for that decision. Developers and municipalities (and ultimately local residents) incur legal bills as they defend the local zoning board decision. Developers also incur extended carrying costs on the land and risk losing access to subsidy funding or financing. A project's overall financial feasibility can be put at risk due to inflation or market changes during the litigation period and in some cases, developers may lose their option to purchase the site. Small nonprofit and for-profit developers, in some cases, are forced to drop their plans due to a lack of resources. In the case of projects that do go forward, increases in production costs may be borne by future occupants of market rate units in the former of higher sales prices or rents. The general public also pays a price if the developer has to seek additional state or federal subsidy funds for the affordable units.

This study does not propose specific recommendations to remedy this growing problem. But, the study points to the need for policymakers to examine ways to expedite the resolution of court appeals to affordable housing developments so that we can better meet the growing housing needs of Massachusetts residents.

APPENDICES

Appendix 1: EXAMPLES OF RECENT APPEAL CASES

1. ANDOVER - Avalon at St. Clare (115 rental units)
Delay 4 years, 5 months

In December 2000, Avalon Bay applied for a comprehensive permit to build 156 units of mixed income rental housing on the former site of a monastery owned by the Sisters of St. Clare. The Andover ZBA denied the application in October 2001, but after the developer appealed the decision to the HAC, it approved a revised application for 115 units in May 2002.

First Appeal:	June 2002 - Abutters appealed the ZBA decision to Superior Court under Chapter 40A.
Arguments:	Project would diminish property values, increase traffic, noise, and possibly increase vandalism.
Court decisions:	Spring 2003 - Superior Court judge dismisses suit, finding no evidence of harm and stating that property value impacts are not a valid basis for contesting zoning decision. The abutters appeal the decision. Avalon Bay's request that appellants be required to post a $450,000 bond is denied. April 2003, abutters persuade Town Meeting Members to repeal a previous agreement to provide the project with sewer access. May 2005 - The State Appeals Court overturned the lower court dismissal June 2006 – the SJC upholds the earlier dismissal of the abutters' appeal, finding claims that affordable housing would diminish property values were not a covered injury under Chapter 40B and finding that abutters had failed to provide evidence supporting any other claims of injury.
<u>Sewer Litigation</u>	December 2006: Avalon and the Sisters of St. Clare win their suit against the Town to enforce the original sewer access agreement.
Project Status:	No building permits have been issued as of December 2007.

2. BEDFORD – Avalon at Bedford Center (139 rental units)
Delay 2 years, 8 months.

In January 2002, the Bedford ZBA approved a comprehensive permit for Avalon Bay to build a 139 unit rental development (35 affordable units).

First Appeal: January 2002- a group of 8 abutters filed suit in Land Court to overturn the ZBA decision.

Claims: Abutters cited concerns about traffic and fear that project would put community residents at increased risk of equine flu and West Nile fever by stirring up mosquitoes at adjacent Wildlife Refuge.

Court Decisions:

December 2003 - Land Court dismisses the case for lack of standing, finding that the petitioners failed to prove direct injury because they relied on personal observation rather than using an expert witness.

When the abutters decided to appeal further, Avalon asked the Land Court judge to require the appellants to post a bond equal to the estimated cost (interest, taxes and management) of two years delay ($870,000), but was turned down.

June 2004 - Appeals Court upholds the Land Court dismissal. The abutters appeal that decision to the State Supreme Judicial Court (SJC).

September 2004 -SJC declines to review the case.

Project status: Construction began in early 2005 and is now complete.

3. BEDFORD - Princeton at Bedford (156 rental units)
Litigation Delays: over 6 years from filing of application

Princeton Development proposes to develop 156-186 units of rental housing on a 50 acre site in Bedford. As detailed below, the project was delayed by Town litigation over the ownership and use of an easement to the development site that lasted almost 6 years. While the ZBA ultimately approved a comprehensive permit in late 2005 and Town challenges to the adverse rulings regarding the easement were resolved in mid-2007, the project has still not moved forward, due to an administrative challenge by the Town to the state's approval of a wetlands permit.

Background: In July 2001, Princeton Development applied for a comprehensive permit to build 258 units of mixed-income rental housing on a 50 acre parcel of land, including 46 landlocked acres to be accessed by an abandoned railroad right of way. Prior to the filing, the Town had indicated that it believed that it owned the right of way, rather than the private landowner who proposed to sell the parcel to Princeton, and would not provide the necessary easement to access the site. Seven days after the CP application was filed, the Town filed suit in Land Court to settle the easement question

Easement Litigation:	July 18, 2001- Town files suit in Land Court, asking declaration that it owns the abandoned right of way. The ZBA decided to continue the hearing until the easement question was solved, since it raised the question of whether applicant had site control.
1st Appeal to HAC:	In October 2001, the developer files an appeal with the Housing Appeals Committee (HAC), arguing that the ZBA's continuance of the hearing constitutes constructive denial of the permit.
1st HAC ruling	January 2002 – The HAC allows ZBA to keep hearing open, pending resolution of the Town's easement litigation in Land Court because of the unusual questions that case raised and orders the ZBA to resume once Land Court issues a decision.
1st Land Court decision:	July 2003 -Land Court rules that Town owns right of way but that developer has a right to use it for any lawful purpose including accessing the proposed development site. Town appeals decision.
	July 2003 - ZBA resumes hearing on Comprehensive Permit (CP) application, now revised down to 213 units.
1st CP decision	May 21, 2004 – ZBA approves CP for 156 units, with multiple conditions.
2nd Appeal to HAC:	June 2004 – The developer appeals several conditions to the HAC, including the reduction in project size from 213 units. In September 2004, the developer revises the proposed project size to 186 units.
2nd Land Court decision	September 20, 2004 - Appeals Court uphold concept but returns the Land Court decision to the original judge to explain the conclusions she reached regarding allowed uses of easement by developer. Town seeks further appellate review by the SJC but is turned down.

2nd HAC decision:	September, 2005 - the HAC upholds the ZBA decision on project size (156 units), in part because of wetlands issues, as well as all but two conditions. Princeton Development files an appeal of the HAC decision, arguing that the reduction in project size from 186 to 156 was not justified. (This litigation is still pending).
2nd CP decision:	ZBA approves modified permit pursuant to the HAC decision in October 2005.
Final easement decisions	December 7, 2006 – Appeals Court upholds Land Court decision. Town seeks further appellate review by SJC. May 2, 2007 – SJC denies Town application for further appellate review.
Project status:	Developer is awaiting outcome on Town appeal of DEP decision to approve wetlands permit. Princeton plans to proceed with 156 units at least (it is also awaiting resolution of its appeal of the 2005 HAC decision, seeking approval for one more 30 unit building).

4. CHELMSFORD – Life Savers Transitional Housing (5 units)
Delay: 2 years, 5 months.

In September 2001, Life Savers Ministries (LSM), a nonprofit agency, applied for a comprehensive permit to build a 5-unit rental building for single mothers who had graduated from a teen-parenting program. The ZBA denied the permit in June 2002, due to concern that fire trucks would not be able to access the property because it was located on a steep street and an alternative approach was often too narrow to use due to illegally parked cars. LSM appealed the denial to the Housing Appeals Committee. After negotiations failed, the HAC ordered the ZBA to issue a permit in August 2004.

First appeal:	August 2004 - the ZBA filed an appeal of the HAC decision in Superior Court under Chapter 30A.
Court Decisions:	
May 2006	Superior Court upholds HAC decision.
June 2006	ZBA files for further review at State Appeals Court.
January 31, 2007	Shortly after the hiring of a new town manager, the ZBA withdrew its appeal with prejudice.
Project Status:	It is unclear whether LSM will proceed with the development. It put the property up for sale several months before the ZBA decided to drop the appeal, due to financial concerns regarding its mounting legal costs and holding costs (it had purchased the site in early 2001).

5. EDGARTOWN - Sandy Road Affordable Homeownership (3 lots)
Delay: 2 years

In 2001, the Town of Edgartown adopted a special "Homesite" bylaw to allow the construction of affordable homeownership units on smaller lots. In August 2005, the Edgartown Zoning Board of Appeals granted three special permits for the construction of affordable homes on lots of just over one acre each in an 8-lot subdivision on Sandy Road. The site is on the island of Chappaquiddick where the minimum lot requirement is three acres. The permits were granted to three families who already had been selected under the Town's Resident Homesite program and had entered purchase and sale agreements with the landowners (two lots were privately owned, while one had recently been purchased by the Island Housing Trust).

First appeal:	September 2005 – ten abutters file an appeal of the special permit approvals in Land Court, citing environmental and other concerns.
Claim:	The permits should be annulled because the project will adversely affect the neighborhood by increasing density and overloading Sandy Road and because the ZBA failed to consider the environmental impacts of the construction. Specifically, they argued that the area is in a priority habitat area and that the ZBA failed to consider the impact of the proposed projects on certain protected species, including moths.
1st Court decision:	June 22, 2006 – Land Court judge rejects abutters' arguments, finding that the homesite bylaw did not require the ZBA to make a special determination regarding environmental impacts and thus it had acted properly in approving the permit. (The court also noted that the State had determined that construction would not harm any protected species.) On July 3, 2006, the abutters asked the judge to consider their other arguments regarding adverse impacts but the judge denied the request later that month. The abutters then filed a motion to overturn the Land Court decision with the State Appeals Court.
Abutter site purchase:	September 29, 2006 – After the purchase and sale agreement for one of the affordable lots expired, abutters involved in the litigation bought the lot. (The seller arranged to sell a lot elsewhere in Edgartown to the would-be first time homebuyer).
Abutter illegal heliport on contested lot:	July 27, 2007 – Edgartown building inspector finds that the purchasers of the lot formerly slated for affordable housing had clear-cut part of the site for use as a helicopter landing area (a forbidden use under Edgartown zoning) and issues cease and desist order.
2nd Court decision:	August 24, 2007 – A State Appeals Court panel upheld the Land Court decision. It noted that the Land Court refusal to re-open the case to consider density and other arguments was proper because the plaintiffs had agreed to the limit the issues before the Land Court judge early on.
Project Status:	Construction is moving ahead on the two remaining affordable lots.

6. FRAMINGHAM – Shillman House (150 rental units for the elderly)
Delay: 3 years, 4 months+ (still in litigation)

In July 2004, the Framingham Zoning Board of Appeals unanimously approved a comprehensive permit for a 150-unit mixed-income elderly housing development with 90 affordable units. A federal grant under the HUD Section 202 program will enable the non-profit developer, Jewish Community Housing for the Elderly (JCHE), to make 50 of the units affordable to very low income frail elders in need of supportive housing. The ZBA also approved a minor permit modification in September 2007 to shift the building footprint and relocate some of the parking.

First Appeal:	On August 4, 2004, abutters appealed the ZBA decision to Land Court.
Claim:	The 40B permit should not have been approved – ZBA failed to consider traffic impacts, density, etc. and the development would have negative effects on the abutters' property values, that their privacy would be hurt by the proposed lighting, that local water pressure would be negatively affected, etc.
Court Decisions:	August 2006 - Land Court dismissed the abutter appeal, finding the plaintiffs had failed to submit evidence showing that the project would harm the neighborhood. In November 2006, the abutters appealed the Land Court decision to Appeals Court. November 30, 2007 – Appeals Court upholds Land Court dismissal. December 2007 – Abutters file application for further appellate review by the SJC.
Second Appeal:	October 2007 – *Same* abutters file appeal of ZBA approval of a modification to the original comprehensive permit at Land Court.
Project Status:	Still in litigation. The abutters have filed an application for further appellate review of the Appeals Court decision by the SJC. JCHE is also waiting for a decision on the October 2007 appeal of the CP modification and requesting reimbursement for legal fees and costs in connection with that appeal.

7. FRANKLIN – The Woodlands (16 single family homes)
Delay: 6 months

The Woodlands is a 16-unit single family home development (4 affordable) first proposed in 1995. The project is located at the border of the towns of Franklin and Bellingham and includes additional units in Bellingham. The Franklin ZBA initially denied the comprehensive permit application for 16 units in 1996 and the developer (Arcadia Enterprises, Inc. and Pentad Realty Trust) appealed the denial to HAC. The HAC remanded the case to the ZBA in March 1999, and the developers filed an amended application in May 1999. The ZBA approved a comprehensive permit for the project on October 26, 2000.

Construction was delayed several years, leading to the expiration of environmental permits. The Town executed an Affordable Housing Agreement for the project under the Local Initiative Program in November 2004 and the Conservation Commission approved an extension of the environmental permit, with new conditions, in February 2005 and the Town issued a building permit for the project in early 2006.

First appeal: October 23, 2006: Abutter files suit in Land Court to annul the comprehensive permit.

Claim: The abutter claimed that the comprehensive permit was invalid for two reasons: first, that the abutter did not receive proper notice of the May 1999 revised permit application and second, that the permit was now invalid because the developer did not obtain an extension (permits expire after 3 years if construction has not started, unless there is good cause).

April 24, 2007 – The Land Court judge dismissed the abutter appeal for lack of timely filing (the abutters failed to notify the Town and developer when filing the complaint). In May 2007, it denied the developer's request for reimbursement of legal fees ($6,156).

Project Status: Under construction.

8. IPSWICH - Powder House Village (48 rental units)
Delay: 3 years, 1 month

In June 2003, the developer of a golf course and events facilities approached the Town and the non-profit North Shore YMCA to discuss ways in which the developer might meet the requirement in its special permit that it provide up to 25 affordable housing units, including up to 15 units offsite. The Town agreed to let the developer transfer his affordable housing obligation to the Y in late 2003 and on October 13, 2004, the Ipswich Zoning Board of Appeals approved the YMCA's application to build 48 units of affordable rental housing near an Ipswich Housing Authority senior housing development. The comprehensive permit also approved a limited commercial component added at the request of the Ipswich Planning Board.

First appeal:	November 2, 2004 – The Ipswich Housing Authority and an individual abutter filed suit in Lawrence Superior Court under Chapter 40A against the Town and the ZBA arguing that the permit should be overturned.
Claim:	The individual abutter argued that the project should not be approved because it will increase trespassers, increase traffic, cause drainage problems on his property and reduce the value of his property. The Housing Authority argued that ZBAs when issuing a comprehensive permit are not authorized to override zoning requirements for a commercial use within an affordable housing project.
First Court decisions:	January 2006 – The Superior Court judge dismissed both appeals. Both parties appealed that decision to the Appeals Court.
	December 2006 – The Supreme Judicial Court decides to hear case directly.
Other Actions:	November 2006 - The Ipswich Board of Selectmen votes to bring the question of the project approval to Town Meeting.
	April 2007 - Despite the opposition of the Zoning Board, Conservation Commission and other town entities, town meeting members voted 1288-486 to instruct the Selectmen to ask the YMCA for "a significant reduction in the overall density of the project", as well a reduction in the massing of the structures, increases in setbacks and consideration of both ownership and rental units.
Supreme Court decision:	November 20, 2007 - SJC rules against appellants and upholds ZBA approval of comprehensive permits.
Project Status:	Planning to proceed.

9. MARSHFIELD – Ocean Shore Condominiums (Originally 150 units, now 90)
Delay: 2 years, 9 months

In late August 2002, the Marshfield Zoning Board of Appeals approved Beacon Residential Properties' application for a comprehensive permit - allowing a 180-unit rental development (down from the 198 units requested). The developer appealed certain conditions to the Housing Appeals Committee (HAC) in September 2002.

First Appeals: Four appeals were filed in September 2002 following the local decision:

- Town officials and other boards (Board of Selectmen, Conservation Commission, Public Works Department, Fire Department and Planning Board) filed an appeal of the ZBA decision in Plymouth Superior Court.
- A citizen activist abutter filed an appeal with the same court.
- A residential abutter and a commercial abutter both filed separate appeals (the developer settled).

Court Decisions: August 2003: The Superior Court judge upholds the zoning approval in both the Town and citizen suits.

- The Town filed an appeal with the State Appeals Court, but agreed to stay the case pending negotiations with the developer.
- The citizen also filed with the Appeals Court.

March 2004: after 18 months of discussion with the HAC, the ZBA and developer agree to a reduction in project size and agree that the ZBA will issue a new comprehensive permit for 150 units (down from the 180 allowed under the first ZBA decision). At that point, the Town decided to reactivate their court appeal and arguments were heard in January 2005.

June 2004: Appeals Court upholds Superior Court dismissal of abutter's case.

July 2005: Beacon agrees to revise the project, changing it from rental units to condominiums, cutting the size to 90 units, and funding additional mitigation measures. The Town agrees to the dismissal of its court appeal.

Project Status: While the zoning litigation is settled, opponents are now fighting the project on environmental grounds, citing concerns about vernal pools and impact on local Eastern box turtles. In 2006, ten residents asked the Division of Administrative Law Appeals (DALA) to overturn the State Department of Environmental Protection (DEP) approval of a wetlands permit for the project and the Town later joined in support of the appeal. The appeal to DALA was dismissed in September 2007, after Beacon relocated one building to increase the distance from a vernal pool but the citizens and Town filed separate suits in Superior Court in October 2007, challenging the DEP approval again.

The cost of the initial 2006 DALA appeal was paid by the Town as project opponents persuaded Town Meeting members to approve the use of municipal funds for legal costs over the opposition of the Board of Selectmen. Town officials noted at that time that the appeal was delaying $300,000 in traffic and water conservation improvements that Beacon agreed to fund.

10. MIDDLEBOROUGH - Pine Grove Estates (10 homeownership units)
Delay – 5 years

Delphic Associates, LLC applied for a comprehensive permit in 2000 to build 10 single family homes (3 affordable) on a four acre site. The ZBA denied the permit, arguing the site was not zoned as buildable and did not meet minimum frontage requirements. The developer appealed to the Housing Appeals Committee and in July 2002. HAC ordered the ZBA to issue a permit for 10 units.

First Appeal: July 2002 - The Town and ZBA appeal the HAC decision.

Issues: Despite a well-publicized HAC decision in 1998 to the contrary, the Town's primary argument was that the proposed funding source - the New England Fund (NEF) - did not meet the statutory definition of a subsidy program under Chapter 40B. It also argued that HAC process for hearing arguments in the original decision was flawed; CP was issued to a non-existent entity (since the limited partnership was not yet established, pending approval of the CP) and that the CP did not specifically require construction of affordable units.

Court Decisions: Spring 2004 - Superior Court upholds HAC decision.

June 2004 – Town and ZBA appeal to Appeals Court.

April 2006 - Appeals Court also upholds the HAC decision, finding that NEF is a valid subsidy under 40B and finding other 3 arguments "without merit".

August 2006 - Town appeals the decision to the Supreme Judicial Court.

July 20, 2007 – The SJC affirmed the Appeals Court decision that NEF is a valid program and upheld the permit.

Project Status: Planning to proceed.

11. TOWNSEND – Coppersmith Way (40 homeownership units)
Delay: 1 **year**

In May 2001, Transformations, Inc. applied for a comprehensive permit to built 40 homes on a 30 acre site. After the ZBA denied the permit in June 2002, the developer appealed to the HAC which in late January 2004 ordered the ZBA to issue a permit for 40 units.

First Appeal:	January 2004: the Town appealed the HAC decision in Superior Court.
Argument:	HAC was wrong in approving project -New England Fund was not a valid subsidy program. Project also raises environmental concerns.
Court decision:	December 30 2004 – Superior Court judge dismisses Town appeal.
Project status:	Under phased construction. Town issued permit on January 21, 2005 and first units were built in 2006.

12. WRENTHAM – West Wrentham Village (31 homeownership units)
Delay: 2 years, 4 months+

In February 2005, the Wrentham ZBA denied a CP application by West Wrentham Village, LLC to build 31 condominiums, claiming the Town has met the 10% subsidized housing threshold established under Chapter 40B and therefore could deny comprehensive permits applications.

The developer appealed the denial to HAC. The ZBA argued that its decision was appeal-proof because Wrentham should be considered to have reached the 10% subsidized housing threshold even though State records indicated it was only at 4%. Specifically, the ZBA argued that the State figure was wrong because housing for residents of the Wrentham Development Center (a state hospital) should be included in the subsidized housing count.

In July, 2005 HAC ruled that the Developmental Center did not meet DHCD's definition of subsidized housing and remanded to CP application back to the ZBA for a new hearing.

First Appeal:	In August 2005, the ZBA appealed HAC's decision to Superior Court.
Argument:	State hospital should count toward Town's 10% subsidized housing threshold and thus local denial of CP should be upheld.
Court Decisions:	Early 2006 - Superior Court dismisses Town appeal, ruling that a HAC remand order is not subject to judicial review because the Town has not yet exhausted its administrative remedies. Town files appeal of this decision in April 2006. June 2007 – Appeals Court affirms Superior Court dismissal, finding that HAC ruling that the Developmental Center is not subsidized housing is a factual question entrusted to the expertise of the HAC. ZBA files for further appellate review by the SJC and the SJC accepts the request in October 2007.
Current status:	The project remains in litigation, with arguments scheduled before the SJC for February 2008.

Appendix 2: Affordable Housing Developments Subject to Litigation Since 2000
Summary List

A. Total Cases and Projects Upheld/Overturned in Court Decision

	NP*	City/Town	Project Name	Total Units	Low-Mod Units	Tenure	Yr Litigation Start	Litigation End Date	Delay (mos)	Other Litigation still under way?
84	**11**	**Total Cases**		**9701**	**2583**					
Cases Upheld through Court Decisions										
1	0	Bedford	Princeton at Bedford	156	32	Rental	2001	5/3/2007	46	1
1	1	Amherst	Butternut Farm	26	26	Rental	2002	6/14/2007	64	
1	0	Andover	Avalon at St. Clare	115	29	Rental	2002	6/16/2006	50	
1	0	Bedford	Avalon at Bedford Center	139	35	Rental	2002	9/10/2004	32	
1	1	Cambridge	Bolton Blair Condominium	6	6	HO	2002	12/17/2003	21	
1	1	Chelmsford	Lifesaver Ministries	5	5	Rental	2004	1/31/2007	30	
1	0	Cohasset	Avalon Cohasset	200	50	Rental	2003	1/19/2007	39	1
1	1	Edgartown	Sandy Road	3	3	HO	2005	8/24/2007	24	
1	0	Falmouth	Gerloff Court	20	5	HO	2002	3/1/2007	57	
1	0	Franklin	Franklin Commons	96	63	Rental	2001	4/2003	19	
1	0	Franklin	The Woodlands	16	4	HO	2006	4/24/2007	6	
1	0	Hanson	Dunham Farms	52	13	Condo	2003	12/23/2004	23	
1	0	Hingham	Hingham Campus	1750	484	Rental	2001	1/6/2003	16	
1	1	Ipswich	Powder House Village	48	48	Rental	2004	11/20/2007	37	
1	0	Lynnfield	North Shore Homes	8	3	HO	2000	6/20/2003	39	
1	0	Marshfield	Metuxet Woods	31	9	HO	2002	10/29/2002	0	
1	0	Middleborough	Pine Grove Estates	10	3	HO	2002	7/20/2007	60	
1	0	Needham	Townhouses at Greendale	32	8	HO	2003	??		
1	1	Newton	Linden Green	5	3	HO	2004	4/11/2005	5.5	
1	0	Peabody	Litchfield Heights	88	22	HO (condo)	2006	2/27/2007	12.5	
1	0	Reading	Beacon Street	10	3	HO	2001	4/27/2007	68	
1	1	Stoughton	Evelyn House	16	16	Rental	2003	3/5/2004	16	
1	0	Townsend	Coppersmith Way	41	11	HO	2004	12/30/2004	11	
1	0	Wayland	Commonwealth Road	12	3	HO	2002	11/30/2004	28	
1	0	Westminster	Kingsbury Arms	56	14	HO	2005	6/27/2006	8	
1	0	Wilmington	Crystal Commons	108	27	Condo	2006	12/6/2006	8	
1	0	Woburn	Woburn Heights	168	42	Rental	2003	9/14/2006	39	
27	**7**			**3217**	**967**					
Cases Overturned by Court Decision										
1	0	Topsfield	470 Boston Street	[48]	[12]	Ownership	2001	7/15/2003	30	

Affordable Housing Developments Subject to Litigation (continued)

B. Projects Resolved through Settlement Agreements of Appellant Withdrawal of Suit

	NP*	City/Town	Project Name	Total Units	Low-Mod Units	Tenure	Yr Litigation Start	Litigation End Date	Delay (mos)	Other Litigation still under way?
Cases Resolved through Settlement Agreements or Appellant Withdrawal of Suit										
1	0	Chelmsford	Princeton Commons	108	22	Rental	2004	12/9/2004	3	
1	0	Dover	Meadows of Dover	24	6	HO	2003	9/27/2004	11	
1	0	Duxbury	Duxbury Farms	20	5	Ownership	2005	6/3/2006	12	
1	1	Edgartown	Jenney Lane	10	9	HO	2003	8/29/2006	30	
1	0	Franklin	Brandywine Village	64	16	HO	2002	4/30/2004	24	
1	0	Grafton	High Point Estates	75	19	Own	2003	10/2005?	10	
1	0	Haverhill	Northern Essex Crossing	120	30	Rental	2001	Sept/Oct 2007	74	
1	0	Hudson	Knotts Clearing	32	8	HO	2003	6/12/2003	5	
1	0	Lancaster	Jones Crossing	36	9	HO	2006	2/28/2007	12	
1	0	Mansfield	Fairfield Green at Mansfield	200	50	Rental	2005	4/14/2006	10	
1	0	Marblehead	Marblehead Highlands	88	22	HO	2004	5/17/2004	5	
1	0	Marshfield	Ocean Shore	90	23	HO	2002	7/20/2005	16.5	
1	0	Merrimac	Greenleaf Park Apts	55	14	Rental	2003	8/19/2003	6.5	
1	0	Natick	Cloverleaf Apts	183	46	Rental	2003	3/1/2006	39	
1	0	Needham	Browne-Whitney Place	6	2	HO	2002	10/8/2003	16	
1	0	Scituate	Stockbridge Woods	68	13	Own	2003	??		
1	0	Shrewsbury	Avalon Shrewsbury	251	63	Rental	2004	6/20/2005	8.75	
1	0	Stoneham	Langwood Commons	405	102	Mix	2005	12/18/2006	15	
1	0	Tewksbury	Shawsheen Woods	16	4	HO (condo)	2004	4/27/2006	18	
1	0	Tewksbury	Southwood Condominiums	7	2	HO (condo)	2005	8/9/2007	30	
1	1	Tisbury	Bridge Commons	30	8	HO	2004	10/4/2007	37	
1	0	Westwood	Highland Glen expansion	102	26	Rental	2002	7/30/2004	0	
22	**2**			**1990**	**499**					
Cases Resolved - don't know if won in court or settled										
1	0	Norton	Strawberry Fields	42	11	HO	2003	Not known		1
Total Cases Resolved										
51	**9**			**5249**	**1477**					

Affordable Housing Developments Subject to Litigation (continued)

C. Projects Still in Litigation

	NP*	City/Town	Project Name	Total Units	Low-Mod Units	Tenure	Yr Litigation Start
Projects Still in Zoning Litigation							
1	0	Amesbury	Meadowbrook Estates	268	67	HO (condo)	2007
1	0	Belmont	Acorn Park (aka Uplands)	299	60	Rental	2007
1	0	Brookline	45 Marion Street	68	17	HO	2007
1	0	Canton	Highlands at Canton	227	57	Mix	2005
1	0	Carlisle	Coventry Woods	30	8	HO	2007
1	0	Falmouth	Little Pond	168	48	condo	2006
1	1	Framingham	Shillman House	150	90	Rental	2004
1	0	Gloucester	Captain's Row Estates	240	48	Rental	2004
1	0	Groton	Groton Residential Gardens	44	11	HO	2006
1	0	Groton	Oak Ridge Estates	36	9	condo	2005
1	0	Groton	Washington Green	44	11	Condo	2005
1	1	Harwich	HECH Main Street	10	8	Rental	2007
1	0	Harwich	Summerwoods	32	8	Own	2005
1	0	Lexington	Rising Tide	28	8	Condo	2003
1	0	Mansfield	Copeland Crossing**	42	11	Own	2007
1	0	Marion	Marion Village Estates	96	24	Rental	2005
1	0	Medway	123 Main	30	8	Rental->condo	2007
1	0	Middleborough	Cranberry Village**	236	59	Condo->R	2007
1	0	Needham	Webster Street Green	10	2	HO (condo)	2007
1	0	Norton	Bay Road Heights	36	9	HO	2007
1	0	Norwell	Tiffany Hill	24	6	HO	2003
1	0	Norwell	Washington Place	39	10	condo	2007
1	0	Plymouth	Village at Sawmill Woods	200	50	condo	2006
1	0	Sandwich	Autumnwood	272	68	HO	2007
1	0	Scituate	Oceanside Village	250	63	Own	2007
1	0	Sharon	Residences at Old Post	66	17	Own	2005
1	0	Stoughton	Villages at Goddard	104	26	HO	2003
1	0	Stoughton	Villas at MetroSouth	240	48	Rental	2007
1	0	Tewksbury	Lodge at Ames Pond	364	81	Rental	2007
1	0	Woburn	Archstone	540	108	Rental	2003
1	0	Wrentham	West Wrentham Village	31	8	HO (condo)	2005
31	**2**			**4224**	**1048**		
Status Unknown							
1	0	Kingston	Old Colony Commons	200	50	Condo	2004
1	0	Scituate	Walden Woods	28	8	condo	2003
Total in Litigation or Litigation Status Unknown							
33	**2**			**4452**	**1106**		
TOTAL CASES							
84	**11**			**9701**	**2583**		

*Non-profit developer
**Litigation related to request for approval of a modification of an existing comprehensive permit.

Appendix 3: Impact of Litigation on Project Size
(Cases Resolved through Settlement Agreements or Withdrawal of Litigation by Appellant)

City/Town	Project Name	Total Units	Affordable U	Settlement reduced project size?		Units Cut	% Units Cut	Settled after court victory
				No	Yes			
Marshfield	Ocean Shore	90	23		1	90	50%	1
Mansfield	Fairfield Green at Mansfield	200	50		1	56	22%	1
Stoneham	Langwood Commons	405	102		1	45	10%	1
Franklin	Brandywine Village	64	16		1	28	30%	0
Westwood	Highland Glen expansion (55+)	102	26		1	18	15%	0
Tisbury	Bridge Commons	30	8		1	8	27%	1
Dover	Meadows of Dover (55+)	24	6		1	4	14%	0
Grafton	High Point Estates	75	19		1	1	1%	0
Merrimac	Greenleaf Park Apts	55	14		1	1	2%	0
Tewksbury	Southwood Condominiums	7	2		1	1	13%	1
Subtotal		**1052**	**266**		**10**	**252**		**5**
Shrewsbury	Avalon Shrewsbury	251	63	1	0	0		0
Natick	Cloverleaf Apartments	183	46	1	0	0		1
Haverhill	Northern Essex Crossing	120	30	1	0	0		0
Chelmsford	Princeton Commons	108	22	1	0	0		0
Scituate	Stockbridge Woods	68	13	1	0	0		0
Lancaster	Jones Crossing	36	9	1	0	0		0
Hudson	Knotts Clearing	32	8	1	0	0		0
Duxbury	Duxbury Farms	20	5	1	0	0		0
Tewksbury	Shawsheen Woods	16	4	1	0	0		0
Edgartown	Jenney Lane	10	9	1	0	0		1
Needham	Browne-Whitney Place	6	2	1	0	0		0
Marblehead	Marblehead Highlands	88	22	1	0	-4		0
		1990	499	**12**	**10**	**248**		7

ENDNOTES

[1] A recent study by the MIT Center for Real Estate found that most affordable housing developments (70%) seeking a comprehensive permits are approved by the local zoning board 7-8 months from the date of application on average and are not appealed to the State Housing Appeals Committee (HAC). In the 30% of cases where a developer appeals the local approval or denial to the HAC, it takes longer (24 months on average). An estimated 10% of projects approved locally or by the HAC are further delayed by litigation challenging the validity of that approval.

[2] While a State Supreme Judicial Court decision established that municipal boards do not have standing to appeal comprehensive permit decisions, some municipal entities have continued to file appeals.

[3] Seventy five of the 81 comprehensive permit projects in this litigation study were initially approved or first appealed to the HAC between 2000 and 2006, representing 15.0% of all projects (499) approved or initially appealed during that period. The other six 40B projects in the study were initially approved or first appealed in 2007. Another 27 of the 499 projects first approved or appealed to the HAC between 2000 and 2006 are still before the HAC.

[4] The November 30, 2007 Housing Appeals Committee status report includes 41 projects in various stages of appeal, including 4 projects currently or previously in court litigation.

[5] The status of two abutter lawsuits is unknown. One relates to a site in Kingston that is now expected to be part of a larger development under a different form of zoning. The abutter challenged a 2004 HAC decision to hear a developer's appeal alleging constructive approval of a project in Kingston. The HAC remanded the case to the ZBA and the Town has since approved 40R zoning for the site. The developer recently withdrew the HAC appeal (November 2007). The second involves a 28 unit project in Scituate (Walden Woods) approved by the ZBA in January 2003. Both the developer and the abutters appealed the ZBA approval. After the developer and town settled at the HAC, agreeing to modify one condition relating to storm water management, Land Court took up the abutters appeal and dismissed it as moot, given the revised permit agreed to at the HAC. The abutters appealed and the State Appeals Court decided that the Land Court erred in dismissing the case. However, it is not clear whether the abutters have returned to Land Court for a new hearing of their appeal.

[6] In this case (*Larson et al. v. Borden et al.*, July 15, 2003, Essex Superior Court Civil Action 01-0185, 2003 WL 22285323), the project eligibility letter was issued in 2000 under the New England Fund (NEF) program before the State had issued guidelines regarding the content of such letters. Citing a then-recent HAC decision (1999), the judge ruled that when details establishing compliance with the jurisdictional requirements of 40B (in terms of site control, affordability, profit limits and monitoring) were missing in these eligibility letters, ZBAs needed to specifically require compliance with the 40B regulation in their decision. In this case, the ZBA had agreed on mechanisms to ensure compliance but failed to detail them in the decision initially filed with the town clerk. It later prepared a corrected decision but failed to sign it.

[7] The following are just a few of the many studies documenting the rise in land use restrictions in Massachusetts: Commonwealth of Massachusetts, Executive Office of Administration and Finance, "Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts", Policy Report Series 04 – October 2000, Boston, MA (see pp. 37-8) http://www.chapa.org/pdf/A_F_HousingReport.pdf Edward Moscovitch, "Open Space, Housing Construction and Home Prices: What's the Payoff from Smart Growth?", September 2005, prepared for the Massachusetts Housing Partnership, Boston, MA http://www.mhp.net/uploads/resources/cape_ann_report.pdf Jenny Schuetz, "Guarding the Town Walls: Mechanisms and Motives for Restricting Multi-family Housing in Massachusetts", March 2006, Rappaport Institute for Greater Boston, Cambridge, MA http://www.ksg.harvard.edu/rappaport/downloads/final_townwalls.pdf Andrew Jakabovics, "Housing Affordability Initiative – Land Use Research Findings, MIT Center for Real Estate Development, January 31, 2006 http://web.mit.edu/cre/research/hai/land-use.html; Henry Pollakowski, "Boston Area Housing Approaches an Acre per Home" , MIT Center for Real Estate Development, January 31, 2006 http://web.mit.edu/cre/news/060131-land-use.html

[8] In most communities, the special permit granting authority (SPGA) for comprehensive permits is the zoning board of appeals (ZBA); in some cities, it is the city council.

[9] Massachusetts Housing Partnership and Edith M. Netter, Esq., "Local 40B Review and Decision Guidelines", November 2005, prepared for the Massachusetts Housing Partnership, Boston, MA pages 3-4. http://www.mhp.net/uploads/resources/local_40b_v3_low_res.pdf

[10] Current regulations do not impose a deadline for the conduct of the ZBA hearing, but DHCD has proposed revised regulations to set a 180-day deadline. If adopted, they would go into effect sometime in early 2008.

[11] Communities are also "appeal-proof" if subsidized housing sites make up more than 1.5% of their land area, a large subsidized development has been approved in the past two years or they are making progress toward the 10% goal under a state-approved "planned production program" for affordable housing.

[12] Per Section 21 of Chapter 40B, "Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section 17 of chapter forty A" [M.G.L. Chapter 40A, §17]

[13] In cases where the ZBA argues that its decision is appeal-proof, the HAC will hear evidence on that determination. If it concludes that the ZBA is correct, the ZBA decision is automatically consistent with local needs and HAC dismisses the appeal.

[14] M.G.L. Chapter 30A.

[15] The State Supreme Judicial Court put an end to this practice in its *Planning Bd. of Hingham v. Hingham Campus LLC*, 438 Mass. 364 (2003) decision, finding that town officials lack standing to challenge local 40B approvals if they are pursuing public interests such as traffic or drainage. It is possible that they may have standing as "persons aggrieved" if the town owns abutting land. http://64.233.169.104/search?q=cache:R2DZzLgHd-cJ:caselaw.findlaw.com/scripts/getcase.pl%3Fcourt%3Dma%26vol%3Dsjcslip/sjcJan03d%26invol%3D1+%22Hingham+Campus%22+decision+SJC&hl=en&ct=clnk&cd=3&gl=us&client=firefox-a

[16] See Chapter 205 of the Acts of 2006 (the "Expedited Permitting Law")

[17] The number of courts in which 40B appeals can be filed has made it difficult to collect information on the incidence and outcomes of such suits, especially since none had automated system that tracks this category of cases. The Expedited Permitting Law will improve this situation with regard to larger projects, since it requires the State court administrator to issue an annual report, listing each permit appeal by type, length of proceedings, and disposition.

[18] For example, in cases involving appeals of subdivision plan approvals, the courts can require non-municipal plaintiffs to post a cash or surety bond of $2,000-$15,000. The City of Boston's Zoning Enabling Act also allows the courts to require appellants to post a bond of up to $25,000 or more to cover property owners' costs in the event the local decision is upheld (Boston Zoning Enabling Act, St. 1956, c.665, §11). According to a recent article in Banker and Tradesman, the March 2007 decision by a Superior Court judge to require a surety bond was the first such decision in at least 25 years involving a project outside Boston. http://www.hanify.com/docs/CMM-BT-Developers_Add_Weapon_to_Arsenal.pdf

[19] M.G.L. Chapter 40R, §11(h)

[20] *Taylor v. Board of Appeals of Lexington* (Middlesex Superior Court No. 03-0746, December 1, 2005), Judge Christopher J. Muse

[21] The 3-member Appeals Court panel for the Scituate decision included two of the judges who reversed the lower court decision in the Lexington case. See *Louis Chin et al. v. Town of Scituate Zoning Board of Appeals et al., Massachusetts State Appeals Court 2006-P-0872, June 11, 2007.*

[22] After two and a half years, a November 2007 Land Court decision upheld the City of Newburyport's May 2005 challenge to a developer's purchase option for land subject to an agricultural land restriction

under Massachusetts General Laws Chapter 61A, Section 14. Under Chapter 61A, owners of land covered by such a restriction who wish to sell their property must give the locality a 120-day right of first refusal. In this case, the potential buyer intended to seek a comprehensive permit to develop housing on the site and the parties agreed to a variable purchase price, based on the number of units ultimately approved. The Court ruled that these contingencies on price violated the intent of Chapter 61A by making it difficult or impossible for the City to reasonably match the price (i.e. it could not match the price without becoming a qualified 40B applicant within 120 days, which would be a difficult or impossible timetable since it would have to obtain a project eligibility letter from a subsidy agency during that period). See *City of Newburyport v. Woodman*, Mass. Land Court 309692, November 7, 2007 (Westlaw 3256964). It remains to be seen whether the City will exercise its purchase option.

[23] The July 27, 2004 Superior Court decision denying the Town of Norwell's petition seeking review of MassHousing's determination of project eligibility for Tiffany Hill is summarized on page 4 of a MassHousing report posted at http://www.chapa.org/pdf/MHpostpermit40B.pdf .

[24] In this second case, the Town's appeal, filed in March 2005, was dismissed by a Superior Court judge on October 25, 2005. The Town appealed the Superior Court decision and lost in early 2007 (see *Town of Marion v. Massachusetts Housing Finance Agency et al., Massachusetts 68 Mass.App. Ct. 208, 861 N.E.2d 468, decided February 12, 2007).* MassHousing asked for reimbursement of its legal costs as part of the Appeals Court case, but the Court turned down the request, stating that it declined to find the Town's argument "frivolous", citing earlier court decisions ("we are hesitant to deem an appeal frivolous and grant sanctions except in egregious cases".)

[25] See *Town of Bedford et al. v. Rose C. Cerasuolo, Trustee et al*. (SJC-FAR-15928), first filed at Land Court in July 2001 and finally resolved in May 2007 when the State Supreme Judicial Court rejected the Town's application for further appellate review.

[26] See endnote 22.

[27] The five cases we are aware of were Princeton Development (Bedford), Ocean Shores (Marshfield), Walden Woods (Scituate), Stockbridge Woods (Scituate), and Villages at Goddard (Stoughton).

[28] 310 CMR 10.04 and 10.05(7)(j)

[29] Avalon at St. Clare in Andover

[30] [Town-Appointed] Middleborough Gambling Casino Study Committee, "Community Impact Analysis and Mitigation of a Casino-Resort in the Town of Middleborough", July 23, 2007, page 11. Online at http://www.middleborough.com/General/Impact%20and%20Mitigation%20Report.pdf

[31] Projects in which litigants argued that the New England Fund should not be considered a subsidy under Chapter 40B include Pine Grove Estates (Middleborough), Marblehead Highlands (Marblehead), Walden Woods (Scituate), Village at Goddard Highlands (Stoughton) and Coppersmith Way (Townsend).

[32] This case (Town of Wrentham Zoning Board of Appeals v. West Wrentham Village, LLC) will be heard by the State Supreme Judicial Court in February 2008.

[33] The litigation over a ZBA's decision to require more affordable units in exchange for approving a comprehensive permit modification to allow a tenure change involves a project in Medway developed by Maritime Housing, LLC. The HAC (decision 06-14) overturned that condition and its decision is now being appealed. The HAC decision can be read online at http://www.mass.gov/Ehed/docs/dhcd/hac/decisions/medway2.pdf

[34] This case, brought by the Board of Selectmen in Bedford, technically did not challenge the zoning approval for Princeton Development but indirectly sought to prevent it by challenging the validity of an easement needed to access the site, even after the zoning board approved the comprehensive permit. The courts found that the developer had a right to use the easement for access.