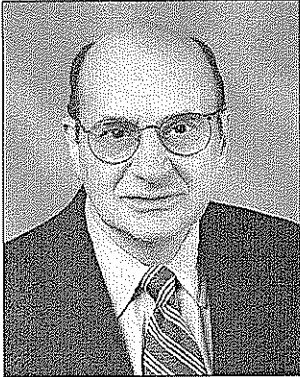
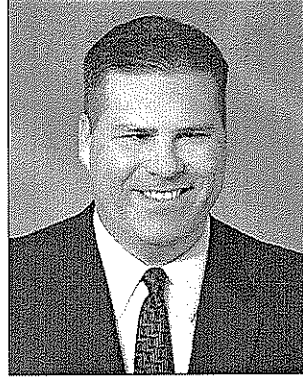


Compelling Reasons Why the Legislature Should Resist the Call to Repeal Chapter 40B

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The issue of affordable housing continues to be an extremely contentious topic in Massachusetts politics. At the center of this controversy is the statutory scheme contained in Massachusetts General Laws chapter 40B, sections 20-23, frequently referred to as

the anti-snob zoning statute, the Comprehensive Permit Law or simply Chapter 40B.¹ This statute allows developers of affordable housing to bypass local bylaws and ordinances (including zoning bylaws, subdivision rules and regulations and local wetlands bylaws, but excluding state wetlands regulations and Title V sanitary code provisions), which hinder the development of affordable housing. Opponents of the law, particularly suburban communities that have been subject to numerous comprehensive permit applications, are lobbying for its repeal, claiming that it interferes with a municipality's right to control its own growth. Proponents of Chapter 40B, typically affordable housing advocates and developers, note that these communities have had more than 30 years to increase their affordable housing stock, and point to the ever decreasing number of affordable housing units available in Massachusetts as evidence that the statute should remain unchanged.² Given the affordable housing shortage in Massachusetts, which is nearing crisis proportions, and considering that Chapter 40B is the major enabling tool for most of the new affordable housing units created in the commonwealth, it is important that a compromise between these factions be reached.³ In the spirit of such compromise, Governor Mitt Romney appointed a task force to submit recommendations to the legislature on how to preserve the ability to create affordable housing pursuant to Chapter 40B, while addressing the legitimate concerns of municipalities concerning the impacts of such development. It is the authors' con-

1. Chapter 40B authorizes an applicant to apply for a single permit from the local board of appeals, allowing him or her to bypass other local boards such as planning boards and conservation commissions (when enforcing local wetlands bylaws). For this reason, the resulting permit is referred to as a "comprehensive permit."

2. See Ryan Allen, Barry Bluestone, Bonnie Heudorfer and Gretchen Weisman, *The Greater Boston Housing Report Card 2002*. This study prepared by the advocacy group Citizens Housing and Planning Association (CHAPA) and the Center for Urban and Regional Policy (CURP) examines the state of affordable

housing in Massachusetts in 2002. The key finding of this report is that there are fewer affordable units being created per year in Massachusetts than are needed.

3. *Id.* at 45 (noting Chapter 40B "has become one of the major production vehicles for new rental housing that qualifies for inclusion in a community's subsidized housing inventory"). The report further notes that for the period between 1997-2001, Chapter 40B was "a factor in more than three-quarters of the new units gained in communities that had been below the 10% 'affordable' housing threshold." *Id.* at 46.

attention that the recommendations which have been submitted by the Chapter 40B Task Force, if implemented, will satisfactorily address the concerns of municipalities subject to comprehensive permit applications, without unduly jeopardizing the production of affordable housing in Massachusetts. For this reason, the legislature should take steps to implement the task force recommendations rather than heed the calls of those who wish to repeal Chapter 40B.

History of Chapter 40B

Not surprisingly, this is not the first time in memory that Massachusetts has faced an affordable housing shortage. Chapter 40B was promulgated in 1969 in response to a similar shortage.⁴ Acknowledging that exclusionary zoning practices were partly responsible for the lack of affordable housing, the legislature responded by passing Chapter 40B.⁵ This statute was designed to streamline the often lengthy and expensive permitting process that discouraged and sometimes thwarted the creation of affordable housing.⁶ Chapter 40B allows "[a]ny public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing [to] submit to the board of appeals . . . a single application to build such housing in lieu of separate applications to the applicable local boards."⁷ The board of appeals must hold a public hearing on the comprehensive permit application within 30 days of receipt of the application, and it must issue its decision within 40 days of the close of the public hearing.⁸ Persons aggrieved by the decision of a board approving a com-

prehensive permit application may appeal such approval to the Land Court or the Superior Court pursuant to Massachusetts General Laws chapter 40A, section 17.⁹

Upon the denial of a comprehensive permit, or the approval with conditions, the applicant may file an appeal to the Housing Appeals Committee pursuant to Massachusetts General Laws chapter 40B, section 22.¹⁰ The Housing Appeals Committee is limited to determining whether the proposed development is "consistent with local needs" in the case of a denial, or in the case of an approval with conditions, whether the conditions render the development uneconomic.¹¹ The definition for "consistent with local needs" establishes the requirement that municipalities must have a minimum of 10 percent of their total housing stock affordable to low- and moderate-income residents.¹²

If faced with a denial of a comprehensive permit by a board of appeals from a municipality that has not met its housing unit minimum, as defined in 760 CMR 31.04(1), the Housing Appeals Committee may still uphold the decision of the board if such decision is "reasonable and consistent with local needs."¹³ To show a denial is consistent with local needs, a board of appeals for a municipality that has not met its housing unit minimum has the burden of proving there is a valid "health, safety, environmental, design, open space or other local concern which supports such denial, and then, that such concern outweighs the regional housing need."¹⁴ Once the Housing Appeals Committee has issued its decision, the aggrieved party may appeal the decision to the "superior court

4. See *Bd. of Appeals of Hanover v. Hous. Appeals Comm. in Dep't of Cmty. Affairs*, 363 Mass. 339, 343, [1973] (examining legislative history of Chapter 40B); see also, Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience With a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 382 (2001).

5. *Bd. of Appeals of Hanover*, 363 Mass. at 353-54.

6. *Milton Common Assocs. v. Bd. of Appeals of Milton*, 14 Mass. App. Ct. 111, 117 (1982), citing *Bd. of Appeals of Hanover*, 363 Mass. at 351-352.

7. MASS. GEN. LAWS ch. 40B, § 21.

8. *Id.*

9. *Id.*

10. Chapter 40B sets up a dual appellate route, allowing the developer to appeal to the Housing Appeals Committee upon the denial or approval with conditions of a comprehensive permit application, while abutters must appeal to the Superior or Land Court pursuant to Massachusetts General Laws chapter 40A, section 17.

11. MASS. GEN. LAWS ch. 40B, § 22.

12. The definition of "consistent with local needs" states that

Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in the city or town where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year; provided, however, that land owned by the United States, the commonwealth or any political subdivision thereof, the metropolitan district commission or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs.

MASS. GEN. LAWS ch. 40B, § 20.

13. MASS. GEN. LAWS ch. 40B, § 23; see also, MASS. GEN. LAWS ch. 40B, § 20 (for definition of "consistent with local needs").

14. 760 CMR 31.06(6).

in accordance with the provisions of chapter thirty A."¹⁵

Developing the Parameters of Chapter 40B

The statutory scheme contained in Chapter 40B leaves much of the detail to be developed by regulation and case law.¹⁶ The wait was not long before the provisions of Chapter 40B were challenged, requiring the Supreme Judicial Court to flesh out the scope of the statute. In *Board of Appeals of Hanover v. Housing Appeals Committee*,¹⁷ the court held that the Housing Appeals Committee had the authority pursuant to Chapter 40B to "override local 'requirements and regulations' including zoning ordinances or by-laws, which are not 'consistent with local needs.'"¹⁸ The court also noted that the failure of a municipality to meet its affordable housing obligations, as defined in Chapter 40B, does not automatically mean that it must approve all comprehensive permit applications.¹⁹ It is only if a municipality's "valid planning objections to the details of the proposal such as health, site design, and open space" fail to outweigh the regional need for affordable housing that a denial of a comprehensive permit application must be reversed.²⁰

Other appellate decisions have helped further define the parameters of Chapter 40B. In one case, the Appeals Court held that the Housing Appeals Committee may not "override or ignore laws passed by the Legislature or regulations validly promulgated by the Commonwealth's various boards, departments, agencies or commissions."²¹ Another Appeals Court decision held

that the Housing Appeals Committee may issue a comprehensive permit for a project even if the permit will place that community over the 10 percent minimum, reasoning that the legislature did not intend "to require piecemeal approval of a project so a municipality can hit the ten percent requirement on the button."²² These cases, along with the various decisions of the Housing Appeals Committee over the early years, focused mainly upon the parameters of the statute, rather than upon when a board of appeals could properly deny or condition a comprehensive permit application in a municipality that was under the statutory minimum. As a result, a bright line emerged as to when a board of appeals would be required to approve a comprehensive permit application, and when a denial would be valid. This bright line has since become obscured as boards of appeals have begun to focus upon planning, public health, safety and welfare concerns about comprehensive permit projects.

The Case Against Chapter 40B

As the legislative goal of facilitating the creation of affordable housing was realized, the number of comprehensive permit applications began to increase.²³ A number of factors, including escalating land costs, more restrictive zoning throughout the state and a new source of funding led to a substantial increase in comprehensive permit applications over the past five years.²⁴ The increased Chapter 40B activity has resulted in numerous complaints from municipalities and residents groups.²⁵ The primary objection of these

15. MASS. GEN. LAWS ch. 40B, § 22.

16. See 760 CMR 30.00, 31.00 and 45.00.

17. 363 Mass. 339 (1973).

18. *Id.* at 355.

19. *Id.* at 366-67.

20. *Id.* at 367. In addition to finding that Chapter 40B allows the Housing Appeals Committee to override local zoning decisions, the court in *Board of Appeals of Hanover* made several other significant determinations. The court found that Chapter 40B does not violate home rule; that the award of a comprehensive permit does not constitute spot zoning; that Chapter 40B is not unconstitutionally vague; that the hearing before the Housing Appeals Committee must be de novo; that the alternative methods of review provided by the statute (to the Housing Appeals Committee if the applicant is aggrieved by a denial or an approval with conditions, and to the Superior or Land Court pursuant to Massachusetts General Laws chapter 40A, section 17 if an abutter is aggrieved by the approval or approval with conditions) are valid; that a remand is not required when the Housing Appeals Committee overturns a zoning board's denial; and that the Housing Appeals Committee may issue an order granting approval of a comprehensive permit with conditions.

21. *Bd. of Appeals of North Andover v. Hous. Appeals Comm.*, 4 Mass. App. Ct. 676, 680 (1976) [Chapter 40B does not author-

ize the Housing Appeals Committee to override the provisions of the state building code, regardless of whether such authority would facilitate the creation of affordable housing].

22. *Zoning Bd. of Appeals of Greenfield v. Hous. Appeals Comm.*, 15 Mass. App. Ct. 553, 562 (1983).

23. See Bonnie Heudorfer, *Use of the Comprehensive Permit in Massachusetts*, March 18, 2003, Presentation to the Governor's Chapter 40B Task Force. This presentation outline is available on the Chapter 40B Task Force's Web site at <http://www.chapa.org/Useof40B.pdf> (last visited Nov. 10, 2003).

24. See Kenneth Forton, *Expanding the Effectiveness of the Massachusetts Comprehensive Permit Law by Eliminating Its Subsidy Requirement*, 28 B.C. ENVTL. AFF. L. REV. 651 (2001) (discussing emergence of Federal Home Loan Bank of Boston's New England Fund and its importance to the creation of affordable housing in Massachusetts).

25. Examples of such complaints can be found on the many Web sites devoted to opposing Chapter 40B. Examples of these sites can be found at www.marshfieldaction.com (last visited Nov. 1, 2003) (containing links to other sites opposed to Chapter 40B, and also containing information on how to use wetlands as a method to block comprehensive permit applications) and www.40B.org (last visited Nov. 1, 2003) (includes information about Chapter 40B projects throughout Massachusetts).

groups is that developers are taking advantage of the statute to seek projects that are too dense compared to what they would be permitted to do under the applicable zoning bylaws. Another frequent complaint is that the number and size of the projects being filed are overwhelming municipalities' ability to provide services for the increased population.²⁶ These groups argue the manner in which the subsidized housing inventory is counted is unfair and inaccurate, as it does not count trailer parks, Section 8 housing or other inclusive housing measures. The communities also argue that the policy of counting all of the apartment units in a Chapter 40B development toward the subsidized housing inventory, while only counting the affordable units of a homeownership project, is unfair because the municipality has little say in the type of housing developers propose.²⁷ Many of these complaints from the opponents of Chapter 40B have been addressed by either recent case law or by regulatory changes promulgated by the Department of Housing and Community Development. Most of the remaining issues are addressed by the recommendations of the Chapter 40B Task Force. Although some groups opposed to Chapter 40B would likely prefer to see the task force recommendations address all of their suggestions, the recommendations of the Chapter 40B Task Force effectively address most of the perceived flaws remaining in the system.

Recent Developments in Case Law

The most recent prominent development in the Chapter 40B case law is *Zoning Board of Appeals of Wellesley v. Ardmore*.²⁸ In that case, the court ruled that the affordable units of a development created pursuant to Chapter 40B must remain affordable "for as long as the housing is not in compliance with local zoning requirements, regardless of the terms of any attendant construction subsidy agreements."²⁹ This decision responds to the concern that the return of once affordable units to the open market further inhibits a community's ability to meet its affordable housing requirements.³⁰ If the board fails to address

the issue, the units must remain affordable for as long as they do not comply with the local zoning requirements.³¹

In *Planning Board of Hingham v. Hingham Campus, LLC*,³² the court addressed another significant issue concerning Chapter 40B. The Planning Board of Hingham appealed the approval of a comprehensive permit application by the Hingham Board of Appeals.³³ The court held that because Chapter 40B, unlike Massachusetts General Laws chapter 40A, section 17, contains no provision specifically granting standing to local boards or their officers to challenge a decision of the board of appeals, the planning board lacked standing to appeal. The court then applied existing case law to rule that neither the planning board nor a person acting as a board member was an aggrieved person.³⁴ This decision is significant because it upholds the statutory goal of reducing obstacles to the creation of affordable housing, which objective would be frustrated if municipal boards that the comprehensive permit process bypasses could appeal decisions of the board of appeals.

In a recent Land Court case, the court held that in a town that has exceeded its housing unit minimum, the board of appeals may continue to hear and grant comprehensive permits, although it is no longer under any obligation to grant such permits.³⁵ This decision allows municipalities that decide that an affordability rate of 10 percent is not sufficient to meet their particular housing needs to approve additional affordable housing, without having to undergo the difficult process of amending their zoning bylaws.³⁶

Opponents of Chapter 40B frequently charge that the Housing Appeals Committee will not sustain a denial of a comprehensive permit application by a community that has not met the housing unit minimum, irrespective of whether the denial was based on legitimate public concerns. However, in the case of *Dennis Housing Corp. v. Dennis Board of Appeals*,³⁷ the committee upheld a decision of the Dennis Zoning Board of Appeals denying a comprehensive permit application because the lot coverage of the plan was ex-

26. See *Hilltop Pres. Ltd. P'ship v. Walpole Bd. of Appeals, Mass. Housing Appeals Comm. No. 00-11* (April 10, 2002) (noting that inadequacy of municipal services is grounds for denying a comprehensive permit only in limited instances).

27. See 760 CMR 45.07 (containing requirements for inclusion in the subsidized housing inventory). The reason apartment units are counted more generously than homeownership units is to create an incentive for municipalities to encourage the development of apartment units, which are deemed to be a greater need than additional homeownership units.

28. 436 Mass. 811 (2002).

29. *Id.* at 813.

30. *Id.* at 824.

31. *Id.* at 813.

32. 438 Mass. 364 (2003).

33. *Id.* at 365.

34. *Id.* at 367-68.

35. See *Boothroyd v. Zoning Bd. of Appeals of Amherst, Land Court Misc. Case No. 278308 and 279352* (Aug. 14, 2003) (Sands, J.).

36. *Id.* Presently there is no appellate case law or regulatory authority defining the standard of review which the Land Court or Superior Court must apply when reviewing an abutter's appeal of the grant of a comprehensive permit in a municipality that has exceeded its 10 percent housing unit minimum.

37. Mass. Housing Appeals Comm. No. 01-02 (May 7, 2002).

cessive.³⁸ This case shows that whether a particular proposal is appropriate can only be determined on a case-by-case basis, and the Housing Appeals Committee will deny applications that it deems inappropriate.³⁹

The Housing Appeals Committee also upheld the local board of appeals in *Drumlin Development LLC v. Sudbury Board of Appeals*,⁴⁰ and, in so doing, sustained a condition that the applicant claimed made development of the project uneconomic. This decision represents a reaffirmation by the committee that the exercise of discretion by the local board of appeals must be upheld, even if not objectively reasonable, as long as the condition imposed does not result in the project becoming uneconomic.⁴¹ Because the condition imposed by the board did not affect the economic viability of the project, it was held to be valid.⁴² Conversely, if a condition does affect the project's economic viability, the local board must show there is a valid local concern protected by the condition, and that such concern "outweighs the regional need for affordable housing."⁴³

Casaleto Estates, LLC v. Georgetown Board of Appeals is yet another recent Housing Appeals Committee case decided in favor of the board of appeals.⁴⁴ In this case, the committee held that once a town exceeds the 10 percent minimum, it may deny all comprehensive permit applications, even ones filed before

the 10 percent minimum was met.⁴⁵ As provided in Massachusetts General Laws chapter 40B, section 20, once a municipality has exceeded its 10 percent affordable housing requirement, any decision denying a comprehensive permit application is automatically consistent with local needs.⁴⁶

While the Housing Appeals Committee is willing to deny inappropriate developments, it remains committed to the mandate of Chapter 40B, which is to increase the production of affordable housing in Massachusetts. The Housing Appeals Committee has overturned denials based on insufficiency of municipal services in *Hilltop Preserve Limited Partnership v. Walpole Board of Appeals*,⁴⁷ inadequate municipal sewer systems in *Franklin Commons Limited Partnership v. Franklin Board of Appeals*,⁴⁸ and claims of insufficient frontage in *Delphic Associates, Inc. v. Middleborough Board of Appeals*.⁴⁹

The decision in *Hilltop Preserve* is particularly important, as it exhaustively examines the reasons a local board of appeals may not, except in limited circumstances, deny a comprehensive permit due to the project's impact upon municipal services.⁵⁰ The municipal services that communities claim are being overwhelmed (schools, emergency services, roads and water and sewer capabilities) are services they have a legal obligation to provide.⁵¹ Therefore, municipalities can-

38. *Id.* On an appeal of a related declaratory judgment action, the Supreme Judicial Court held that the Historic District Committee of the town of Dennis was a "local board" pursuant to Massachusetts General Laws chapter 40B, section 21, and thus the applicant was not required to file a separate application with that Historic District Committee. *Dennis Hous. Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 83 (2003).

39. *Dennis Housing Corp.*, No. 01-02 (May 7, 2002).

40. Mass. Housing Appeals Committee No. 01-03 (Sept. 27, 2001).

41. *Id.* The condition at issue in the *Drumlin* case involved the location of signs on the property, a condition which the Housing Appeals Committee determined did not make the project uneconomic.

42. *Id.*

43. *Id.* See also, 760 CMR 31.06(7).

44. Mass. Housing Appeals Comm. No. 01-12 (May 19, 2003).

45. *Id.* at 21. The applicant in the *Casaleto Estates* case had appealed to the Housing Appeals Committee the board of appeals' failure to close the public hearing in a timely manner, seeking a constructive grant of the application. *Id.* at 1. The Housing Appeals Committee held that the applicant did not unequivocally state to the board that it would not participate in any further hearings or provide further evidence, as is required for constructive approval (or constructive denial, as is the Housing Appeals Committee's oft-stated preference in this type of situation); therefore constructive approval was denied. *Id.* at 15. Typically when the Housing Appeals Committee denies an appeal seeking a constructive approval, the case will be remanded back to the board for further proceedings. However, in this case, the board issued a decision denying the comprehensive permit while the appeal was

pending, and, aided by the new regulation counting units as soon as the comprehensive permit is issued, the town added enough affordable units to exceed its 10 percent threshold. *Id.* at 16. The Housing Appeals Committee held that the change in the regulation applied to applications filed before the effective date of the new regulations, and that once the town exceeded its 10 percent requirement, it could deny all comprehensive permit applications, even ones filed before the date the town had exceeded the 10 percent minimum. *Id.* at 21.

46. See MASS. GEN. LAWS ch. 40B, § 20.

47. Mass. Housing Appeals Comm. No. 00-11 (April 10, 2002).

48. Mass. Housing Appeals Comm. No. 00-09 (Sept. 27, 2001). In this case the Housing Appeals Committee ruled that even when a townwide sewer moratorium was in place, the town could not use the inadequacy of the municipal services unless such installation was not technically or financially feasible. *Id.* at 15-16.

49. Mass. Housing Appeals Comm. No. 00-13 (July 17, 2002). The town claimed that the provisions of Massachusetts General Laws chapter 40A, section 6 mandate that an access road to a subdivision have at least 50 feet of frontage on a street, a claim summarily rejected by the Housing Appeals Committee. *Id.* at 11.

50. *Hilltop Preserve Ltd. P'ship v. Walpole Bd. of Appeals*, Mass. Housing Appeals Comm. No. 00-11 (April 10, 2002) (pursuant to 760 CMR 31.06(8), a municipality may not deny a comprehensive permit based upon the inadequacy of municipal services unless it can show that "installation of adequate services is not technically feasible or is not financially feasible due to unusual geographic or environmental circumstances.").

51. *Id.*

not use the inadequacy of these services as grounds for denying a comprehensive permit nor can they require a comprehensive permit applicant to address community-wide inadequacies in municipal services.⁵² However, the city or town may require mitigation from a comprehensive permit applicant for the actual impacts of the project.⁵³ In *Hilltop Preserve*, the committee also examined the limitations upon planning boards, water and sewer commissions and zoning boards of appeal under Massachusetts General Laws chapter 40A (the "Zoning Act" or "Chapter 40A") to require off-site improvements, and held that towns are similarly limited in relation to comprehensive permits.⁵⁴

The Housing Appeals Committee has further shown its willingness to rule against developers in two recent decisions, both issued on the same day. The first involved the grant by the Zoning Board of Appeals of Rehoboth of a comprehensive permit with the condition that only 16 units would be allowed, rather than the 37 units requested by the developer.⁵⁵ The Housing Appeals Committee held that the developer did not meet its burden of showing that the condition rendered the project uneconomic, and thereby upheld the board's decision.⁵⁶ In the second case, the Housing Appeals Committee considered the approval of a comprehensive permit, with conditions, by the Woburn Zoning Board of Appeals.⁵⁷ The developer in the Woburn case had sought to build 640 apartment units, which the board reduced to 300 units in its decision.⁵⁸ After intensive analysis of the financial information that the parties provided, the Housing Appeals Committee ruled that, although the developer did not prove that 640 units were necessary for the project to be economic, the city likewise failed to show that the project would be economic at 300 units.⁵⁹ Because neither party was able to sustain its burden, the Housing Appeals Committee determined that, based on the financial information before it, the proper size of the project was 420 units.⁶⁰ These cases show the level of analysis that the Housing Appeals Committee uses to determine

whether a project meets the requirements of Chapter 40B, and reflect favorably on the agency's even-handedness and objectivity.

2001 Regulatory Changes

In 2001, the Department of Housing and Community Development promulgated changes to the regulations governing the creation of affordable housing. These changes were designed to address specific concerns about the impact of the rapid growth of affordable housing developments on host communities. One such concern involved the manner in which the housing unit minimum is calculated. Prior to the change, affordable housing units were not counted unless they were subject to building permits, were available for occupancy or were occupied.⁶¹ Municipalities that were close to meeting their housing unit minimum believed this method of counting subjected them to additional applications even after they had issued comprehensive permits that, if exercised fully, would place them above their minimum. In response, the regulation was amended to count units allowed pursuant to a comprehensive permit as soon as the permit becomes final, eliminating the need to wait for the developer to apply for a building permit.⁶² However, if no building permit is sought within one year of the date of the comprehensive permit, the units must be removed from the subsidized housing inventory.⁶³ Thus, municipalities are protected from having to issue comprehensive permits beyond their statutory obligation, but are prevented from taking permanent credit for units until they are created.

One of the most persistent charges by opponents of Chapter 40B is that the law permits a rate of growth that many municipalities are unable to sustain. The Department of Housing and Community Development addressed this concern in two different amendments in 2001. First, a provision was promulgated to grant temporary relief to municipalities that have made "recent progress" toward meeting their afford-

52. *Id.*

53. *Id.* at 15.

54. *Id.*

55. See 9 N. Walker St. Dev., LLC. v. Rehoboth Bd. of Appeals, Mass. Housing Appeals Comm. No. 99-03 (June 11, 2003).

56. *Id.* at 8.

57. See Archstone Cmtys. Trust v. Woburn Bd. of Appeals, Mass. Housing Appeals Comm. No. 01-07 (June 11, 2003).

58. *Id.* at 1, 13.

59. *Id.* at 39-40.

60. *Id.* at 40. Besides the financial information, the Housing Appeals Committee reviewed numerous additional concerns of the board, and took those considerations into account when limit-

ing the size of the project to 420 units.

61. See 760 CMR 31.04(1)(a).

62. The new regulation provides that

Housing units shall be counted if they are subject to building permits, available for occupancy, or occupied. In addition, housing units authorized by a comprehensive permit shall be counted when the comprehensive permit becomes final (760 CMR 31.08(4)), provided that any housing units, for which building permits have not been issued within one year of the date when the comprehensive permit becomes final, shall no longer be counted until building permits have been issued.

Id.

63. *Id.*

able housing obligations.⁶⁴ The regulations define “recent progress” as occurring when “the number of housing units that have been created during the twelve months prior to the date of the Comprehensive Permit application and that count toward the housing unit minimum . . . is equal to or greater than 2% of the municipality’s total housing units.” The benefit of this amendment is that a municipality that has made actual significant progress toward meeting its affordable housing obligation in the previous 12 months is allowed to take a step back and absorb the impact of that progress for one year, before being required to resume issuing comprehensive permits.⁶⁵ While this may have a slight negative impact on the rate of creation of affordable housing in Massachusetts, it is necessary to allow municipalities that are actually making progress to recover from the impact of such progress before they are subjected to additional applications.

In addition to the “recent progress” exemption, the Department of Housing and Community Development has acted to protect municipalities from projects that are simply too large for the size of the community, by adopting the “Large Project” exemption.⁶⁶ This exemption allows a board of appeals to deny an application for a comprehensive permit seeking an inappropriate number of units.⁶⁷ The appropriateness of the size of the project is based upon the total number of units within the municipality.⁶⁸ Given the propensity of some developers to threaten affordable housing developments well beyond the municipality’s ability to assimilate, in order to obtain zoning relief without an affordable housing component, this provision should benefit both opponents and proponents of Chapter 40B. Municipalities, and their boards of appeal, will know the maximum number of units an applicant may seek, and affordable housing advocates will no longer have to support inappropriate developments that the developer has no actual intention of building.

Another response to the frequent complaint that developers threaten to file comprehensive permit applications as a means of obtaining zoning relief not involving the creation of affordable housing is the new one-year “cooling off” period.⁶⁹ This regulation prevents developers who have filed for permits without an affordable component from seeking a comprehensive

permit on the same land for one year.⁷⁰ Coupled with the “Large Scale Project” regulation, this cooling off period should deter developers from using the threat of a Chapter 40B development that they have no intention of constructing as a means of seeking zoning relief to which they are not entitled.

2002 Regulatory Changes

The legislature was not content with the extent of the regulatory changes promulgated in 2001 and voted to overhaul Chapter 40B in the summer of 2002. The resulting Omnibus Housing Bill represented a compromise between affordable housing advocates and opponents to Chapter 40B.⁷¹ Key provisions of the bill included new methods for calculating the subsidized housing inventory (including counting accessory apartments, units developed either through a local subsidy or the Community Preservation Act and subsidized long-term affordable units for individuals who are mentally retarded or mentally ill); recognition for community planning by granting exemptions for municipalities that increase their affordable housing stock by .5 percent annually pursuant to a Department of Housing and Community Development certified plan; a requirement that the Department of Housing and Community Development update the subsidized housing inventory every two years; and a requirement that subsidizing agencies submit detailed site approval letters.⁷²

Governor Swift vetoed the Omnibus Housing Bill in August 2002 stating that it would have a negative impact on the development of affordable housing. Instead, the governor, through the Department of Housing and Community Development, promulgated additional regulations that addressed most of the issues contained in the vetoed legislation.

The first of the new regulations became effective as an emergency regulation on July 22, 2002. This provision effectively ended the use of the Federal Home Loan Bank of Boston’s New England Fund as a means of subsidizing affordable housing developments, because it required that the bank itself issue a written determination of project eligibility (the “site eligibility letter”) for any applications for a comprehensive per-

64. 760 CMR 31.07(1)(d).

65. *Id.*

66. 760 CMR 31.07(1)(g).

67. *Id.*

68. *Id.* The regulation allows a municipality having 7,500 or more housing units to deny an application for a comprehensive permit that seeks to add more than 300 units, or 2 percent of all of the housing units in the municipality, whichever is greater. A municipality having between 5,000 to 7,500 units may deny comprehensive permits seeking to add more than 250 units,

while a municipality having between 2,500 to 5,000 units may deny permits seeking more than 200 units. Municipalities having less than 2,500 units may deny any comprehensive permit seeking to add more than 150 units.

69. 760 CMR 31.07(1)(h).

70. *Id.*

71. See generally *Chapter 40B Preserved with Modifications*, CHAPA Newsletter, Aug. 2, 2002, available at http://www.chapa.org/news_08-02-02.htm.

72. *Id.*

mit. Previously, the member banks had been issuing site eligibility letters.⁷³ As a result, the Federal Home Loan Bank of Boston suspended the operation of the New England Fund, effective Aug. 8, 2002. Given the large number of affordable housing developments that had been created under the New England Fund, the loss of this subsidizing option will likely have a negative impact upon the creation of affordable housing in Massachusetts.

The remaining new regulations became effective Dec. 20, 2002. Included among these regulations is an attempt by the Department of Housing and Community Development to reinvigorate the dormant New England Fund by allowing it to choose a public or quasi-public agency to determine site eligibility when the funding entity is a non-governmental agency.⁷⁴ In addition to issuing site eligibility letters, this agency would also be charged with issuing final approval of the project.⁷⁵ This new regulation has, in fact, enticed the Federal Home Loan Bank of Boston to reinstate the New England Fund, but it remains to be seen whether developers will consider the program a workable funding source. The most troubling issue is that such oversight will lead to a return of the command and control system of subsidies, which has proved to be a less effective method of stimulating creation of affordable housing than market-driven methods.⁷⁶ In order for this regulation to be truly effective in creating affordable housing, the guidelines for the agency issuing site approval and final approval must allow developers enough flexibility to make projects financially feasible.

The most significant of the 2002 regulations res-

urrects the legislature's attempt to reward municipalities for planned growth of affordable housing.⁷⁷ The "planned production" exemption sets forth a regulatory scheme for approving a local master plan for the development of affordable housing.⁷⁸ After initial certification by the Department of Housing and Community Development, this plan must be recertified every year to ensure progress is being made.⁷⁹ If the municipality has increased the total number of affordable housing units by .75 percent of the total number of its year-round housing units, it is awarded a one-year exemption from granting comprehensive permits.⁸⁰ An increase of 1.5 percent in a year results in a two-year exemption.⁸¹ This regulation acknowledges the importance of local planning, and accords it great deference, so long as the municipality is in fact working to implement its plan.

Another indication that the new regulations are responsive to concerns about local control is 760 CMR 31.07(3)(d), which allows the Housing Appeals Committee to consider a town's master plan, comprehensive plan or community development plan when it assesses local need. If such a plan is in place and it addresses affordable housing, and if progress is being made in its implementation, then the board of appeals may deny a comprehensive permit application that it deems contrary to the plan. That decision will be treated as consistent with local needs.⁸²

Finally, the 2002 regulations have addressed many of the concerns of Chapter 40B opponents about the manner in which the Department of Housing and Community Development's subsidized housing inventory is calculated. The definition of low- or mod-

73. See 760 CMR 31.01.

74. 760 CMR 31.01(2)(g).

75. 760 CMR 31.09(3) (requiring final written approval from the subsidizing agency before the comprehensive permit becomes valid). See also, Forton, *supra* note 24 (illustrating the benefits of the New England Fund upon the development of affordable housing in Massachusetts, and calling for the elimination of the subsidy requirement).

76. The Department of Housing and Community Development issued *Guidelines for Housing Programs in Which Funding is Provided Through a Non-Governmental Entity* on Feb. 18, 2003. These guidelines provide a list of seven mandatory findings a project administrator must make when determining site eligibility. In addition to these mandatory findings, the project administrator is instructed to consider the project's density and size, affordability, environmental impact (including the principles of "smart growth"), community impact and the impact of other pending housing applications. While the guidelines do not indicate the level of consideration to be given by the project administrator to these issues, a strict reading will result in making projects undertaken pursuant to the New England Fund more tightly constrained than projects undertaken pursuant to existing subsidies. The result of the regulation and guidelines will

likely render the New England Fund obsolete as developers are unlikely to choose to work with a more restrictive subsidy when less restrictive alternatives are available. The additional limits present in the new regulations and guidelines also are troubling because they seem to represent a return to the command and control approach to the development of affordable housing. This approach has proven to be less effective at creating new affordable housing units than the market-driven approach that existed under the New England Fund prior to the new regulations. In any event, there should be uniformity in the regulations and guidelines for all subsidy programs.

77. 760 CMR 31.07(1)(i).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. 760 CMR 31.07(3)(d). Although the Housing Appeals Committee already had the ability to take a municipality's master plan into account when deciding if a denial of a comprehensive permit application is consistent with local needs, the new regulation provides specific parameters for municipalities to follow to allow them to plan for the gradual increase of affordable housing units within its borders.

erate-income housing contained in 760 CMR 30.02 was modified to include low- and moderate-income housing created pursuant to the Community Preservation Act,⁸³ accessory apartments (if occupied by persons making less than 80 percent of the area median income), and housing created under the Local Initiative Program. These changes are essentially the same as those reflected in the vetoed Omnibus Housing Bill.⁸⁴ Although there are still other units of affordable housing that Chapter 40B opponents would like to see included in the count, such as Section 8 housing or trailer parks, the changes that have been made seek to address many of the inequities in compiling the subsidized housing inventory.

The 2002 regulatory changes also respond to proponents' concerns about affordable housing. In addition to attempting to entice the New England Fund to reenter the subsidized housing business in Massachusetts, the Department of Housing and Community Development promulgated a regulation that prohibits municipalities from requiring more than a 5 percent down payment for units created pursuant to local initiative.⁸⁵ Another new regulation creates a rebuttable presumption that a condition imposed in the grant of a comprehensive permit that causes a subsidizing agency to deny funding makes the project uneconomic.⁸⁶

These regulations illustrate the balance that the Department of Housing and Community Development has sought to achieve between the goal of creating sufficient affordable housing in every Massachusetts community and the often contradictory goal of protecting those same communities from the problems associated with the rapid expansion that can occur due to approving Chapter 40B projects.⁸⁷

Chapter 40B Task Force Recommendations

On Feb. 18, 2003, Governor Romney appointed a task force to address the remaining problems and controversies surrounding Chapter 40B. The governor won a key concession from the legislature — a moratorium on bills filed to amend or repeal Chapter 40B until the task force completed its study.⁸⁸ After numerous public meetings, the task force issued the "Chapter 40B Task Force Findings and Recommendations Report to Governor Mitt Romney May 30, 2003" (the "report").⁸⁹ The report's recommendations are a result of extensive debate after receiving voluminous amounts of both written and oral testimony.⁹⁰ The recommendations will not make all participants in the debate completely satisfied, which is, itself, persuasive evidence of a viable compromise.

The report begins with findings concerning the impacts on municipalities of affordable housing developments created pursuant to Chapter 40B.⁹¹ The report examines the effect of such developments upon school systems, noting that the task force has received no evidence of any such development being the sole or even primary cause of shortfalls in municipal school budgets.⁹² The report does acknowledge, however, that the units created pursuant to a Chapter 40B development will likely cause an increase in school enrollment in the municipality.⁹³ The report recommends revamping the local aid formula to address inequities in funding due to the creation of Chapter 40B housing in certain municipalities.⁹⁴

Another finding concerns municipal water and sewer impacts.⁹⁵ The report notes that many communities operate on the basis of a "full cost recovery" of water and sewer expenses, and therefore Chapter 40B

83. MASS. GEN. LAWS ch. 44B.

84. See 760 CMR 30.02; see also, Omnibus Housing Bill, Report of the Committee on Conference, July 29, 2002.

85. See 760 CMR 45.03(4); see also, 760 CMR 45.04(4).

86. See 760 CMR 31.07(1)(f).

87. A recent study conducted for Citizens Housing and Planning Association calls into question the assumption that growth is automatically accompanied by "increased demand for [municipal] services and higher municipal costs." See Robert Nakosteen & James Palma, *The Fiscal Impact of New Housing Development In Massachusetts: A Critical Analysis*, currently available at www.chapa.org/fiscalimpact.pdf (last visited Nov. 1, 2003). The report states "the standard models relied upon by cities and towns to estimate the fiscal impact of development may be systematically overestimating these costs in many communities." *Id.* at 2.

88. Press Release, Governor Mitt Romney, Romney Convenes Affordable Housing Task Force (Feb. 18, 2003). Available at: http://www.mass.gov/portal/govPR.jsp?gov_pr=gov_pr_030218_40B_taskforce.xml (last visited Nov. 1, 2003).

89. See Chapter 40B Task Force Findings and Recommendations,

Report to Governor Mitt Romney, May 30, 2003. A copy of this report can be obtained on the Chapter 40B Task Force's Web site at www.state.ma.us/dhcd/Ch40Btf/ (last visited Nov. 1, 2003) (hereinafter Task Force Report).

90. *Id.* The minutes of the Chapter 40B Task Force hearings, along with copies of the materials presented during those hearings, are also available on the task force Web site.

91. *Id.* at 19-24.

92. *Id.* at 20-21.

93. Task Force Report, *supra* note 89, at 21.

94. *Id.* at 35. Because the creation of affordable housing pursuant to Chapter 40B will have a negligible effect upon the number of school-aged children in the state, the task force was correct in determining the problem that needs to be addressed is inadequacies in the local aid formula, not in Chapter 40B. Clearly, the school-aged children living in homes developed pursuant to Chapter 40B would have to be educated somewhere in the state, particularly considering that up to 70 percent of the affordable units may be set aside for local preference, so the issue should be addressed by the legislature by redistribution of local aid.

95. *Id.* at 21-22.

developments do not add to the financial burden on these communities in that regard.⁹⁶ The report further notes the municipality may legitimately require mitigation from the developer for the impacts the development has upon the municipal water and sewer service.⁹⁷

In response to the frequently encountered argument that Chapter 40B developments raise public safety concerns because they place an increased burden on municipal emergency services (fire and police), the report finds that these concerns are not limited to developments pursuant to Chapter 40B. Furthermore, the report notes that no evidence was presented to the task force showing that a Chapter 40B development has placed an unreasonable strain upon a particular municipality's ability to provide fire and police services.⁹⁸

In addition to assessing the impact of Chapter 40B development upon municipalities, the report assesses factors that create the need for the statute.⁹⁹ In particular, the report notes the problems associated with Chapter 40A, which makes the permitting of non-Chapter 40B developments difficult and expensive.¹⁰⁰ The report calls upon the governor to reevaluate the effectiveness of Chapter 40A, but does not make any suggestions along these lines.¹⁰¹

With the issues thus identified, the report recommends changes to Chapter 40B and the regulations promulgated thereunder.¹⁰² The first, and most significant, recommendation is to change the method for counting homeownership units.¹⁰³ As discussed above, at the present time only the affordable units of a homeownership development count toward the municipality's subsidized housing inventory.¹⁰⁴ In contrast, all of the units of an apartment complex created pursuant to Chapter 40B count, regardless of whether they are affordable or market-rate units.¹⁰⁵ This disparity in the counting of units, which was implemented to create

an incentive for municipalities to create much needed rental housing, has been a source of great consternation for municipalities. As a result, in order to make the count more equitable, while preserving an incentive for creating apartment units, the report recommends counting every affordable unit in a homeownership development twice when calculating the subsidized housing inventory.¹⁰⁶ Although this change may not completely satisfy opponents of Chapter 40B, it does remove much of the inequity in the count while preserving the incentive to create rental housing.

The report's second recommendation pertains to the counting of manufactured housing (or mobile homes).¹⁰⁷ Although the report does not endorse the counting of these units, as many municipal leaders would like, it does propose that further study be done on the issue.¹⁰⁸

One issue that emerged during the task force hearings was that many projects approved by a comprehensive permit could not reasonably be ready to apply for a building permit within the one-year period given by the current regulations.¹⁰⁹ Thus, through no fault of the municipality, the units would cease to be counted after the one-year period expired. In response to this criticism, the report recommends that if a municipality can show that the developer could not reasonably seek a building permit within the one-year period due to factors beyond the control of the municipality, the Department of Housing and Community Development may extend the one-year time limit.¹¹⁰

One of the most persistent political and philosophical complaints about Chapter 40B is that it represents a derogation of the much cherished right of Home Rule for Massachusetts communities. As discussed above, the 2002 regulatory changes addressed this criticism by creating the "planned production" exemption.¹¹¹ However, many municipalities argued the

96. *Id.* at 22.

97. *Id.*

98. Task Force Report, *supra* note 89, at 22.

99. *Id.* at 22-25. The task force's finding that development is "often expensive and time consuming" listed the following factors as contributing to the problem: "the high cost of land, housing demand; and the extent of regulation." The task force found these factors have inhibited the development of housing in Massachusetts, and have led developers to use Chapter 40B as a means of avoiding the extensive regulation inhibiting the development of housing.

100. *Id.* at 23-25.

101. *Id.* at 34. The task force recommended that a task force be convened to examine the inadequacies of Chapter 40A if the governor determines changes are required.

102. *Id.* The recommendations of the task force are contained in Step Two of the report, pages 25-42.

103. Task Force Report, *supra* note 89, at 26-27. The recom-

mendation proposes to amend 760 CMR 31.04(1)(a) to count two times the number of affordable home ownership units in a municipality toward its housing unit minimum.

104. *See* 760 CMR 31.04.

105. *Id.*

106. *See* Task Force Report, *supra* note 89, at 26.

107. *Id.* at 27.

108. *Id.* The reluctance of the task force to include mobile homes in the subsidized housing inventory was based not on a belief that such homes are not affordable, but instead on the difficulties in determining whether a particular mobile home meets the affordability requirements without the presence of a deed restriction on the units. The goal of the further study recommended by the task force will, presumably, focus on how such units can be reliably counted in the subsidized housing inventory.

109. 760 CMR 31.04(1).

110. Task Force Report, *supra* note 89, at 27.

111. *See* 760 CMR 31.07(1)(i).

threshold for achieving the exemption was set too high. In response, the report proposes a change in the "planned production" regulations by lowering the threshold for the one-year exemption from .75 percent to .5 percent.¹¹² The report also recommends lowering the threshold for the two-year exemption from 1.5 percent to 1 percent.¹¹³ Additionally, under the report's proposal, a new three-year exemption would be created for municipalities that increase their affordable housing stock by 1.5 percent in a year.¹¹⁴ As before, these exemptions only would apply to communities that have a certified affordable housing plan.¹¹⁵ These recommendations, coupled with the proposed double counting of the home ownership units, will allow a municipality to take the initiative to plan for and create affordable housing in a manner of its own choosing. Any municipality failing to take advantage of this opportunity will no longer be able to argue convincingly that Chapter 40B is interfering with its legitimate planning goals.

Due to the hardships volunteer boards face when presented with numerous comprehensive permit applications, the report recommends limiting the number of applications a municipality must consider at any given time. The proposed limit is either 2 percent of the municipality's total year-round housing stock (if it does not have a Department of Housing and Community Development certified affordable housing plan) or .5 percent of its total year-round housing stock (pursuant to a Department of Housing and Community Development certified affordable housing plan).¹¹⁶ Comprehensive permit applications that have been pending before the board for longer than nine months will not count toward the total in order to discourage boards from delaying action on applications to forestall additional filings for an indefinite period.¹¹⁷ This recommendation essentially extends the one-year "recent progress" and "planned production" exemptions an additional nine months.

Another of the report's proposals would allow the municipality to submit written comments to the subsidizing agency to be answered by the applicant.¹¹⁸ This

recommendation would inform the developer about municipal concerns with the project at a point when the developer has the greatest flexibility to make changes. However, this regulation will not work if it is simply used by municipalities to short-circuit the comprehensive permit process by blocking site eligibility letters for technically feasible projects. It will also fail if developers are unwilling to be responsive to the legitimate concerns raised by the municipalities.

Given the breadth of the issues for the task force to consider, it was not able to spend much time on the matters pertaining to the Housing Appeals Committee. The study did hear a great deal of commentary about problems with the Housing Appeals Committee, both of performance and of perception, and decided that the issue was important enough to require a separate study to recommend ways of improving the committee.¹¹⁹ One major area of concern for the new Housing Appeals Committee Task Force will be to examine whether abutter appeals of decisions granting comprehensive permits should be heard by the Housing Appeals Committee, as reconstituted, or whether those appeals should remain in the Superior and Land Courts.¹²⁰ Currently there is a bifurcated appeals process dependent upon the status of the party filing the appeal: a developer appealing the denial of a comprehensive permit application (or the grant of a comprehensive permit with conditions) must appeal to the Housing Appeals Committee, but an abutter aggrieved by the grant of a comprehensive permit (or the grant of a comprehensive permit with conditions) must appeal to the Superior Court or Land Court.¹²¹ In the case of the grant of a comprehensive permit with conditions, it is possible that both the developer and abutters will choose to appeal, resulting in the filing of both administrative and judicial appeals. This dual appellate track can present serious problems, particularly in the case where the court acts on an appeal of a comprehensive permit, only to have the substantive nature of that permit changed by a subsequent decision of the Housing Appeals Committee.¹²² To prevent the inefficient allocation of state resources by

112. See Task Force Report, *supra* note 89, at 35-38.

113. *Id.* at 38.

114. *Id.*

115. See *id.*; see also 760 CMR 31.07(1)(i).

116. See Task Force Report, *supra* note 89, at 27. This proposal would add a new subsection to 760 CMR 31.07, which would be subsection (1)(j).

117. *Id.*

118. *Id.* at 29-33. This recommendation proposes to amend 760 CMR 31.01 to improve the site eligibility process to encourage additional local input earlier in the process.

119. *Id.* at 33. The authors submitted a proposal for the reor-

ganization of the Housing Appeals Committee to the task force, which can be found on the task force Web site. Attorney Regnante has since been appointed to the task force charged with examining the procedures of the Housing Appeals Committee.

120. *Id.*

121. See MASS. GEN. LAWS ch. 40B, § 22 (for developer appeals); see also MASS. GEN. LAWS ch. 40B, § 21 (for abutter appeals).

122. The dual appellate track could result in a situation where both the developer and abutters appeal the grant of a comprehensive permit with conditions. The developer would be appealing to the Housing Appeals Committee claiming that the conditions render the project uneconomic. The abutters would be appealing to the Superior or Land Court claiming that the zon-

allowing multiple appeals of an identical board of appeals decision, abutter appeals should come under the jurisdiction of a reconstituted Housing Appeals Committee, whose decision could then be reviewed by the Superior Court pursuant to Massachusetts General Laws chapter 40B, section 22 and Massachusetts General Laws chapter 30A.¹²³ The Housing Appeals Committee Task Force will be charged with examining this idea, along with many other proposals for improving the efficiency of the committee, all with the goal of expediting the creation of affordable housing.

The report also makes several other recommendations. For example, it proposes revising 760 CMR 31.04 to require the Department of Housing and Community Development to update its subsidized housing inventory at a city or town's request; acknowledges that eight units per acre or four times surrounding density (whichever is greater) is an appropriate measure of the proper density for homeownership developments;¹²⁴ recommends that a growth aid formula be created to compensate municipalities for the impacts on services coming with a Chapter 40B development; and suggests that inter-municipal agreements to share affordable housing units in a manner commensurate with the impact upon each municipality be allowed.¹²⁵ Additionally, the task force recommended a pilot program for creating "housing regions," which would allow cities and towns to count some affordable housing units located in neighboring municipalities toward their own affordable housing obligation.¹²⁶ To participate in the "housing region," municipalities must be contiguous, and each have affordable housing exceeding 5 percent of its existing year-round housing stock while remaining under the 10 percent housing unit minimum.¹²⁷ This was a very controversial recommendation, as there was much concern that wealthier municipalities would

buy their way out of their affordable housing responsibilities. The resulting compromise allows contiguous communities that share impacts from a Chapter 40B development located in one of the communities to share the affordable units as well. No single unit would appear in more than one of the municipality's inventories.¹²⁸

Overall, the report contains comprehensive recommendations for the reform of Chapter 40B that would be in the best interest of the commonwealth to adopt. The legislature should move quickly to enact the proposed reforms.¹²⁹

Alternatives to Chapter 40B

If the legislature does not believe that the recommendations of the task force will suffice, and instead chooses to repeal Chapter 40B, it should be aware that a judicially imposed solution to the affordable housing crisis is a realistic possibility, given the course of events in other states.

Several state courts have imposed judicially mandated affordable housing requirements based upon civil rights provisions of their state constitutions. The most notable instance of such a judicial solution to exclusionary zoning occurred in New Jersey shortly after Chapter 40B was passed in Massachusetts. In *Southern Burlington County NAACP v. Township of Mount Laurel*,¹³⁰ the Supreme Court of New Jersey ruled that the zoning scheme of the Township of Mount Laurel discriminated against low- and moderate-income housing, and held that this violated the state constitution because the ordinance in question was "presumptively contrary to the general welfare and outside the intended scope of the zoning power" of the township.¹³¹ Later cases in New Jersey have extended the scope of the *Mount*

ing board of appeals should have denied the project. Assuming that the court did not stay its proceedings while the Housing Appeals Committee hearing was pending, the possibility exists that the court could issue a decision before the decision of the Housing Appeals Committee is issued. If the court upheld the board of appeals decision based upon the reasonableness of the conditions imposed by the board of appeals, then the Housing Appeals Committee subsequently held that those conditions were invalid because they rendered the project uneconomic, the basis upon which the court based its decision would no longer be valid, and a new trial would likely be required. Given these valid procedural complications, it is clear that the appellate route for comprehensive permit decisions must be changed.

123. The Chapter 40B Task Force Web site contains copies of all submissions made by interested parties to the task force.

124. This acknowledgement was accompanied by the suggestion that subsidizing agencies adopt guidelines consistent with the new density criterion, a suggestion that has already been implemented by Mass Housing.

125. Task Force Report, *supra* note 89, at 25-42.

126. *Id.* at 39.

127. *Id.*

128. *Id.*

129. On Oct. 16, 2003, the Joint Committee on Housing and Urban Development favorably reported on a bill entitled "An Act Promoting Affordable Housing and Community Planning in the Commonwealth." This bill closely tracks the recommendations of the task force, and implements most of the key features contained in the report. Additionally, the HUD bill codifies certain Housing Appeals Committee regulations that have been discussed above, and also includes a new provision allowing a board of appeals to deny a comprehensive permit application, consistent with local needs, when it has approved at least three comprehensive permit applications, each of which was for at least 20 units, in the previous 12 months. See Joint Committee on Housing and Urban Development, Oct. 16, 2003 "An Act Promoting Affordable Housing and Community Planning in the Commonwealth," section five, page 10.

130. 336 A. 2d 713 (N.J. 1975).

131. *Mount Laurel*, 336 A.2d at 730.

Laurel decision, including the creation of a builder's remedy that allows a developer to avoid local zoning provisions in a manner similar to what is authorized by Chapter 40B.¹³²

In addition to state constitutional provisions, advocates of affordable housing throughout the country are beginning to use the Fair Housing Act¹³³ as a method of overcoming exclusionary zoning practices.¹³⁴ Affordable housing advocates necessarily will turn to these alternatives in the event the legislature repeals Chapter 40B, and the remedies under these alternatives may impose requirements more onerous than what is currently in place pursuant to Chapter 40B.

Conclusion

There is an inherent conflict between the provisions of Chapter 40B and the strong desire of mu-

nicipalities to direct their own growth. Although recent case law and new regulations cannot resolve those conflicts, they can facilitate an atmosphere where both goals can coexist. The recommendations of the task force, if implemented, would give municipalities greater ability to plan for the creation of affordable housing within their borders without having the location of such housing imposed by developers. Additionally, developers would have a better idea where and when an affordable housing development would be appropriate. Finally, while the compromises reached in the report could have a detrimental impact upon the amount of affordable housing created in Massachusetts, the lessening of the hostility toward Chapter 40B developments should help these projects proceed through the approval process faster, minimizing the impact of the new regulations.

132. *Id.*; see also *S. Burlington County NAACP v. Mount Laurel Township*, 456 A.2d 390 (N.J. 1983).

133. 42 U.S.C. §3601-3631.

134. See Michael Allen, *The Fair Housing Act: An Essential Civil*

Rights Law in the Affordable Housing Tool Box, The NIMBY Report, Using Civil Rights Laws to Advance Affordable Housing, Fall 2002 at 4. Available at <http://www.nlihc.org/nimby/fall2002.pdf> (last visited Nov. 2, 2003).