

Overcoming Restrictive Zoning for Affordable Housing in Five States: Observations for Massachusetts

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Executive Summary

Chapter 1: Introduction

- 1) One of the key limits to affordable housing development is zoning and other land use restrictions that discourage the development of smaller or moderately sized market rate housing, thereby limiting overall affordability for lower income households. Often called “exclusionary zoning,” these practices greatly reduce the likelihood that households with a wide range of incomes will be able to live in certain locales, thereby contributing to social and racial segregation. The result is that non-white and lower income households are often disadvantaged in seeking desirable employment and educational opportunities.
- 2) Concerns about restrictive land use patterns have been articulated for at least four decades by government, academics, and professionals.
- 3) This study is aimed at better understanding the experiences in Massachusetts and other states that have programs targeted at overcoming the negative impacts associated with exclusionary zoning. A number of states have attempted to deal with the reality that many cities and towns across the country do not have any areas zoned for multifamily housing, or for homes that can be built on small lots. Many cities and towns in Massachusetts have zoning ordinances that restrict the construction of multifamily housing and single family homes on small lots.
- 4) In short, what can we learn about how five states have attempted to develop more affordable housing and a more balanced distribution of such housing among cities, suburbs and rural areas by intervening in local land use practices?
- 5) The point of reference for this inquiry is the Massachusetts Chapter 40B statute, which is aimed at encouraging the construction of housing units affordable to lower income people into areas where such housing was not being built (e.g., affluent suburbs).
- 6) This inquiry was launched with the hope that states both with statutes with goals similar to 40B and states without such laws would be able to reflect on the comparative strengths and weaknesses of the various approaches.

Key Questions

- 1) The central question is: What have been the experiences in Massachusetts and other states that have programs with similar goals to Chapter 40B-- to develop more affordable housing and a more balanced distribution of such housing among cities, suburbs and rural areas?
- 2) In addition, this study poses the following set of questions for each state:
 - What types of administrative/regulatory changes in the implementation of the program have occurred and how is the statute viewed by key stakeholders
 - How much affordable housing has been produced per year since the statute became operational?
 - What type of affordable housing has been produced (e.g., rental, homeownership, elderly, special needs)? Does the state monitor production activity under the statute through a state-wide database

- Where has this housing been produced? To what extent have locales that had little or no affordable housing added to their stock?
 - If the state assigns affordable production goals to municipalities, to what extent is compliance being attained?
 - Are there demographic differences between municipalities that have been producing affordable housing (in terms of race, income, and population density) and those that have not? Do demographic differences exist between municipalities that have attained production goals (in states where they exist) and those that have not?
 - To what extent was the overall amount of affordable housing produced correlated with demographic characteristics? Is race, income, or population density correlated with the amount of affordable housing produced?
 - What can be learned from the various initiatives that might assist Massachusetts, as well as other states in creating more optimum programs?
- 3) Our assumption was that production patterns in municipalities with higher percentages of white residents, higher incomes, and lower densities (in comparison to municipalities that do have production, or with fewer units) would be indicative of the program making inroads on exclusionary land use patterns. However, in an attempt to develop relatively simple ways of measuring exclusivity, our analyses may yield some ambiguous findings.

Selection of States for Study

- 1) To select the programs for study, we sought initiatives that would provide important contrasts with the Massachusetts approach. We determined the major types of strategies aimed at overriding local zoning and then developed a set of criteria for selecting the four states to be studied.
- 2) The major types of anti-exclusionary zoning strategies were sorted into these groups: general city/town goal with state zoning override; mandatory inclusionary zoning; fair share mandate; and mandated housing element as part of planning requirement
- 3) The selected states were chosen purposefully, with each providing information and examples of purportedly exemplary procedures and interventions. The following criteria were used for selecting the four states for study.
 - The group of states selected should, taken as a whole, offer a range of interventions.
 - The statute must differ significantly from Chapter 40B.
 - The statute must have a significant “track record,” defined as being operational for at least ten years.
 - Selected key informants, and the available literature, must cite the state as being an exemplary model of overcoming exclusionary zoning.
- 4) The state programs in Rhode Island, New Jersey and California were selected, along with the county-wide program in Montgomery County, Maryland. Rhode Island has created a program similar to Massachusetts Chapter 40B, but with some important differences. Montgomery County, Maryland, New Jersey and California were also selected, in large part because they are widely viewed as the pre-eminent examples of inclusionary zoning, fair share mandates, and housing elements as part of a planning requirement, respectively.

Methods

- 1) A qualitative and quantitative research design was followed. Differences in state data collection methods made it difficult to fully answer some of the research questions. In addition, California does not have a centralized method of recording affordable housing data across the state. For Rhode Island, Montgomery County, Maryland, and New Jersey, data was obtained from the relevant state agency in charge of that task, as such data was available (ideally, from the start of the program), up to the period of the study (about 2008). In general, there were three or four sources of data for each case study. Various descriptive and correlation analyses were performed. (See Appendices II for additional details on the qualitative and quantitative information that was collected for each case study, to the extent that it was available.)
- 2) The qualitative part of the study involved reviewing available literature and interviewing key informants. This mixed-methods approach enabled us to present a full picture of the context in which the programs developed, how they changed over time, and how key informants viewed the various strengths and weaknesses of the programs operating in their state.
- 3) The term “affordable housing” is used somewhat differently by each case study locale. Despite the variations, we use the terms, “affordable housing,” “moderate income housing,” and “low-moderate income housing,” as they are used in each of the states under study. No effort was made to standardize the definitions or to count as affordable units targeted to the same income level households, across all states. As a result, housing that is classified as affordable in one state, might not meet that threshold in another.
- 4) Two measures were used in the analysis. First, the Wilcoxon Rank-Sum test, which assesses whether or not differences between two groups of data are statistically significant, was used to measure whether or not there were statistically significant differences between municipalities with affordable housing and those without any. Second, the Spearman correlation was used to measure whether or not there is a correlation between demographic characteristics and the amount of affordable housing produced.
- 5) In presenting correlations, it is critical to keep in mind that these analyses do not reveal anything about causality. Therefore, no finding in this report may be interpreted to say, for example, that income levels, racial characteristics, or density of municipalities are the *cause* of either the use or lack of use of any given program. Correlation findings only demonstrate whether a given variable is related to another variable. This caveat is repeated a number of times throughout this report.
- 6) Census data is based on 2000 information, whereas production data goes through the most recent date for which such information was available, late in the decade of the 2000s. We also acknowledge that 2010 census data, not available when the study was carried out, might reveal somewhat different municipal-level characteristics.
- 7) Each of the states included in this analysis presented a unique set of challenges, in terms of data analysis.

Overall Structure of the Report

- 1) This study is aimed at providing useful insights for Massachusetts as it continues to address exclusionary land use practices and for other states interested in better understanding the role that they can play in creating more opportunities for diverse populations to find decent, affordable homes throughout their entire jurisdiction.
- 2) Each of the five case studies is presented in a separate chapter. The final chapter presents cross-cutting themes and recommendations.

Chapter 2: Massachusetts

Overview and Background

- 1) Chapter 40B, Section 20, of the General Laws of Massachusetts, was enacted in 1969 as a mechanism to address zoning barriers that made it difficult or impossible to build subsidized housing in many municipalities. In an effort to counter restrictive local land use ordinances that limited the production of single family homes on small lots and multifamily buildings, Chapter 40B created tools to make it easier to develop subsidized housing, especially in municipalities with a limited supply (less than 10% of year-round housing stock).
- 2) The statute authorizes a special approval process (the comprehensive permit process) that allows local boards of appeal to waive zoning and other land use restrictions if needed to make subsidized developments (including mixed income projects) feasible.
- 3) Under Chapter 40B, a for-profit or nonprofit developer, or a public agency can propose a development that may not conform to existing land use regulations, as long as at least 20-25% of the units are reserved for low and moderate income households (incomes of up to 80% of area median income-AMI) for at least 30 years at an affordable rent or sale price, using a state-approved subsidy program.
- 4) The developer applies for a comprehensive permit to the local Zoning Board of Appeals. The application must specify any waivers of zoning or land use regulations requested (e.g., to build housing at higher densities than those permitted under the local zoning law and/or to develop multifamily housing in a single family zone).
- 5) In municipalities with a subsidized housing stock below 10% of their year-round housing stock (or certain alternative thresholds), developers can appeal an adverse ZBA comprehensive permit decision (denial or the imposition of uneconomic conditions) to the state-created Housing Appeals Committee (HAC) and ask it to overturn or modify the local decision so that the development may proceed.
- 6) Such appeals may be made unless any one of six conditions is met. If none are met, and as long as the housing complies with various health and environmental regulations and does not pose serious health, safety, design, environmental or open space concerns that cannot be mitigated, the HAC has the right to overturn or modify the local decision and order the granting of a comprehensive permit. (In the case of appealed conditions, the HAC also must find that the conditions would make a project uneconomic.)
- 7) All developments built using a comprehensive permit under Chapter 40B must use a Department of Housing and Community Development (DHCD)-approved subsidy program and designate at least 25% of the units as affordable, meaning that they are

targeted to households earning 80% or less of AMI. Alternatively, 20% of the units may be targeted for households earning up to 50% of AMI.

- 8) All units built in subsidized rental developments count toward the municipality's 10% affordable housing goal, whether built with or without a comprehensive permit, as long as at least 20-25% of the units are affordable. In homeownership developments, only those units that are actually affordable are so counted. All affordability restrictions must last for at least 30 years (although most municipalities require affordability in perpetuity).
- 9) The vast majority of comprehensive permit applications is negotiated at the local level and eventually receives approval from the local ZBA. The majority of cases appealed to the HAC are resolved prior to a formal decision by the HAC. For those proposals that have been decided by the HAC, "reasonable" projects generally have been approved.

Recent Regulatory Changes

- 1) Over the years, there have been dozens of regulatory changes to the 40B program.
- 2) Many changes have been instituted in response to local concerns. Two of the most important modifications include: (a) a municipality that has not met the 10% goal has the ability to reject a comprehensive permit application, without the developer having recourse to the HAC, if it has been making a specified level progress toward meeting the affordable housing goal; and (b) a municipality that has been certified by DHCD as being in compliance with its housing production plan can become appeal-proof for a year or two years, depending on the level of production.
- 3) Other modifications have attempted to address various criticisms of the statute. Nevertheless, opponents have argued that abuses in the program have allowed developers to reap excessive profits, that the program is not based on consistency with planning principles, and that the ends don't justify the means.

Chapter 40B Survives Repeal Initiative

- 1) Opponents to Chapter 40B have made various efforts to weaken or repeal the statute. Toward the end of the 2000s, a new effort to repeal 40B emerged, using the slogan: "Affordable Housing Now: Support REAL Affordable Housing—Vote Yes to Repeal 40B."
- 2) Arguments supporting the repeal were countered by a vigorous and well-organized anti-repeal coalition, which called itself the Campaign to Protect *the* Affordable Housing Law, the campaign urged voters to Vote NO on 2 (the ballot initiative) to Protect *the* Affordable Housing Law for Seniors and Working Families. There are several reasons why supporters of Chapter 40B were successful.
- 3) Voters defeated the effort to repeal Chapter 40B with a 58% majority vote. However, opposition continues, with the most recent effort to weaken Chapter 40B occurring in late 2011.

Zoning and Planning Context

- 1) Massachusetts has 351 municipalities, with each having jurisdiction over its zoning.
- 2) Town meeting is the predominant form of local government. Municipalities have Home Rule (adopted in 1966), which gives the residents of every city and town the right of self-government in local matters. There are, however, limits to these powers as set forth in

state laws. Chapter 40B is an example of the state setting a standard of performance in an area of public concern that over-shadows local control.

- 3) There is a long history of political will, leadership, pro affordable housing legislation, many supportive private developers, and a vigorous advocacy community around housing issues.
- 4) Massachusetts is among the one-half of the states in the U.S. with a weak planning framework. Specifically, for example, the state does not mandate regional planning; enforce the requirement for local comprehensive planning (with a housing element); mandate that municipalities adopt growth management plans; or mandate that a certain amount of land in each jurisdiction be zoned for multifamily housing/high density single family; or require that local plans and zoning be consistent and there has been little (but growing) recognition of the importance of such consistency;
- 5) The various limitations and problems with Massachusetts' approach to planning and land use have been widely acknowledged. A pending legislative initiative, the Comprehensive Land Use Reform and Partnership Act, would address a number of the most problematic aspects of Massachusetts' land use statutes, including the promotion of master planning as a basis for consistent zoning and permitting.

Housing Context

- 1) Massachusetts has long been a leader in affordable housing development. It has created a number of innovative state-based programs and has been a pioneer in implementing many federal programs.
- 2) Since deep federal subsidies are no longer available, the current context of affordable housing development in Massachusetts, and elsewhere across the country, involves the layering of a number of public and private subsidy and financing sources.
- 3) It also has become more difficult to target units to the lowest income households, since supporting such households requires high levels of additional support, from a large number of funders and subsidy sources.
- 4) With the demise of deep federal subsidies and the rise in private sponsorship of affordable housing, market factors have played an ever increasing role in development.
- 5) Despite the strong public support for affordable housing in Massachusetts, there is very little direct state assistance for the production or acquisition of affordable homeownership units.

Sources of Data and Approach to Data Analysis

- 1) The Citizens' Housing and Planning Association (CHAPA) provided the data on housing production in each municipality using the Chapter 40B comprehensive permit process. Affordable housing in municipalities that have not attained the 10% goal is almost always produced with comprehensive permits. The CHAPA database includes information on all affordable housing in the Subsidized Housing Inventory developed without using a comprehensive permit. This study analyzed the subset of projects that used comprehensive permits, most of which are outside the largest cities.
- 2) The state's Subsidized Housing Inventory (SHI), which is maintained by the state DHCD, is the official count of each municipality's affordable housing inventory for the purpose of calculating whether it has reached the 10% goal. It includes all units developed under an approved subsidy program. Units do not have to have been developed using a

comprehensive permit to be included (e.g., state and federal public housing and developments built under other state and federal subsidy programs). SHI counts sometimes lag behind actual production because many communities only submit updates when requested by DHCD (once every two years), rather than as soon as units are eligible to be counted.

- 3) This analysis assumes that all affordable units tracked in the comprehensive permit database continue to be affordable.

Affordable Housing Production Using Comprehensive Permits

- 1) Comprehensive permits have been used to produce nearly 58,000 housing units. Of these, 70% are rental and 30% are for homeownership. Over one third (36%) of these units are targeted to special needs populations, including the elderly and disabled.
- 2) With the exception of the age-restricted units, over 90% of the special needs units are affordable to households at or below 80% of AMI. Overall, 53% of the units are affordable and most (84%) of these are rental.
- 3) The more white residents, the fewer elderly housing units the municipality built using a comprehensive permit.
- 4) Homeownership opportunities (primarily developed since the late 1990s) are associated with higher-income and higher growth areas, while rental opportunities (developed between 1970 and 2010) are associated with denser, less-white, slower-growth areas (i.e., cities and built-out suburbs).
- 5) 30,703 affordable units were built through the Chapter 40B comprehensive permit process. This production came both from the 53 municipalities that had reached the 10% goal as of April 1, 2010 (6,902 units) as well as from the 298 municipalities that had not (23,801 units).
- 6) In 1970 there were 1,836,198 year-round housing units in Massachusetts and by 2010 this number had grown to 2,692,186 units. The 30,703 affordable (income restricted) units created during that period using comprehensive permits accounted for 3.6% of the increase; all production through the comprehensive permit process (whether affordable or not) accounted for 6.8% of the increase.
- 7) Between 1972 and June 2011, the number of units in the SHI that count toward each municipalities' 10% goal rose from about 84,054 to about 247,042 -- a net increase of about 162,188 units. CHAPA estimates that the June 2011 SHI count includes about 15,750 group home beds and homeowner rehabilitation loan units. Excluding those units, the net increase in SHI units between 1972 and 2001 was about 146,438 units or just over 17% of the increase in the state's total number of year round housing units.
- 8) DHCD does not publish the number of affordable units. However, CHAPA has estimated, that affordable SHI units (reserved for households with incomes at 80% or less of AMI) rose by about 117,150 units between 1972 and 2011 (from about 84,054 to about 201,204 units). The 117,150 affordable units are equal to 13.7% of the net increase to the state's year-round housing unit count between 1970 and 2010.
- 9) The 30,703 affordable units were produced with comprehensive permits; this accounted for 26% of the total growth in the number of affordable units produced since 1972.
- 10) There was steady growth in the percent of the state's overall housing stock that is included in the SHI count, from 4.6% in 1972 to 9.2% in 2011.

- 11) For all municipalities, affordable housing produced through the Chapter 40B comprehensive permit process is more often produced in municipalities with greater densities and higher median incomes, while production is less often associated with municipalities with larger white populations. The growth in the municipality, as measured by the change in the size of the housing stock, is not significantly correlated with housing production using the 40B comprehensive permit process. The 35 municipalities with no affordable units in the SHI as of June 2011 were small and rural.
- 12) The percent of the housing stock that is affordable is positively correlated with comprehensive permit activity. This is a further indicator that 40B is a critical strategy in the state's overall affordable housing production efforts.
- 13) In view of the very low median density of municipalities that have not used comprehensive permits, the places that have used the Chapter 40B comprehensive permit process are more metropolitan (i.e., urban and suburban) than places with no development using a comprehensive permit; the latter tend to be rural or exurban municipalities. While our general assumption is that development in higher density locales is indicative of a program not being successful at breaking down exclusionary zoning barriers, in this case we are simply not sure, since the relatively higher density of municipalities where comprehensive permits have been used may mean that it is being used in exactly the kinds of locales to which the program is targeted.
- 14) Thus, while our level of analysis is not able to offer definitive conclusions, these findings suggest that the availability of the comprehensive permit process may be encouraging development in relatively denser (more suburban than rural) locales. Similarly, the relatively higher white populations in places where Chapter 40B has not been used may also be indicative of more rural, as opposed to suburban municipalities.
- 15) A total of 316 municipalities have at least some affordable housing, as recorded in the state's SHI. Over three quarters of these municipalities and 70% of all municipalities in Massachusetts, have produced affordable housing using the Chapter 40B comprehensive permit process.
- 16) Among the 316 municipalities with some affordable housing, where a greater share of the affordable housing was built using comprehensive permits, there are more white residents, higher median incomes, and they grew at a faster rate than municipalities that have lower percentages of affordable housing built with comprehensive permits. This provides a compelling piece of evidence that Chapter 40B is being used in a wide array of municipalities to produce affordable housing.

Progress toward 10% Goal

- 1) While the Chapter 40B comprehensive permit process is only partially responsible for municipalities approaching or attaining the 10% goal, it likely played some role for all but the few municipalities that had attained the goal before the statute went into effect.
- 2) In late 2010, based on year-round housing stock figures from the 2000 census, the number of municipalities that exceeded the 10% affordable housing goal had risen to 53 municipalities. Subsequently, with the release of 2010 census data which revealed an increase in the number of year-round housing units, the number of municipalities that exceeded the 10% goal declined to 39.
- 3) Although there was a net reduction in 14 municipalities at or above the 10% goal using the higher overall 2010 housing stock figures, the actual number of affordable housing

units recorded in each of these municipalities, whether above or below 10%, either did not change or went up slightly.

- 4) The number of municipalities that were at least half way to meeting the 10% goal stayed about the same between mid-2010 and the beginning of 2011, based on either the 2000 and 2010 housing stock census figures: 177 (50%) compared with 171 (49%), respectively.
- 5) There has been steady, albeit slow, movement of cities and towns adding affordable housing units and making strides toward this goal. Over the nearly four decades between 1972 and 2011, 35 additional municipalities crossed over to the 10% or above level. In addition, a declining number of municipalities had no units listed in the state's SHI. While 55% had no such housing in 1972, just 10% of municipalities were without any subsidized units as of 2011. In 1972, 96% of municipalities were less than half-way to reaching the 10% goal; as of 2011, this was true for only about one-half of the state's municipalities. Moreover, 22% were at 8% or better, compared with only 2% in 1972.
- 6) Another way of exploring the progress being made toward the 10% goal is by examining the extent to which the SHI is keeping pace with the overall increase in the stock of year-round housing units. Between 2000 and 2010 there was a 6.5% in the number of these units. However, the number of units listed as part of the SHI grew at about double that pace.
- 7) As of late 2010, 70% of Massachusetts' municipalities had developed housing through the Chapter 40B comprehensive permit process.
- 8) Among the municipalities that have attained the 10% goal, Concord, Lincoln, and Lexington, are in the top 15 most affluent municipalities in the state, located in the suburbs of Boston. This provides an important bit of evidence that affordable production is feasible even in some of the most exclusive areas.
- 9) Municipalities that had attained the 10% goal as of April 1, 2010 are denser, have smaller white populations and lower incomes than those that did not. The former municipalities also grew at a significantly slower rate between 1970 and 2000, suggesting that these are the more built out cities and towns and inner-ring suburbs. Not surprisingly, municipalities that attained the 10% goal exhibit more overall 40B activity than municipalities that had not, as demonstrated by the higher median number of comprehensive permits issued and the higher median number of units built with comprehensive permits.
- 10) Thus, our data suggest that many of the locales that have at least 10% of their housing stocks as affordable are the large cities, which have larger low-income populations. In contrast, municipalities that are working to attain the 10% goal and are using the 40B comprehensive permit process, tend to be more affluent.
- 11) There was more affordable housing production overall in municipalities that had attained the 10% threshold than those that had not. Consistent with this finding, the former municipalities also had more comprehensive permits issued, more housing built under comprehensive permits, and far more affordable units per 10,000 residents than municipalities that had not attained the threshold.
- 12) Making progress toward the 10% goal is positively (and strongly) correlated with population density, and negatively correlated with the percent of the population that is white and the percent change in the housing stock. Thus, municipalities that are denser

and have fewer white residents, and that grew more slowly between 1970 and 2000, are associated with being closer to meeting the 10% affordable housing goal.

- 13) Municipalities that had attained the 10% affordable housing goal as of April 1, 2010 with the use of comprehensive permits, have significantly higher median incomes and higher housing growth rates than municipalities that attained the 10% goal without using comprehensive permits. These are important findings: municipalities where Chapter 40B has been used to the extent that the 10% threshold was attained have characteristics that are associated with more exclusionary locales.

Overall Assessment

- 1) Chapter 40B has produced nearly 58,000 units, with 53% of these units affordable. Chapter 40B also has been enormously successful in stimulating the production of rental housing, with 84% of the affordable stock being for rent, as opposed to homeownership units. Chapter 40B is viewed by key informants across the country, as one of the best strategies for encouraging all municipalities to produce affordable housing.
- 2) The 10% affordable housing goal is easy to understand and there is a certain sense of equity in it being a statewide goal, applicable to all municipalities. It is also relatively easy to administer and the HAC is an effective, non-judicial forum, which allows developers a mechanism to appeal local zoning decisions with minimal cost. The HAC serves as an important threat that often stimulates a negotiated settlement between the developer and the municipality. Changes in Chapter 40B over the years have also created various incentives for municipalities to receive immunity from HAC overrides if they are making progress toward meeting affordable housing goals.
- 3) Opposition to 40B has been strong in some areas of the state, primarily on the part of municipal officials and residents in many suburban towns. In November 2010, voters had the opportunity to repeal Chapter 40B, through a ballot initiative. However, over 58% of the electorate voted to retain the statute and supporters were in the majority in 78% of the state's cities and towns.
- 4) The criticisms of Chapter 40B notwithstanding, opponents have not put forward any serious proposals about how the state's affordable housing agenda could be better served.
- 5) In the absence of such plans, 40B has been effective at countering exclusionary zoning practices and has served as an important stimulus for municipalities to develop affordable housing using other mechanisms. Nearly one-half of Massachusetts' municipalities are at least half-way to meeting the 10% goal.
- 6) Although the attainment of the 10% affordable housing goal can change with each decennial census as the year-round housing unit count is updated, the more than 40 year history of the program demonstrates slow and steady progress by municipalities.
- 7) There is evidence that Chapter 40B has had a positive impact on the supply of affordable housing in more affluent municipalities. On the one hand,
 - Out of all municipalities, those that have more Chapter 40B affordable housing production tend to have higher median incomes and the larger the percent of the housing stock that is affordable;
 - Among only the 316 municipalities that have some affordable housing, the greater the share of the affordable housing that was built using comprehensive permits, the higher the median incomes and the larger the white population. These

municipalities also grew at a faster rate than municipalities with lower percentages of affordable housing built with comprehensive permits.

- The Chapter 40B comprehensive permit process likely played some role in reaching the 10% goal for all but the few municipalities that had attained the goal before the statute went into effect.
- Municipalities that attained the 10% goal had more overall 40B activity than municipalities that did not,
- Municipalities that attained the 10% goal with the use of comprehensive permits, have significantly higher median incomes and higher housing growth rates than municipalities that attained the 10% goal without using comprehensive permits.
- The more white residents, the fewer elderly housing units the municipality built through the 40B process.

On the other hand,

- Out of all municipalities, those that have more affordable housing produced through the Chapter 40B comprehensive permit process are associated with greater density and smaller white populations. This can be partially explained by the fact that municipalities that do not have comprehensive permit projects tend to be the smaller, rural municipalities, which typically have larger white populations.
 - Municipalities that attained the 10% goal are associated with greater density, smaller white populations and lower incomes than those that did not. In part, this is because the municipalities that have reached the 10% goal include all of largest cities in the state which have larger populations of low income households.
 - Municipalities that are closer to meeting the 10% affordable housing goal are associated with greater density, fewer white residents, and growing more slowly between 1970 and 2000. This may be explained by the fact that most of the housing growth over the past many decades has occurred in the eastern half of the state, which has historically been more densely settled than western Massachusetts.
 - Homeownership opportunities developed with a comprehensive permit are associated with higher-income and higher growth areas, while rental opportunities are associated with denser, less-white, slower-growth areas (i.e., cities and more built-out suburbs).
- 8) Chapter 40B has been a major positive force behind the state's affordable housing production record. It is also likely a key reason behind the affordable housing production in numerous cities and towns that would not, on their own, have been likely to host such development. In other words, it has helped to significantly mitigate exclusionary zoning patterns in Massachusetts.

Chapter 3: Rhode Island

Overview and Background

- 1) The Rhode Island Low and Moderate Income Housing Act was enacted in 1991 and directed all municipalities to attain a 10% (of their overall housing stock) low and moderate income housing (LMIH) threshold. In addition, the original act recommended that each municipality include a housing element as part of its comprehensive plan that details how the state-mandate LMIH goals will be attained. All zoning decisions must be in accordance with the plan.
- 2) Nonprofit, for-profit or limited dividend developers were given permission to apply to a city or town for a single comprehensive permit for a rental housing development (in lieu of seeking permits from all the relevant boards separately), as long as at least 20% of the units were subsidized by a federal or state program.
- 3) Developers whose applications were turned down at the municipal level were provided an appeals process at the state level through the State Housing Appeals Board (SHAB), which was given the authority to override a local board's rejection of the comprehensive permit.
- 4) Throughout the Rhode Island case the phrase "low and moderate income housing" (LMIH) is used instead of the phrase used elsewhere in this report, "affordable housing," since this is the statutorily defined term used in Rhode Island.
- 5) A number of important questions are not yet resolved about the Rhode Island statute. What specific types of positive efforts toward attainment of the housing goal would be sufficient to protect a municipality from unwanted development under the statute and immune from a SHAB override? In what ways would a developer's proposal need to diverge from a municipality's comprehensive plan for the proposal to be deemed out of conformance and subject to an override by the SHAB? And, in view of the July 2011 Comprehensive Planning law concerning the need for zoning to be consistent with each municipality's comprehensive plan, will Rhode Island adopt clear guidelines to enforce the statute?

Modifications in the Low and Moderate Income Housing Act and Current Regulations

- 1) The act has been revised five times. In 1999 it was amended to provide an alternative for municipalities to receive an exemption from the 10% threshold, and to be considered immune from developer appeals to the SHAB. An urban city or town must have at least 5,000 occupied year-round rental units; these units must comprise 25% or more of the city or town's year-round housing units and the low and moderate income units must comprise 15% or more of the rental stock.
- 2) The municipality's review board may deny a request for a permit if: the municipality has an approved Affordable Housing Plan and is meeting housing needs, and the proposal is inconsistent with the local plan; or the proposal is not consistent with local needs; or the proposal is not in conformance with the comprehensive plan; or the community has met or has plans to meet the goal of 10% of the year-round units or, in the case of an urban town or city, 15% of the occupied rental housing units as being LMIH; or concerns for the environment and health and safety of current residents have not been adequately addressed.

- 3) If a municipality denies a comprehensive permit and if the SHAB finds that the proposed development is consistent with the municipality's plan, with consideration of the state's overall need for affordable housing, the SHAB may overrule the local decision and grant approval for the development
- 4) There are at least three critical differences between the Rhode Island statute and Massachusetts Chapter 40B. First, SHAB has a legislative mandate to consider conformance of the local decision with the local Affordable Housing Plan, while no such guideline is required of the Massachusetts Housing Appeals Committee. (However, as noted in Chapter 2, while there is no statutory mandate under 40B to consider affordable housing plans, under 40B regulations first adopted in 2002, Massachusetts allows communities that have produced a certain number of units in accordance with their plan to be appeal-proof for one or two years.) Second, in Rhode Island there is no attempt at regulating developer profits under the act. Nevertheless, the profit limits under 40B have been used as a guideline for how much profit a developer should be allowed to earn when demonstrating the kind of densities needed to keep the developer whole in implementing inclusionary zoning, for example. And, third, any aggrieved party, including abutters, may make a formal notice to intervene an approval or an approval with conditions regarding the issuance of a comprehensive permit with the SHAB. Massachusetts' HAC does, however, allow other parties to participate in the hearing on an appeal.

Implementation of the Housing Act

- 1) A number of state agencies have responsibility for implementing various components of the Housing Act.
- 2) The state typically does not reject plans; rather, it asks for revisions and there is an iterative process between the municipality and the state until the plan is approved.
- 3) Between 1991 and 2002 there were only 8 appeals to SHAB. In 2003, 8 additional appeals were heard. Thus, in the first 12 years that the statute was in effect, only 16 cases came before SHAB. From 2004-2011 an additional 20 appeals were filed with the SHAB, for a total of 36 cases, since 1991.
- 4) The appeals process, following a SHAB ruling, is time-consuming and provides for hearings at both the Superior and Supreme Court levels.

Approved Affordable Housing Plan and Protection from Developer Appeal

- 1) There are ongoing questions about whether having an approved housing plan and making "adequate progress" toward meeting a municipality's housing goals will exempt them from a SHAB override. State officials generally felt that only reaching the 10% goal provided immunity, although no case law has established this so far.
- 2) A related major concern is the extent to which a municipality's zoning must be consistent with its comprehensive plan. There has not yet been a case where a developer's proposal that is found to be out of conformance with a municipality's plan, has been overturned by the SHAB. A Superior Court ruling held that there is a clear need for the comprehensive plan to be a realistic document, in terms of the municipality's ability to produce the housing it has proposed, given its current land use regulations. Whether Rhode Island will create clear guidelines to enforce such consistency, however, is not yet known.

Sources of Data and Approach to Data Analysis

- 1) Rhode Island Housing provided a copy of their 2009 database on LMIH for all municipalities in the state, showing LMIH unit totals by municipality. They further provided information going back to the program's first year, in 1991.
- 2) To establish a total production number since the statute went into effect, the research team first subtracted the total number of units in each town in 1991 from the total number in 2009. However, the total number was reduced by the number of beds in group homes.
- 3) The number of LMIH units reflects the net change in units, rather than gross affordable housing production. This almost certainly resulted in an under-counting of actual construction of new LMIH units in many places.
- 4) Since Rhode Island Housing also administers the state's Low Income Housing Tax Credit program, their database includes all developments built under this program, even in municipalities already in compliance with the state affordable housing goal.

LMIH Production under the Act

- 1) When the housing act was passed in 1991, 5 cities or towns (out of 39) had met the 10% goal; one additional town, New Shoreham, has attained this goal.
- 2) As of June 30, 2009, in addition to the 6 municipalities exempt from the comprehensive permit rule because they had attained the 10% LMIH goal, another 5 became exempt (as of 1999) because of the size of their rental/LMIH stock.
- 3) The 10 municipalities in compliance goal as of 2009 (not including New Shoreham) were also the most urban areas. These areas had 75% of the total number of LMIH units in the state, while they occupy only 14% of the land.
- 4) New Shoreham's exceptional record was partly due to a change in how the denominator of the 10% calculation is derived (2004 amendments stipulated that only year-round housing units were to be counted when calculating the basis on which the 10% goal is assessed, thereby eliminating the many vacation units in that town) and because of the town's significant efforts to produce LMIH.
- 5) By mid-2010, 7 additional municipalities (18% of the total cities and towns in Rhode Island, including two municipalities that were exempt from the comprehensive permit rule because of the size of their rental/LMIH stocks) were close to the 10% LMIH goal, with at least 8.0% of their housing stock devoted to LMIH; an additional 11 municipalities (28%) had at least 5.0% LMIH.
- 6) There was a net increase of 5,301 LMIH units in Rhode Island between 1991 and 2009, or about 11% of the increase in total number of housing units during that period.
- 7) The level of production was nearly equal among the 10 municipalities that had not met one of the state's housing goals prior to 2009 and those that had. A total of 2,547 units were produced by the former and 2,754 were produced by the latter. In 19 out of Rhode Island's 39 municipalities, the total LMIH stock comprised less than 5% of total housing units.
- 8) Between 1991 and 2009, only 3 municipalities had no net gain in the number of LMIH housing units.
- 9) The municipalities that have met the state's housing goal are denser, have smaller white populations and lower median incomes, and grew at a slower rate in the 1990s than municipalities that have not met either housing goal. Generally, then, the municipalities

that have complied with the state's LMIH mandate are urban and inner-ring suburban communities, which are typically associated with LMIH production.

- 10) The difference in LMIH production was not statistically significant between municipalities that had attained one of the two housing goals and those that had not, although the median production numbers were much higher for municipalities that had not attained a state-mandated housing goal than for those that did. If the lack of a statistically significant difference is due simply to the small sample size, this may indicate that those areas that have not attained the LMIH goals are moving in the right direction, by at least keeping pace with, if not out-producing, those locales that have a track-record of LMIH production.
- 11) There is a positive correlation between new LMIH units produced and the percent of a municipality's overall housing stock that is LMIH. Thus, a higher net change in the amount of LMIH is associated with more of a municipality's housing stock that is affordable.
- 12) There is a positive correlation between the size of a municipality's white population and its LMIH production per 10,000 residents. This indicates that LMIH production was higher in municipalities where a larger share of the population was white. This finding suggests that the Rhode Island statute is associated with LMIH production in areas that have typically excluded such housing.
- 13) Municipalities with the highest populations and the greatest densities are among the 10 municipalities that have attained the thresholds set forth in the statute. There is a 100% overlap between the 10 densest municipalities, in terms of persons per square mile, and the original 10 municipalities that attained either the 10% goal or the alternative rental housing goal. New Shoreham is an outlier, being among the least dense municipalities in the state.
- 14) Housing for the elderly and for families represents 57% and 39%, respectively, of the LMIH units.
- 15) 52% of all LMIH units are located in the 5 original municipalities that reached the 10% goal. These municipalities contain only 30% of the housing units in the state.
- 16) 76% of all LMIH units are located in the 10 municipalities that were in compliance with the statute prior to 2009. These municipalities contain 60% of the housing units in the state.
- 17) Production by municipalities not in compliance with the statute generally has been slow.

Relationship between Goals Projected in Plans and Actual Production

- 1) Based on housing goals that municipalities had projected in plans submitted between 2005 and 2009, New Shoreham, was the only municipality that attained 100% of its goal; no other municipality attained more than 80% of its goal. Only 4 municipalities (14%) attained more than one-half their goals; 83% of municipalities attained less than 50% of their goals, with 5 municipalities building no LMIH units designated in their plans during that period.
- 2) There is a positive, fairly strong correlation between the extent to which a municipality built the LMIH units it planned for, and the amount of LMIH in the municipality overall.
- 3) The State's Strategic Housing Plan projects the need for some 13,000 new units of LMIH to meet the state goal that each municipality have at least 10% of the stock dedicated to LMIH. However, production levels are not keeping up with the state's target.

Overall Assessment

- 1) Adoption of ordinances implementing municipalities' plans has been slow.
- 2) The statute is playing an important role in educating the population about the importance of affordable housing. (For example, the Building Homes Rhode Island bond bill to support LMIH was approved by all 39 Rhode Island municipalities. Nevertheless, NIMBY issues are still a concern.)
- 3) Several interviewees noted that the Rhode Island statute does not have sharp enough "teeth" to produce the needed LMIH units.
- 4) In terms of the LMIH statute's record in encouraging municipalities that are typically associated with exclusionary land use patterns (lower density with more white and higher median income residents), the picture is mixed.
- 5) On the one hand, the difference in LMIH production was not statistically significant between municipalities that have attained one of the two housing goals and those that have not, although the median production numbers were much higher for municipalities that had not attained a state-mandated housing goal than for those that did. If the lack of statistically significant difference is due simply to the small sample size, this finding may suggest that those areas that have not attained the LMIH goals are moving in the right direction, by at least keeping pace with, if not out-producing, those locales that have a track-record of LMIH production. In addition, since LMIH production was higher in municipalities where a larger share of the population was white, we might be seeing evidence that the Rhode Island statute is encouraging LMIH production in areas that have typically excluded such housing.
- 6) On the other hand, the finding of no significant difference in the amount of LMIH produced between municipalities that have attained one of the two housing goals and those that have not could also mean that municipalities that have not yet attained one of the housing goals have not been more successful in building LMIH housing. In addition, municipalities that have met the state's housing goal are denser, have smaller white populations and lower median incomes, than municipalities that have not met either housing goal. This could be an indication of a continuation of exclusionary patterns. However, similar to Massachusetts, the municipalities that have reached the 10% goal include all of largest cities in the state which have large populations of low income households.

Key Observations for Massachusetts (and others)

Major Similarities between the Rhode Island Statute and Massachusetts 40B

- All municipalities have the same goal to attain a 10% (of their overall housing stock) LMIH threshold.
- Nonprofit, for-profit or limited dividend developers may apply to a city or town for a single comprehensive permit for a rental or owner-occupied housing development (in lieu of seeking permits from all the relevant boards separately), as long as at least 20% of the units are subsidized by a federal or state program.
- Both have statewide appeals entities, the HAC in Massachusetts and the SHAB in Rhode Island. Applications that are denied or granted by the local review board with conditions or requirements that would make the development infeasible, in terms of

either the construction or operation may be brought to the respective committee/board. Each has the authority to override a local board's rejection of the comprehensive permit.

- Under the original statute, a municipality was given immunity from HAC or SHAB appeals if at least 10% of its housing stock was aimed at the targeted below-market population.
- Each state has changed its program, either by statute or through regulatory modifications, which have provided immunity from statewide appeals based on additional ways of reaching compliance.

Massachusetts (and others) May Want to Consider These Lessons from Rhode Island

- Mandatory Community Comprehensive Plans are required and are an important component of Rhode Island's approach to dealing with exclusionary zoning.
- A housing element is included as part of the comprehensive plan to determine if the municipality has either met the 10% threshold or to demonstrate that it is dedicated to meeting this goal. The housing element must detail how the state-mandated LMIH housing goals will be attained and all zoning decisions must be consistent with the plan. Similar to the experiences in California, these first two lessons would seem to be important and highly valuable modifications in Massachusetts's overall approach. However, clear guidelines must be in place so that municipalities understand what, exactly, constitutes compliance with the plan and how progress toward attaining the statewide goal will be measured.
- SHAB has a legislative mandate to consider whether the proposal being discussed is in conformance with the local Affordable Housing Plan, while there is no such requirement imposed on the Massachusetts Housing Appeals Committee.

Chapter 4: Montgomery County, Maryland

Overview and Background

- 1) The MPDU program was created in 1974 and is widely viewed as the first mandatory inclusionary zoning/density bonus program in the U.S.
- 2) The power to plan and zone in Maryland is held by local governments, either counties or municipalities. However, Maryland has relatively few municipalities; zoning is predominantly carried out by the 23 county governments.
- 3) The program requires developments of a certain size to earmark a fixed percentage of the units as affordable to moderate-income households. To compensate developers for any loss in profits, a density bonus is provided.
- 4) To accommodate even lower income groups, the Housing Opportunities Commission (HOC), which is Montgomery County's Housing Authority, was given the right to purchase MPDU units, to be set aside for rental housing.
- 5) The MPDU program is aimed at developing moderately priced housing throughout the growth areas of the County, as well as retaining an inventory of low-income housing.

- 6) The MPDU program is responsible for the creation of some 13,133 units of affordable housing. However, due to time limits on affordability restrictions, the great majority of these units are no longer in the affordable housing stock.

Major Changes in the MPDU Program and Current Requirements

- 1) Several program requirements have been debated and changed throughout the years: the number of affordable units that should be set aside as affordable and the size of the developments that should fall under the statute; the length of time the units must be kept affordable; and whether developers should have the option to “buy-out” of including MPDU units on-site and, instead, donating money for moderate-priced units to be built elsewhere.
- 2) Currently, developments that are served by public water and sewer, and that have 20 or more units, must set aside between 12.5 and 15% of the units as affordable for moderate-income households. This requirement pertains to small lots of even one-half an acre or less.
- 3) At its inception, a long-term affordability restriction for the moderate-income units produced was absent. The earliest developments built under the program only required that units remain affordable for 5 years; after that, re-rental prices were set by the builder. MPDU owners could resell their units at a market sales price. These have been steadily lengthened through the years. At the present time, for-sale units must be kept affordable for a minimum of 30 years and rental units for 99 years, from the date of initial sale or rental.
- 4) Between 1989 and 2003, 19 developments were allowed to opt for a buy-out provision. In-lieu payments failed to produce as many units as would have been required by the MPDU program, without the buy-out provision.
- 5) Currently, buy-out provisions are allowed only under conditions that would make the on-site units unaffordable for MPDU residents or if the inclusion of the MPDU units would be economically infeasible due to environmental constraints.
- 6) In terms of eligibility to purchase or rent a MPDU, targeted households must have incomes of 65% or less of area median income for rental MPDUs, and 70% of median or less in order to purchase a MPDU.

Implementation of the MPDU Program

- 1) MPDU units are generally viewed as high quality and attractive. Although they are not always fully integrated with the overall development, they appear to fit in well.
- 2) Diversity has been enhanced due to the MPDU program.
- 3) The Housing Opportunities Commission, the County’s housing authority (as well as nonprofit housing groups) have been able to purchase over 1,700 MPDU units, contributing to the County’s permanent supply of low-income housing. These units represent about 25% of the latter’s housing stock. Nonprofits currently own some 231 units of housing that were built under the MPDU program.
- 4) One of the key characteristics of the MPDU program is its relative simplicity. However, here, too, day-to-day program requirements are quite complex for builders and program participants.
- 5) Currently, there are virtually no exceptions to the MPDU program, and it has operated without any significant public subsidy.

- 6) As with all inclusionary zoning programs, the MPDU Program is dependent on a robust private housing market. When the economy weakens and private housing development stalls, affordable units are not built.
- 7) The overall MPDU program was never aimed at assisting very low or low-income households. Nevertheless, while the maximum incomes are 65 and 70% of median income, in practice, the program reaches lower income people—households earning in the 55 to 60% of median income range.
- 8) Very low-income households are, however, assisted by the MPDU program since the HOC or other nonprofit organizations have the right to purchase up to 40% of the MPDU units in each development. However, due to insufficient funds, and other considerations, only between one-quarter and one-fifth of the total possible number of units that could have been set-aside in this way are under HOC or nonprofit ownership.

Sources of Data and Approach to Data Analysis

- 1) Housing production data was provided by the Montgomery County Planning Department in two different GIS shapefiles. In view of the overlap between the two databases and the total number of entries in each, we believe this analysis captures somewhere between 65% and 80% of all MPDUs ever built.
- 2) Most of Montgomery County is unincorporated, so simply matching housing production data to municipal demographic information was not an option. We chose to use census-designated places (CDPs) as our unit of demographic analysis. Various assumptions and adjustments had to be made in order to assign each MPDU to a CDP.
- 3) This analysis includes 8,210 MPDU units and 1,711 HOC (former MPDU) units.

MPDU Production

- 1) The major strength of the MPDU program is that it has produced a significant amount of housing —some 13,133 units through 2010. However, only about one-third of the units built under the MPDU program (including units that were subsequently purchased by the HOC) are still under affordability restrictions.
- 2) Placing the record of the MPDU program in the context of overall affordable housing production in the County, inclusionary zoning had accounted for one half of the affordable units produced since 1974.
- 3) In 1980 there were 211,126 housing units in the county and by 2010 this number grew to 376,023 units. Thus, MPDU production accounted for 7.6% of total production.
- 4) As of the end of 2007, a total of 12,520 MPDU units had been produced. Of these, 71% were for-sale units. These are the numbers used in the remainder of the analysis. During 2008-2010, an additional 613 MPDU units were added to the inventory, bringing the total to 13,133 MPDU units produced, since the start of the program.
- 5) In recent years there has been a marked shift toward rental housing production. Through 2007 only 29% of the MPDU housing stock was rental housing, whereas from 2008-2010, this housing represented 62% of MPDU production.
- 6) Although rental units accounted for less than one-third of the total MPDU inventory, they represent 38% of the units still being monitored for compliance under the MPDU program, based on the database used in this analysis.
- 7) Data were available, and included in this analysis, for a far higher percentage of the for-sale units than for the rental units. Also noteworthy is that, based on the data available for

this study, a far higher percentage of rental units built under the MPDU program are still price controlled and therefore affordable under the MPDU program's guidelines in comparison to homeownership units.

- 8) In addition, affordability has been preserved for all 1,711 rental units built under the MPDU program and recorded in the HOC database and which we were able to map and assign a location; 18% of the total number of MPDUs produced are still monitored for affordability within the MPDU program, and nearly 14% have their affordability permanently maintained by the HOC, for a total of 4,005 units or 32%.
- 9) Slightly more than one-half (27) of the 51 CDPs have had MPDUs at some point in time, thus resulting in a fairly low overall median number of MPDU units per locale (10).
- 10) CDPs with no MPDU or HOC units (through the MPDU program) have significantly higher percentages of white residents and residents with significantly higher median household incomes than CDPs that have MPDU units. It also shows that CDPs with no MPDU or HOC units grew more slowly than those with MPDUs. This suggests that MPDUs are more likely to be built in faster-growing areas than in slow-growing areas. Although there is some evidence that the MPDU program has increased diversity, the data indicate correlations of MPDU production in less diverse locales.
- 11) MPDU and HOC units are more often situated in CDPs with lower percentages of white residents, with higher percentages of lower-income households, and with higher rates of growth in the housing sector. These results suggest that when left up to the private sector, and where there is no government influence on where affordable units get built, wealthier locales, with higher percentages of white residents, are less likely to produce affordable units.
- 12) There is little correlation between the median race or income of a CDP and the amount of each type of unit produced there (whether homeownership or rental). However, the production of rental units occurs more often in denser areas. The number of homeownership units is slightly negatively correlated with the percent of the population that is white, indicating that the larger the white population in a CDP, the fewer MPDU homeownership units it generally has. There is a significant, positive correlation between housing growth and homeownership units, indicating that higher CDP growth rates between 1980 and 2000 are associated with more MPDU homeownership units.

Current Issues and Proposed Changes to the MPDU Program

- 1) As with much of the country, new housing construction in 2009 and 2010 was sluggish without much activity in the MPDU program. However, when there was a significant amount of development in the County, the program was used extensively.
- 2) While the MPDU program is not producing many units at the present time, the County's trust fund, the HIF, has become a critical source for financing affordable housing.
- 3) To the extent that the County is seeing any construction at the present time, most activity is in high-rise, high-end development. A key issue pertaining to high-rises relates to the difficulty of MPDU condo owners in high-end developments being able to afford the condo fees, as well as concerns on the part of developers about the cost of setting aside MPDU units in high priced developments.
- 4) DHCA has proposed a rule whereby the price of the MPDU units would not be related to the actual costs of constructing the units. Instead, MPDU sales prices would be based on the carrying costs of the unit, including the condo fees and priced in relation to what a

household earning 70% of AMI could afford. Developers are far from happy with this proposal.

- 5) Other proposed amendments to the MPDU program would remove language from the statute, which clearly indicates that developers are not expected to lose money by including MPDU units in their projects.

Overall Assessment

- 1) Inclusionary zoning has become a popular approach for producing housing that is affordable to low and moderate-income households. From the perspective of the public sector, this strategy is particularly attractive since it relies primarily on the private housing market, rather than public subsidies. But therein also lies one its key weaknesses: when there is little private market activity, the program stalls or shuts down.
- 2) While the MPDU program enjoyed quite a bit of support through its first several decades, in recent years it has become far more contentious. Private developers have become increasingly concerned about the ever more demanding requirements of the program, which, they fear, will threaten the viability and profitability of potential projects.
- 3) A popular provision of the MPDU program, which was aggressively used between 1989 and 2003, permitted developers to opt out of the program and, instead, to provide in-lieu payments, which were then used to produce affordable housing elsewhere. However, contributions under this rule did not produce as many units as would have been required by the MPDU program, without the buy-out provision. This experience suggests that buy-out provisions should be used very rarely. At the present time, the MPDU program allows buy-out provisions only under conditions that would make the on-site units unaffordable for MPDU residents or if the inclusion of the MPDU units would be economically infeasible due to environmental constraints.
- 4) In its more than 35 years, the MPDU program has produced some 13,133 units. However, due to time limits on the number of years units are required to remain affordable, only about one-third of this inventory is still either in the MPDU program, or has been purchased by the county-wide housing authority, the Housing Opportunities Commission. Linking affordable housing production to public housing authority purchases appears to be an important strategy.
- 5) A far higher percentage of MPDU rental units are still affordable, in comparison to MPDU homeownership units. This suggests that, in order to maintain a stock of permanently affordable housing, inclusionary housing programs should consider including requirements for the production of rental housing. Requiring affordable units to remain affordable in perpetuity, or as long as feasible, is critically important for inclusionary housing programs. In addition, opportunities, and even funding, should be made available to public housing authorities and/or nonprofits to purchase inclusionary units for long-term low and moderate-income occupancy.
- 6) Despite the loss of about two-thirds of the housing produced under the MPDU program, informants note that MPDU units tend to be more affordable than neighboring units, even after affordability restrictions have expired.
- 7) Slightly more than one-half of Montgomery County's 51 Census-Designated Places have produced MPDU units and/or HOC-owned (former MPDU) units. CDPs with no MPDU units and no HOC units have significantly more white residents and significantly higher median household incomes than CDPs that have MPDU and HOC units. This suggests

that when left up to the private sector, and where there is no government influence on where affordable units get built, wealthier locales, with higher percentages of white residents, are less likely to produce affordable units.

- 8) The above pattern may be the result of the County's historical development patterns; many of the denser areas were essentially built-out prior to the passage of the MPDU law in 1974. While density did not emerge as a factor significantly related to MPDU production, we did find that MPDU production was closely associated with higher growth locales (i.e., those that were less built out).
- 9) On the one hand, slightly more than one-half of Montgomery County's 51 Census-Designated Places have produced MPDU units and/or HOC-owned (former MPDU) units.
- 10) On the other hand, CDPs with no MPDU units and no HOC units have significantly more white residents and significantly higher median household incomes than CDPs that have MPDU and HOC units. This pattern may be the result of the County's historical development patterns: many areas were essentially built-out prior to the passage of the MPDU law in 1974. These would likely be the denser areas of the County. While density did not emerge as a factor significantly related to MPDU production, we did find that MPDU production was closely associated with higher growth locales (i.e., those that were less built out). In addition, the production of rental units occurs more often in denser areas; the number of homeownership units is slightly negatively correlated with the percent of the population that is white, indicating that the larger the white population in a CDP, the fewer MPDU homeownership units it generally has.

Key Observations for Massachusetts (and others)

Major Similarities between the MPDU Program and Massachusetts' Chapter 40B

- Both rely on private sector initiation of developments and on a robust housing market (although in Massachusetts nonprofit developments and those that are 100% subsidized also use Chapter 40B).
- Both are viewed as relatively simple to administer.
- The court systems have been infrequently used.

Massachusetts (and others) May Want to Consider These Lessons from Montgomery County

- When buy-out provisions have been allowed, financial payments have not been adequate to allow for a 1:1 construction of units that would have been required under the MPDU program.
- The Housing Opportunities Commission was able to purchase MPDUs, thereby promoting affordability in perpetuity. It might be desirable for housing authorities or municipalities in Massachusetts to make similar purchases of 40B units.
- A higher percentage of units built under the MPDU program have been for-sale than under the 40B program. However, a disproportionate share of the rental units in Montgomery County is still affordable. This suggests that promoting rental housing accompanied by long-term use restrictions or other mechanisms for assuring affordability is an important strategy.

Chapter 5: New Jersey

Overview and Background

- 1) New Jersey's statute, the Fair Housing Act (1985), emerged from the Mt. Laurel decisions, rendered by the state's Supreme Court, which determined that a municipality's land use regulations must provide opportunities for a range of housing options for all people who might want to live there.
- 2) There have been a number of changes in how the state has attempted to implement the various judicial and legislative mandates, including the creation of the Council on Affordable Housing (COAH), the administrative branch of government charged with enforcement of the statute.
- 3) A key aspect of the New Jersey strategy involves the builder's remedy, whereby a developer that demonstrates that a municipality's zoning is exclusionary and commits to a set-aside of low-moderate income units, would be able to seek permission from the courts to build more market-rate units than would be allowed under existing zoning, if the site and project meet certain planning and environmental standards. A municipality that does not produce adequate changes in its zoning could be subject to a court mandate including voiding its existing zoning, as well as other sanctions impacting development.
- 4) A municipality can be granted immunity from the builder's remedy by submitting a realistic plan to COAH for attaining its affordable housing allocation, and receiving certification for the duration of the cycle period. A realistic plan would have to include, for example, zoning to accommodate the new housing, the identification of suitable sites, and designation of financial resources.
- 5) COAH attempts to evaluate housing needs across the state and it strives to develop a rational "fair share" distribution. This statewide "fair share" plan is supposed to lead to more rational planning at the local level. Each locality, not just those below a certain threshold of affordable housing, is required to develop zoning appropriate for affordable housing development. However, filing of plans with COAH is voluntary.
- 6) The 1985 law created the Regional Contribution Agreement to assist municipalities meet their "fair share" housing allocations. Until mid-2008, when this strategy was eliminated, a given municipality could transfer up to one-half of this target to another municipality within its region, so long as the latter was able to provide a realistic opportunity for affordable housing production consistent with sound planning. The "sending" municipality was required to make payments to the "receiving" municipality. However, per unit payments were never enough to create an actual unit.

Early Implementation of the State Law

- 1) When COAH was launched in 1986, the agency set to work developing "fair share" goals to be attained over a 6-year cycle. The numerical formula for developing "fair share" allocations was complex, bureaucratic, and broadly criticized.
- 2) Many municipalities have granted developers density bonuses through re-zoning or in conjunction with inclusionary zoning.
- 3) The ability of municipalities to charge fees to developers has been a major area of controversy. One-half of the state's municipalities have established trust funds and, in the

aggregate, have collected over \$541 million in developer fees, with some \$265 million still available as of June 2010.

- 4) The first round of “fair share” housing goals covered 1987 to 1993 and the second from 1994-1999. However, not all of New Jersey’s 566 cities and towns were assigned a new construction obligation. Urban municipalities, which receive state aid to supplement their municipal budgets because of high poverty rates and low tax revenues, were generally viewed as already “doing their share” and were not assigned a new construction obligation.
- 5) By the end of the second 6-year cycle, which ended in 1999, new housing need figures for the third round still had not been published by COAH. .
- 6) Despite the controversies, there was a sense that the system was working.

The Emergence of Growth Share and Third Round Fair Share Plans

- 1) In the late 1990s “growth share,” gained popularity as an alternative to COAH’s arcane rules and methodology for calculating “fair share.” An affordable housing obligation was articulated that was connected to all kinds of growth—residential and non-residential.
- 2) The third round “fair share” numbers were supposed to be announced as the second round was coming to a close. However, the new “growth share” rules, which were to govern the operation of the third round of COAH’s activities, were not adopted until 2004. Controversy again followed the new rules, including several court cases.
- 3) New third round rules, promulgated in October 2008, took into account the court’s several areas of concern and a new “growth share” formula was developed. Overall, however, neither the formula nor its implementation is simple.
- 4) As of February 2009, 53% of New Jersey’s municipalities had either filed “fair share” plans with COAH, or had a case pending in the courts, or were expected to file with the courts. Counting the 53 municipalities that had received a one-year extension for complying with COAH, 38% of New Jersey’s municipalities had chosen not to submit “fair share” plans.
- 5) Municipalities that are fully built up, intensely urban, or far from a major urban center, often do not submit plans to COAH. Nevertheless, they may still have “fair share” obligations and a few have been sued by developers. In any case, municipalities only need to build affordable housing to the extent that they actually grow.
- 6) Since submission of plans to COAH is voluntary, there are two important reasons for doing so: a COAH-approved plan, enables a municipality to retain the developer fee funds; if not, these monies are contributed to the statewide trust fund. And, second, once a municipality’s plan has been certified by COAH, it is immune from builder’s remedy lawsuits for the duration of the COAH cycle. However, all plans submitted to COAH must create a realistic opportunity for the development of affordable housing.
- 7) In October 2010, the New Jersey Appellate Division threw out the revised third round rules in a decision currently awaiting review by the New Jersey Supreme Court. As of fall 2011, third Round plans were, for the most part, not being processed even for municipalities that had submitted plans.

Additional Key Issues

- 1) Legislation enacted in 2008 abolished RCAs. In its place, a new strategy was created that provides municipalities in certain parts of the state, that already have a regional planning body, the opportunity to undertake their affordable housing work through these entities. For a municipality that is covered by a regional planning body, 50% of its obligation can be met by coordinating affordable housing efforts with other cities and towns in a particular region. However, obligations cannot be transferred to certain high-poverty towns, making this new system very different from RCAs.
- 2) The 2008 legislation also mandated that 13% of the housing created through state action must be affordable at 30% AMI or less; and created an up-front statewide developer fee that goes toward affordable housing development.
- 3) Municipalities that had developer fees in place prior to 2008 were (for the most part) given permission to keep any money collected or committed up to July 2008.
- 4) While the developer fee controversy did not appear to be active as of fall 2011, there were ongoing legislative efforts on the part of municipalities that were looking for relief from affordable housing obligations.

Builder's Remedy Lawsuits and Other State Sanctions for Non-Compliance with "Fair Share" Obligations

- 1) Only if a town is neither under COAH or court jurisdiction does a developer have a chance of being successful in Mt. Laurel litigation which, in turn, could result in rezoning that would allow inclusionary development. COAH also has the authority to grant a builder's remedy—site-specific relief in the form of COAH-ordered rezoning. While this is not referred to as "overturning" the zoning, COAH is directing the municipality to rezone or change the zoning of the builder's property. However, this authority has been exercised exceedingly rarely.
- 2) The great majority of cases are never actually decided in the courts, with developers and municipalities typically reaching an agreement before trial. There have been only about 10 builder's remedy court decisions that have forced a change in local zoning. Nevertheless, the perception is that there have been far more such decisions and the builder's remedy continues to serve as an implicit threat from developers. This represents a very important part of the development dynamic in New Jersey.
- 3) Another "stick," although one that also has been used infrequently, allows a trial judge to replace the town's planning board with a court-appointed master who is charged with developing new zoning ordinances consistent with the municipality's "fair share" obligation.
- 4) The general downturn in the housing market and a governor who is strongly opposed to COAH, makes the future uncertain for New Jersey's affordable housing agenda.

Sources of Data and Approach to Data Analysis

- 1) COAH provided computerized information on affordable housing production since 1980. COAH's records only include municipalities that have filed plans with them or whose plans have been approved by the Superior Court; affordable housing production in other municipalities is typically not counted by COAH.

- 2) Our analysis also includes affordable housing production that is not part of COAH’s database, especially the Low Income Housing Tax Credit developments that have been built in urban areas that do not have affordable housing goal obligations.
- 3) In developing the production figures presented here, only actual production is counted; the tallies do not include “credits” that the State of New Jersey allocates to municipalities based on various alternative strategies for compliance. Specifically, the state has developed several mechanisms that enable municipalities to meet the “letter” of their affordable housing obligation, if not the overriding intent of the Mt. Laurel decisions. In other words, municipalities may be in some degree of compliance with the state’s affordable housing goals, without themselves producing the number of units that the state has designated as their affordable housing obligation.
- 4) Assuming the third round is allowed to proceed, it would cover from mid-1999 through 2018. All production through March 2009 is credited toward the prior round obligation. Therefore, with reference to the extent to which production targets specified in the prior round obligation were attained, this analysis gives the “benefit of the doubt” to the municipalities, since a significantly longer-than-anticipated time frame is being utilized. This presentation of the production record is necessitated by COAH’s record-keeping method; all COAH production is aggregated and viewed as efforts toward compliance with the prior round obligation.

Housing Production

- 1) From 1980 to March 2009, affordable housing production in municipalities that had filed plans either with COAH or with Superior Court, plus completed LIHTC units, totaled 62,071 units. An additional 28,672 COAH units were either approved for construction or were in the pipeline and likely to be built.
- 2) 494 municipalities (87%) were assigned a prior round obligation; 72 municipalities did not have a prior round obligation because they were, for the most part, urban locales with a history of affordable housing production.
- 3) Proportionally more municipalities without a prior round obligation built affordable housing (69%) than those that were required to do so (59%). Although, in the aggregate, they produced more housing, municipalities with an obligation tend to have fewer new affordable units than municipalities without an obligation, both overall and per 10,000 residents.
- 4) The 43,161 new units completed by municipalities with prior round obligations fulfilled one-half of the statewide prior round obligation. These municipalities completed 70% of all new units produced, while municipalities without prior round obligations completed 30%. These 43,161 units were completed by 293 of the 494 municipalities with prior round obligations. Of these municipalities, 201 built no affordable housing. Proportionally more municipalities without a prior round obligation built affordable housing (69%) than those that were required to do so (59%). A total of 18,910 affordable units (COAH plus LIHTC) were produced by 50 out of the 72 municipalities without a prior round obligation. Counting all affordable units produced (COAH plus LIHTC), the total comes to 62,071, of which 30% were produced by municipalities without prior round obligations.
- 5) Adding together all the new units produced, as well as the approved units in all municipalities (with and without prior round obligations; N=90,743), New Jersey’s

municipalities may be able to exceed the total prior round obligation, even though 23% of the total number of units would be provided by municipalities that did not have a prior round obligation.

- 6) In 1980 there were 2,691,313 housing units in New Jersey and by 2010 this number grew to 3,544,909 units. Thus, COAH units accounted for 6.1% of total production. Adding in the LIHTC units, the percentage equals 7.3% affordable units out of overall production.
- 7) Of the 18,910 units produced in municipalities without prior round obligations, 3,029 (16%) were produced through the now-defunct RCA program, which allowed municipalities to make cash contributions to “receiving” municipalities, which did not have prior round obligations.
- 8) Municipalities with new affordable units tend to have proportionally smaller white populations and higher median incomes, and that their housing stock grew at a faster rate between 1980 and 2000 than municipalities with no new affordable housing.
- 9) Among all municipalities with new affordable units, the median number of units built was 82 (or 69 per 10,000 residents).
- 10) More family units were built than any other type of housing, although the percentages of family units and elderly units were quite close: 49% and 43%, respectively, while only 8% were special needs units. Few municipalities that have built affordable housing focus on only one type.
- 11) The production of elderly housing is associated with municipalities that are denser and that have fewer white residents, while special needs housing is associated with higher-income, less-dense municipalities with higher percentages of white residents.

Compliance with State-Mandated Prior Round Obligations

- 1) Of the municipalities not in compliance, more than one-half (201) built no new affordable units whatsoever. Over 80% of municipalities with prior round obligations have not produced affordable housing within their own jurisdictions at the level specified in their prior round obligations. And 68% of municipalities with a prior round obligation attained 50% or less of their obligation.
- 2) At the other extreme, almost 20% of municipalities with a prior round obligation completely fulfilled their goal and close to 5% additional municipalities completed over 80% of their prior round obligation goals.
- 3) If the approved units are counted, the record looks significantly more positive; only about 28% of municipalities with prior round obligations are slated to contribute no new affordable housing units and nearly 37% could be in full compliance, attaining 100% of their goal. Nevertheless, over 60% of municipalities will not have fulfilled their prior round obligation goals, even under the generous assumption that all approved units will actually get built.
- 4) Including both the municipalities that have produced a significant amount of affordable housing, either by reaching the state-mandate goal or because they did not have a prior round obligation due to their already substantial affordable housing stocks, a total of 148 municipalities (26%) appear to be fulfilling the state’s expectations concerning affordable housing production.
- 5) In municipalities with no prior round obligation, population density is much greater while growth in housing stock is lower than in municipalities with prior round obligations.

Residents in municipalities with no prior round obligations have lower median incomes and are more likely to be non-white than in municipalities with prior round obligations.

- 6) Municipalities that met their prior round obligations were denser and had somewhat fewer white residents, compared with municipalities that did not meet their prior round obligations. They also had lower obligations.
- 7) Among municipalities with a prior round obligation, there was a negative correlation between the extent to which that obligation was met, and the percent of that municipality's population identifying as white. Thus, the larger the share of a municipality's population that is white, the less likely it was to build affordable housing. Median income, change in housing stock, and ratio of new affordable units to all new units are positively associated with the percent of obligation met, while the percent of the population that is white is negatively associated with the extent to which the obligation was attained. Thus, municipalities with smaller white populations and higher incomes are associated with greater success meeting their prior round obligations. This finding presents a mixed picture concerning the hypothesis that higher income areas with more white residents will be less likely to produce affordable housing.

Third Round Obligations

- 1) The state's third round "fair share" numbers indicate that there is a statewide need for 115,566 new affordable units to be added from between 1999 and 2018. Plans submitted by municipalities as part of the third round indicate anticipated production of 39,189 units. Plans that were still in the process of being developed (when the data were collected) would add another 7,243 units for a total of 46,432 homes. This is obviously far short (only about 40%) of the total statewide need for affordable housing and the "fair share" obligations that are designated to most of the state's 566 municipalities.
- 2) Since the Appellate Court has invalidated the third round rules, the process has stalled. If the Supreme Court upholds the decision, new rules will have to be promulgated.

Overall Assessment

- 1) The climate for affordable housing production in New Jersey does not appear to have improved over the past decade.
- 2) Zoning has actually gotten more restrictive and exclusionary in many areas as suburban and rural towns have increased minimum lot sizes to as much as 10 acres.
- 3) The builder's remedy has been more of a threat than a reality; there have only been about 10 cases where the state has over-ruled local zoning to provide the permits to developers to build housing against the desires of the municipality. Many more have reached settlements, often with the encouragement of the courts. This is an important contribution of the builder's remedy; it has provided a point of leverage for reaching an agreement that is satisfactory to all parties.
- 4) Production certainly has not occurred easily. Implementation is extremely complex—from how "fair share" or "growth share" figures have been calculated to how the state has provided bonuses and credits to municipalities, beyond the actual production of units.
- 5) Numerous court cases have stalled the affordable housing process in New Jersey.
- 6) The New Jersey experience in implementing the Mount Laurel decisions and, later, its Fair Housing Act, presents a mixed record. On the one hand, tens of thousands of units

have been produced; municipalities with new affordable units have higher median incomes; and municipalities with higher income residents are associated with higher levels of affordable housing production and greater success at meeting their prior round obligations.

- 7) On the other hand, over 80% of the municipalities with prior round obligations have not produced affordable housing within their own jurisdictions at the level specified in their goals; municipalities with new affordable units are associated with proportionally smaller white populations; municipalities that met their prior round obligation are associated with higher densities and somewhat fewer white residents, compared with municipalities that did not meet their obligations; (similar to Massachusetts, development in higher density areas could also mean that suburban development is, indeed, occurring); municipalities that built no housing have higher percentages of white residents and lower median income residents compared with municipalities that built at least some housing; and municipalities with smaller white populations are associated with greater success at meeting their prior round obligations. Thus, municipalities with larger white populations are associated with building less affordable housing.

Key Observations for Massachusetts (and others)

- Both states have created affordable housing production goals that municipalities are encouraged to meet.
- In both states there is a statewide authority that can overturn local zoning. However, in Massachusetts it has been used more frequently.
- Neither state has the power to enforce the “fair-share” requirements proactively. In New Jersey, COAH or the courts may only act on the request of a locality, a developer, or a fair housing organization or other non-profit. In Massachusetts, the developer initiates a 40B application.

Massachusetts (and others) May Want to Consider These Lessons from New Jersey

- The attempt to create specific goals for individual municipalities has been extremely difficult to implement and has resulted in numerous court cases. Massachusetts’ 10% across-the-board goal appears preferable to the New Jersey strategy and Massachusetts should not, therefore, consider creating municipality-specific affordable housing goals. In fact, legislation was passed by both houses of the New Jersey legislature but vetoed by the Governor that would have instituted a similar across the board 10% goal as in Massachusetts.
- In New Jersey, immunity from the builder’s remedy is provided to municipalities that have submitted plans, while in Massachusetts immunity also may be granted to municipalities that have not yet met the 10% statewide affordable housing target but that have either made significant progress toward meeting the goal and/or that have met the goals stated in their housing production plans. Massachusetts should continue to follow its seemingly stronger guidelines.
- When payments were allowed through RCAs, the funds were not sufficient to cover a unit of housing. Therefore, any such arrangements, including in-lieu options for inclusionary housing, should require adequate contributions to enable a unit of

- housing to be constructed, in the same municipality, consistent with the intent of the guidelines.
- The option for municipalities to charge developers a fee, which is then earmarked for affordable housing development, appears to be a good strategy for creating a dedicated source of revenue.
 - In addition, Massachusetts may want to consider adopting a statewide mandatory developer fee that is earmarked to an affordable housing fund and that would be available for appropriate development, particularly in municipalities that have had weak affordable housing production records. Massachusetts should monitor New Jersey’s new regional planning approach that attempts to coordinate affordable housing production among several municipalities.

Chapter 6: California

Overview and Background

- 1) Since 1969, California law has required all cities and counties to complete a housing element, as one of the components of their general plan.
- 2) The overriding purpose of the housing element is to encourage each local government in the state to do its part to facilitate the development of adequate housing to meet the needs of all economic groups. It also must indicate how, exactly, these needs will be met.
- 3) The state holds local jurisdictions accountable for what they can control—land use regulations that allow for affordable housing—rather than housing production.
- 4) Although infrequently used, the major sanction for non-compliance comes through the judicial system.
- 5) The original housing element statute was only a few paragraphs long; today it spans over 60 pages and is enormously complex, covering the state’s sophisticated housing need allocation procedures and standards for compliance.

Implementation of the Housing Element

- 1) The housing element is one of seven required components of a city or county’s general plan.
- 2) In addition to the locality providing an inventory of possible sites for development, it must provide an indication that the zoning, as well as the infrastructure, is appropriate and adequate to meet the community’s need for housing during the upcoming planning period. Further, where appropriate and legally possible, the housing element must state how the locality will address the ways in which governmental constraints to housing development will be removed, taking into consideration the needs of persons with disabilities.
- 3) The housing element law uses a “fair share” type of allocation process. For each planning period, the DHCD assigns a share of the statewide regional housing need to one of the state’s Council of Governments (COGs), broken down for four income categories. This is known as the Regional Housing Needs Assessment (RHNA). Each local government is then assigned a share of the regional housing need by their regional COG.

- 4) No local government is exempt from being assigned a housing need, even those areas that already have a significant amount of affordable housing.
- 5) The housing element submitted by each local government must demonstrate that it has a concrete plan for satisfying the various needs that it has been assigned to meet. Communities are directed not to allow exclusionary zoning provisions and the housing element must include a mechanism for removing local government rules or ordinances that constrain the development of affordable housing. Adequate local zoning must be in place if there is not enough available land to meet the needs, the housing element must include a plan to rezone the land, as appropriate. The local government's housing element also must specifically list all the sites available to accommodate the needed housing.
- 6) DHCD is responsible for reviewing each municipality's plan to assess whether it will likely accommodate the targeted number of housing units. The state can either certify the local government's housing element or it can request modifications. If the housing element is adopted by the locality, but does not satisfy the DHCD's requirements or if the housing element is not updated according to schedule, the local government is deemed to be out of compliance.
- 7) Local governments typically view compliance as a distinct advantage, since DHCD certification means that, in any legal dispute, California law directs judges to presume the legality of a certified housing element. More specifically, noncompliant communities are not eligible or would be less competitive for various federal and state loans and grants that are administered through DHCD and they are more vulnerable to lawsuits on development issues.
- 8) Each locality must determine for each site in the inventory whether it can accommodate some portion of the jurisdiction's share of the RHNA, by income category, during the planning period. If the inventory reveals insufficient sites to accommodate the RHNA-specified needs for all income levels, the housing element must state how it is going to create developable "by right" parcels, including those that would be suitable for multifamily housing.

Criticisms of the Housing Element

- 1) Key criticisms include: the way in which the state assigns housing need figures to the COGs and that they, in turn, assign specific housing goals to local governments; meeting housing needs should be a minimum threshold for what is needed, not a cap, and should not be grounds for rejecting an otherwise suitable development that would bolster the affordable housing stock; a lack of a requirement to explicitly zone for affordable housing (i.e., the state uses density as a proxy for affordability); lack of state funding to help COGs assign local needs numbers and to help local governments develop their plans; growth is assumed to be occurring, although this may not be happening in all locales; how or whether the rehabilitation or subsidization of existing units should count toward meeting local housing element goals; and whether or how compliance should be tightened.

The Compliance Issue

- 1) Local government compliance with the housing element requirement is widely viewed as the weakest aspect of the law.
- 2) A 2003 study on the relationship between the housing element requirement and housing production found that compliant communities were not more likely to build more housing overall, but of the housing they built, they were more likely to build multifamily units. However, state officials and others have been critical of the methodology used in the study.
- 3) In the 1990s, a maximum of only about one-half of the local governments were in compliance. As of 2004 about two-thirds of municipalities and three-quarters of the counties were in compliance. In December 2007, the state boasted that 80% of California's local governments had adopted a compliant housing element—the highest compliance rate ever attained.
- 4) Each jurisdiction in the state is required to submit its housing element based on its location—the COG area it falls within. At the beginning of each cycle, one would expect a high level of noncompliance, since many submissions are late or the jurisdiction has not identified a sufficient number of sites to attain the housing goals. As time goes on, the compliance rate should go up. Thus compliance levels appear to be a “moving target,” with fairly large variations based on when the tallies are compiled, in relation to when each local government is required to submit its plan.
- 5) In an effort to get an indication of aggregate compliance levels among California's 535 local governments, hand calculations were performed at two points in time, just over one year apart. In July 2010, only about 42% of California's local governments were in compliance with the housing element requirement; this number grew to 67% thirteen months later. Local governments whose housing elements were either out of compliance or due, fell from a combined nearly 42%, to just under 30%, from 2010 to 2011.
- 6) Whether due to funding shortages or other reasons, compliance with the housing element is not universal. Nevertheless, as of August 2011, one-third of California's local governments were not in compliance. The level of compliance continues to be a concern for state officials.
- 7) There are two key ways that the state attempts to put “teeth” into the housing element requirement--administrative incentives and the judicial threat. Concerning the first, if a local government is not in compliance, it may not qualify for certain categories of state and federal housing assistance, including state-administered CDBG and HOME grants to non-entitlement communities. Several of those interviewed felt that if the state were really serious about using the sanction of a possible loss in funding, they would tie funds to non-DHCD transportation and parks/recreation programs that local governments typically care about.
- 8) The judicial remedy may be pursued under two circumstances: if a particular project has been denied or if the adequacy of a housing element is challenged. Concerning the first, the remedy is a court order requiring the city or county to approve the project or come up with legal reasons for denial. Concerning the second, a building moratorium is a potential remedy.
- 9) Despite the existence of a housing element that fulfills all the requirements mandated by the state, projects can still be denied at the local level. When this occurs, there is no statewide recourse to argue the denial, other than by a citizen bringing a lawsuit through

the court system. However, this process is seldom used (30-40 cases since 1983) because of the costs involved and the adversarial nature of the judicial system.

- 10) Despite the infrequency of its use, the judicial threat is compelling: a local government that is not in compliance with the housing element requirement could lose all permitting authority for any type of project, even the ability to issue a building permit for a modest home renovation. Of those cases that have gone to court, the court remedy (of suspending development) probably has occurred no more than 10 times. Even those cases that do not get decided in the courts, the process of litigation is typically a sufficient prod to encourage a local government to create a compliant housing element.
- 11) Although, California's housing element law has been criticized for its weak enforcement, there is evidence, often anecdotal, that developers are producing housing as a result of the opportunities provided by the housing element statute.

The Housing Element Requirement and Housing Production

- 1) As of mid-2010, there was no centralized database that tracks affordable housing production by municipality. Regardless of how much production that one might be able to document, it was not possible to compare that to what the housing element outlined. In other words, communities can promise to produce "x" units, but it was not possible to determine if that had been fulfilled. At best, we could have simply learned that "y" units were built.
- 2) As a result, in view of the resources available to carry out this study, there was no way to determine the effectiveness of housing elements in producing the housing that is delineated in the plan, without analyzing each locality's housing element and then gathering the needed data to determine actual production.
- 3) Thus, the question of how the housing element impacts affordable housing production could not be answered through this study. This finding, itself, is important. Given that California is frequently cited as a model for a statewide intervention that is effective at producing affordable housing, the question is: "Based on what is this assertion made?" Recent efforts by the state may improve the data collection process.

Current Issues and Proposed Changes

- 1) Several issues concerning the housing element recently have attracted the attention of housing advocates and public officials: whether the 8-year cycle of state approvals of the housing element is appropriate; various issues related to local inclusionary zoning ordinances; the connection between the housing element and the availability of subsidies; and the length of time interested citizens have to protest an inadequate housing element.

Overall Assessment

- 1) The story of California's housing element is one of pluses and minuses and there are two possible summations to the California housing element story. On the one hand, local governments are held accountable for land use decisions—an activity that is uniquely within their domain. They are required to create appropriate plans and regulatory frameworks that are conducive to attaining their housing goals. This view stresses that the California model is one of the best efforts to counter exclusionary zoning, within a strong comprehensive planning framework.

- 2) On the other hand, while local governments are required to create plans that would enable them to attain their housing goals, they are not, required to produce the needed housing. In this view, the housing element is certainly a positive step and a critical planning tool and it creates an overall policy direction and awareness of the need for housing across all regions of the state. But it does not, in itself, create the housing and the sanctions for either not submitting a housing element or producing one that does not follow the state's guidelines are not sufficient to result in anything approaching full compliance across the state's local jurisdictions.
- 3) Based on the analyses done for this report, no more than two-thirds of California's local governments were in compliance over a period of just over one year. Therefore, it is arguable whether one could call the California law "mandatory."
- 4) While there are strong penalties for non-compliance, these penalties can only be imposed through the court system, which is costly, cumbersome, and time-consuming to utilize.
- 5) Zoning is just one piece of the story; cities can do the zoning and still frustrate developers when they come forward with a proposal. A number of interviewees noted that: "If we had the builder's remedy, we'd have the whole package, so that people would not have to sue in the state."
- 6) The lack of deep federal subsidies for affordable housing, combined with the ongoing financial crisis in California, has underscored the need for additional state funding.

Key Observations for Massachusetts (and others)

Major Similarities between the California Housing Element and Massachusetts' Chapter 40B

- A level higher than the municipality (in California it is the courts and in Massachusetts it is the Housing Appeals Committee) has the power to invalidate local land use decisions.
- In both states, contesting a local land use decision regarding an affordable housing development is dependent on an individual filing a complaint, which is time consuming and can result in increased costs.
- The extent to which local jurisdictions within each state are able to meet the statewide goals keeps shifting. In California, whether or not a local government is in compliance with the state-mandated submission of a housing element is due, in part, to when in the submission cycle the analysis done. Similarly, the number of Massachusetts' municipalities that have reached the 10% goal under Chapter 40B is affected in part by how close to the most recent decennial census the analysis is performed—the more years since the last census, the higher the number of municipalities that have reached the 10% goal is likely to be (the number of year-round housing units in each municipality is adjusted only ever ten years, while the number of affordable housing units may increase through the decade).

Massachusetts (and others) May Want to Consider These Lessons from California

- California represents one of the best models in the country of state-mandated comprehensive planning, with an explicit emphasis on how localities will meet the housing needs of residents at all income levels. Massachusetts should carefully study this approach and assess how it could be adapted.

- Similar to New Jersey, California’s attempts to assign “fair share” numbers to each municipality has resulted in a complex system that has provoked a great deal of controversy. This does not seem advantageous in comparison to Massachusetts’s 10% affordable housing goal, which is applicable to all municipalities.
- Requiring municipalities to inventory available sites for the production of affordable housing and requiring that zoning be supportive of meeting the various housing needs “by right” are critical approaches that could be required of Massachusetts municipalities.
- Another noteworthy strategy developed in California allows the courts to remove the right of municipalities to grant any type of building permit if a municipality is not in compliance with the housing element law.
- The lack of an administrative enforcement mechanism, with extensive reliance on the courts to implement the housing element, has proven to be problematic. This underscores the importance of the Massachusetts Housing Appeals Committee.
- Municipalities that do not have a certified housing element are either ineligible or in a less good position to compete for various federal and state loans and grants that are administered through DHCD. This could be a useful “stick” in Massachusetts.
- Although never implemented in California, a number of informants suggested that the state could make funding of non-DHCD transportation and parks/recreation programs contingent on having an approved housing element. This is another strong strategy that could be explored in Massachusetts.

Chapter 7: Cross-State Comparisons and Recommendations

Overview

- 1) Each of the programs discussed in this report represents a strong statewide or, in the case of Montgomery County, a strong county-wide commitment, within the state’s context and history, for developing affordable housing in locales that would otherwise be unlikely to produce such housing.
- 2) Each program has evolved over many years, making many modifications since its inception, to make it more responsive to articulated concerns. However, the many programmatic changes have resulted in increasing levels of complexity.
- 3) Interviewees repeatedly noted the extent to which locales are borrowing or copying details of other programs, learning from each other, and using the experiences from other states to inform and, in some cases, to modify their own initiatives.
- 4) Different methods of collecting data, missing data, and other methodological challenges have made the quantitative analyses difficult to carry out and also difficult to compare the experiences in the several states studied.
- 5) Another important consideration is the extent to which variations in market conditions create unique challenges in the various locales.
- 6) There is no such thing as simplicity or the proverbial “magic bullet” when it comes to devising a state (or county-level) strategy for overcoming local land use patterns that limit the opportunities for lower income households to find decent, affordable homes in a wide array of locales across the region.

Key Qualitative Comparative Observations

- 1) There is, perhaps, a trade-off between how well-targeted a program is to each municipality, and how easy it is to administer.
- 2) Informants from several locales commented that Massachusetts Chapter 40B is an exemplary key model of a state-based effort to overcome local exclusionary zoning.
- 3) A key reason why the Massachusetts approach has been praised is The Housing Appeals Committee, which is viewed as a highly effective tool for the state to implement its affordable housing goals. Rhode Island's State Housing Appeals Board has similar functions to Massachusetts's HAC.
- 4) In those states that rely on the courts, rather than an administrative agency such as HAC or SHAB, to implement the statewide statute (New Jersey and California), the process has often gotten bogged down in legal proceedings.
- 5) In Massachusetts, Rhode Island, New Jersey, and California, the state does not have the power to enforce its mandate proactively; a complaint or court case must be filed by an individual or entity with "standing" to protest a specific action by the local jurisdiction, which is time consuming and costly.
- 6) In the locale that experimented with local governments being given the option to make "in lieu" payments to other municipalities, (New Jersey) rather than building the housing in their own jurisdictions, the result has been fewer units being produced than what would have been required by the statute.
- 7) Similarly, in Montgomery County, when developers were given the option to opt out of developing units on-site and, instead, could make a donation to a fund to be used elsewhere, the per unit contributions were inadequate to provide an actual housing unit, as would have been required under the MPDU program.
- 8) An inclusionary zoning program (as in Montgomery County), or other affordable housing built through other statewide initiatives, working in conjunction with a local housing authority, can be an effective way to create a stock of long-term affordable units. However, the ability to do this is dependent on sufficient funding being able for the housing authority to purchase the housing units from developers.
- 9) A higher percentage of units built under the MPDU program have been for-sale, as opposed to rental units. However, a disproportionate share of the rental units in Montgomery County is still affordable. This suggests that promoting rental housing is an important strategy for creating a long-term stock of affordable housing.
- 10) Assessments of the progress municipalities are making toward meeting a given statewide goal may vary depending on when the analyses are done.
- 11) The various strategies to encourage the attainment of statewide goals primarily serve as threats, albeit important ones; very few cases actually come before the state's administrative or judicial bodies. The various appeals mechanisms encourage developers and local jurisdictions to come to a resolution through negotiation.
- 12) All the locales studied, with the exception of Montgomery County, have state-mandated goals that local jurisdictions are expected to meet. However, in all cases, attainment of the goals lags behind the state mandates.
- 13) Mandated comprehensive planning, with a housing element that requires localities to detail how they will meet the housing needs of residents at all income levels, is a powerful tool, particularly when coupled with the threat of negating local zoning (as in California). Massachusetts, New Jersey and Rhode Island have linked progress toward

attaining affordable housing goals with immunity from a state over-ride of the proposal in question.

- 14) In Rhode Island, it is not yet clear whether immunity will actually be granted for locales that are making “adequate progress” toward meeting their state-mandated affordable housing goals.
- 15) In the case of California, perceptions concerning the effectiveness of the statute must be tempered by the lack of a centralized database on housing production. Such a database would allow, for each jurisdiction, comparisons of housing needs as specified in the housing elements, with housing production outcomes.

Key Quantitative Comparative Observations

- 1) While each program appears to have stimulated the production of housing affordable to lower income households, there are mixed findings on the extent to which the new units are being located in higher income areas with higher percentages of white residents, and that have lower densities.
- 2) In locales where local jurisdictions may be exempt from the state statute, primarily because they already provide a significant amount of affordable housing, affordable units have continued to be produced.
- 3) Massachusetts had the best record of affordable housing production as a percentage of the growth in the state-wide (or county-wide for Maryland) housing stock from the start of the program. Rhode Island had the second best record.
- 4) In the one locale where long term-affordability restrictions did not accompany the program from the outset (Montgomery County), only about 32-34% of the total number of units produced through the program are still affordable, due to short-term restrictions on affordability in the early years of the program.
- 5) While the Montgomery County MPDU program had the highest affordable housing production record per 10,000 residents, in comparison to the other states’ programs, only 45 units produced through the MPDU program per 10,000 residents are still affordable.
- 6) Counting only the affordable units produced through the program, per 10,000 residents, the Massachusetts record was slightly lower than two of the other three states, and slightly higher than Montgomery County, Maryland’s still-affordable stock. However, adding all affordable housing production (whether or not through the program), Massachusetts’s production per 10,000 residents was second to Montgomery County, Maryland’s, with New Jersey and Rhode Island substantially lower.
- 7) Aside from the loss of affordable units in Montgomery County, the mandatory inclusionary zoning mechanism resulted in a very high rate of production.
- 8) Massachusetts had, by far, the highest total production and annual production of affordable units (including both program and other units). Montgomery County, Maryland had the highest annual affordable housing production per 10,000 residents, followed by Massachusetts.
- 9) Rhode Island had the highest percentage of municipalities producing and/or experiencing a net increase in affordable housing and Massachusetts had the second best rate.
- 10) Only limited data was available on the types of housing produced. Based on available information, there was substantial production for both families and elderly households.
- 11) Massachusetts produced considerably more affordable rental housing units than homeownership units, while in Montgomery County, the reverse was true.

- 12) New Jersey and Rhode Island had the best records in terms of the percentage of municipalities that attained the statewide goal overall, whether or not through the program. New Jersey also had the best record in terms of the percentage of municipalities that attained the goal through the program; Massachusetts had the second best record.
- 13) Massachusetts had the best record in terms of municipalities' attaining 50% of program goals. Massachusetts and New Jersey had the same percentage of municipalities attaining 80% of program goals.
- 14) In both Massachusetts and Rhode Island, municipalities that attained their statewide goals are denser, have smaller white populations, have lower median incomes and grew at a slower rate, than municipalities that have not met their housing goals.
- 15) In Rhode Island there is a significant positive correlation between LMIH production per 10,000 residents and the percent of white residents.
- 16) In both Massachusetts and New Jersey, affordable housing production is positively correlated with higher median incomes. This suggests that affordable housing production can be produced in high income areas, as well as lower income areas. However, our analyses did not explore the extent to which some higher income areas also have certain characteristics that would make them more likely to produce housing, such as available land.
- 17) Yet, municipalities that attained the statewide goal tended to have some combination of lower incomes, fewer white residents and higher densities, than municipalities that had not reached the state goal. This was the case in Massachusetts and Rhode Island, where all three relationships prevailed; in New Jersey municipalities that had met their prior round obligations tended to be denser and to have lower percentages of white residents, . In Montgomery County, MPDU units tended to be built in locales where there were fewer white residents and with lower median incomes.
- 18) Thus, municipalities that are working toward attaining the statewide goal are showing some promising signs that exclusionary patterns are changing. But, for the most part, the municipalities that have attained their state goals or obligations are those that historically are associated with producing more affordable housing.

Recommendations

- 1) In order to produce high quality housing that is affordable to low-income households generous funding from the public sector is needed. Without adequate federal and state subsidies, the ability of municipalities to attain affordable housing goals is likely problematic. Although resources for rental housing are a major priority, subsidies to enable qualified low-income people to become homeowners are also essential.
- 2) A single state-wide affordable housing goal is likely preferable to individual "fair share" mandates
- 3) Long-term affordability restrictions are critical.
- 4) Set-aside appropriations for rental units to be purchased by public housing authorities or nonprofits could contribute to a stock of long-term affordable housing.
- 5) Inclusionary housing programs need additional incentives or sanctions to encourage state-wide development of affordable housing.
- 6) The development of affordable rental housing should be encouraged.

- 7) In-lieu payments and other arrangements for off-site housing should, in general, be discouraged.
- 8) The potential of instituting a statewide developer fee applicable in strong market areas should be explored.
- 9) The record of state-based incentive programs for stimulating the production of affordable housing should be assessed.
- 10) Consistent and comparable forms of record-keeping on affordable housing production should be developed.
- 11) Data should be compiled on impacts of affordable housing, in general, and multifamily housing, in particular, on municipal costs, traffic, and property values.
- 12) State aid should be more closely linked to attainment of housing goals; significant sanctions for non-attainment of goals should be instituted.
- 13) Progress toward meeting housing goals should render a municipality exempt from sanctions for non-attainment of the goal.
- 14) It would be desirable to explore whether other interested parties should be allowed to proactively initiate a claim if a municipality has not attained the state's goal.
- 15) The state should require municipalities to develop and submit comprehensive plans, including detailed housing goals for addressing a full range of housing needs. As part of this, comprehensive plans for housing must be consistent with local zoning. The state should hold municipalities responsible for meeting housing goals.
- 16) Zoning should allow for multifamily housing development.
- 17) Requiring an inventory of available land is a desirable part of a planning effort.

Future Research Suggestions and Opportunities

- 1) Given the time and resources available for this project, various questions could not be addressed.
- 2) Future research efforts may want to consider other ways to quantify the differences between the urban areas that have traditionally been the main providers of affordable housing, and the suburbs that have typically avoided such housing
- 3) It would also be desirable to attempt to quantify a community's exclusivity before and after a policy's enactment. Particular attention should be paid to what population density means, either in an urban or more suburban context.
- 4) Including one or more "baseline" states could be a valuable addition to future studies
- 5) Other statistical tests may be useful in analyzing the type of data used in this study.
- 6) Further research examining affordable housing production would benefit from analyses using Geographic Information Systems.
- 7) Other measures might be able to provide additional information needed to assess and compare states' accomplishments.
- 8) It could be fruitful to explore the extent to which various types of incentive programs are encouraging locales to produce affordable housing.
- 9) It would be desirable to better understand how some communities, particularly those that may be viewed as "exclusionary," have managed to meet state affordable housing goals
- 10) A related question would be to focus specifically on how infrastructure constraints have been overcome.

Final Note

- 1) Each of the five programs explored in this report deserves praise. In all five cases, the problems created by exclusionary zoning were acknowledged and a bold set of strategies were developed, often over several decades. Also, in each locale, a significant amount of affordable housing was produced in areas that likely would not have experienced this growth if the statute had not been in force.
- 2) If enacted, the Comprehensive Land Use Reform and Partnership Act in Massachusetts would help to improve current shortcomings in the land use landscape.
- 3) Hopefully the material presented in this study will serve to further the debate and discussion about how the housing needs of all residents in Massachusetts and other states can be met through a joint effort between state and local governments, and with the support of nonprofit and philanthropic organizations, as well the for-profit development community.

Chapter 1: Introduction

One of the key limits to affordable housing development is zoning and other land use restrictions that discourage the development of smaller or moderately sized market rate housing, thereby limiting overall affordability for lower income households. Often called “exclusionary zoning,” these practices greatly reduce the likelihood that households with a wide range of incomes will be able to live in certain locales, thereby contributing to social and racial segregation. The result is that non-white and lower income households are often disadvantaged in seeking desirable employment and educational opportunities.¹

This study is aimed at better understanding the experiences in Massachusetts and other states that have programs targeted at overcoming the negative impacts associated with exclusionary zoning. In short, what can we learn about how various states have attempted to develop more affordable housing and a more balanced distribution of such housing among cities, suburbs and rural areas by intervening in local land use practices? While the focus is on Massachusetts, and how the efforts in other states might inform that state’s approach to combating exclusionary zoning, it is hoped that the information presented will be of broader use and applicability.

The exclusionary zoning issue is hardly new. Going back over four decades, concerns about restrictive land use patterns have been articulated, underscored, and re-emphasized by numerous high level commissions. For example, in 1968, the Report of the National Commission on Urban Problems, stated:

The most widely discussed form of exclusion is large-lot zoning, by which a jurisdiction attempts to limit development in substantial portions of its territory to single-family residences on very large lots...Perhaps an even more important form of exclusionary zoning is the limitation of residential development to single-family houses. The Commission recommends that governments at all levels adopt policies and implementation techniques for expanding the choice of person of all income levels in the selection of their homes. [It further] recommends that State governments amend State planning and zoning enabling acts to include as one of the purposes of the zoning power the provision of adequate sites for housing persons of all income levels and to require that governments exercising the zoning power prepare plans showing how the community purposes to carry out such objectives in accordance with county or regional housing plans, so that within the region as a whole adequate provision of sites for all income levels is made (pp. 213, 215 and 242).²

The academic and professional literature on the subject is also extensive. For example, almost forty years later a report published by the American Planning Association noted that:

¹ In recent years, the preference of zoning to include only single family residential development on large lots has been cited as a key cause of “urban sprawl” and its associated problems (e.g., transportation congestion, high energy consumption, and pollution). An additional group of opponents to exclusionary zoning have called for “new urbanism” and “smart growth.”

² For additional excerpts from commission reports see Appendix I.

... exclusionary zoning is in fact a significant barrier to higher-density, multifamily housing in major metropolitan areas throughout the United States...[We] Encourage state and regional governments to provide oversight of local land-use policies... ” (Knaap, et al., 2007, p. v and 70).

Alan Mallach, among the country’s leading experts on exclusionary zoning practices and the initiatives taken to overcome them, summed up the situation:

It would be vastly unrealistic to suggest that suburban exclusion of affordable housing is a thing of the past. Exclusionary land-use regulations are still commonplace, and even in those states that have housing appeals or fair share statutes, the process of overcoming local regulations is often slow and expensive (2009, p. 174).

The problems associated with exclusionary zoning include limiting educational and employment opportunities for lower income households, racial segregation, and sprawling land use patterns (see, for example, Hasse, Reiser and Pichacz, 2011). In response, a number of states have attempted to deal with the reality that many cities and towns across the country do not have any areas zoned for multifamily housing, or for homes that can be built on small lots. In Massachusetts, the following land use patterns prevail:

- Cities and towns are free to adopt any land use patterns that they choose.
- There is no requirement that any portion of land be set aside for multifamily housing or for single family units on small lots.
- More than one-half (106) out of 187 eastern Massachusetts communities, comprising nearly 70 percent of the total land in the area, have average lot sizes of close to one acre or more (35,000 square feet or greater; one acre equals 43,560 square feet) (Glaeser, Schuetz and Ward, 2006, p. 14).
- Many cities and towns in Massachusetts have no land zoned for multifamily housing. Only one percent of the land in 144 towns in the Boston metro area is currently zoned for multifamily housing and in 101 of these towns there is no land zoned for multifamily housing (Fisher, 2007, p. 1).

In the 101 cities and towns in eastern Massachusetts with minimum lot sizes of close to one acre or more, there are higher percentages of white households and lower percentages of foreign-born households, than in municipalities with smaller minimum lot size requirements (Glaeser, Schuetz and Ward, 2006, p. 14).³ Not surprisingly, studies have repeatedly shown that excessively large lot size regulations are a significant factor in the overall cost of housing (National Association of Home Builders, 2007).

Since exclusionary land use patterns are not unique to Massachusetts, a number of states have adopted diverse strategies to enable the development of housing affordable to low and moderate-income households. In fact “about half the states have enacted legislation that recognizes the significant impact local land use regulation can have on the availability of affordable housing” (Salsich 2003, p. 27).

³ In a prior study, Pendall (2000) confirmed “the long-known connection between low-density-only zoning and racial exclusion” (pp. 125-142).

To the extent that poverty is concentrated in various locales, and racial groups are often segregated geographically, targeted public initiatives are needed that enable developers to build housing affordable to a households at all income levels (assuming the availability of adequate subsidies), particularly in areas that will promote the deconcentration of poverty and increase the living options of various racial groups. These kinds of programs are based on a belief that the quality of one's neighborhood makes a difference in family well-being, primarily by providing better school and employment opportunities and potentially useful social and professional contacts. In fact, there is a large body of research exploring how neighborhoods impact people, with the general finding that neighborhoods make a difference (see, for example, Pettit et al. 2003).

Looking back more than 100 years, Jacob Riis chronicled *How the Other Half Lives*, by focusing on poor ethnic groups settling in various New York City neighborhoods. Since then many analysts and policymakers have focused on how to improve the quality of neighborhoods in which lower income residents reside. In the 1960s, the War on Poverty was launched, the Model Cities program was created, and several presidential commissions highlighted the plight of the inner city (The President's Committee on Urban Housing, 1968; National Commission on Urban Problems, 1968). A generation later, William Julius Wilson (1987) underscored the problems associated with concentrated poverty in some black inner city areas: an undermining of middle class black community institutions, a lack of positive role models for young black workers and a disconnect from informal job networks.

While a clear policy direction through much of the second half of the 20th century directed financial resources to inner city areas, a counter-movement advocated against such priorities, with the concern that federal programs should not serve to exacerbate the number of poor people in any given area. Changes in where new federally assisted housing developments could be built reflected the shifting policy winds.

The Moving to Opportunity program, which operated in five metropolitan areas from 1994 to 1998, continued the effort to deconcentrate poverty and encouraged public housing residents to take advantage of housing opportunities in low poverty neighborhoods. This program spawned numerous studies, with some mixed results. One of the most definitive studies pointed out that while the outcomes for young males did not live up to the promise, the results in relation to feelings of safety and security were "simply extraordinary... more than a move to opportunity, [the program] provided a move to security" (de Souza Briggs, Popkin and Goering, 2010, pp. 223-224).

The present study focuses on another major approach to promote the ability of low-income households to live in more affluent communities: how to overcome land use restrictions that limit or significantly discourage the production of a broad range of housing, including multifamily dwellings and lower cost homes. Yet, the more policy shifts to trying to provide affordable housing opportunities outside central cities, the more vehement the opposition that can be expected from municipal officials and local residents. Arguments opposing new affordable housing typically focus on impacts on the environment, stresses on infrastructure, increases in school, police and fire protection costs, and adverse impacts on property values. Although a full review of the literature on these impacts is beyond the scope of the present effort, concerning the latter point, a number of research studies have found that if housing is attractively designed, fits

in with the surrounding neighborhood, and managed well, there are no negative impacts of affordable housing on the property values of neighboring single family homes (see Appendix II for additional details).

This project explores the experiences in five states that have been recognized for their exemplary efforts at promoting affordable housing production in communities that traditionally have excluded it. The point of reference for this inquiry is the Massachusetts Chapter 40B statute⁴, which was enacted in 1969 with the goal of encouraging the construction of housing units affordable to lower income people in areas where such housing was not being built. The exclusion of affordable housing in these areas (e.g., affluent suburbs) is due, in large part, to a lack of zoning accommodating such housing. Chapter 40B encourages each city and town in Massachusetts to produce a minimum level of affordable housing, set at 10% of a city or town's total year-round housing stock. The housing units must be created under a state-approved "subsidy"⁵ program that requires affordability for a specified number of years.

The Chapter 40B statute addressed barriers to the development of affordable housing in two ways. It created a streamlined process through which developers (public, non-profit or for-profit) of projects where at least 20-25% of the units meet the state's definition of "affordable" and do not meet all local land use requirements, can request a "comprehensive permit;" authorized local zoning boards can approve or deny these permit applications. As part of the comprehensive permit application, developers can ask for waivers from specific local regulations if needed to make the development feasible. It also created a state entity (the Housing Appeals Committee or HAC) to hear appeals from developers whose comprehensive permit was denied or approved with conditions that would make the project "uneconomic. However, the ability of a developer to appeal to the HAC only applies to projects in localities with a subsidized housing inventory that is less than 10% of its year round housing stock. The HAC can modify or reverse the local decision if it finds that the local concerns do not outweigh the regional need for affordable housing. Since its inception, Chapter 40B has been seen as a major vehicle for making it possible to build affordable housing in communities with restrictive zoning.

Colloquially known as the state's "anti-snob" zoning law, the Comprehensive Permit and Zoning Appeals Act, referred to as Chapter 40B, has been the subject of controversy and debate. Most recently, a citizen-led ballot initiative was put to a vote by the Massachusetts electorate on November 2, 2010, that would have repealed Chapter 40B. However, as discussed in Chapter 2, advocates of 40B were successful in stopping the repeal, with nearly 60% of Massachusetts voters saying "No."

Less dramatic than attempts to repeal the statute, there have been persistent questions about whether any other state has created a better approach than Massachusetts to deal with restrictive zoning, particularly in affluent suburbs, which typically limit the ability of developers to build multifamily housing or high density single family housing "as of right." Without zoning that accommodates such housing types, difficult-to-obtain zoning variances are required. This inquiry

⁴ Massachusetts General Laws, Chapter 40B, Sections 20 through 23

⁵ State regulations have broadened the definition of "subsidy" over the years to include non-financial subsidies such as technical assistance that results in the creation of affordable housing that meets state income-targeting, fair housing and long-term use restriction requirements.

was launched with the hope that states both with statutes with goals similar to 40B and states without such laws would be able to reflect on the comparative strengths and weaknesses of the various approaches.

Key Questions

As noted at the outset, the central question of this project is:

What have been the experiences in Massachusetts and other states that have programs with similar goals to Chapter 40B-- to develop more affordable housing and a more balanced distribution of such housing among cities, suburbs and rural areas?

In addition, this study poses the following set of questions for each program:

- What types of administrative/regulatory changes in the implementation of the program have occurred and how is the statute viewed by key stakeholders?
- How much affordable housing has been produced per year since the statute became operational?
- What type of affordable housing has been produced (e.g., rental, homeownership, elderly, special needs)? Does the state monitor production activity under the statute through a state-wide database?
- Where has this housing been produced? To what extent have locales that had little or no affordable housing added to their stock?
- If the state assigns affordable production goals to municipalities, to what extent is compliance being attained?
- Are there demographic differences between municipalities that have been producing affordable housing (in terms of race, income, and population density) and those that have not? Do demographic differences exist between municipalities that have attained production goals (in states where they exist) and those that have not?
- To what extent was the overall amount of affordable housing produced correlated with demographic characteristics? Is race, income, or population density correlated with the amount of affordable housing produced? What can be learned from the various initiatives that might assist Massachusetts, as well as other states in creating more optimum programs?

Our assumption was that production patterns in municipalities with higher percentages of white residents, higher incomes, and lower densities (in comparison to municipalities that do not have production, or with lesser amounts) would be indicative of the program making inroads on exclusionary land use patterns. However, in an attempt to develop relatively simple ways of measuring exclusivity, our analyses may yield some ambiguous findings. For example, as discussed in the Massachusetts chapter, and again in Chapter 7, findings pertaining to density provoked additional questions. In particular, development in lower density areas, particularly those that may be more rural, may be less able to support multifamily development, due to lack of adequate infrastructure (e.g., municipal water and sewer hook-ups). Also, development in many higher density locales may be indicative of exactly the kind of development that states are trying to encourage—in inner ring suburban areas. In addition, concerning the race variable, we

chose to use only a white vs. non-white distinction, where white includes both Hispanic and non-Hispanic white households.

We recognize that this presents a much less comprehensive and nuanced picture of a municipality's racial make-up than would be optimally desirable. It also does not allow us to present any conclusions related to overall diversity or ethnicity of the locales. Developing more fine-tuned methodologies to explore these variables represents a challenge for future researchers.

The research was launched with a hope that the selected states would be able to provide the data needed to answer these questions. However, as it turned out, differences in state data collection methods made it difficult to fully answer some of the above questions. In addition to collecting affordable housing production data and data pertaining to key characteristics of municipalities in each locale under study, telephone interviews were conducted with academics, representatives from the public (state, local, or county government), nonprofit (community development or advocacy organizations) and private sectors (homebuilders). Interviewees were identified with the help of the project advisory committee,⁶ as well as through initial contacts who, in turn, recommended key people involved with the particular program. This mixed-methods approach enabled us to present a full picture of the context in which the programs developed, how they changed over time, and how key informants viewed the various strengths and weaknesses of the programs operating in their state.

Selection of States for Study

A critical aspect of this project involved selecting programs that would provide important contrasts with the Massachusetts approach. In order to develop a process for selecting the four additional states for inclusion in this study, it was necessary both to determine the major types of strategies aimed at overriding local zoning and then to develop a set of criteria for selecting the four states to be studied.

Major Types of Anti-exclusionary Zoning Strategies

Various states and localities have adopted mechanisms that encourage or require localities to revise local planning and land use regulations as a way to allow the production of housing affordable to low income households. These can be classified as follows:

General city/town goal with state zoning override—This is the category in which the Massachusetts Chapter 40B program falls. Three other states also have a zoning override provision that is similar to Chapter 40B: Connecticut, Illinois and Rhode Island.

Mandatory inclusionary zoning—Inclusionary zoning is probably the most popular local strategy being used to encourage the development of affordable housing. Under a typical

⁶ The advisory committee was comprised of local experts who provided critical comments on the research design and who helped identify initial people to contact in each state. They included: Keri-Nicole Dillman, currently working at Mathematica (formerly at NYU and MIT); Lynn Fisher, MIT; Phil Herr, consultant; Sharon Krefetz, Clark University; Peter Lowitt, Devens Enterprise Commission; Jennifer Raitt, Metropolitan Area Planning Council; Karen Wiener, CHAPA; and Clark Ziegler, Massachusetts Housing Partnership.

inclusionary statute, a builder or developer is required to set aside a fixed percentage of units for rent or for sale to lower income households within a given housing development, if its overall size is covered by the statute. Although later struck down by the Virginia Supreme Court, the first inclusionary zoning program was created in 1971, in Fairfax County, Virginia (Mallach, 2009). The Montgomery County, Maryland ordinance, enacted two years later, authorized a density bonus to builders for providing affordable housing, to help offset some of the production costs of the moderately priced units. Other inclusionary zoning statutes were enacted in a host of relatively affluent east coast counties and medium-sized cities. In the late 1990s, a number of large cities also adopted mandatory citywide inclusionary zoning laws, including Boston, Denver, Sacramento, San Diego and San Francisco. As of 2003, 24 states had some form of inclusionary zoning mandate, with the most active programs in: California, Massachusetts, the New York metropolitan area including Connecticut and New Jersey, the Washington, DC area, Florida, Oregon Rhode Island, and Washington (cited in Salsich, 2003, p. 14).

Fair share mandate—New Jersey and California require regional or state agencies to forecast regional demand for housing and determine a “fair share” for each locality in the region; local governments must identify suitable sites and adopt appropriate regulations.

Mandated housing element as part of planning requirement—In the U.S., about 25 states mandate localities to adopt comprehensive plans with housing elements. However, only five states aggressively attempt to get local governments to plan for affordable housing (California, Florida, New Jersey, Oregon, and Washington) (Pendall 2008, p. 230); state review of local programs varies widely and even within states. State-mandated comprehensive plans and housing elements do not necessarily translate into housing production and there are questions about whether states have mechanisms to assure that affordable housing actually gets built.

Selection Criteria

The selected states were chosen purposefully, with each providing information and examples of purportedly exemplary procedures and interventions. In consultation with the project advisory board, the following criteria were used for selecting the four states for study.

- 1) The group of states selected should, taken as a whole, offer a range of interventions.
- 2) The statute must differ significantly from Chapter 40B.
- 3) The statute must have a significant “track record,” defined as being operational for at least ten years.
- 4) Selected key informants, and the available literature, must cite the state as being an exemplary model of overcoming exclusionary zoning.

Since the override aspect of Chapter 40B is the most contentious area of debate in Massachusetts, we decided that this project would focus on state strategies that include zoning override provisions, or ones that are different from the Massachusetts approach, in some significant way.

In Connecticut, the statute has been rendered near-impotent because of its reliance on slow judicial procedures. The Illinois statute did not take effect until 2009. Therefore, these two states were not included in the study. In Rhode Island, the third state with an override, the statute is only invoked if a city or town is not moving toward the 10 percent goal **or** has not adopted and

received approval from the state for a plan for affordable housing. This important variation from the Massachusetts statute made it a good candidate for further study.

Montgomery County, Maryland, New Jersey and California were also selected, in large part because they are widely viewed as the pre-eminent examples of inclusionary zoning, fair share mandates, and housing elements as part of a planning requirement. In selecting California for study, we acknowledged that the planning context in that state is very different from that of Massachusetts. Unlike Massachusetts, California has a strong state-wide mandate for comprehensive planning.

More generally, the states selected present a range of perspectives on the nature of the relationships between the state and local jurisdictions. Massachusetts is a “home rule” state, which means that cities and towns have relatively more autonomy and that there are more limits on the degree of state interference in local affairs. Cities in a “Dillon's rule” state are more restricted in their powers. Nevertheless, state legislatures in both types of states may alter the prevailing patterns: in Dillon's Rule states, legislatures may grant localities autonomy and in “home rule” states the legislature may limit localities’ powers. Maryland and Rhode Island are Dillon’s rule states.

In “Dillon’s Rule” states, local governments may exercise those powers that are expressly granted by the state; or implied in the expressly granted powers; or essential to the accomplishment of the objectives of the locality. This means that municipalities in these states “must look to specific statutory authorization in enabling statutes to provide them with the necessary authority to develop and adopt comprehensive plans, municipal zoning by-laws and ordinances, and subdivision regulations” (Lawlor, 2009). California is a Dillon’s rule state but only for certain types of municipalities. Massachusetts and New Jersey are not Dillon’s rule states (National League of Cities, 2010).

Methods

A qualitative and quantitative research design was followed. The qualitative part of the study involved reviewing available literature and developing a list of potential interviewees from the four states (other than Massachusetts) based on personal contacts and suggestions of the advisory committee. These contacts often led to additional people to interview. The cases include many quotations from interviewees, as well as a number of excerpts from private email communications. In all places where a name of an informant is included, the quotation has been approved. In a few cases, the title that the person currently holds, in addition to the title held at the time of the interview, is provided. The names and titles of all contacts and interviewees are listed in Appendix VI.

Affordable housing production data was collected from each of the states being analyzed, with the exception of California. As described in more detail in Chapter 6, California does not have a centralized method of recording affordable housing data across the state. For all the other states, data was obtained from the relevant state or nonprofit agency in charge of that task. Data was requested from as far back as such data was available (ideally, from the start of the program), up to the period of the study (about 2008). Various descriptive and correlation analyses were

performed. (See III for additional details on the qualitative and quantitative information that was collected for each case study, to the extent that it was available.)

Since this project spanned several years, the data analyses were based on somewhat different cut-off dates, depending on when the various cases were studied. For all five programs, 2000 census data was used. However, where possible, various bits of updated data were incorporated into the report. All statistical analyses were based on the original data compiled.

Definitions of Affordable Housing

Before describing those analyses, it is important to clarify how the term “affordable housing” is used in this report. Although the term itself is problematic (since all housing is, indeed affordable to someone at some income level), we have retained this language in this study because it is so frequently used in discussions about housing targeted to low and moderate income households. While determining affordability is based on households paying no more than 30% of gross income for housing, in line with HUD guidelines, the income limits of who is targeted is variable. Each state included in this study uses its own definition of what units count as part of their low or low and moderate income “affordable” housing stock. However, a common characteristic of affordable housing is that the units were built through some type of public program and that they include a provision targeting the housing to lower income households for some period of time. Thus, market rate housing that may be affordable to lower income groups is not included, since those units are not restricted in their use, and changes in market conditions can render the units unaffordable to the targeted population. The specific affordability definitions for each state are as follows:

Massachusetts—generally, households earning no more than 80% of area median income paying no more than 30% of their incomes for housing. Units must be subsidized through a state-approved subsidy program to count and the allowed income limits vary by program. Units in older HUD or Rural Housing Service programs with slightly higher income limits also count, but represent a very small number of units.

Rhode Island—homeownership units are targeted to moderate income households—those with incomes up to 120% of area median income; rental units are targeted to households up to 80% of area median income. Both categories would count as low-moderate income housing.

Montgomery County, Maryland—households must have incomes of 65% or less of area median income for rental units, and 70% or less in order to purchase units.

New Jersey—affordable housing is targeted to low and moderate income households. At least 50% of the units addressing a municipality’s fair share obligation must be affordable to low income households. Low income households have incomes below 50% of area median income and moderate income households have incomes between 50 and 80% of area median income.

California—housing elements must specify how housing needs for four income groups will be met: very low, 0-50% of area median income (AMI); low, 51-80% of AMI; moderate, 81-120% of AMI; and above-moderate, over 120% of AMI). If production data for California had been available, we would have aggregated units targeted to the two lower income groups in measuring output and compliance.

Despite the variations, we use the terms “affordable housing,” “moderate income housing,” and “low-moderate income housing” as they are used in each of the states under study. No effort was made to standardize the definitions or to count as affordable units targeted to the same income level households, across all states. As a result, housing that is classified as affordable in one state, might not meet that threshold in another. This presents an additional challenge in the cross-state comparison presented in Chapter 7.

Overview of Quantitative Analyses

We attempted to collect the following data for as much of the program’s history as possible: affordable housing production, by municipality; and density and racial and income profiles of the municipalities in which the affordable housing was built. The data on housing production was provided by the relevant housing agencies in each state, while the socio-economic information primarily came from census data. As a result, an unavoidable temporal mismatch in the data was created (i.e., the census data often came from a different year than the housing production data).

It was our original intent to try to construct ordinary least squares (OLS) regression models using the data gathered, in order to model the extent to which affordable housing production is predicted by certain demographic factors. However, due to the irregularity of the data, as well as the temporal mismatch described above, an OLS model was not appropriate, and other, non-parametric measures had to be used instead (See Appendix IV for more details). Two measures were used in the analysis. First, the Wilcoxon Rank-Sum test, which assesses whether or not differences between two groups of data are statistically significant, was used to measure whether or not there were statistically significant differences between municipalities with affordable housing and those without any. Second, the Spearman correlation was used to measure whether or not there is a correlation between demographic characteristics and the amount of affordable housing produced.

For all analyses one asterisk indicates marginal significance (at the 10% level); two asterisks indicate significance at the 5% level; and three asterisks indicate a high level of significance, at the 1% level. A finding of no significance or a low level of significance does not prove that there is no correlation between the two variables, or that they are not statistically different from one another; it simply means that this dataset could not demonstrate that there is correlation, or that they are different. This is especially the case with small data sets (as with the Rhode Island case study), for which it is more difficult to prove significance. In presenting correlations, it is critical to keep in mind that these analyses do not reveal anything about causality. Therefore, no finding in this report may be interpreted to say, for example, that income levels, racial characteristics, or density of municipalities are the *cause* of either the use or lack of use of any given program. Correlation findings only demonstrate whether a given variable is related to another variable. This caveat is repeated a number of times throughout this report.

Data Sources and Limitations

In general, there were three or four sources for the data used in each state. In most cases, the state agency or nonprofit responsible for monitoring the housing policy in question provided data on affordable housing built pursuant to that policy. The Massachusetts, data was provided by the Citizens’ Housing and Planning Association (CHAPA). Since the New Jersey data did not encompass all affordable housing construction, additional data was compiled from the U.S.

Department of Housing and Urban Development (www.huduser.org) on production through the Low Income Housing Tax Credit (LIHTC) Program, which has been the major source of new affordable housing construction since it began in 1986. In view of the importance of this program, we tried to capture as many LIHTC and other subsidized units as possible in each state. Whenever LIHTC data was used, we used the number of affordable units only, as opposed to all units built under the program.

All data on state and local social characteristics and the total number of housing units was gathered from the U.S. Census Bureau using American Fact Finder, and historical housing unit numbers (pre-1990) were gathered from Geolytics, using data normalized to 2000 political boundaries, where feasible. Since this study explored the actions taken by municipal governments, our targeted unit of analysis was the municipality. Because each state's program is administered differently, and because political organization is different in each state, there were cases when a state's data had to be handled in a particular way, as discussed in the individual state sections below.

A further limiting aspect of the quantitative analysis is that census data is based on 2000 information, whereas production data goes through the most recent date for which such information was available, late in the decade of the 2000s. We also acknowledge that 2010 census data, not available when the study was carried out, might reveal somewhat different municipal-level characteristics.

Most of the variables are self-explanatory (or are explained in the respective case studies) with a few exceptions. The "new affordable units" category measures (as closely as possible) overall affordable housing production, as discussed above. However, in a few cases these programs have been around for decades and, as such, previously-affordable units have lost affordability due to expiring deed restrictions. Where possible, expired units were counted separately from still-affordable units, to help give a sense both of overall housing production as well as what the program has contributed to the current housing situation. We also acknowledge that by using only one category for race of residents, white/non-white, the analyses may not have captured the complex dynamics of race relations in an increasingly multi-cultural America.

Additionally, three states provided data on units projected to be built, but not yet built; these were variously credited to a municipality or not, for reasons described below. Finally, the data we received from the various state agencies did not always include all affordable housing built in the state. This was often [or especially] the case in municipalities already deemed to be "in compliance" with an affordable housing goal that were not being monitored by the state agency in charge of monitoring compliance. Under these circumstances, the "new affordable units" category includes Low-Income Housing Tax Credit units not already included in the affordable housing database given to us by the state agency.

Each of the states included in this analysis presented a unique set of challenges, in terms of data analysis. These are discussed below.

Massachusetts—The data we received on affordable housing construction through the Chapter 40B comprehensive permit process in Massachusetts included information both on tenure and population served. It included units in developments under construction or only partially built; however, it did not include units in developments that have been approved but where

construction has not yet begun, or in developments currently under dispute. The Citizens' Housing and Planning Association, which compiled the data, does not have information on comprehensive permit units that are no longer affordable due to expiring affordability, but staff members do not believe that many have been lost. The Massachusetts case also relied on data compiled by the state, which includes a full listing of all units that count as subsidized housing, for each municipality, known as the Subsidized Housing Inventory.

Another consideration pertaining to the data presented in this analysis is that from the time that the major work on this project was completed to the release of the report, new census figures on the number of total housing units in each municipality became available. This had the effect of reducing the number of municipalities that had met the state's 10% affordable housing goal from 53 to 39. This is discussed in more detail in the Chapter 2.

Rhode Island—Rhode Island's housing agency has not tracked housing production at the municipal level going back to the program's first year, in 1991. Rather, each year they update a spreadsheet showing the total number of affordable housing units in each municipality. To establish a total production number since the statute went into effect, the research team subtracted the total number of units in each town in 1991 from the total number in 2009. This number shows the net change in units rather than gross affordable housing production. In other words, if a municipality constructed 5 new units but demolished 2 old ones, only 3 units are counted as being added to the affordable housing inventory, rather than 5 as in the other case studies. Since, the "new affordable units" variable in this case is not actually a count of all program units produced, the result is almost certainly an under-counting of actual construction of new affordable units in many places.

Rhode Island's data included information about populations served (e.g., how many units were designated as elderly housing, how many as family, etc.), but not about tenure (i.e. whether they were designated for homeownership or rental).

Since the program is relatively new, there is no data yet on expiration of affordability restrictions. Rhode Island Housing, which monitors municipalities for program compliance, also administers the LIHTC program. This means that virtually all affordable housing developments should be covered by the database that was provided to us. The net change calculation does not include units that have been approved for construction but not yet built; however, these units *are* included when evaluating each municipality's progress toward attaining its housing goal. The specified goal was for low/moderate income housing construction through 2010. Since funding was already secured for the "approved" projects, it seemed likely these units would be built reasonably close to the December 2010 deadline, but no further analysis was done to determine if, in fact, that assumption held true.

Montgomery County, Maryland—Maryland is an anomaly among the case studies here, in that we were not studying the entire state, but just Montgomery County. This is also the only case in which not all the land in the jurisdiction under study lies within the municipal boundaries of incorporated areas; that is, most people live in unincorporated parts of the county. Three of the municipalities within the county do not participate in the county's inclusionary housing program, but run similar programs of their own, which were not included in our data.

In every other state studied, data was measured on the level of the municipality (or “county subdivision” in Census terms), since the goal of this project was to understand the effects of statewide policies on municipal actions. Since this was not possible in Montgomery County due to their political structure, we used census-designated places (CDPs) as our unit of demographic analysis, as CDPs are as close an entity to municipalities as we could approximate.⁷ However, many of the affordable housing units were built outside of CDPs. In order to be able to associate units with CDP demographic data, we used GIS software to “assign” these units to the CDP to which they were closest.

Data in Maryland included information on tenure, but not on population served.

A high proportion of the affordable units built through Montgomery County’s Moderately-Priced Dwelling Unit program are no longer in the inventory of affordable housing. Although their prices may still be affordable, that affordability is not contractually enforced and, instead, it is subject to changes in the private real estate market. Therefore, the units still monitored for compliance are broken out from the overall numbers of units produced, wherever possible. Our data includes virtually all of the MPDU units that are still affordable. Some of the units that are no longer a part of the MPDU stock have been absorbed into a separate affordability program maintained by the Housing Opportunity Commission, and these have also been broken out where possible. LIHTC data was not included separately because this information was provided in the data provided by the county on the MPDU program.

New Jersey—New Jersey’s Council on Affordable Housing presented us with two sets of data: one that had a complete counting of all units built pursuant to its policies, and one that was less complete, but included information about populations served. Neither dataset provided information about housing tenure.

New Jersey’s Council on Affordable Housing provided data on all units built under its jurisdiction since 1986; it does not provide data on expiration of affordability. Since the data received for New Jersey only included affordable housing construction information for the 87% of municipalities required to build such housing, the “new affordable units” variable includes units from HUD’s LIHTC database for the other municipalities (13%), as well. The new affordable units count does not include units projected to be built, but not yet completed, since the time period over which municipalities were supposed to have complied with their affordable housing obligations ended 10 years prior to the point at which data for this analysis was collected (2009). Thus, it would appear that municipalities had ample time to clear out their pipelines.

Since this project was carried out over several years, we have attempted to present updated information, where available. For example, with the release of 2010 census figures, we have included information on the number of housing units in Massachusetts. The updated year round

⁷ The Census Bureau defines a CDP as “A statistical entity, defined for each decennial census according to Census Bureau guidelines, comprising a densely settled concentration of population that is not within an incorporated municipality, but is locally identified by a name. CDPs are delineated cooperatively by state and local officials and the Census Bureau, following Census Bureau guidelines. Beginning with Census 2000 there are no size limits.” http://factfinder.census.gov/home/en/epss/glossary_c.html#census_designated_municipality_cdp (accessed November 24, 2010).

housing units count reduced the number of municipalities that had met the 10% goal. However, it was not possible to use this updated information in the quantitative analyses presented.

Overall Structure of the Report

This study is aimed at providing useful insights for Massachusetts as it continues to address exclusionary land use practices and for other states interested in better understanding the role that they can play in creating more opportunities for diverse populations to find decent, affordable homes throughout their entire jurisdiction. The initiatives examined in this report constitute one broad type of strategy for reducing racial and economic disparities between various cities and towns within a state.

The next chapter presents an overview of Chapter 40B in Massachusetts and presents the analysis of its production record. This is followed by case studies of the four other states: Rhode Island, New Jersey, Montgomery County, Maryland, and California. Each case relies on both qualitative and quantitative analyses, as described earlier. While each of the cases follows a similar format, the sub-headings vary slightly from chapter to chapter, based on the unique characteristics of each program. The final chapter presents cross-cutting themes and recommendations.

As noted at the outset, The United States has long recognized that there is a problem concerning segregated housing. Recently, this issue has even captured the attention of the United Nations Committee on the Elimination of all Forms of Racial Discrimination (2008). Although not specifically referencing land use patterns, the Committee expressed deep concern:

that racial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterised (sic) by sub-standard housing conditions...The Committee urges the State party to intensify its efforts aimed at reducing the phenomenon of residential segregation based on racial, ethnic and national origin... [p. 4]

This study is part of a long commitment on the part of researchers and practitioners to provide information that will help to influence the development of public policies that will, finally, end our embarrassing, opportunity-limiting, and discriminatory housing patterns.

Chapter 2: Massachusetts

Overview

Chapter 40B, Section 20, of the General Laws of Massachusetts, was enacted in 1969 as a mechanism to address zoning barriers that made it difficult or impossible to build subsidized housing in many municipalities. At the time of its enactment, much of the subsidized housing in Massachusetts was concentrated in 15 older, poorer cities partly as a result of local exclusionary zoning, along with federal policies that favored urban locations.

In an effort to counter restrictive local land use ordinances that limited the production of single family homes on small lots and multifamily buildings, Chapter 40B created tools to make it easier to develop subsidized housing, especially in municipalities with a limited supply (less than 10% of its year-round housing stock). The statute authorizes a special approval process--the comprehensive permit process--that allows local boards of appeal to waive zoning and other land use restrictions if needed to make subsidized developments (including mixed income projects) feasible. To streamline the local approval process and eliminate the need to go to multiple boards, the zoning board serves as the single approving agency, with the exception of environmental approvals. Thus, under Chapter 40B, a for-profit or nonprofit developer, or a public agency can propose a development that may not conform to existing land use regulations, as long as at least 20-25% of the units are reserved for low and moderate income households (incomes up to 80% of area median income-AMI) for at least 30 year at an affordable rent or sale price, using a state-approved subsidy program.

In municipalities with a subsidized housing stock below 10% of their year-round housing stock (or certain alternative thresholds), developers can appeal an adverse Zoning Board of Appeal (ZBA) comprehensive permit decision (denial or the imposition of uneconomic conditions) to the state-created Housing Appeals Committee (HAC) and ask the HAC to overturn or modify the local decision so that the development may proceed. If a municipality has met the 10% standard (or one of the alternatives), developers can (and often do) continue to use the comprehensive permit process but the local decision cannot be appealed to the HAC. This 10% threshold can be seen as setting a goal for municipalities.

While opponents argue against the state's ability to override local zoning decisions in the interests of producing affordable housing, the comprehensive permit process has been used to develop over 58,000 units of housing. Across the country, Chapter 40B is often cited as a model state program aimed at stimulating the production of affordable housing.

Background

In contrast to New Jersey and California, both of which have created complex formulas to determine a "fair share" number of affordable housing units to be fulfilled by each unit of local government within the state, in Massachusetts (similar to Rhode Island), each municipality has the identical level of responsibility in terms of meeting a portion of the state's overall affordable housing needs. The Massachusetts Department of Housing and Community Development (DHCD) maintains a Subsidized Housing Inventory (SHI) to track the number of qualifying

“subsidized” units in each municipality. (Each city and town in the state self-reports the number of its subsidized housing units, with DHCD monitoring compliance.) The SHI also lists the total number of year-round housing units in each municipality as of the most recent decennial census; the subsidized unit count is divided by the number of year-round housing units to calculate each municipality’s SHI percentage; this number is then used as the basis for determining the extent to which the 10% goal is being attained. While the SHI’s legal function is to determine whether the number of a town’s affordable housing units is at or above 10% of its year-round housing stock, it also provides an indication (if imperfect) of the overall affordable housing supply in Massachusetts.¹ The SHI includes all subsidized units that meet certain state criteria, whether or not developed with a comprehensive permit, including subsidized units that pre-date the enactment of Chapter 40B.

All developments built using a comprehensive permit under Chapter 40B must use a DHCD-approved subsidy program and designate at least 25% of the units as affordable, meaning that they are targeted to households earning 80% or less of AMI. Alternatively, 20% of the units may be targeted to households earning up to 50% of AMI. As the result of a Housing Appeals Committee decision, which was upheld by a court decision,² as well as DHCD regulations, all units built in subsidized rental developments count toward the municipality’s 10% affordable housing goal, whether built with or without a comprehensive permit, as long as at least 20-25% of the units are affordable. In homeownership developments, only those units that are actually affordable are so counted. All affordability restrictions must last for at least 30 years³ (although most municipalities require affordability in perpetuity).

Subsidized developments built without using a comprehensive permit are also eligible for inclusion in the SHI, as long as they meet the above standards. In addition, affordable, restricted units in properties where less than 20-25% of all units are affordable can also be counted (e.g., units in inclusionary zoning developments).

¹ The system is imperfect for several reasons. First, reporting errors by individual municipalities can result in under-counts or over-counts. Second, the SHI only lists units that are use-restricted for at least 30 years or 15 years in the case of prior to 2001, the minimum terms were 15 and 5 years, respectively). Third, big cities that have been over the 10% threshold for a long time may be less energetic about reporting changes in their inventory. Fourth, as described in the text, the state count of “subsidized” units includes market-rate rental units in mixed income projects developed under an approved subsidy program as long as 20-25% of the units meet the state’s definition of affordable. Finally, municipalities can add units to their count before a project is built in some cases and some do, while others may wait until a project is built or until the next bi-annual statewide update.

² *Cedar Street Assoc. v. Wellesley*, No. 79-05, slip op. at 23 (Mass. Housing Appeals Committee Mar. 4, 1981), *aff’d*, *Zoning Board of Appeals of Wellesley v. Housing Appeals Committee*, 385 Mass. 651, 433 N.E.2d 873 (1982).

³ In addition, developers (whether a limited-dividend for-profit, a nonprofit or a public agency) are not allowed more than a 20% profit on for-sale developments and 10% per year for rental developments (unless indicated otherwise in the subsidy program or the comprehensive permit). Furthermore, owners must meet affirmative marketing requirements. However, municipalities can give priority to existing residents, to children or parents of residents, or to employees working in that locale. Up to 70% of a given development’s units can be for occupancy under this local preference rule. After the development is occupied, there must be ongoing oversight and monitoring by a public agency or non-profit organization.

Over time, the definition of subsidy has expanded and now includes conventional federal, state, and local financing programs, as well as non-cash subsidies, such as zoning waivers or state technical assistance. For example, included in the list of DHCD-approved subsidy programs is financing from the Federal Home Loan Bank of Boston's New England Fund. This fund provides member financial institutions with advances to support housing and community-development initiatives that benefit moderate-income households and neighborhoods, with a particular focus on mixed-income developments. It also includes locally supported developments created without direct state or federal funding ("Local Initiative Projects") if they comply with DHCD affordability and other requirements.

Most 40B developments built since the 1990s have included some combination of market rate and affordable homes, apartments, or condominiums. Singles, seniors and families who earn between 100% and 150% of the AMI are typically eligible for the market rate units. The affordable apartments/condominium and homes are targeted for seniors or families who earn less than 80% of AMI. Most of the residents in the affordable units earn less than \$50,000 per year (CHAPA, 2009, p. 2)

The types of developments built using a comprehensive permit have varied over the years depending on the types and levels of subsidy funding available. Prior to the mid-1980s, there were no subsidy programs for homeownership units and all of the comprehensive permits developments were rental and most were 100% affordable. In 1990, the state broadened its definition of subsidy to allow projects built without direct state or federal funding to use the comprehensive permit process as long as at least 20-25% of the units were affordable. This change made it possible to build affordable homeownership units. It also made it possible to build rental housing without public subsidy in areas where strong demand for market rate units made it possible to include an affordable component if sufficient density was allowed (e.g. through inclusionary housing statutes).

A developer interested in applying for a comprehensive permit must first request a "project eligibility" determination from the state or federal agency providing the subsidy, such as MassHousing (the state housing finance agency), or from the state's DHCD. The preliminary review procedures of various subsidizing agencies may vary, but they generally address issues pertaining to financial feasibility and design. Following such an approval, the developer applies for a comprehensive permit to the local ZBA. The application must specify any waivers of zoning or land use regulations requested (e.g. to build housing at higher densities than those permitted under the local zoning law and/or to develop multifamily housing in a single family zone).

After consulting with other town boards, such as the Planning Board, the Board of Health, the Conservation Commission, and police and fire departments, the ZBA has the power to grant all approvals required under local regulations necessary for the development to move forward through the issuance of a comprehensive permit. All state regulations must also be met. Although the review process may be more streamlined than for projects not applying for a comprehensive permit, the ZBA must hold public hearings and the project must be found in compliance with State environmental regulations, the State building code, and health and safety requirements.

Often, the developer and municipal officials work on the project together, to make it more desirable to the city or town. The state’s DHCD or the Massachusetts Housing Partnership (MHP), a quasi-public state agency, provides technical assistance and financial support to municipalities as they review comprehensive permit applications and write their decisions.⁴ MHP has assisted more than 100 local ZBAs in carrying out project reviews and negotiating with developers. Increasingly, comprehensive permit developments are what is known as “Friendly 40Bs,” meaning that a municipality and a developer negotiate the project details together. In fact, many 40B developments have been initiated by a local government (the Local Initiatives Program is discussed below).

If the city or town’s ZBA denies the comprehensive permit, or if it places conditions on the development that would make it “uneconomic,” the developer may appeal the decision to the statewide Housing Appeals Committee (HAC) unless any one of six conditions is met:

- the municipality has met the 10% housing goal (as measured by the SHI)⁵ or
- low and moderate income housing exists on sites comprising more than 1.5% of the municipality’s total land area zoned for residential, commercial, or industrial use; or
- approval of the application would result in the commencement of construction of low and moderate income housing in any one calendar year⁶ on sites comprising more than 0.3 of 1% of the city or town's land area or ten acres, whichever is larger; or
- the municipality has been making progress in its efforts to provide affordable housing (defined as an increase in SHI-eligible housing units over the prior 12 months totaling at least 2% of the town’s year-round housing units); or
- the municipality has an approved “housing production plan” that sets out how it will gradually reach the 10% goal through annual increases in its affordable housing inventory and has increased its affordable housing percentage by a number equal to at least 0.5% of its year round housing stock over the prior 12 months; or
- the project is very large (for larger municipalities, this means a project with a unit count exceeding the larger of 300 units or 2% of the municipality’s year round housing stock⁷),

If none of the above conditions are met and as long as the housing complies with various health and environmental regulations and does not pose serious health, safety, design, environmental, or open space concerns that cannot be mitigated, the HAC has the right to overturn or modify the local decision and order the granting of a comprehensive permit. (In the case of appealed conditions, the HAC also must find that the conditions would make a project uneconomic.) It should be noted that changes to Chapter 40B regulations have made it easier for municipalities to

⁴ Funding for MHP derives from a 1990 Massachusetts interstate banking act, which requires companies that acquire Massachusetts banks to make funds available to MHP for affordable housing.

⁵ These include programs sponsored by: MassHousing, MassDevelopment, the Massachusetts Department of Housing and Community Development, the U.S. Department of Housing and Urban Development, and the Federal Home Loan Bank of Boston. These are discussed in more detail later in this chapter.

⁶ The relevant calendar year is the applicant’s projected date for initiation of construction.

⁷ The 300 unit threshold applies in municipalities with 7,500 or more housing units. For municipalities with 5,000-7,500 units, the threshold is 250 units, for those with 2,500 to 5,000, the limit is 200 units and for municipalities with less than 2,500 units, the limit is the number equal to 6% of all housing units.

become appeal-proof, particularly in the form of the fourth and fifth criteria, noted above. Thus, a decision by the local ZBA on a comprehensive permit application cannot be appealed to the HAC during that period. In addition, municipalities that approve projects over a certain size also gain appeal-proof status for a year.

Municipalities have varied in their response to these six conditions, or incentives. Only about one-third (103) of the municipalities that have not yet met the 10% goal have submitted housing production plans. And, of those that have submitted such plans, about 40 have let them expire, including many that are still short of the 10% goal. This may reflect the fact the many municipalities receive few, if any, comprehensive permit applications; the comprehensive permit process is primarily used in municipalities with restrictive zoning (generally suburban or rural municipalities). In addition, with the decline in comprehensive permit applications since the 2007 downturn in the housing market, municipalities may have felt less pressure to adopt housing plans.

The vast majority of comprehensive permit applications is negotiated at the local level and eventually receives approval from the local ZBA. The ZBA has the power to by-pass local regulations, such as zoning laws, but it does not have the authority to by-pass state regulations, such as those in place for wetlands protection. A 2007 study found that 80% of applications filed between 1999 and 2005 were approved locally (cited in CHAPA, 2009). Further, the majority of cases appealed to the HAC are resolved prior to a formal decision by the HAC. In another study, carried out in 2003, out of 415 cases that were appealed to the HAC, 69% were either withdrawn, dismissed, or resolved through negotiation; this trend has continued since 2002 (cited in CHAPA, 2009, p. 4). For those proposals that have been decided by the HAC, “reasonable” projects generally have been approved.

The existence of the 10% goal and the availability of the comprehensive permit process has raised municipal awareness of the need to provide affordable housing and have encouraged them to adopt various pro-active strategies. Some have revised their zoning, adopting inclusionary zoning or creating overlay districts that offer a density bonus in exchange for providing an affordable housing component. Others have made zoning changes after discussions with developers that were considering using a comprehensive permit. Overall, according to CHAPA, comprehensive permits were used for 80% of the suburban units added to the subsidized inventory between 1997 and 2008 (excluding group home beds and homeowner rehabilitation loan units).

Recent Regulatory Changes

Over the years, there have been dozens of regulatory changes to the 40B program. Many of these have been instituted in response to local concerns. Two of the most important modifications were mentioned above: First, a municipality that has not met the 10% goal now has the ability to reject a comprehensive permit application, without the developer having recourse to the HAC, if they have been making a specified level progress toward meeting the affordable housing goal. Second, a municipality that has been certified by DHCD as being in compliance with its housing production plan can become appeal proof for one or two years. (Compliance with the plan is defined as meaning that the municipality has, over the prior 12

months, increased its SHI count by a number equal to 0.5% or 1.0%, respectively, of its year round housing units.)

Other modifications have attempted to address various criticisms of the statute. Additional recent changes to the regulations governing Chapter 40B include the following:

- subsidizing agencies conducting project eligibility determinations for comprehensive permit developments must do more extensive reviews of project designs and assessments of how they fit into the neighborhood context and town planning efforts; project size is limited to 150-300 units, depending on the size of the municipality, unless the ZBA chooses to allow a larger project; if the ZBA does not choose to allow a larger project, its decision on an application above the 150-300 unit limit cannot be appealed;
- developers must comply with extensive audit and cost-certification guidelines regarding the profit limitations imposed on 40B developments;
- developers must ensure completion of cost-certification through credit, bond, or cash ranging from \$25,000-\$100,000;
- municipalities can reject a 40B application if a developer submitted an application for the same site for a non-40B development within the previous 12 months;
- municipalities that have hearings underway on three or more projects may defer hearing additional projects if the projects being considered involve a larger number of units than in the new proposal;
- group homes, accessory apartments, locally assisted units, and units funded under the Community Preservation Act (discussed later in this chapter) qualify for inclusion on the SHI and can count toward a municipality's 10% goal;
- units can count toward the municipality's 10% goal as soon as a comprehensive permit is issued, rather than having to wait until a building or occupancy permit is issued;
- municipalities can also count units toward this goal if the locality has approved a comprehensive permit but issuance is delayed by litigation filed by a party other than the ZBA;
- Massachusetts DHCD and the local chief elected official must be notified when a developer applies to the ZBA;
- municipalities must provide a 30-day comment period starting when a 40B application is filed;
- the subsidizing agency must consider comments made by the municipality when issuing a site approval letter;
- these site approval letters must contain more extensive, standardized information, including a consideration of municipal actions previously taken to meet affordable housing needs;
- developers who want to access financing from the New England Fund⁸ must obtain a site approval letter from a state agency. The state agency then monitors and oversees the project; and

⁸ This fund is administered by The Federal Home Loan Bank of Boston and provides member financial institutions with advances to support housing and community development initiatives targeted to moderate-income households and neighborhoods. This program is discussed later in the chapter.

- the SHI must be updated every two years, although municipalities can submit changes to DHCD at anytime (CHAPA, 2009, pp. 5-6; also see CHAPA, 2008).

Despite these changes, opponents have argued that abuses in the program have allowed developers to reap excessive profits (developers are subject to profit limits),⁹ that the program is not based on consistency with planning principles, and that the ends don't justify the means (Witten, 2003, pp. 511-512). Importantly, the state does not mandate local plans.

Chapter 40B Survives Repeal Initiative

Opponents to Chapter 40B have made various efforts to weaken or repeal the statute. Toward the end of the 2000s, a new effort to repeal 40B emerged. However, opponents were not successful in getting enough signatures to get the repeal referendum placed on the November 2008 ballot. Two years later, however, the group submitted over 80,000 signatures to the state's Attorney General, far in excess of the number of signatures required (Sullivan, 2010a); the repeal vote was set for November 2010. Led by John Belskis, a resident of Arlington, an inner suburb of Boston, the opponents' website was called: "Affordable Housing Now: Support REAL Affordable Housing—Vote Yes to Repeal 40B."¹⁰

Interestingly, those supporting the repeal did not base their arguments on many of the standard reasons for opposing affordable housing, such as increased school and other municipal costs. Instead, they put forward three major assertions: that 40B had been ineffective in providing a sufficient amount of affordable housing; that it had actually served to increase the cost of housing; and that it allowed for excessive developer profits. According to the Coalition to Repeal 40B, by encouraging the development of market rate housing, in order to attain the required 25% minimum number of affordable units, 40B has caused the state's overall lack of housing affordability. In addition, the Coalition cited the 2006 report by the Inspector General (see 9), which had found instances of developers reaping profits in excess of the allowed amounts.

Following the first efforts to get a repeal referendum approved, in December 2007 pro-40B advocates formed an Advisory Committee to Retain Chapter 40B, which included some 50 representatives from academia, businesses, civic organizations, religious groups, environmental groups, and residents of affordable housing. This group eventually grew to over 200 members and was instrumental in fund-raising and in providing information on the importance of Chapter 40B to their own organizations.¹¹ Calling itself the Campaign to Protect *the* Affordable Housing

⁹ In 2006, the state's Inspector General investigated alleged abuses in the cost certification process used by developers under the 40B program and found a number of instances where developer profits were larger than those allowed by the statute; such excess profits not being returned to the city; and a failure of regulatory agencies to detect cases of abuse. See, for example, letter from Gregory W. Sullivan, Inspector General to Peter Ashton, Chairman, Board of Selectmen and Don P. Johnson, Town Manager, Town of Acton, May 26, 2006. <http://www.mass.gov/ig/publ/acton40b.pdf> (accessed July 24, 2011). (Also see note #3) In response to such findings, DHCD has noted that the IG found only 8 alleged cases of "abuse" and the alleged violations involved rules that were not enacted until after the subject developments were built.

¹⁰ <http://www.affordablehousingnow.org/> (accessed April 28, 2011)

¹¹ I was an early member of this committee.

Law, this vigorous and well-organized coalition of supporters of the law put forth counter-arguments to those advocating repeal and urged voters to Vote NO on 2 (the ballot initiative) to Protect *the Affordable Housing Law for Seniors and Working Families*.¹² Thus, the group presented the successes of 40B in terms of meeting the needs of people whom the electorate generally views positively, rather than focusing on poor households.

The well-timed release of a report, shortly before the election, presented data showing that, in the prior decade, Chapter 40B had been responsible for \$9.25 billion in economic activity, some 47,683 jobs, and significant tax payments (property taxes, state taxes, and sales taxes) (Koshgarian, Clayton-Matthews, and Bernstein, 2010). *The Boston Globe* announced the report with this headline: “Affordable-housing law called a big boon.” Aaron Gornstein, the Executive Director of CHAPA was quoted as saying: “It (the report) demonstrates the significant economic impact that affordable housing has had in the Commonwealth. It is one of the important reasons to make sure it does not get repealed” (McKim, 2010).

Advocates of 40B, those against the repeal initiative, were successful in defeating the November 2010 referendum with about 58% of the electorate voting against repeal. While supporters of 40B called this a “decisive victory,”¹³ opponents pointed out that almost 900,000 people voted for repeal—a significant minority to be sure. Despite the election results, Belskis stated: “We’re not giving up on this... (there are) a lot of hardworking citizens and voters who aren’t gonna go away...opponents of 40B are taking time to regroup” (Sullivan, 2010b, citing John Belskis).

Indeed, it did not take the opposition long before they launched another attack on Chapter 40B. Less than one year later, a new petition was presented to the Attorney General’s office that would have substantially weakened a number of aspects of the Chapter 40B, including reducing the “safe harbor” for each municipality from 10% to 3% of its housing stock as affordable. However, the Attorney General viewed the petition as substantially the same as the prior initiative and refused to certify it. The result is that a re-vote will not take place as part of the 2012 election. But, clearly, the issue is far from dead and strong opposition persists even though, “almost invariably, housing created under Chapter 40B is very well received after the development has been completed ” (Chapter 40B Task Force, 2003, p. 15; DeGenova et al., 2009).

In summary, there are several reasons why supporters of Chapter 40B were successful in making sure that the program could continue to function. First, the anti-repeal campaign presented a positive message of productivity using Chapter 40B, which it communicated effectively. Second, it was well organized and well funded, and prepared for the referendum far in advance of the vote. It also used the press, public meetings, and televised videos of 40B residents to explain the merits of the program to the electorate. Third, their message was probably more palatable to voters, since it was framed around meeting the housing needs of seniors and working families, rather than focusing on low-income, poor households. Fourth, they were prepared with data and research findings countering many common arguments against affordable housing. With no evidence that affordable housing produced adverse fiscal impacts, the repeal campaign could not resort to the various widely held myths on this issue. Fifth, a well-timed research report

¹² <http://www.protectaffordablehousing.org/cms/home> (accessed April 28, 2011)

¹³ <http://www.protectaffordablehousing.org/cms/home> (accessed April 28, 2011)

discussed the economic benefits of Chapter 40B, thereby further diminishing the arguments supporting repeal. And, sixth, while opponents may have been vocal, they did not offer any serious proposals about how the state's affordable housing agenda could be better served.

Zoning and Planning Context

As further background to this exploration, it is important to acknowledge a number of key characteristics of Massachusetts' land use, zoning, and housing landscape.

- Massachusetts has 351 municipalities, with each having jurisdiction over its zoning.
- Town meeting is the predominant form of local government. Fifty three municipalities have "city" governments with zoning changes subject to the approval of the city council. The other 298 have "town-meeting" governments and zoning changes require the approval of two-thirds of the residents attending town meeting, rather than a simple majority (alternatively, zoning changes can be stopped by one-third of those attending).
- Municipalities have Home Rule (adopted in 1966), which gives the residents of every city and town the right of self-government in local matters. There are, however, limits to these powers as set forth in state laws. Chapter 40B is an example of the state setting a standard of performance in an area of public concern that over-shadows local control.
- As discussed in more detail in the next section, there is a long history of political will, leadership, pro affordable housing legislation, many supportive private developers, and a vigorous advocacy community around housing issues. Consistent with this, a number of state subsidy programs have been created to support affordable housing, both directly and through institutional infrastructure and supports.
- The housing stock, jobs, and population are growing slowly or not at all compared to other states in the US.

In terms of its approach to planning, Massachusetts is among the one-half of the states in the U.S. with a weak planning framework. Specifically, Massachusetts does not:

- mandate regional planning and county governance is non-existent;
- enforce the requirement for local comprehensive planning (with a housing element);
- mandate that municipalities adopt growth management plans;
- mandate that a certain amount of land in each jurisdiction be zoned for multifamily housing/high density single family;
- require that local plans and zoning be consistent and there has been little (but growing) recognition of the importance of such consistency;
- mandate inclusionary zoning; and
- mandate that municipalities use existing housing stock for the explicit use of creating affordable housing (e.g., there is no mandate to develop accessory apartment bylaws or encouragement for municipalities to purchase market rate properties and transfer them to the subsidized stock).

The various limitations and problems with Massachusetts' approach to planning and land use have been widely acknowledged. A pending legislative initiative, the Comprehensive Land Use

Reform and Partnership Act, would address a number of the most problematic aspects of Massachusetts' land use statutes, including the promotion of master planning as a basis for consistent zoning and permitting. Specifically, it would further promote master planning, it would require that zoning by-laws and ordinances should be consistent with master plans, and it would explicitly bar exclusionary zoning.¹⁴

Housing Context

Massachusetts has long been a leader in affordable housing development. It is one of four states to have its own public housing program, it created one of the first housing finance agencies in the country, it has been successful in gaining federal funding for various demonstration and competitive grant programs (e.g., HOPE VI, Moving to Work), and it has developed a number of innovative state-funded programs to stimulate affordable housing production.

As part of Massachusetts' vigorous support for affordable housing, it has been a pioneer in promoting mixed-income developments. While many developments that are targeted to only very low income households (e.g., public housing) have been successful, there is a prevailing view among planners and policy makers that it is preferable to create living environments that include households with a mix of incomes. In keeping with this idea, the 40B program only requires that 20-25% of the units in any given development be set aside as affordable. Some of the benefits of mixed income housing include opportunities for lower income residents to network with people who may be able to assist with job searches and, perhaps, to serve as positive role models, particularly for children. In addition, the possibility of the development being stigmatizing is eliminated since people with diverse economic backgrounds live in the same development.

Until the 1960s, virtually all affordable housing development in Massachusetts (and elsewhere) was the result of either the federal or state-funded public housing programs. Since then, however, the basic method for supporting production has come through various types of public initiatives that encouraged private for-profit and nonprofit participation. These included the below market interest rate subsidy programs in the 1960s and the Section 8 New Construction/ Substantial Rehabilitation program in 1974. While the latter lasted less than a decade, it was viewed as a successful, albeit expensive strategy for producing high quality housing affordable to very low income households. Since 1986, the key federal subsidy for affordable housing has been the Low Income Housing Tax Credit, another program that relies heavily on private investment.

Although both the public housing and Section 8 New Construction/Substantial Rehabilitation programs provided deep federal subsidies, which enabled sponsors of affordable housing to essentially build developments with a single federal subsidy, the current context of affordable housing development involves the layering of a number of public and private subsidy and financing sources. In the current development context, any given project is likely to have

¹⁴ See <http://www.mphaweb.org/documents/CLURPASummary51810.pdf>; and http://www.mass.gov/?pageID=eheadterminal&L=5&L0=Home&L1=Economic+Analysis&L2=Executive+Office+of+Housing+and+Economic+Development&L3=Massachusetts+Permit+Regulatory+Office&L4=Zoning+Reform&sid=Ehead&b=terminalcontent&f=permitting_zoning_lupa&csid=Ehead (both accessed October 23, 2011).

upwards of 8-10 different funders. This has made development more challenging in Massachusetts and elsewhere across the country. In addition, since deep federal subsidies are no longer available, it has become more difficult to target units to the lowest income households, since supporting such households requires high levels of additional support.

With the demise of deep federal subsidies and the rise in private sponsorship of affordable housing, market factors have played an ever increasing role in development. Specifically, under many shallow subsidy programs, private for-profit developers typically build projects that include the minimum number of units affordable to lower income households. For the developments to be successful, they have to be attractive to a mix of higher income residents. Furthermore, the tax credits need to be sold to high income investors. And the price of the tax credits is dependent on the general state of the economy. In fact, during the economic downturn of the late 2000s, the price of the tax credit declined significantly, thereby threatening the viability of numerous developments.

In addition, some affordable housing units have been built through inclusionary housing programs (see Chapter 4), which are also dependent on market factors: if the market is soft, the market rate units will not be rentable or saleable. Finally, in order for for-profit developers to be interested in using Chapter 40B, the private housing market must be robust or they must have access to conventional state and federal subsidy programs. Similar to the inclusionary housing program, for developers to undertake housing development with a certain number of units set aside for lower income households, a healthy demand for the market-rate units is necessary.

In 1990, the Massachusetts Legislature enacted a new program, known as the Local Initiative Program (LIP), which had emerged out of a set of recommendations by a special legislative commission. The commission's report observed that the statutory language limiting the use of comprehensive permits to developments subsidized by a federal or state agency was being interpreted quite narrowly: such a subsidy could only come in the form of financial assistance. Under LIP, however, technical assistance provided by the Massachusetts Department of Housing and Community Development qualifies as a "subsidy" and therefore the affordable units constructed are considered subsidized and can be counted toward meeting the municipality's 10% goal. Created as a way to stimulate cooperation between private for-profit or nonprofit developers and local governments, DHCD notes that: "Unlike conventional housing subsidy programs, in which a state or federal agency must approve every aspect of financing, design and construction, LIP allows most of these decisions to be made by the municipality" Massachusetts Department of Housing and Community Development. 2011).¹⁵

Two additional state programs that have an affordable housing focus are noteworthy. First, under the Community Preservation Act, which was enacted in 2000, local governments were given the ability to create their own new tax (up to a 3% surcharge on the property tax), the proceeds of which are partially matched by state funds. At least 10% of each municipality's CPA

¹⁵ Funds from two additional programs are considered as eligible types of subsidies, thereby enabling units constructed with this assistance to be counted toward a municipality's stock of Chapter 40B housing. First, through the state's Housing Starts program a developer receiving initial approval for a 40B development from MassHousing, the state's housing finance agency, could also be provided financing through its Construction Financing Program. Second, 40B developments financed with below-market interest rate funds that come through the Federal Home Loan Bank's New England Fund also are considered as receiving an appropriate subsidy.

funds must go to each of three areas: acquisition and preservation of open space; acquisition and preservation of historic buildings and landscapes; and creation and support of affordable housing. As of fall 2011, 148 municipalities had adopted the CPA – 42% of all the cities and towns in the state. Sixty-four (23%) considered whether to adopt CPA and voted no (a number of additional municipalities initially voted no, but on a subsequent re-vote, the initiative passed). Thus, nearly 70% of municipalities that voted on adopting CPA, voted affirmatively (Community Preservation Act, 2011).

Second, Chapter 40R was enacted in 2004 and encourages municipalities to create special zoning overlay districts that allow for increased densities of single family, townhouses units, and condominiums/apartments, so long as the zoning includes the requirement that at least 20 % of the units are affordable and that they combine mixed uses. As an incentive for creating this new zoning district and creating a streamlined process for development within these areas, cities and towns can receive between \$10,000 and \$600,000 in state funding, as well as \$3,000 for each new home created. A companion law, Chapter 40S, was enacted one year later. Under this initiative, state subsidies are provided to local governments to cover the net increase in education costs resulting from the development of affordable housing built under the Chapter 40R program.

Despite the strong public support for affordable housing in Massachusetts, there is very little direct state assistance for the production or acquisition of affordable homeownership units. This is particularly problematic in many suburban locales, where the vast amount of the housing stock is single-family homes and where neighbors are typically concerned about how any new development will fit into the existing residential landscape. In addition, many of Massachusetts' municipalities do not have public water or sewer systems, or both, thereby making multifamily development more costly. This further points to the need for more public assistance for affordable homeownership units.

The housing agenda in Massachusetts typically has enjoyed strong bi-partisan support. This has been particularly true of the current administration of Governor Deval Patrick. In addition, working in partnership with state and local officials, as well as leading financial institutions, the private philanthropic community has played a leadership role in supporting affordable housing development. Particularly noteworthy is the Home Funders initiative, which is a collaborative effort on the part of the state's leading foundations to promote set-asides for extremely low-income households in mixed-income developments.

In brief, then, Massachusetts has a well-deserved reputation for being an active supporter and advocate of affordable housing, and it has more than a half century-long record of creating innovative programs.

Sources of Data and Approach to Data Analysis

The Citizens' Housing and Planning Association (CHAPA) provided the data on housing production in each municipality using the Chapter 40B comprehensive permit process.¹⁶ Affordable housing in municipalities that have not attained the 10% goal is almost always produced with comprehensive permits. The CHAPA database includes information on all affordable housing in the state's Subsidized Housing Inventory developed without using a comprehensive permit (to the extent that information is known). This study analyzed the subset of projects that used comprehensive permits, most of which are outside the largest cities.

The state's Subsidized Housing Inventory was used to examine overall affordable housing production. The SHI, which is maintained by the state Department of Housing and Community Development, is the official count of each municipality's affordable housing inventory for the purpose of calculating whether it has reached the 10% goal. It includes all units developed under an approved subsidy program. Units do not have to have been developed using a comprehensive permit to be included (e.g., state and federal public housing and developments built under other state and federal subsidy programs). Although most of the units in the SHI are affordable, some are not (e.g., units in subsidized rental developments where a minimum of 20-25% of the units must be affordable.) SHI counts sometimes lag behind actual production because many communities only submit updates when requested by DHCD (once every two years), rather than as soon as units are eligible to be counted.

According to data from CHAPA, very few of the affordable units built under 40B with a comprehensive permit have lost their affordability due to expiring subsidies or lapsed deed restrictions. A few were lost when several rental developments went into foreclosure during the housing downturn of the late 1980s and early 1990s; these are not counted in the following analysis. This analysis assumes that all affordable units tracked in the comprehensive permit database continue to be affordable.

Affordable Housing Production Using Comprehensive Permits

Over the past two decades, local zoning has become more restrictive in many municipalities, thereby necessitating the use of Chapter 40B to build at all. For example, according to CHAPA (2009), between 2002 and 2006, approximately 34% of all housing production in Greater Boston (excluding the City of Boston) was directly attributable to Chapter 40B, including nearly 80% of all rental housing production.

¹⁶ This database builds on a 2001 database originally compiled by Professor Sharon Krefetz, based on a survey administered to all Massachusetts municipalities, although some had not responded. The database has been further developed by housing consultant Bonnie Heudorfer and CHAPA staff. However, it is likely that the current Chapter 40B database still does not include all older comprehensive permit projects; these continue to be added as information becomes available. The 40B database used in this analysis was based on information available as of January 1, 2010.

Since the early 1970s, comprehensive permits have been used to produce nearly 58,000 housing units (see Table 1). Of these, 70% are rental and 30% are for homeownership. Over one third (36%) of these units are targeted to special needs populations, including the elderly and disabled. With the exception of the age-restricted units, over 90% of the special needs units are affordable to households at or below 80% of AMI. Overall, 53% of the units (30,703) in comprehensive permit projects are affordable (i.e., reserved for and affordable to households with incomes at or below 80% of AMI) and most (84%) of these 30,703 affordable units are rental. This analysis, as well as the data presented in Tables 2, 4, and 6, highlights comprehensive permit units built that are actually affordable, rather than those units that were credited toward meeting the 10% goal.¹⁷

Table 1: Housing Production through the Chapter 40B Comprehensive Permit Process: 1969-2010

| Type | Overall (% of all units) | Affordable (as % of type) |
|----------------------|--------------------------|---------------------------|
| Rental | 40,266 (70%) | 25,829 (84%) |
| Homeownership | 17,532 (30%) | 4,874 (16%) |
| Total | 57,798 (100%) | 30,703 (100%) |
| | | |
| Family | 36,990 (64%) | 14,007 (38%)* |
| Elderly | 15,124 (26%) | 14,121 (93%) |
| Age-restricted (55+) | 4,346 (8%) | 1,298 (30%) |
| Disabled | 670 (1%) | 640 (96%)** |
| Other Special Needs | 668 (1%) | 637 (95%) |
| Total | 57,798 (100%) | 30,703 (53%) |

* All the remaining percentages in this column are based on the overall number of housing units. Thus, out of the 36,990 family units produced, 14,007 (38%) were affordable.

** In the case of housing for persons with disabilities or other special needs, units reserved for supers or resident managers are excluded from the affordable count.

Source: Research team analysis based on data provided by CHAPA, “40B list January 2010.”

¹⁷ This is consistent with the New Jersey analysis (see Chapter 5), which counts only those units actually built in a particular municipality, even though the state has a different way of measuring production, giving credit to municipalities that have provided funds for affordable housing to be built elsewhere.

Table 2 presents further information concerning the type of affordable housing that has been produced by municipalities that have developed housing through the Chapter 40B comprehensive permit process. In the first three columns, the “overall” figures pertain to total production using comprehensive permits and which are listed in the SHI. The second three columns pertain to the units built through the comprehensive permit process that are affordable. While some relationships are stronger on one side than the other, there are not dramatic differences. Both elderly and rental housing are positively correlated with population density and the overall amount of affordable housing produced, and negatively correlated with the growth in the housing stock.

Table 2: Correlations between Demographic Characteristics and Type of Housing for Municipalities that Have Built Housing Using the 40B Comprehensive Permit Process (N=246)

| | Overall | | | Affordable | | |
|--|----------------------|----------|----------------|------------|----------|----------------|
| | Elderly ⁺ | Rental | Home-ownership | Elderly | Rental | Home-ownership |
| Population density | 0.37*** | 0.52*** | 0.06 | 0.33** | 0.50*** | 0.01 |
| Percent white | -0.14** | -0.29*** | -0.01 | -0.12* | -0.30*** | -0.03 |
| Median income | -0.06 | -0.01 | 0.32*** | -0.06 | -0.05 | -0.29*** |
| Percent change in housing stock, 1970-2000 | -0.22 | -0.20*** | 0.22*** | -0.21*** | -0.21*** | -0.29*** |
| Percent of housing stock affordable | 0.36*** | 0.60*** | 0.04 | 0.33*** | 0.60*** | 0.06 |

+ This includes age-restricted, 55+ units.

* = significant at 10% level

** = significant at 5% level

*** = significant at 1% level

Sources: Research team analysis based on data provided by CHAPA, “40B list January 2010,” Massachusetts Department of Housing and Community Development, “Chapter 40B Subsidized Housing Inventory (SHI) as of April 1, 2010” (<http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm>); Geolytics Census CD 1970; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April, 2010.

While conventional wisdom suggests that areas with more white residents (and higher incomes) are more likely to host elderly developments, rather than other types of affordable housing, Table 2 reveals a negative correlation between white residents and elderly units. Thus, the more white residents, the fewer elderly housing units the municipality built using a comprehensive permit. The development of homeownership units using comprehensive permits is positively correlated with median income and growth in the housing stock. In other words, homeownership opportunities (primarily developed since the late 1990s) are associated with higher-income and higher growth areas, while rental opportunities (developed between 1970 and 2010) are associated with denser, less-white, slower-growth areas (i.e., cities and built-out suburbs).¹⁸ The same relationships hold, with very little variation, for both the affordable and not affordable units produced through the comprehensive permit process.

Table 1 showed that 30,703 affordable units were built through the Chapter 40B comprehensive permit process. This production came both from the 53 municipalities that had reached the 10% goal as of April 1, 2010 (6,902 units) as well as from the 298 municipalities that had not (23,801 units). (As discussed in the following section, the number of municipalities that exceeded the 10% goal declined to 39 municipalities, with the release of 2010 census data on the number of year-round housing units.) As of June 30, 2011, Boston, which has exceeded the 10% goal since the inception of Chapter 40B, has 48,503 units listed on the SHI, or about 20% of the total SHI.

Table 3 shows that in 1970 there were 1,836,198 year-round housing units in Massachusetts and by 2010 this number had grown to 2,692,186 units, an increase of 855,998 units. The 30,703 affordable (income-restricted) units created during that period using comprehensive permits accounted for 3.6% of the increase; all production through the comprehensive permit process (whether affordable units or not = 57,798 units) accounted for 6.8% of the increase.

Between 1972 and June 2011, the number of units in the SHI that count toward each municipalities' 10% goal rose from about 84,054 to about 247,042¹⁹ -- a net increase of about 162,188 units. CHAPA estimates that the June 2011 SHI count includes about 15,750 group home beds and homeowner rehabilitation loan units. Excluding those units, the net increase in SHI units between 1972 and 2001 was about 146,438 units or just over 17% of the increase in the state's total number of year round housing units.

¹⁸ Many cities and towns have developed affordable homeownership units without using a comprehensive permit by taking advantage of vacant or blighted lots, by using their urban renewal powers, or by creating multifamily condominiums.

¹⁹ This includes 2,000 units that CHAPA estimates were added to the SHI between DHCD's June 30, 2011 count and the end of 2011. All data based on CHAPA estimates were provided by Ann Verrilli and were offered as part of her ongoing data collection efforts. The data was continuing to be refined as this report was completed. Private email communications, December 22, 2011 and January 11 and 17, 2012. Cited with permission.

Table 3: Statewide Changes in Subsidized Housing Inventory since Start of Chapter 40B Program

| | 1972 | 1983 | 1993 | 2001 | 2011 | No. (%) change in SHI from 1972-2011 | Net no. (%) change in SHI from 1972- 2011 ⁺ | Net total SHI ⁺⁺ |
|---|---------------|-----------|-----------|-----------|-----------------------|---|---|-----------------------------|
| Total SHI units | 84,854 | 165,479 | 193,921 | 218,140 | 247,042 ⁺⁺ | 162,188 (191%) | 146,438 ⁺⁺⁺ (173%) | 231,292 |
| Approximate Number of Affordable Units⁺⁺⁺ | 84,054 | | | | | | 117,150 (139%) | 201,204 |
| Total Year-Round Housing Units (decennial census) | 1,836,198 | 2,140,141 | 2,382,210 | 2,526,963 | 2,692,186 | 855,998 (47%) | | |
| % SHI stock | 4.6% | 7.7% | 8.1% | 8.6% | 9.2% | | | |

+ Excludes 15,750 group home beds and homeowner rehabilitation loan units.

++ Estimated figure updated by CHAPA, December 22, 2011, based on DHCD SHI, June 30, 2011, which shows SHI totaling 245,042 units.

+++ These numbers are based on preliminary estimates provided by CHAPA which show that about 80% of the units listed on the SHI since 1972 are affordable. CHAPA estimates that in 1972 only about 800 units listed in the SHI were not affordable. Ann Verrilli. Private email communications, December 22, 2011, January 11 and 17, 2012. Cited with permission.

Source: CHAPA, 2011, 2012

DHCD does not publish the number of affordable units. However, CHAPA has estimated, that, excluding the 15,750 group home beds and homeowner rehabilitation loan units, affordable SHI units (reserved for households with incomes at 80% or less of AMI) rose by about 117,150 units between 1972 and 2011 (from about 84,054 to about 201,204 units). The 117,150 affordable units are equal to 13.7% of the net increase to the state's year-round housing unit count between 1970 and 2010.

As shown in Table 1, 30,703 affordable units were produced with comprehensive permits; this accounted for 26% of the total growth in the number of affordable units produced since 1972 (117,150). Table 3 also shows the steady growth in the percent of the state's overall housing stock that is included in the SHI count, from 4.6% in 1972 to 9.2% in 2011.

Using two different statistical analyses, Tables 4 and 5 present very similar findings about the demographic characteristics of municipalities that are using the Chapter 40B comprehensive permit process.

Table 4 presents a number of correlations for all municipalities, whether or not they have any affordable housing. Chapter 40B affordable housing production is positively correlated with municipalities that are denser in terms of population and that have higher median incomes, while the percent of the population that is white is negatively correlated with affordable housing production. Thus, affordable housing through the Chapter 40B comprehensive permit process is more often produced in municipalities with greater densities and higher median incomes, while production is less often associated with municipalities with larger white populations. The growth in the municipality, as measured by the change in the size of the housing stock, is not significantly correlated with housing production using the 40B comprehensive permit process. The 35 municipalities with no affordable units in the SHI as of June 2011 were small and rural, with an average population of 514 units and an average housing density of 19.3 units per square mile (the latter is one-seventeenth the statewide average of 343 housing units per square mile of land area).

Table 4: Correlations between Demographic Characteristics and Production Using Chapter 40B Comprehensive Permit Process for all Municipalities (N=351)

| | Number of Comp. Permits issued | Number of units built under 40B | Number of units built under 40B, per 10,000 residents | % of units that are affordable in 40B developments |
|--|--------------------------------|---------------------------------|---|--|
| Population density | 0.52*** | 0.59*** | 0.38*** | 0.32*** |
| Percent white | -0.36*** | -0.37*** | -0.20*** | -0.19*** |
| Median income | 0.31*** | 0.32*** | 0.34*** | 0.05 |
| Percent change in housing stock, 1970-2000 | 0.00 | -0.06 | 0.03 | -0.09* |
| Percent of housing stock affordable | 0.53*** | 0.59*** | 0.53*** | 0.34*** |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by CHAPA, “40B list January 2010”; Massachusetts Department of Housing and Community Development, “Chapter 40B Subsidized Housing Inventory (SHI) as of April 1, 2010” (<http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinVENTORY.htm>); Geolytics Census CD 1970; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April, 2010.

Table 4 also shows that the percent of the housing stock that is affordable is positively correlated with comprehensive permit activity. This is a further indicator that 40B is a critical strategy in the state’s overall affordable housing production efforts.

The caveat noted in Chapter 1 about correlations merits repeating: correlations do not suggest causality. Therefore, we *cannot* say that if a municipality has a higher density, for example, that this is the *cause* of a greater use of the comprehensive permit process. The analyses only reveal relationships between one variable and another.

Consistent with the findings presented in Table 4, the following Table (#5) shows that municipalities where the Chapter 40B comprehensive permit process has been used tend to be denser in terms of population, have fewer white residents, and higher median incomes than municipalities where no comprehensive permits have been issued. They also have a relatively larger affordable housing stock. Not surprisingly, municipalities that have no units built with a comprehensive permit tend to be small rural or exurban municipalities (71 had populations below 5,000 in 2010) or older cities (including Boston) with less restrictive zoning.

Table 5: Comparison of Median Demographic Characteristics by Whether Municipalities Have Used Chapter 40B Comprehensive Permit Process

| | Municipalities that have used Chapter 40B comprehensive permit process (N=246) | Municipalities that have not used Chapter 40B comprehensive permit process (N=105) |
|--|--|--|
| Population density (residents per sq. mi.) | 700*** | 90 |
| Percent white | 96%*** | 97% |
| Median income | \$57,716*** | \$49,583 |
| Percent change in housing stock, 1970-2000 | 58% | 61% |
| Percent of housing stock affordable | 6%*** | 1% |

* = significant at 10% level

** = significant at 5% level

*** = significant at 1% level (the lower the level, the stronger the significance)

Sources: Research team analysis based on data provided by CHAPA, “40B list January 2010”; Massachusetts Department of Housing and Community Development, “Chapter 40B Subsidized Housing Inventory (SHI) as of April 1, 2010” (<http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm>); Geolytics Census CD 1970; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April, 2010.

In view of the very low median density of municipalities that have not used comprehensive permits, the places that have used the Chapter 40B comprehensive permit process are more metropolitan (i.e., urban and suburban) than places with no development using a comprehensive permit; the latter tend to be rural or exurban municipalities. While our general assumption is that development in higher density locales is indicative of a program not being successful at breaking down exclusionary zoning barriers, in this case we are simply not sure, since the relatively higher density of municipalities where comprehensive permits have been used may mean that it is being used in exactly the kinds of locales to which the program is targeted. Thus, while our level of analysis is not able to offer definitive conclusions, these findings suggest that the availability of the comprehensive permit process may be encouraging development in relatively denser (more suburban than rural) locales. Similarly, the relatively higher white populations in places where Chapter 40B has not been used may also be indicative of more rural, as opposed to suburban municipalities. Smart growth advocates and many others would say that creating housing in areas with relatively more compact development patterns is desirable. Indeed, 40B works best in non-rural locations because rural sites present special challenges, in terms of market demand and limited infrastructure.

A total of 316 municipalities have at least some affordable housing, as recorded in the state’s SHI. Over three quarters of these municipalities (N=246), and 70% of all municipalities in Massachusetts, have produced affordable housing using the Chapter 40B comprehensive permit process. Examining only those municipalities with at least some affordable housing, Table 6 shows correlations between the percent of a municipality’s affordable housing that was built using Chapter 40B and the demographic characteristics selected for this study. It shows a positive correlation between this percentage and the percent of white residents, median income, and the change in the housing stock from 1970-2000. In other words, municipalities where a greater share of the affordable housing was built using comprehensive permits have more white residents, higher median incomes, and grew at a faster rate than municipalities that have lower percentages of affordable housing built with comprehensive permits. This provides a compelling piece of evidence that Chapter 40B is being used in a wide array of municipalities to produce affordable housing.

Table 6: Correlations between Demographic Characteristics and Percent of Affordable Units Built Using Chapter 40B Comprehensive Permit Process for all Municipalities with Affordable Housing (N=316)

| | Percent of affordable units built using Comprehensive Permits |
|--|---|
| Population density | -0.04 |
| Percent white | 0.12** |
| Median income | 0.37*** |
| Percent change in housing stock, 1970-2000 | 0.29*** |
| Percent of housing stock affordable | -0.03 |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by CHAPA, “40B list January 2010”; Geolytics Census CD 1970; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April, 2010.

With the important caveat that it is based on median values over relatively small populations in some cases, Table 7 reveals some interesting differences between municipalities when grouped by the percent of the overall housing stock that was affordable as of April 1, 2010. Consistent with several prior findings, this table shows that the greater the amount of affordable housing in a municipality, the higher the density and the smaller the white population. In addition, Table 7 shows that, other than the 35 municipalities with no affordable housing, faster growing municipalities have less affordable housing.

Table 7: Median Characteristics of Municipalities with Varying Amounts of Housing in Subsidized Housing Inventory, as of April 1, 2010 (N=351)

| | Percent of Subsidized Housing According to Subsidized Housing Inventory | | | | | |
|--|---|---------------------|--------------------|--------------------|--------------------|-------------------------------------|
| | 0 (N=35) ⁺ | 0.01-1.99 (N=41) | 2.0-4.99 (N=98) | 5.0-7.99 (N=86) | 8.0-9.99 (N=38) | 10% or more (N=53) ⁺⁺ |
| Population density (residents per sq. mi.) | 35 | 132 | 545 | 656 | 1,047 | 1,719 |
| Percent white | 98% | 97% | 97% | 96% | 95% | 90% |
| Median income | \$51,000 | \$55,568 | \$59,463 | \$53,266 | \$52,394 | \$47,979 |
| Percent change in housing stock, 1970-2000 | 74% | 99% | 64% | 57% | 47% | 37% |
| Number of 40B comprehensive permits issued | 0 | 0 | 2 | 3 | 4 | 4 |
| Number of units built with comprehensive permits | 0 | 0 | 66 | 147 | 164 | 307 |

⁺ An additional 62 municipalities in Massachusetts have affordable housing, but none of these units were produced using Chapter 40B or the LIHTC program. These units were presumably built through a program that predated these initiatives, such as the public housing program or the Section 8 New Construction Substantial Rehabilitation program. Therefore, a total of 254 municipalities increased their affordable housing stocks since the start of Chapter 40B.

⁺⁺ As noted earlier, and as discussed in the following section, this number declined to 39 municipalities with the release of 2010 census data.

Sources: Research team analysis based on data provided by CHAPA, “40B list January 2010,” Massachusetts Department of Housing and Community Development, “Chapter 40B 21 Subsidized Housing Inventory (SHI) as of April 1, 2010” (<http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm>); Geolytics Census CD 1970; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April, 2010.

Progress toward 10% Goal

In view of the state's goal to make it easier to develop low and moderate income housing in a wider range of municipalities and that all cities and towns should have a subsidized housing stock equal to at least 10% of their year-round housing stock, one way of assessing the accomplishments of Chapter 40B is to examine the growth in the number of municipalities that have reached the 10% goal. While the Chapter 40B comprehensive permit process is only partially responsible for municipalities approaching or attaining the 10% goal, it likely played some role for all but the few municipalities that had attained the goal before the statute went into effect. In 1972 (a few years after the enactment of Chapter 40B), only 4 municipalities were at 10% or above (Amherst, Boston, Fall River, and Holyoke).

In late 2010, based on year-round housing stock figures from the 2000 census, the number of municipalities that exceeded the 10% affordable housing goal had risen to 53 municipalities (15%). However, in mid-2011 DHCD released new data on the total number of year-round housing units based on the 2010 census. As a result, the number of municipalities that exceeded the 10% goal declined to 39 municipalities (11%). The decline is due to the 2011 affordable housing percentage being based on the larger number of housing units recorded in the 2010 census, compared to the 2000 census.²⁰ Although there was a net reduction in 14 municipalities at or above the 10% goal using the higher overall 2010 housing stock figures,²¹ the actual number of affordable housing units recorded in each of these municipalities, whether above or below 10% , either did not change or went up slightly. Furthermore, as shown in Table 8, the number of municipalities that were at least half way to meeting the 10% goal stayed about the same between mid-2010 and the beginning of 2011, based on either the 2000 and 2010 housing stock census figures: 177 (50%) compared with 171 (49%), respectively.

²⁰ DHCD released one more Subsidized Housing Inventory, after the one used in this analysis, which was still based on the 2000 census figures for total housing units. There was very little change in the numbers, although one additional municipality was recorded as having reached the 10% goal, for a total of 54.

²¹ As shown in Table 8, 16 municipalities dropped out of the 10% or higher group and 2 municipalities moved into the above 10% group.

Table 8: Changes in Subsidized Housing Inventory from April 1, 2010 to June 30, 2011

| | Subsidized Housing Inventory April 1, 2010 (based on number of housing units from 2000 census) Data used in this analysis | | Subsidized Housing Inventory June 30, 2011 (based on number of housing units from 2010 census) | | Net change | Explanation of change |
|-------------|---|--------|---|--------|------------|--|
| 10% or more | 53 | 15.1% | 39 | 11.1% | (-)14 | 16 municipalities left this group and dropped below 10%⁺ 2 municipalities attained 10% goal and entered this group |
| 8.0-9.99 | 38 | 10.8 | 38 | 10.8 | 0 | 18 municipalities entered this group (16 of these had dropped down from 10% or more group; 2 went up to this group) 0 municipalities left this group and reached 10% goal 18 municipalities left this group and dropped below 8.0% |
| 5.0-7.99 | 86 | 24.5 | 94 | 26.8 | (+) 8 | 16 municipalities dropped below 8.0% and entered this group 3 municipalities that had been below 5.0% entered this group. 3 municipalities left this group and went above 8.0% (NOTE: one municipality from this group, Concord, reached the 10% goal.) 8 municipalities left this group and dropped below 5.0% |
| 2.0-4.99 | 98 | 27.9 | 103 | 29.3 | (+) 5 | 10 municipalities dropped below 5.0% and entered this group 3 municipalities that had been below 2.0% entered this group. 5 municipalities left this group and went above 5.0% (NOTE: one municipality from this group, Northborough, reached the 10% goal.) 3 municipalities left this group and dropped below 2.0% |
| 0.01-1.99 | 41 | 11.7 | 42 | 12.0 | (+) 1 | 4 municipalities that had been above 2.0% entered this group. 3 municipalities left this group and went above 2.0% |
| 0 | 35 | 10.0 | 35 | 10.0 | 0 | None of the towns with 0 units added any units |
| Total | 351 | 100.0% | 351 | 100.0% | | |

⁺Explanations in bold indicate the number of municipalities leaving the specific group.

Source: Department of Housing and Community Development, Subsidized Housing Inventories, April 1, 2010 and June 30, 2011

Based on the total number of housing units listed in the 2010 census:

- more municipalities moved to a lower percentage group of affordable housing produced (45) than moved to a higher percentage group (14) (see explanations in bold in Table 2);
- there was no change in the number of municipalities that had no affordable housing 35 (10%).

The above information provides insights into how the denominator (the total number of year-round housing units in a municipality) impacts the municipality's status relative to the 10% goal. However, since this study was carried out prior to the release of the new census figures, the following analyses based attainment of the 10% goal on the state's April 1, 2010 SHI, which used the total housing stock figures from the 2000 census.

In addition to municipalities that had attained the 10% affordable housing goal as of April 1, 2010, three other municipalities had met the land area standard (low-moderate income housing exists on sites comprising more than 1.5% of the municipalities' zoned land). Twelve municipalities had also met short-term planned production goals, thereby receiving immunity from a developer appeal to the HAC for one to two years.²² Municipalities that have met the 10% threshold may, at their discretion, still accept proposals for 40B developments, although a negative local ZBA decision could not be appealed to the HAC.

²² Less than one year later, March 14, 2011, the number of municipalities with certified compliant production plans had dropped to 6, with one-half of those due to expire by the end of 2011. The other three had expiration dates in 2012.

http://www.mass.gov/?pageID=eheadterminal&L=3&L0=Home&L1=Community+Development&L2=Chapter+40B+Planning&sid=Ehed&b=terminalcontent&f=dhcd_cd_ch40b_planprod&csid=Ehed (accessed August 23, 2011).

While opponents of 40B note that, after nearly 40 years, relatively few municipalities have reached the 10% goal, another interpretation of the record reveals steady, albeit slow, movement of cities and towns adding affordable housing units and making strides toward this goal. As shown in Table 9, over the nearly four decades between 1972 and 2011, 35 additional municipalities crossed over to the 10% or above level. In addition, a declining number of municipalities had no units listed in the state's SHI. While 55% had no such housing in 1972, just 10% of municipalities -- with less than 1% of the state's year-round housing stock -- were without any subsidized units as of 2011. In 1972, 96% of municipalities were less than half-way to reaching the 10% goal; as of 2011, this was true for only about one-half of the state's municipalities. Moreover, 22% were at 8% or better, compared with only 2% in 1972.

Table 9: Changes in Municipalities' Progress toward Meeting 10% Goal

| | 1972 | | 1983 | | 1993 | | 2001 | | 2011 | |
|-----------------|--------|-------------------|---------|------|---------|-------------------|---------|-------------------|---------|------|
| | N | % | N | % | N | % | N | % | N | % |
| 0 | 193 | 55% | 106 | 30% | 75 | 21 % | 43 | 12% | 35 | 10% |
| 0.01-1.99 | 65 | 19 | 38 | 11 | 40 | 11 | 56 | 16 | 42 | 12 |
| 2.0-4.99 | 76 | 22 | 116 | 33 | 130 | 37 | 135 | 38 | 103 | 29 |
| 5.00-7.99 | 11 | 3 | 55 | 16 | 68 | 19 | 73 | 21 | 94 | 27 |
| 8.0-9.99 | 2 | 1 | 17 | 5 | 20 | 6 | 17 | 5 | 38 | 11 |
| 10% + | 4 | 1 | 19 | 5 | 18 | 5 | 27 | 7 | 39 | 11 |
| Total | 351 | 100% ⁺ | 351 | 100% | 351 | 100% ⁺ | 351 | 100% ⁺ | 351 | 100% |
| Total SHI units | 84,854 | | 165,479 | | 193,921 | | 218,140 | | 247,042 | |

⁺ error due to rounding

Source: CHAPA, 2011

Yet another way of exploring the progress being made toward the 10% goal is by examining the extent to which the SHI is keeping pace with the overall increase in the stock of year-round housing units. As presented earlier, in Table 3, there were 2,526,963 year-round housing units in 2000, compared with 2,692,186 units in 2010, an increase of 165,223 units, or 6.5%. However, the number of units listed as part of the SHI grew at about double that pace; at the start of the decade, in 2001, there were 218,140 units counted in the compared with 247,042 units as of June 30, 2011, a net increase of 28,902 units, a 13.2% increase.

As of late 2010, the database on Chapter 40B developments indicated that a total of 1,030 comprehensive permits had been issued in 246 cities and towns. In other words, 70% of Massachusetts' municipalities have developed housing through the Chapter 40B comprehensive permit process. Also, as previously explained, all rental units built with a comprehensive permit count toward the 10% goal as long as at least 25% of the units are affordable to households earning below 80% of AMI. However, in mixed-income homeownership developments, only the income-restricted units count toward this goal. While the median number of units built using a comprehensive permit per municipality is 38, the median number of affordable units is slightly lower (36) (See Appendix V-1).

Before presenting the statistical analyses, it is worth noting that among the municipalities that have attained the 10% goal, Concord, Lincoln, and Lexington, are in the top 15 most affluent municipalities in the state, located in the suburbs of Boston. This provides an important bit of evidence that affordable production is feasible even in some of the most exclusive areas.

There are a number of significant differences between municipalities that had attained the 10% goal as of April 1, 2010 and those that had not. In presenting this information, however, it is important to keep in mind a point previously discussed: attainment of the 10% goal is dependent on the overall number of housing units in a municipality, which changes every ten years when new census figures are released.

Table 10 shows that municipalities that had attained the 10% goal as of April 1, 2010 are denser, have smaller white populations and lower incomes than those that did not. The former municipalities also grew at a significantly slower rate between 1970 and 2000, suggesting that these are the more built-out cities and towns and inner-ring suburbs. Not surprisingly, municipalities that attained the 10% goal exhibit more overall 40B activity than municipalities that have not, as demonstrated by the higher median number of comprehensive permits issued and the higher median number of units built with comprehensive permits. We also did a similar analysis removing the 4 municipalities that had attained the 10% goal when Chapter 40B went into effect and found little change in the relationships.

Table 6, presented earlier, revealed that municipalities with relatively high comprehensive permit activity have higher median incomes than those with less activity, Table 10 shows that municipalities that had attained the 10% goal have lower median incomes than those locales that had not attained this goal. These findings are consistent: many of the locales that have at least 10% of their housing stocks as affordable are the large cities, which have larger low-income populations. In contrast, municipalities that are working to attain the 10% goal and are using the 40B comprehensive permit process, tend to be more affluent.

In addition, as would be expected, Table 10 shows more affordable housing production overall in municipalities that had attained the 10% threshold than those that had not. Consistent with this finding, the former municipalities also had more comprehensive permits issued, more housing built under comprehensive permits, and far more affordable units per 10,000 residents than municipalities that had not attained the threshold.

Table 10: Comparison of Median Characteristics of Municipalities by Attainment of 10% Affordable Housing Goal as of April 1, 2010 N=351

| | Municipalities that had attained 10% affordable housing goal (N=53) | Municipalities that had not attained 10% affordable housing goal (N=298) |
|--|---|--|
| Population density (residents per sq. mi.) | 1,719*** | 397 |
| Percent white | 90%*** | 97% |
| Median income | \$47,979*** | \$54,761 |
| Percent change in housing stock, 1970-2000 | 37%*** | 63% |
| Percent of housing stock affordable | 12%*** | 4% |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by CHAPA, “40B list January 2010”; Massachusetts Department of Housing and Community Development, “Chapter 40B Subsidized Housing Inventory (SHI) as of April 1, 2010” (<http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm>); Geolytics Census CD 1970; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April, 2010.

Table 11 presents the correlations between the percent of affordable housing in a municipality, and the characteristics of that municipality. It presents data on how much of the 10% goal a municipality had attained, for all municipalities that had not attained the 10% goal as of April 1, 2010. Consistent with findings presented in Table 9, making progress toward the 10% goal is positively (and strongly) correlated with population density, and negatively correlated with the percent of the population that is white and the percent change in the housing stock. Thus, according to the analysis presented in Table 11, municipalities that are denser and have fewer white residents, and that grew more slowly between 1970 and 2000, are associated with being closer to meeting the 10% affordable housing goal.

Table 11: Correlations between Percent of Subsidized Housing According to the Subsidized Housing Inventory and Characteristics of Municipalities that Had Not Attained 10% Affordable Housing Goal as of April 1, 2010 (N=298)

| | Percent of subsidized housing according to Subsidized Housing Inventory |
|--|---|
| Population density (residents per sq. mi.) | 0.61*** |
| Percent white | -0.36*** |
| Median income | 0.04 |
| Percent change in housing stock, 1970-2000 | -0.31*** |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on Massachusetts Department of Housing and Community Development, “Chapter 40B Subsidized Housing Inventory (SHI) as of April 1, 2010” (<http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm>); Geolytics Census CD 0; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April, 2010.

The data presented in Table 12 shows that municipalities that had attained the 10% affordable housing goal as of April 1, 2010 with the use of comprehensive permits, have significantly higher median incomes and higher housing growth rates than municipalities that attained the 10% goal without using comprehensive permits. Additionally, these municipalities seem to be less dense and have relatively more white residents, although these differences are not statistically significant (possibly due to the small sample size rather than to a true lack of difference). These are important findings (and consistent with several results shown in Table 5), Table 12 demonstrates that municipalities where Chapter 40B has been used to the extent that the 10% threshold was attained have characteristics that are associated with more exclusionary locales.

Table 12: Median Values of Municipalities that Attained 10% Affordable Housing Goal as of April 1, 2010, by Whether Comprehensive Permits Were Used (N=53)

| | Municipalities with comprehensive permits (N=44) | Municipalities with no comprehensive permits (N=9) |
|--|---|---|
| Population density (residents per sq. mi.) | 1,634 | 2,964 |
| Percent white | 91% | 87% |
| Median income | \$54,136 | \$36,849** |
| Percent change in housing stock, 1970-2000 | 38% | 20%** |
| Percent of housing stock affordable | 11% | 12% |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by CHAPA, “40B list January 2010,” Massachusetts Department of Housing and Community Development, “Chapter 40B Subsidized Housing Inventory (SHI) as of April 1, 2010” (<http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinVENTORY.htm>); Geolytics Census CD 1970; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April, 2010.

Overall Assessment

Chapter 40B has, for more than 40 years, been a major contributor to the state's affordable housing agenda and continues to be a critical tool in producing housing throughout the Commonwealth. As of fall 2011 it had been used to produce nearly 58,000 units, with 53% of these units affordable. Chapter 40B also has been enormously successful in stimulating the production of rental housing, with 84% of the affordable stock being for rent, as opposed to homeownership units. Also, as mentioned several times in the chapters that follow, Chapter 40B is viewed by key informants across the country, as one of the best strategies for encouraging all municipalities to produce affordable housing.

The 10% affordable housing goal is easy to understand and there is a certain sense of equity in it being a statewide goal, applicable to all municipalities. It is also relatively easy to administer, particularly when viewed in the context of the complexity of some other states' programs, particularly those in New Jersey and California. The HAC is an effective, non-judicial forum, which allows developers a mechanism to appeal local zoning decisions with minimal cost. The ability of the HAC to overturn local zoning, thereby allowing developments to proceed at higher densities or with multifamily dwellings, serves as an important threat that often stimulates a negotiated settlement between the developer and the municipality. Changes in Chapter 40B over the years have also created various incentives for municipalities to be proactive in encouraging the development of affordable housing; they can receive immunity from HAC overrides if they are making progress toward meeting affordable housing goals.

Opposition to 40B has been strong in some areas of the state, primarily on the part of municipal officials and residents in many suburban towns. Over the history of the law, the opposition increases during periods when there has been more development activity (mid-1980s and early 2000s). As noted earlier, in November 2010, voters had the opportunity to repeal Chapter 40B, through a ballot initiative. However, over 58% of the electorate voted to retain the statute and supporters were in the majority in 275 (78%) of the state's 351 cities and towns.

The criticisms of Chapter 40B notwithstanding, opponents have not put forward any serious proposals about how the state's affordable housing agenda could be better served. In addition, municipalities have had a long time to create zoning plans that would better accommodate affordable housing, without developers needing to initiate a 40B process. In the absence of such plans, 40B has been effective at countering exclusionary zoning practices. In addition, 40B has served as an important stimulus for municipalities to develop affordable housing using other mechanisms such as Chapter 40R (discussed earlier) and inclusionary zoning, or by actively working with developers to create a suitable project under the statute. Chapter 40B is likely the key impetus for municipalities to attain the state's 10% affordable housing goal. Indeed, nearly one-half of Massachusetts' municipalities are at least half-way to meeting the 10% goal. Interestingly, some 79% of the state's population lives in a municipality that is at least half-way to the 10% goal, compared to 34% in 1972.²³

²³ CHAPA data provided by Ann Verrilli. Private email communication, December 22, 2011. Cited with permission.

Although the attainment of the 10% affordable housing goal can change with each decennial census as the year-round housing unit count is updated,²⁴ the more than 40 year history of the program demonstrates slow and steady progress by municipalities.

Furthermore, there is evidence that Chapter 40B has had a positive impact on the supply of affordable housing in more affluent municipalities. On the one hand,

- Out of all municipalities, those that have more Chapter 40B affordable housing production tend to have higher median incomes and the larger the percent of the housing stock that is affordable.
- Among only the 316 municipalities that have some affordable housing, the greater the share of the affordable housing that was built using comprehensive permits, the higher the median incomes and the larger the white population. These municipalities also grew at a faster rate than municipalities with lower percentages of affordable housing built with comprehensive permits.
- The Chapter 40B comprehensive permit process likely played some role in reaching the 10% goal for all but the few municipalities that had attained the goal before the statute went into effect.
- Municipalities that attained the 10% goal had more overall 40B activity than municipalities that did not.
- Municipalities that attained the 10% goal with the use of comprehensive permits have significantly higher median incomes and higher housing growth rates than municipalities that attained the 10% goal without using comprehensive permits.
- The more white residents, the fewer elderly housing units the municipality built through the 40B process.

On the other hand,

- Out of all municipalities, those that have more affordable housing produced through the Chapter 40B comprehensive permit process are associated with greater density and smaller white populations. This can be partially explained by the fact that municipalities that do not have comprehensive permit projects tend to be the smaller, rural municipalities, which typically have larger white populations.
- Municipalities that attained the 10% goal are associated with greater density, smaller white populations and lower incomes than those that did not. In part, this is because the municipalities that have reached the 10% goal include all of largest cities in the state which have larger populations of low income households.
- Municipalities that are closer to meeting the 10% affordable housing goal are associated with greater density, fewer white residents, and growing more slowly between 1970 and 2000. This may be explained by the fact that most of the housing growth over the past many decades has occurred in the eastern half of the state, which has historically been more densely settled than western Massachusetts.

²⁴ Indeed, there other changes can influence the extent to which a municipality attains the 10% goal, such as the loss of subsidized units built without using comprehensive permits, whose affordability restrictions have expired,

- Homeownership opportunities developed with a comprehensive permit are associated with higher-income and higher growth areas, while rental opportunities are associated with denser, less-white, slower-growth areas (i.e., cities and built-out suburbs), although this may reflect the differences in subsidy availability for ownership and rental development. That is, with limited public subsidy, funding for affordable homeownership development, developers must rely primarily on density bonuses in strong market areas to make mixed income homeownership development feasible. Built-out municipalities, by contrast, more often use existing units to create ownership opportunities.

Chapter 40B has been a major positive force behind the state's affordable housing production record. It is also likely a key reason behind the affordable housing production in numerous cities and towns that would not, on their own, have been likely to host such development. In other words, it has helped to significantly mitigate exclusionary zoning patterns in Massachusetts.

Chapter 3: Rhode Island

Overview

The Rhode Island Low and Moderate Income Housing Act was enacted in 1991 and directed all municipalities to attain a 10% (of their overall housing stock) low and moderate income (LMIH) threshold. The statute, which has been amended five times, requires each city and town, not already exempt by law, to prepare and seek state approval for a plan that incorporates LMIH goals, as part of its Comprehensive Plan. This plan must include a housing element that details how the state-mandated LMIH housing goals will be attained. Furthermore, all zoning decisions must be in accordance with the plan. If a municipality has less than 10% of its housing stock as affordable, and does not meet other rental housing thresholds, the denial of a comprehensive permit may be contested by any party and brought before the State Housing Appeals Board (SHAB). After reviewing whether the local decision is consistent with the municipality's plan, and taking into account the state's overall need for affordable housing, the SHAB may overrule the local decision and grant approval for the development. A number of important questions are not yet resolved about the Rhode Island statute. What specific types of positive efforts toward attainment of the housing goal would be sufficient to protect a municipality from unwanted development under the statute and immune from a SHAB override? In what ways would a developer's proposal need to diverge from a municipality's comprehensive plan for the proposal to be deemed out of conformance and subject to an override by the SHAB? And, in view of the July 2011 Comprehensive Planning law concerning the need for zoning to be consistent with each municipality's comprehensive plan, will Rhode Island adopt clear guidelines to enforce the statute? These questions notwithstanding, the statute's linkage of affordable housing goals to the planning requirement is what makes the Rhode Island program of particular interest in comparison to Chapter 40B.

Background

The Rhode Island Low and Moderate Income Housing Act was aimed at addressing the "acute shortage of affordable, accessible, safe, and sanitary housing for its citizens of low and moderate income, both individuals and families." The act also stated that: "it is necessary that each city and town provide opportunities for the establishment of low and moderate income housing." And further, "equal consideration shall be given to the retrofitting and rehabilitation of existing dwellings for low and moderate income housing and assimilating low and moderate income housing into existing and future developments and neighborhoods."¹ The need for this statute was explained as follows:

Without the Low and Moderate Income Housing Act...there is virtually no chance of homes [under \$150,000] being created in communities [where homes are not available in this price range]. These communities represent 89% of the total land area of the State. Most of the remaining land area is already at or near full build out, has limited potential for the creation of new moderate or low income homes, and/or has already met or exceeded its proportionate obligation to provide for affordable housing opportunities

¹ R.I.G.L. Section 45-53-2

under the Act. The Act prescribes a statewide solution to the affordable housing crisis (Blish and Cavanagh, 2003, p. 8).

As with Massachusetts, all municipalities are encouraged to attain a 10% (of their overall housing stock) LMIH threshold. However, Mandatory Community Comprehensive Plans also have been required of Rhode Island municipalities since 1991. It was further recommended that each municipality include a housing element as part of its comprehensive plan to either determine if it had met the 10% threshold or to demonstrate that it was dedicated to meeting this goal. The housing element portion of the plan includes land use and housing needs analyses, goals, strategies, and steps toward implementation. Comprehensive plans were submitted to the Statewide Planning Program in the Department of Administration which submitted them to Rhode Island Housing to check for consistency with the State's housing policy.² Despite this requirement, there is some question about the efforts and capacity of the municipalities, as well as the state, to react to the planning requirements appropriately.

Similar to Massachusetts, nonprofit, for-profit or limited dividend developers can apply to a city or town for a single comprehensive permit for a rental housing development (in lieu of seeking permits from all the relevant boards separately), as long as at least 20% of the units were subsidized by a federal or state program. In Rhode Island, however, only nonprofit developers can apply for a comprehensive permit for owner-occupied developments. Municipalities were given the power to approve the comprehensive permits. Developers whose applications were turned down at the municipal level were provided an appeals process at the state level. And, with another similarity to Massachusetts (the Housing Appeals Committee), the SHAB was created to review applications that were denied or granted by the local review board with conditions or requirements that would make the development infeasible, in terms of either the construction or operation. The SHAB was given the authority to override a local board's rejection of the comprehensive permit. Under the original statute, a municipality was given immunity from SHAB appeals if at least 10% of its housing stock was low or moderate income.

[It should be noted that throughout the Rhode Island case the phrase "low and moderate income housing" (LMIH) is used instead of the phrase used elsewhere in this report, "affordable housing," since this is the statutorily defined term used in Rhode Island.]

Modifications in the Low and Moderate Income Housing Act and Current Regulations

The act has had five sets of revisions: 1999, 2002, 2004, 2005 and 2006. In 1999 the act was amended to provide an alternative for municipalities to receive an exemption from the 10% threshold. An urban city or town must have at least 5,000 occupied year-round rental units; these units must comprise 25% or more of the city or town's year-round housing units and the low and moderate income units must comprise 15% or more of the rental stock.

² Since then, the Office of Housing and Community Development has become the primary reviewer of housing plans, along with the Statewide Planning Program. OHCD was not in existence until 2005 and therefore pre-dates the statute.

As of 2002, the Low and Moderate Income Housing Act had had little impact; no municipality in the state had developed or implemented a plan to meet the 10% goal and few had tried. Moreover, the 10% goal was not mentioned in most of the comprehensive plans filed with the state and most communities outside the urban areas had not attempted to make sure that at least 10% of all new development was LMIH (Blish and Cavanagh, 2003, p. 19).³

In 2002, in an environment of sharply escalating housing prices and a lethargic track record, the act was amended to allow for-profit developers to apply for a comprehensive permit for the development of LMIH owner-occupied units that would stay affordable as LMIH for a period of no less than 30 years; prior to this, for-profits could only apply for a comprehensive permit to build rental units, although the development of long-term affordable homeownership units was always permitted for nonprofits.

There was an explosion of interest. Between 2002 and 2004, 59 comprehensive permit applications were filed that involved the development of 7,610 new homes; nearly 28% were to be LMIH. Most of the interest came from for-profit developers, accounting for 52 of the comprehensive permit applications and over 94% of the total number of units being proposed. Just over the minimum number of units were set aside in these developments for LMIH households (22%). Of the 7 applications filed by the nonprofit developers, all 440 units were targeted for LMIH households (Rhode Island Housing Resources Commission, 2009).

This level of activity overwhelmed the local capacity to review applications and the number of appeals filed with the SHAB soared (Rhode Island Housing Resources Commission, 2008a). Many of the applications that were filed did not respond to the housing needs referenced by the municipalities' comprehensive plans which, at that time, did not provide for specific production strategies for attaining their LMIH 10% goal. In addition, municipalities "were concerned about density exceeding existing zoning, inappropriate sites, lack of infrastructure and a multitude of other issues related to such rapid development" (Rhode Island Housing Resources Commission, 2008a, p. 14). The state responded by calling a moratorium on the comprehensive permitting process and by creating a new task force to assess the issue.

Although many town officials and residents across the state were concerned about the high number of development proposals, and this is what prompted the moratorium, the private development community viewed the 2002 amendments as providing a valuable opportunity. Colin Kane, a partner with the Rumford, Rhode Island Peregrine Group, LLC, elaborated on his company's response:

When for-profit developers were allowed to build homeownership units, our firm was 'right on it.' We filed an application for a 144 unit development. By right, the land would have supported four homeownership units. But the land was right on the highway with water and sewer. This was an example of terrible by-right zoning, since there was too much infrastructure (water and sewer) for only four homes. We were far into the review process when the moratorium was called, and the process stopped with the moratorium being applied retroactively. We appealed to Superior Court and our application was

³ Annette Bourne, Assistant Director of Policy at Rhode Island Housing, added that: "Although the original comprehensive plans did have a housing element, they were not highly specific to attaining the 10% goal."

turned down. The process took five years and a couple of million dollars. We relied on a statute, but I have now lost faith in the rule of law.

Following the moratorium and the work of a special task force, the 2004 amendments were enacted. The Housing Act of 2004 included a number of key changes:

- 1) LMIH units have to comprise 25% of the total development (an increase from 20%);
- 2) A municipal government subsidy now counts as an appropriate public subsidy;⁴ a federal or state subsidy also may be attached to the development (previously, there was no such option of a “municipal government subsidy”);
- 3) Affordability has to be maintained for at least 30 years (previously, that period had been defined by the federal or state subsidy);
- 4) Developer applications for comprehensive permits can be reviewed by an appropriate local review board, such as the planning board/commission or by the zoning board of appeals/review (previously, it was only the Zoning Board of Review);
- 5) Owner-occupied units targeted to “moderate” income buyers (up to 120% of AMI, up from 80%) are now considered in the municipality’s stock of LMIH, and the definition for “affordable” rental was set at a maximum of 80% AMI;
- 6) All municipalities not meeting or not exempt from the 10% LMIH threshold are required to write and submit to the state an Affordable Housing Plan for the development of LMIH as part of the housing element of their comprehensive plan. This plan enables a municipality to guide the production of LMIH development based on household type, tenure, and location. Further, the plan is supposed to detail specific strategies for meeting the LMIH goal.
- 7) A municipality with an approved Affordable Housing Plan, and that is meeting local housing needs, may limit the total number of units proposed in comprehensive permit applications from for-profit developers to an aggregate of 1% of the total number of year-round housing units in that municipality.
- 8) Required drafting of a Five-Year State Strategic Housing Plan.
- 9) Required annual reporting by the Housing Resources Commission on the progress of the implementation of the law.
- 10) Required annual reporting by Rhode Island Housing (the state’s housing finance agency) on the issuance of letters of eligibility for comprehensive permits and the production of LMIH.

In short, each city or town is required to prepare and seek state approval for a comprehensive plan. This plan must include a housing element that details how the state-mandated LMIH housing goals will be attained. Furthermore, all zoning decisions must be in accordance with the plan. The SHAB reviews local decisions according to the statutory standards 1-5 listed above. Based on its review of the local record, SHAB is authorized to determine the consistency of the local decision with the municipality’s plan, and taking into consideration the state and local need for affordable housing. The SHAB has the authority to overrule local decisions and grant local approval for the development, subject to additional permits and conditions, such as wetlands

⁴ Municipal government subsidies include direct financial support, abatement of taxes, waiver of fees and charges, and approval of density bonuses and/or internal subsidies. An inclusionary zoning ordinance, for example, may also be considered as the municipal subsidy if it includes a density bonus.

permits, which in RI are granted by state agencies, as are permits for public water systems and physical alterations of existing roads.

Prior to the enactment of additional amendments in 2006, SHAB decisions could be appealed directly to the state Supreme Court. However, at the request of that court, and to bring SHAB appeals procedures in line with the state Administrative Procedures Act, SHAB appeals are now first heard in Superior Court. Thus, the Supreme Court is still the final arbiter, but the intermediate step, a hearing in Superior Court, was added. According to Brenda Clement, adding this extra layer in the appeal process is a negative change; “it does the reverse of streamlining the process.” Further complicating the review process is the right of persons aggrieved by any local land use decision to bring an appeal directly to Superior Court. Such persons retain this right of appeal, in addition to the right to partially intervene in appeals to the SHAB. In fact, abutters often seek concurrent appeals before both bodies.

Finally, although Rhode Island’s Statewide Planning Program, Land Use 2025 Plan, adopted in 2006, is not an amendment to the statute being discussed here (R.I.G.L. 45-53), it is worth mentioning since it attempts to provide explicit guidance about where growth, including housing development, should take place. According to Annette Bourne, Assistant Director of Policy at Rhode Island Housing, “the lack of public services outside the Urban Services Boundary is a serious concern.” Specifically:

The boundary represents the general extent of the areas within which public services supporting urban development presently exist, or are likely to be provided, through 2025. Within the boundary most land should be served by public water service and many areas will have public sewer service available as well. Public transit service should be generally available. Several watersheds and other sensitive resource areas were excluded from the boundary, indicating that protection of the resources involved must be a principle concern limiting future development intensity potential. Also included within the boundary, are other undeveloped areas which will have lower development intensities due to the presence of resources constraints and or limited infrastructure.⁵

To summarize the existing statute, municipalities that meet certain conditions are considered immune from developer appeals to the SHAB. These conditions include:

- The LMIH stock is in excess of 10% of the housing stock in the city or town, OR
- An urban city or town has at least 5,000 occupied year-round rental units. These units must comprise 25% or more of the city or town’s year-round housing units, with the LMIH units comprising 15% or more of the rental stock.

The municipality’s review board may deny a request for a permit if:

- 1) The municipality has an approved Affordable Housing Plan and is meeting housing needs, and the proposal is inconsistent with the local plan; or
- 2) The proposal is not consistent with local needs, including, but not limited to, the needs identified in an approved comprehensive plan and/or local zoning ordinances and procedures promulgated in conformance with the comprehensive plan; or

⁵ http://maps.provplan.org/edcmap/Metadata/RI_USB06.htm (accessed June 9, 2010)

- 3) The proposal is not in conformance with the comprehensive plan; or
- 4) The community has met or has plans to meet the goal of 10% of the year-round units or, in the case of an urban town or city, 15% of the occupied rental housing units as being low and moderate income housing; or
- 5) Concerns for the environment and health and safety of current residents have not been adequately addressed.

If a municipality denies a comprehensive permit and if the SHAB finds that the proposed development is consistent with the municipality's plan, with consideration of the state's overall need for affordable housing, the SHAB may overrule the local decision and grant approval for the development.

There are at least three critical differences between the Rhode Island statute and Massachusetts Chapter 40B. First, SHAB has a legislative mandate to consider conformance of the local decision with the local Affordable Housing Plan, while no such guideline is required of the Massachusetts Housing Appeals Committee. (However, as noted in Chapter 2, while there is no statutory mandate under 40B to consider affordable housing plans, under 40B regulations first adopted in 2002, Massachusetts allows communities that have produced a certain number of units in accordance with their plan to be appeal-proof for one or two years.) Second, in Rhode Island there is no attempt at regulating developer profits under the act. Nevertheless, the profit limits under 40B have been used as a guideline for how much profit a developer should be allowed to earn when demonstrating the kind of densities needed to keep the developer whole in implementing inclusionary zoning, for example. And, third, any aggrieved party, including abutters, may make a formal notice to intervene an approval or an approval with conditions regarding the issuance of a comprehensive permit with the SHAB. Massachusetts' HAC does, however, allow other parties to participate in the hearing on an appeal.

Implementation of the Housing Act

The Division of Planning in the Department of Administration oversees both the Statewide Planning Program and the Office of Housing and Community Development (OHCD). The Housing Resources Commission operates within the OHCD. The Housing Resources Commission was created in 1998 and its mission is to "provide housing opportunities for all Rhode Islanders, to maintain the quality of housing in Rhode Island, and to coordinate and make effective the housing opportunities of the agencies and subdivisions of the state."⁶ OHCD was established by administrative order in 2005, after the revisions to Rhode Island statute 45-53, so its existence is not recognized within the law. Among its several functions, OHCD administers the state production programs (the \$50 million Building Homes Rhode Island bond initiative and the Neighborhood Opportunities Program and implements the state strategic housing plan, which has been required since 2004.

More specifically, the Housing Resources Commission is charged with: the development and implementation of the state's strategic housing plan; tracking of local affordable housing plans and comprehensive permit applications made under the plan and issuance of annual reports

⁶ <http://www.hrc.ri.gov/information/index.php> (accessed June 9, 2010).

which are submitted to key state officials and the SHAB. It is further directed to ascertain which towns are not in compliance with implementation requirements.

Amendments passed in 2004 also required the 29 municipalities that were not in compliance with the state's LMIH goals to submit local plans. The Housing Resources Commission was charged with implementing its own state plan and tracking the local 29 plans. Oversight is provided by a two-person team consisting of the Chief of the OHCD/ Executive Director of the Housing Resources Commission (formerly represented by Noreen Shawcross), and one other person. Information from each town is requested annually and the OHCD then compiles all the data into a single report, with a summary page for each city or town.

The Statewide Planning Program is responsible for reviewing all comprehensive plans. In this role, it seeks input from the state agencies that oversee the various "element" topics contained within a comprehensive plan. For the affordable housing plans, and the subsequent housing elements of the five-year updates, the Statewide Planning Program seeks comments from the Chief of OHCD (who also serves as the Executive Director of the Rhode Island Housing Resources Commission) as well as from Rhode Island Housing. As municipalities' 5-year comprehensive plans became due for resubmission in late 2008, Affordable Housing Plans were included in the housing elements.

As of October 2010, five municipalities' five-year updates of comprehensive plans had been approved by the state and one had been denied. However, the state did not choose to "exercise its option under the Comprehensive Planning Act to adopt its own plans for these communities" (Lawlor, 2009, p. 5). The state typically does not reject plans; rather, it asks for revisions and there is an iterative process between the municipality and the state until the plan is approved.

Rhode Island Housing assists municipalities to implement their Affordable Housing Plans. Specifically, it has the responsibility of issuing Letters of Eligibility for the comprehensive permit applications, which indicate eligibility for the sources of federal, state, and/or local subsidies to be sought in the housing development.⁷ In addition, as a housing finance agency, Rhode Island Housing provides access to land-acquisition and pre-development funds and offers technical assistance, including help in drafting ordinances needed to implement municipalities' plans. Further, Rhode Island Housing is directed to provide administrative support to SHAB, to report on the status of SHAB appeals, and to calculate the percentage of year round LMIH in each municipality. Finally, Rhode Island Housing has been taking the lead in compiling more specific data about outcomes under the statute, although that task has been assumed voluntarily.

Noreen Shawcross, who at the time of the interview was the Chief of the Office of Housing and Community Development and Executive Director of the Rhode Island Housing Resources Commission, observed that:

there are only a few communities where the local government officials and town planners are not on board; most are. Most of the town planners see the implementation of the act as part of their work. The problem comes at town council level; some elected officials think they are representing public opinion if they reject LMIH. Also, some town

⁷ There are also two alternative means of "proving eligibility: (1) a reward letter from HUD; or (2) if the municipality certifies the eligibility itself through provision of a local subsidy.

administrators are opposed. All 39 Rhode Island municipalities approved an LMIH bond (Building Homes Rhode Island) in 2006, most by a wide margin.⁸ Then the rubber hits the road, even though they acknowledge the need for LMIH and voted for a state allocation of \$50 million, they didn't think the housing would be near them. Abutters are a problem.

Despite the apparently NIMBY-type opposition, a few municipalities were doing what Noreen Shawcross described as a “remarkable job, usually at the persistence of the town planner.” While some municipalities may be doing well, taking a step forward, they then take a step backward by not allowing water lines to extend to a new development, for example. If a municipality rejects a comprehensive permit and the developer appeals to the SHAB, the town will appeal that decision, resulting in a time-consuming process; many cases are tied up in court. According to Noreen Shawcross: “We could build a lot of homes just on what we've spent on court cases.” However, a nonprofit developer who is also a member of the SHAB, and who has been on the board since its founding in 1991, Steve Ostiguy, commented in late 2008 that since the housing plans went into effect, there had not yet been a test case. In short, he stated, “the value of the SHAB board has been diminished.” But, in the eyes of one interviewee, even in its early days, the SHAB was a “sleepy little board, with very few cases coming before it.”

Based on various state reviews, it appears that no more than one-third of the comprehensive permits filed have been litigated (Rhode Island Housing Resources Commission 2008a).

Between 2002 and 2008, a total of 127 letters of eligibility to pursue comprehensive permits were issued (Rhode Island Housing, 2008a). An additional 23 letters of eligibility were issued in 2009-2010 (Rhode Island Housing, 2011). However, not all developers who receive letters of eligibility proceed to the next stage—filing for a comprehensive permit. Based on various state reviews, it appears that no more than one-third of the comprehensive permits filed have been litigated (Rhode Island Housing Resources Commission 2008a). Between 1991 and 2002 there were only 8 appeals to SHAB. In 2003, 8 additional appeals were heard. Thus, in the first 12 years that the statute was in effect, only 16 cases came before SHAB. From 2005-2011 an additional 20 appeals were filed with the SHAB, for a total of 36 cases, since 1991.⁹

⁸ State funding for housing production began with the Neighborhood Opportunities Program, which started in FY 2001 with an appropriation of \$1.25 million from the Housing Resources Commission budget. As of the end of FY 2009, the total NOP allocation was \$43.4 million.

⁹ In 2004, due to the moratorium, a total of 24 comprehensive permits were undergoing local review. As part of the 2004 LMIH legislative amendments, these developers were permitted to appeal to SHAB to make a determination that their local comprehensive permit applications were “substantially complete” and could continue to be heard by the local boards. SHAB's determinations were “interlocutory” and only permitted applications to go forward in local review. SHAB did not approve or overturn any of these 24 cases.

Approved Affordable Housing Plan and Protection from Developer Appeal

The Low and Moderate Income Housing Act states that the SHAB's review should include:

The extent to which the community meets or plans to meet housing needs, as defined in an affordable housing plan, including, but not limited to, the ten percent (10%) goal for existing low and moderate income housing units as a proportion of year-round housing.¹⁰

Nevertheless, there are two key related questions concerning the Rhode Island statute: What constitutes adequate progress toward meeting a municipality's 10% goal? Does an approved affordable housing plan protect a municipality from appeals by developers?

Reflecting on both these questions, Jonathan J. Reiner, Director of Planning and Development for the Town of North Kingstown stated: "The jury is out on how much protection a municipality will get by having an approved plan and how much progress toward implementation will be considered enough. No case law has been established so far... We had a case in which the Town denied an affordable housing development that was inconsistent with our comprehensive plan. That case was appealed to the SHAB by the applicant. The SHAB upheld the Town's decision but unfortunately, the SHAB did not address the question of "What constitutes adequate implementation of an affordable housing plan?" That's the million dollar question." "Nevertheless," he added:

I'm very happy with the overall goals of the law; it is making all people—planning board members, town council members, and many others—aware of affordable housing and forcing them to address the affordable housing shortage that we still have in this state. One of the problems that no one has devised a solution for yet is that some municipalities may have trouble paying for some of the municipal services created from this new development. This situation could be exacerbated if this development is not completed in conformance with the municipal comprehensive plan.

Noreen Shawcross offered a skeptical interpretation about the immunity offered to towns that are "making progress" toward implementing their housing plans: "The town may be making adequate progress, but it is still subject to the comprehensive permit. Only reaching the 10% LMIH goal will make a town immune from the comprehensive permit."

This was echoed by Annette Bourne who stated:

steps the municipality has taken do not necessarily protect them from a comprehensive permit. There is a reference in the law to promulgating zoning so if they have passed actual ordinances that are strategic to produce LMIH that would help; however, nothing exempts them from the law until they reach 10%. Ultimately, the SHAB is the final arbiter.¹¹

There is a very limited judicial record interpreting what, exactly, constitutes conformance with a municipality's plan. In one case, *Sedona Associates v. the Town of Smithfield*, the developer's

¹⁰ Section 45-53-6 (2)

¹¹ Private email communication, June 8, 2010. Cited with permission.

comprehensive permit sought 120 units. The town's Affordable Housing Plan stated that the site could support up to 75 units and denied the permit. The SHAB upheld the town's denial because, it, like the town, found that the proposal was not in conformance with the town's Affordable Housing Plan.

The ruling in *Clark Falls Realty v. Town of Hopkinton* also sheds light on how SHAB interprets its authority to determine whether a town's decision is "consistent with local needs." Hopkinton argued that it had made exemplary progress in approving LMIH applications in recent years and, in fact, had been recognized by OHCD for doing so. SHAB, however, determined that "consistent with local needs" means that the community has attained its 10% LMIH goal. SHAB upheld the developer's appeal, granting approval subject to state environmental, health and safety concerns. In 2009 the town appealed SHAB's decision to Superior Court. As of fall 2011 the Court had not yet ruled on the town's appeal. There has not yet been a case where a developer's proposal that has been judged out of conformance with a municipality's plan has been overturned by the SHAB.

In *West v. McDonald* the Rhode Island Superior Court concluded that when "the comprehensive plan conflicts with the zoning law, the comprehensive plan takes precedence" (Lawlor, 2009, p.7). This suggests that there is a clear need for the comprehensive plan to be a realistic document, in terms of the municipality's ability to produce the housing it has proposed, given its current land use regulations.

On July 1, 2011, Governor Lincoln Chafee signed a new Comprehensive Planning law which states that: "Each municipality shall ensure that its zoning ordinance and map are consistent with its comprehensive plan."¹² Whether Rhode Island will develop clear guidelines to enforce this law however, is not yet known.

Source of Data and Approach to Data Analysis

Rhode Island Housing provided a copy of their 2009 database on LMIH for all municipalities in the state, including the "Short Form" that is published annually, showing LMIH unit totals by municipality. They further provided these short forms going back to the program's first year, in 1991. To establish a total production number since the statute went into effect, the research team first subtracted the total number of units in each town in 1991 from the total number in 2009. However, the total number was impacted by a further calculation: In 2009, 2,419 of the LMIH "units" in the inventory were beds in group homes. Because the number of group home beds fluctuates from year to year based on funding and contract goals of the state agencies providing the operating subsidies, and not based on any policy actions undertaken by the municipality, Rhode Island Housing staff suggested excluding group beds from the housing production count. This analysis therefore includes actual units of housing only. Finally, it is important to underscore that the number of LMIH units reflects the net change in units, rather than gross affordable housing production. In other words, if a municipality constructed 5 new units but demolished 2 old ones, only 3 units are counted as being added to the affordable housing

¹² Section 45-22.2-5(c)

inventory, rather than 5 as in the other case studies. This almost certainly resulted in an under-counting of actual construction of new LMIH units in many places.

Because record-keeping methods have changed, it was not possible to track overall production of type of housing (e.g., family, elderly, special needs) prior to 2003. Given the already-small number of municipalities, the dataset covering only 2003-2009 was too small to analyze in terms of the demographic characteristics most closely associated with production of each type of housing.

Since Rhode Island Housing also administers the state's Low Income Housing Tax Credit program, their database includes all developments built under this program, even in municipalities already in compliance with the state affordable housing goal. Rhode Island Housing staff estimates that some affordable housing development in these municipalities is not captured in this database, such as low-interest loans through the HOME or CDBG programs. However, their assessment is that units developed under these programs likely represents a small fraction of the overall LMIH housing production.

LMIH Production under the Act

In 1991, only 5 municipalities had at least 10% of their housing stock targeted to low and moderate income households (Central Falls, East Providence, Newport, Providence and Woonsocket). Under the 1999 amendments, 5 more municipalities were viewed as being in compliance with the act because they met the alternative rental housing/LMIH goal (Cranston, North Providence, Pawtucket, Warwick, and West Warwick). Thus, the 10 municipalities in compliance with the state law up to June 30, 2009 represented the most urbanized areas. These areas had 75% of the total number of LMIH units in the state, while they occupy only 14% of the land (Rhode Island Housing, 2007; Blish and Cavanagh, 2003, p. 22).

As of June 30, 2009, a total of 11 Rhode Island municipalities were exempt from the comprehensive permit rule: one additional town, New Shoreham, has recently attained the 10% goal.¹³

Concerning New Shoreham, it is important to point out that its exceptional record is partly due to a change in how the denominator of the 10% calculation is derived. Amendments enacted in 2004 stipulated that only year-round housing units were to be counted when calculating the basis on which the 10% goal is assessed. Since New Shoreham is primarily a vacation community (Block Island), it lost 75% of its housing units (for the purposes of the calculation) when this change was instituted, climbing from 2.24% to 7.24% automatically. As such, its number of year round housing units is quite low (497) and therefore any addition to its LMIH stock boosts its LMIH percentage quite significantly. Thus, New Shoreham's rather modest LMIH stock (a total

¹³ There was no change in the municipalities in compliance as of the most recent tally compiled by Rhode Island Housing, "2010 Low- and Moderate-Income Homes by Community," May 20, 2011. However, this tally was still based on 2000 housing stock figures. According to Annette Bourne, the 2010 Census data did not change the towns that have attained the 10% goal. As of September 2011, an analysis had not yet been done to determine if any of the exempt towns had lost that status. Private email communication, September 16, 2011. Cited with permission.

of 56 units) was able to increase its percentage of these units to an impressive 11.27%. However, there was also a concerted effort on the part of town officials to boost LMIH production.

According to land use expert Phil Herr, New Shoreham's attainment is noteworthy:

"The legislative change would not have given New Shoreham 10%+ status had the town not worked remarkably hard to add new affordable units." He provided some further detail about how the town managed to accomplish this, emphasizing that the motivation was less about the statewide mandate and more about the municipality's own sense of its housing needs.

The town had adopted a zoning rule that cut the required lot area in half for affordable units. When the proposal for the 20-unit [LMIH] project was suggested, the town rezoned the site to a district allowing double the density of the earlier zoning (and of most abutting land). Those actions together allowed the project to quadruple its originally zoned allowable density. The developer was an island nonprofit organization with a track record of having developed most of the 37 LMIH units the community already had. Equity to get the project moving was local contributions and contributed services. Financial feasibility depended upon both state and federal funds, which were facilitated by Rhode Island Housing. The LMIH count appeared to be of almost no significance; this was apparently an effort by a community to serve its own people, not to meet a standard from off-Island.¹⁴

By mid-2010, 7 additional municipalities (18% of the total cities and towns in Rhode Island, including two municipalities that were exempt from the comprehensive permit rule because of the size of their rental/LMIH stocks) were close to the 10% LMIH goal, with at least 8.0% of their housing stock devoted to LMIH; an additional 11 municipalities (28%) had at least 5.0% LMIH. In all, there was a net increase of 5,301 LMIH units in Rhode Island between 1991 and 2009, excluding beds in group homes.¹⁵ [When the Rhode Island statute was enacted in 1991, there were a total of 29,324 units of LMIH in the state. Of these, 9,642 were public housing units; two thirds of these were designated for the elderly and one-third for families.]

According to the U.S. Census Bureau (2003) and to the most recent data from the American Community Survey, Rhode Island's total housing stock increased from 414,572 units in 1990 and to 463,416 in 2010. Thus, there was a net increase during those two decades of some 48,844 units. This means that the LMIH units produced during that period comprised 10.9% of the growth in the state's total housing units.

¹⁴ Private email communication, February 13, 2011. Cited with permission.

¹⁵ Rhode Island Housing's 2010 update shows a total of 36,668 LMIH units, a net addition of 190 LMIH units from the total on which this analysis is based. We do not know how many of the latter were actual units, as opposed to group home beds. Either way, the difference is not large.

Table 1 presents the net LMIH production in all 39 municipalities. The level of production was nearly equal among the 29 municipalities that had not met one of the state’s housing goals prior to 2009 and those that had. A total of 2,547 units were produced by the former and 2,754 were produced by the latter.

Between 1991 and 2009, there was a median increase of 56 units among Rhode Island’s municipalities and a median increase of 31 new units per 10,000 residents (For additional summary statistics see Appendix V, Table A-V-2). Also interesting to note (not shown in Table 1), in 19 out of Rhode Island’s 39 municipalities, the total LMIH stock comprised less than 5% of total housing units. During this period, only 3 out of 39 municipalities had no net gain in the number of LMIH housing units.

Table 1: Net LMIH Production by Municipalities That Have and Have Not Met State LMIH Thresholds, 1991-2009

| | Municipalities that had not met state LMIH threshold prior to 2009 | Municipalities that had met state LMIH threshold prior to 2009 | Overall |
|--|--|--|--------------|
| Number (%) of municipalities | 29 (74%) | 10 (26%) | 39 (100%) |
| Number (%) of new LMIH units completed, 1991-2009 (includes LIHTC units) | 2,547 (48%) | 2,754 (52%) | 5,301 (100%) |
| Number (%) of municipalities with new LMIH units completed | 27 (75%) | 9 (25%) | 36 (100%) |
| Median number of new LMIH units | 56 | 56 | 56 |
| Median number of new LMIH units per 10,000 residents | 40 | 10 | 31 |

Sources: Research team analysis based on data provided by Rhode Island Housing, “2009 Low- and Moderate Income Housing by Community,” “1991/1992 Low/Mod Chart.” U.S. Census Bureau Summary Tape File (STF1) 1990 data, Table H001, “Housing Units”; U.S. Census Bureau Summary File 1 (SF1) 2000 data, Tables P7, “Race (Total Population).”

Table 2 shows the difference between municipalities that, as of 2010, had attained one of Rhode Island’s two affordable housing goals (either 10% of the municipality’s units are LMIH or the municipality has at least 5,000 occupied rental units that comprise at least 25% of the municipality’s housing stock and, of these, at least 15% are LMIH) and those that have not. As might be expected, the municipalities that met the state’s housing goal are denser, have smaller white populations and lower median incomes, and grew at a slower rate in the 1990s than municipalities that did not meet either housing goal. They also have more LMIH overall. Generally, then, the municipalities that have complied with the state’s LMIH mandate are urban and inner-ring suburban communities, which are typically associated with LMIH production.

Table 2: Comparison of Median Demographic Characteristics for Municipalities by Attainment of Either LMIH Housing Goal, 2010

| | Municipalities that have attained either goal (N=11) | Municipalities that have not attained either goal (N=28) |
|--|--|--|
| Population density (residents per sq. mi.) | 3,729*** | 573 |
| Percent white | 86%*** | 97% |
| Median income | \$39,505*** | \$55,495 |
| Percent change in housing stock, 1990-2000 | 2%*** | 12% |
| Net median change in LMIH units, 1991-2009 | 40 | 58 |
| Percent LMIH units | 11%*** | 5% |
| Net change in LMIH units per 10,000 residents, 1991-2000 | 10 | 39 |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by Rhode Island Housing, “2009 Low- and Moderate Income Housing by Community,” “1991/1992 Low/Mod Chart”; U.S. Census Bureau Summary Tape File (STF1) 1990 data, Table H001, “Housing Units”; U.S. Census Bureau Summary File 1 (SF1) 2000 data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000”; and U.S. Census Bureau Summary File 2000 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars). All census data retrieved using American Fact Finder.

Table 3 shows correlations between LMIH production and the demographic characteristics used in this analysis. As would be expected, there is a positive correlation between new LMIH units produced and the percent of a municipality’s overall housing stock that is LMIH. Thus, a higher net change in the amount of LMIH is associated with more of a municipality’s housing stock that is affordable. As noted in Chapter 1, it is important to underscore that correlations must not be interpreted to suggest causality. Our test does not reveal whether municipalities that already have LMIH are likely to build more or that a municipality’s share of LMIH necessarily increases the higher its net increase in LMIH units.

In addition, Table 3 shows a positive correlation between the size of a municipality’s white population and its LMIH production per 10,000 residents. This indicates that LMIH production was higher in municipalities where a larger share of the population was white. This finding suggests that the Rhode Island statute is associated with LMIH production in areas that have typically excluded such housing.

Table 3: Correlations between Demographic Characteristics and LMIH Production for all Municipalities (N=39)

| | Correlation with all new LMIH units | Correlation with all new LMIH units per 10,000 residents |
|--|-------------------------------------|--|
| Population density (residents per sq. mi.) | 0.26 | -0.20 |
| Percent white | 0.00 | 0.37** |
| Median income | -0.25 | 0.13 |
| Percent change in housing stock, 1990-2000 | -0.10 | 0.27 |
| Percent LMIH units | 0.36** | 0.14 |
| Either state housing goal attained | 0.05 | -0.26 |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by Rhode Island Housing, “2009 Low- and Moderate Income Housing by Community,” “1991/1992 Low/Mod Chart”; U.S. Census Bureau Summary Tape File (STF1) 1990 data, Table H001, “Housing Units”; U.S. Census Bureau Summary File 1 (SF1) 2000 data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000”; and U.S. Census Bureau Summary File 2000 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars). All census data retrieved using American Fact Finder.

Due to the small number of municipalities in Rhode Island, some additional descriptive analyses were done. While they are not significant in a statistical sense, the findings are, nevertheless, of interest. Municipalities with the highest populations and the greatest densities are among the 10 municipalities that have attained the thresholds set forth in the statute. Furthermore, there is a 100% overlap between the 10 densest municipalities, in terms of persons per square mile, and the original 10 municipalities that attained either the 10% goal or the alternative rental housing goal. New Shoreham is an outlier, being among the least dense municipalities in the state.

Based on 2009 data provided by Rhode Island Housing:

- Housing for the elderly represents 57% of all LMIH units in Rhode Island; housing for families represents 39% of all units.
- 52% of all LMIH units are located in the 5 original municipalities that reached the 10% goal; 42% of all the elderly LMIH units, 66% of the family LMIH units, and 65% of the special needs LMIH units are located in these municipalities. These 5 municipalities contain only 30% of the housing units in the state.
- 76% of all LMIH units are located in the 10 municipalities that were in compliance with the statute prior to 2009. 73% of the elderly LMIH units and 80% of the family LMIH units are located in these municipalities. These 10 municipalities contain 60% of the housing units in the state.

In presenting the above profile, it is important to keep in mind that it reflects the location of all LMIH in Rhode Island, whether they were built subsequent to the statute, or before it went into effect. Therefore, these figures should not be viewed as providing any indication of the effectiveness of Rhode Island's efforts to promote LMIH.

In Jonathan Reiner's view, by 2003 the act was being used far more extensively, with communities "really under pressure to do something about LMIH, forcing them to adopt an Affordable Housing Plan, and to implement that plan. Unfortunately, it often takes many years to see results from any newly adopted plan, especially plans that many residents do not particularly care for being implemented in their neighborhoods." Perhaps not surprisingly, the actual LMIH production numbers are not large.

According to the first annual report on the implementation of the act in cities and towns from July 1, 2005 through June 30, 2006:

Changing ordinances, working with new partners, identifying sites, and financing housing presents a multitude of challenges for state and local governments, as well as private and non-profit developers. Progress, in terms of units built, has been minimal in this first year of implementation. However, it is clear that because of the [2004 act], there is heightened awareness of housing needs and changes in perceptions of LMIH. Some important initial steps have been taken toward providing quality housing for all Rhode Islanders (Rhode Island Housing Resources Commission, 2007, p.4).

The second year annual report, which covered July 1, 2006-June 30, 2007, noted that, while "progress has certainly been made...overall rate of production remains slow" And in summing up the situation, The Housing Resources Commission stated: "That so many communities were unable to complete a single LMI unit indicates that most towns will need to refocus on

implementation of their LMIH plans or must develop new strategies that will produce more LMI units” (Rhode Island Housing Resources Commission, 2008b, p. 8). During each calendar year spanning 2005 through 2008, no more than 10 municipalities completed any LMIH units.

A few municipalities, such as Burrillville, have been particularly effective in terms of its tangible work toward reaching the LMIH goal. Burrillville, for example, is a “rural town,” located in the northwest section of Rhode Island; it is 20 miles from Providence and 45 miles from Boston.¹⁶ With a population of 15,796, it ranks 24th among Rhode Island’s 39 municipalities, and is the 29th in terms of density. By using its existing structures to its advantage, the town has been able to convert some old mills and a former school building, using “smart growth” principles, into affordable housing.

According to Burrillville’s planner, Tom Kravitz, the town wrote a village development overlay zone ordinance that was parcel specific and that contained a mandatory inclusionary housing component, including a density bonus¹⁷ that was capped at the town’s most dense residential zone (12,000 s.f. lot size).

Tom Kravitz, along with others interviewed, underscored that a number of factors came together that led to a successful outcome:

- timing—the housing market was on fire; there were bidding wars for homes and a substantial percentage of Rhode Island’s workers were struggling to keep pace with high housing prices;
- big push for affordable housing coming from the state—in terms of amendments to R.I.G.L. Title 45 Chapter 53.
- flood of applications by private developers were coming with little regard for appropriate density levels—this was having a counter-productive effect on smart growth projects. It was therefore not too difficult to explain the need for affordable homes to residents, but also, to underscore that the town wanted to do it on their own terms through aggressive redevelopment initiatives as opposed to accepting the sprawl-type comprehensive permit projects that would compromise the town’s rural character and put too much stress on town services. They were interested in developing housing within the town centers, but many developers were proposing projects in more rural locations that did not have water and sewer infrastructure.
- availability of a Brownfield that they were redeveloping--it made sense to do a mixed income housing development there.¹⁸
- advanced wastewater treatment facilities willing and able to accept effluent that could accommodate efficient growth;
- good leadership at the Town Council level that, since 2001, has consistently supported the Planning Board and Planning Department;
- a planning board and zoning board that work well together;

¹⁶ http://www.burrillville.org/Public_Documents/BurrillvilleRI_WebDocs/about (accessed June 9, 2010)

¹⁷ There is no explicit density bonus associated with the Rhode Island statute. Any bonus is at the municipality's discretion and must be consistent with the municipality’s plan.

¹⁸ Private email communication from Tom Kravitz, December 1, 2008. Cited with permission.

- good GIS capabilities that clearly demonstrated to Town Councilors the location and potential unit counts of both the comprehensive permit proposals versus the preferred redevelopment growth projects; and
- highly professional department heads and staff who consistently were willing to “go the extra distance” and to work on weekends to make a project work.

Despite the planning department having a tiny staff—Tom Kravitz plus his deputy Planner—it has been able to write all of their policies in-house, obtain nearly \$14 million in grants, and procure and redevelop nearly \$35 million dollars worth of Brownfield property within just 7 years.

Annette Bourne offered that Tom Kravitz is “terrific; somehow he has managed to create a more trusting political climate and LMI issues in Burrillville seem less contentious than elsewhere.” As a strong advocate of smart growth, Kravitz has been able to steer developments through the local political process.

With Burrillville’s 5,694 year-round housing units, and 500 that qualify as affordable, the town’s LMIH housing stock currently stands at 8.78%, and is only 69 units short of meeting the state-mandated 10% threshold. Phase III of the Stillwater Mill Redevelopment Growth Center will provide an additional 36 LMIH units, thus leaving Burrillville only 33 units short of reaching the 10% goal.

Relationship between Goals Projected in Plans and Actual Production

One measure of the effectiveness of the Rhode Island statute is a comparison between the extent to which LMIH units are actually getting built and municipalities are attaining the housing goals that they had projected in plans submitted between 2005 and 2009. Table 4 presents information on the 29 municipalities that were not in compliance with one of the state’s LMIH goals prior to 2009 (this includes New Shoreham).¹⁹ As noted previously, New Shoreham was the only municipality that attained 100% of its goal; no other municipality attained more than 80% of its goal. Only four municipalities (14%) attained more than one-half their goals; 83% of municipalities attained less than 50% of their goals, with 5 municipalities building no LMIH units designated in their plans during that period.

Table 4: Progress toward Attaining LMIH Goal, 2005-2009 (N=29)

| Percent of planned units built between 2005 and 2009 | Number | Percent |
|---|--------|---------|
| Municipalities that did not complete any LMIH housing | 5 | 17 |
| .01-20.9% | 8 | 28 |
| 21.0-40.9% | 9 | 31 |
| 41.0-50.9% | 2 | 7 |
| 51.0-60.9% | 0 | 0 |
| 61.0-80.9% | 4 | 14 |
| 81.0-99.0% | 0 | 0 |
| 100% or more | 1 | 3 |
| Total | 29 | 100% |

Source: Research team analysis based on data provided by Rhode Island Housing, “LMIH production since AHPs.”

¹⁹ Projected (i.e., un-completed units) are included here, but not in New Jersey, in assessing municipalities’ compliance with housing goals. For an explanation, see the Methodology section in the Introduction of the report.

Table 5 shows the correlations between the percent of its housing goal a municipality was expected to attain by the end of 2010, and the selected characteristics with which we are concerned. Again, the small sample size (only the 29 municipalities required to submit plans were included) makes it difficult to obtain statistically significant results. Only one correlation is significant: a positive, fairly strong correlation between the extent to which a municipality built the LMIH units it planned for, and the amount of LMIH in the municipality overall. However, as noted previously in this chapter (as well as elsewhere in this report), this test does not reveal if this correlation is causal (i.e., if municipalities that already had higher numbers of LMIH housing are adding to that stock at greater rates), or if the higher rate of LMIH is an *effect* of higher compliance rates (i.e., the amount of LMIH grows as municipalities move toward attaining their LMIH goals).

Table 5: Correlation between Percent Obligations Attained and Demographic Characteristics of Municipalities (N=29)

| | Percent of planned units built |
|--|--------------------------------|
| Population density (residents per sq. mi.) | 0.16 |
| Percent white | -0.06 |
| Median income | -0.28 |
| Percent change in housing stock, 1990-2000 | -0.02 |
| Percent LMIH | 0.64*** |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by Rhode Island Housing, “2009 Low- and Moderate Income Housing by Community,” “1991/1992 Low/Mod Chart,” “LMIH productions since AHPs”; U.S. Census Bureau Summary Tape File (STF1) 1990 data, Table H001, “Housing Units”; U.S. Census Bureau Summary File 1 (SF1) 2000 data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000”; and U.S. Census Bureau Summary File 2000 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars). All census data retrieved using American Fact Finder.

The State's Strategic Housing Plan projects the need for some 13,000 new units of LMIH housing to meet the state goal that each municipality have at least 10% of the stock dedicated to LMIH. The state encourages an incremental approach—the goal of producing 1,000 units per year, for each of five years, starting December 2005, the date the plan was adopted by the Housing Resources Commission. Based on the data provided by Rhode Island Housing, between January 1, 2006 and December 31, 2009 there was a net increase of 1,214 units, or about 303 per year (excluding group home beds). Since, again, this is a net change figure and not an overall production figure (Newport, for example, experienced a net loss of LMIH units during time),²⁰ the actual amount of housing produced was actually somewhat higher. Nevertheless, production is clearly not keeping up with the state's overall goal.

Overall Assessment

A recent Housing Resources Commission report noted that “considerable progress” had been made in terms of local involvement in LMIH boards/task forces, with 17 municipalities having such bodies. Yet, in other respects, they acknowledged slow progress, both in terms of LMIH production and in the regulatory changes that were made. Most of the regulatory changes articulated in each local plan were “in progress over two years after the date of the approval of their plans” (2008b, p. 9). For example, of the 26 municipalities that had proposed inclusionary zoning ordinances as a key strategy of their plans, only 9 had passed the needed ordinance. However, the report also noted that adopting such changes is a time-consuming process and that the time frames were realistic, meaning that it was not surprising that enacting ordinances was taking a long time.

Another recent Rhode Island Housing Resources Commission (2010) report noted the limited progress made by Rhode Island cities and towns in producing the needed LMIH is due to the national economic crisis. It also underscored the critical need for this housing and the importance for both struggling households and for the economic well-being of the state. While there are signs that support for LMIH is growing, there is ongoing controversy.

On the positive side, several interviewees offered that the statute has helped to raise public consciousness about the need for LMIH. Some particularly good plans have been put forward and are proceeding; a handful of towns have been using the statute aggressively. Brenda Clement offered that the statute promotes the notion that “affordable housing needs to be done where it makes sense. It gives municipalities the opportunity to make those decisions.” And, further, Annette Bourne added: “the law has fostered a more cooperative attitude among many of the players. Developers have more one-on-one contact with the towns and there is a lot more give and take; everyone seems to be trying to implement the law.” And, it is important to underscore that most municipalities in the state have added LMIH units.

However, several criticisms also were articulated. For example, “local leaders and individuals in the community continue to question specific proposals and resist development due to escalation

²⁰ The Newport “loss” is not really permanent. As a result of the renovation of the former “Tonony Hill” project-based Section 8 development with HOPE VI funds, and as required by the State's Consolidated Plan, all units will be replaced one-for-one. However, about 100 will no longer be in Newport, but in other communities.

of school enrollment, concern about cost of services, and underlying prejudice and negative perceptions” (Rhode Island Housing Resources Commission, 2008a, p. 12). Annette Bourne offered that: “the law is still contentious, particularly at local public meetings; people question where the 10% threshold comes from and how rural areas can possibly attain that goal.” Other concerns focus on the extent to which municipalities are relying on inclusionary zoning and the need for the statute to have more “teeth.” Colin Kane, a private for-profit developer, was negative about the current statute and how it has been implemented by municipalities:

The original law was poorly defined in terms of how it got executed. But the modified statute is so much worse than before. It will effectively preclude residential development. Almost every community took a single approach—they developed their entire affordable housing production plans around the requirement that every new project must have inclusionary units. It is a despicable policy approach since it ruins the economics of residential development by not allowing a commensurate increase in density. Inclusionary zoning effectively shifts the financial burden from the community to the landowner and developer. One town passed a requirement that if you subdivide into 2 lots, one has to be affordable, or you have to pay a \$200,000 in-lieu fee. In some communities, there are higher thresholds, but in most cases the inclusionary rule kicks in with four to five units. Real density bonuses are needed to make it possible to cover the hole in your pocket to make the numbers work. Beyond the costs, not every subdivision can have an affordable component. For example, if you are building an ocean side development with multi-million dollar homes or condos, how can you possibly include affordable units? What is needed is stick-driven policies and blunt instruments capable of overwhelming NIMBY and local leadership resistance.

In contrast, he observed that: “40B is a fairly effective statute” because communities are vulnerable and it encourages them to create housing. However, he is critical about the Massachusetts statute’s cap on developer profits: “Why should there be a cap on the upside if they do not guarantee the downside?”

In terms of the LMIH statute’s record in encouraging affordable housing production in municipalities that are typically associated with exclusionary land use patterns (lower density with more white and higher median income residents), the picture is mixed. On the one hand,

- the difference in LMIH production was not statistically significant between municipalities that have attained one of the two housing goals and those that have not, although the median production numbers were much higher for municipalities that had not attained a state-mandated housing goal than for those that did. If the lack of statistically significant difference is due simply to the small sample size, this finding may suggest that those areas that have not attained the LMIH goals are moving in the right direction, by at least keeping pace with, if not out-producing, those locales that have a track-record of LMIH production.
- since LMIH production was higher in municipalities where a larger share of the population was white, we might be seeing evidence that the Rhode Island statute is encouraging LMIH production in areas that have typically excluded such housing.

On the other hand,

- the finding of no significant difference in the amount of LMIH produced between municipalities that have attained one of the two housing goals and those that have not could also mean that municipalities that have not yet attained one of the housing goals have not been more successful in building LMIH housing;
- municipalities that have met the state's housing goal are denser, have smaller white populations and lower median incomes, than municipalities that have not met either housing goal. This could be an indication of a continuation of exclusionary patterns. However, similar to Massachusetts, the municipalities that have reached the 10% goal include all of largest cities in the state which have large populations of low income households.

Noreen Shawcross summed up the Act as follows:

We have a real weakness in the law. Other than municipalities that are not in compliance being exposed to ongoing comprehensive permits, the law really doesn't have teeth. To counteract that, we try to promote a positive image of LMIH development: we want good development, good design, and smart growth; LMIH is not a blight on the community. We may have good relationships with municipalities, but they still feel like the state is big brother—making demands on the towns with unfunded mandates. It's hard to overcome that relationship. We are trying to engage people early on about how to work on issues and we try to communicate that we respect their opinions. We try to get the message across that LMIH is not a bad thing, it's something that impacts them and their families.

Agreeing with the above statement, that the statute lacks "teeth," Steve Ostiguy said:

The state, in allowing communities to design their own plans, gave too much leeway to the towns; some have been successful, others not. There is no penalty for not meeting the affordable housing goals. A SHAB over-rule would be a penalty, but there is no cutback in school aid, for example. I'm looking for some place in between. Some minimum standards (e.g., required inclusionary zoning plus density bonuses) are needed and some penalty for non-conformance has to be put in place.

Brenda Clement also noted that "We need to add more sticks to the process, as well as carrots. Unless you get a good planner and some political support, LMIH just doesn't get built. Some communities still have not done anything."

Of course, the downturn in the economy in late 2008 was partly to blame. As of late 2010, some developers were walking away from deals while others were getting tired of waiting for approvals. But in mixed-income developments, where the market rate units need to subsidize the LMIH units, there was a feeling that projects were just not feasible because, as one person put it, "everything is so dead."

Key Observations for Massachusetts (and others)

Major Similarities between the Rhode Island Statute and Massachusetts' Chapter 40B

- All municipalities have the same goal to attain a 10% (of their overall housing stock) LMIH threshold.
- Nonprofit, for-profit or limited dividend developers may apply to a city or town for a single comprehensive permit for a rental or owner-occupied housing development (in lieu of seeking permits from all the relevant boards separately), as long as at least 20% of the units are subsidized by a federal or state program.
- Both have statewide appeals entities, the HAC in Massachusetts and the SHAB in Rhode Island. Applications that are denied or granted by the local review board with conditions or requirements that would make the development infeasible, in terms of either the construction or operation may be brought to the respective committee/board. Each has the authority to override a local board's rejection of the comprehensive permit.
- Under the original statute, a municipality was given immunity from HAC or SHAB appeals if at least 10% of its housing stock was aimed at the targeted below-market population.
- Each state has changed its program, either by statute or through regulatory modifications, which have provided immunity from statewide appeals based on additional ways of reaching compliance.

Massachusetts (and others) May Want to Consider These Lessons from Rhode Island

- Mandatory Community Comprehensive Plans are required and are an important component of Rhode Island's approach to dealing with exclusionary zoning.
- A housing element is included as part of the comprehensive plan to determine if the municipality has either met the 10% threshold or to demonstrate that it is dedicated to meeting this goal. The housing element must detail how the state-mandated LMIH housing goals will be attained and all zoning decisions must be consistent with the plan. Similar to the experiences in California, these first two lessons would seem to be important and highly valuable modifications in Massachusetts's overall approach. However, clear guidelines must be in place so that municipalities understand what, exactly, constitutes compliance with the plan and how progress toward attaining the statewide goal will be measured.
- SHAB has a legislative mandate to consider whether the proposal being discussed is in conformance with the local Affordable Housing Plan, while there is no such requirement imposed on the Massachusetts Housing Appeals Committee.

Chapter 4: Montgomery County, Maryland

Overview

The Moderately Priced Dwelling Unit (MPDU) Program in Montgomery County, Maryland, is one of the most frequently cited examples of a successful affordable housing initiative. Although this is a county-wide, rather than a state-wide program, it stands out as an important example of a program being implemented above the municipal level. It is aimed at producing affordable housing and distributing low and moderate-income households throughout the County, particularly the growth areas. Addressing exclusionary land use practices that result in the production of high-cost homes is an explicit component of the statute. Enacted in 1973 and launched a year later, the MPDU program is widely viewed as the first mandatory inclusionary zoning/density bonus program in the U.S. and is responsible for the creation of some 13,133 units of affordable housing. However, due to time limits on affordability restrictions, the great majority of these units are no longer in the affordable housing stock. Nevertheless, Montgomery County's MPDU program represents an important model that warrants close examination.

Background

The power to plan and zone in Maryland is held by local governments, either counties or municipalities. However, few of Maryland's municipalities are responsible for the types of zoning and other land use regulatory activities that are carried out by the cities and towns in the other states covered in this study. Instead, typical municipal-level activities are, most often, carried out by Maryland's 23 county governments. Baltimore and Howard Counties have no incorporated cities or towns, while another six counties have three or fewer cities or towns. Prince George's County has the most municipalities (27) and Montgomery County, the focus of this chapter, is the second largest county, with 19 municipalities, five of which have planning and zoning powers.¹ Two of Montgomery County's largest areas, Bethesda and Silver Spring, with a combined population of over 132,000, are unincorporated areas with typical municipal-level functions carried out by the County. Compared to other states in the U.S., Maryland has relatively few local governments (157). As of the 2010 census, Montgomery County's population of nearly 1 million represented about 17% of the state population.²

In the late 1960s and early 1970s residents of Montgomery County became aware that homes were less and less affordable to public sector employees, particularly teachers, policemen, and firemen. As land was becoming increasingly scarce, developers maximized profits by building large, expensive homes that were out of reach of moderate-income households. In fact, according to Rick Nelson, Director of the Montgomery County Department of Housing and Community Affairs (DHCA), the existence of various growth controls that encouraged developers to build exclusively high-end housing provided the impetus for the enactment of the MPDU program. In response, several advocacy organizations embraced the affordable housing issue and proposed that new developments should include a set-aside for a number of affordable units.

¹ These are Rockville, Gaithersburg, Laytonsville, Poolesville, and Takoma Park.

² <http://www.msa.md.gov/msa/mdmanual/01glance/html/pop.html#cities> (accessed August 10, 2011)

The Montgomery County Council, the governing body, responded with a sweeping new law that set forth a series of compelling reasons why public intervention was necessary. In addition to noting the need for housing for government employees, as mentioned above, the legislative findings of Montgomery County Code 25A emphasized the negative environmental impacts of large numbers of people living outside the area, but commuting to Montgomery County. Specifically, this was resulting in:

...overtaxing existing roads and transportation facilities, significantly contributing to air and noise pollution, and engendering greater than normal personnel turnover in the businesses, industry and public agencies of the County, all adversely affecting the health, safety and welfare of and resulting in added financial burden on the citizens of the County.³

The ordinance also explicitly responded to the effects of exclusionary land use practices, as follows:

Demographic analyses indicate that public policies which permit exclusively high-priced housing development discriminate against young families, retired and elderly persons, single adults, female heads of households, and minority households; and such policies produce the undesirable and unacceptable effects of exclusionary zoning, thus failing to implement the Montgomery County housing policy and the housing goal of the general plan for the County.⁴

Under the originally-enacted MPDU program, all developments with 50 or more units were required to earmark 15% of the units as affordable to moderate-income households. To compensate developers for any loss in profits, a density bonus of 20% was allowed. In essence, by allowing an increase in density over the prevailing zoning for that parcel of land, the County was creating “free” buildable lots for the affordable units. Further, to accommodate even lower income groups, the Housing Opportunities Commission (HOC), which is Montgomery County’s Housing Authority, was given the right to purchase up to one-third of the moderate-priced units, to be set aside for rental housing.⁵

Since its start in 1974, some 350-400 inclusionary programs have been adopted across the country, with national production over 30 plus years totaling some 80,000-90,000 affordable units (Porter 2004, p. 241). The MPDU program is one of a few mandatory inclusionary zoning programs in Maryland; mandatory programs also operate in Frederick County, Howard County, and the cities of Frederick, Rockville and Gaithersburg in Montgomery County. The Prince George’s County and the City of Annapolis have voluntary programs.

Inclusionary zoning programs differ from locale to locale. In exchange for the requirement that a certain percentage of new units being developed be set aside for lower income households, incentives are typically offered to developers to help them reduce overall costs, thereby allowing them to include the affordable units without losses in profitability. These incentives include

³ Montgomery County Code, Chapter 25A-1 (4), Legislative findings. Enacted 1973.

⁴ Montgomery County Code, Chapter 25A-1 (6), Legislative findings. Enacted 1973.

⁵ As noted later in this chapter, the percentage recently has been increased to 40%.

various kinds of fee waivers, cash subsidies, property tax abatements, density bonuses, expedited permitting/approvals, and flexible zoning and design standards (Brunick. 2007).

The goals of the MPDU program are:

- 1) to produce moderately priced housing so that County residents and persons working in the County can afford to purchase or rent decent housing;
- 2) to help distribute low and moderate-income households throughout the growth areas of the County;
- 3) to expand and retain an inventory of low-income housing in the County by permitting the HOC and recognized nonprofit housing sponsors to purchase up to 40% of the affordable units (HOC is limited to one-third);⁶
- 4) to provide funds for future affordable housing projects by sharing the windfall appreciation when MPDUs are first sold at the market price after expiration of the resale price controls (Montgomery County, 2009).

The largest of Montgomery County's 19 municipalities, Rockville, Gaithersburg, and Takoma Park all have their own zoning. Therefore, they are officially exempt from the MPDU requirement. However, Rockville and Gaithersburg have adopted their own MPDU-like programs.

Both at the outset and over the past few years, the MPDU program has encountered opposition. Initial concerns revolved around whether the program raised constitutional issues of "takings without compensation" and the extent to which local planning and zoning would be undermined by approving developments with higher densities than those specified in the original plans. Other important issues raised were whether higher-income people would choose to live beside lower-income people and the impacts on abutters' property values caused by the lower-income homes being introduced in the area. Despite the many ways in which the original bill was modified to reflect as many of these concerns as possible, the County Executive vetoed the legislation, believing that it was "unconstitutional, invasive public policy, and too difficult to administer" (Montgomery County, 2009). The County Council, however, overrode the veto and the law became effective in January 1974.

Despite the contentious start of the MPDU program, for the next two decades there was relatively little controversy. In fact, David Flanagan, president and founder of the private development firm that has produced the most MPDU units, offered the view that: "We were a big happy family for 20 years." Despite this rosy assessment, a number of issues have been debated over the years: the number of units that should be set aside as affordable, the size of the developments that should fall under the statute, whether developers should be allowed to make cash contributions in lieu of building MPDU units on-site, and the length of time the units must be kept affordable. Many of these concerns have been reflected in various changes to the original statute. Current controversies and concerns are discussed in a subsequent section of this chapter.

⁶ In other words, no more than 33 percent of the 40 percent set-aside can be HOC-owned.

Major Changes in the MPDU Program and Current Requirements

Several program requirements have been debated and changed throughout the years: the number of affordable units that should be set aside as affordable and the size of the developments that should fall under the statute; the length of time the units must be kept affordable; and whether developers should have the option to “buy-out” of including MPDU units on-site and, instead, donate money for moderate-priced units to be built elsewhere.

Number of Affordable Units Set Aside and Size of Developments Covered by the Statute

By 1981 the building industry was voicing displeasure with the requirement that 15% of the units in any development had to be set aside as moderate-income housing; their position was that a 10% set-aside would be more appropriate. The County compromised, and created the new affordability minimum set-aside of 12.5%; however, this could be increased if density bonuses were maximized. In 1989 MPDU was changed to allow for some flexibility in the number of MPDUs required to be set-aside in any given development, ranging from 12.5-15%, depending on the level of the density bonus provided. The greater the density, the higher the number of MPDU units that were required to be set aside.⁷

In 2002 the law was further amended to require any development with 35 or more units to set aside MPDU units; this was a decrease from 50 units and, in 2005, developments with 20 or more units fell under the MPDU requirements.

Affordability Control Period

One of the most complex issues in the affordable housing field relates to public-private subsidy programs in which the period of time that units are required to stay affordable expires at some not-too-distant point in the future. The MPDU program has struggled with this requirement.

The MPDU program was a pioneering initiative but, at its inception, a long-term affordability restriction for the moderate-income units produced was absent. The earliest developments built under the program only required that units remain affordable for 5 years; after that, re-rental prices were set by the builder. MPDU owners could resell their units at a market sales price; the restriction period was extended to 10 years in 1981.

In addition to changes promulgated in 1981, noted above, the County increased the price control period to 10 years (up from 5 years) and required all MPDUs to be for-sale, unless they were in subdivisions consisting of only rental housing. After the 10-year period, the units could be sold at prevailing market rates. If a MPDU homeowner sold their home within the 10-year “control” period, the County had the right of first refusal to purchase the unit and to sell to another MPDU-eligible household. The law was further modified in 1989 and: increased the control period to 20

⁷ The 1989 the statute was also modified as follows: increased the maximum density bonus to 22% (up from 20%); required that a portion of the profit from the first sale of a MPDU unit, taking place after the end of the control period, be shared with the County and set aside for future housing programs in the Housing Initiative Fund (HIF); and allowed higher MPDU sales prices, thereby encouraging developers to make the MPDU units more comparable to the market rate units.

years for rental housing (up from 5 years when the law was first enacted and extended to 10 years in 1981; the control period for for-sale housing remained 10 years until 2005).

Under the current statute, for-sale units must be kept affordable for 30 years and rental units for 99 years, from the date of initial sale or rental. If a for-sale unit is sold within 30 years, the new eligible household must then maintain the unit for an additional 30 years. In other words, the 30-year clock re-sets for the new buyer, and each subsequent buyer, unless the home is kept by any single purchaser for a minimum of 30 years.

As with most programs that regulate re-sale prices of below market homes, the sale price during the control period must not be greater than the original purchase price, adjusted for increases in the cost of living (usually determined by the Consumer Price Index), for improvements to the property, and other allowed costs. In addition, any home sold during the control period must first be offered to the Department of Housing and Community Affairs and, if they are not interested, to the HOC. Moreover, for all MPDU units brought into service after the 1989 amendments, at the first sale after the control period ends, the seller must pay to the HIF one-half of the excess of the total resale price (above the original purchase price, plus inflation, improvements, and other allowed costs). However, the seller is to retain at least \$10,000 of the excess sale price.⁸

The goal of these strengthened controls is to safeguard recent and future development, so that the MPDU housing remains affordable for much longer periods of time. However, as previously noted, most of the MPDU units produced are no longer available as affordable units. Even when the number of MPDU units in force was at its peak in 1990, there were only 4,300 such units, or 55% of the 7,799 MPDU units that had been built up to that time (Trombka et al., 2004, p. 6-1, also see Table 1). The recent changes to the MPDU statute favor the long-term affordability provisions of the law over the goal of providing homeowners appreciation from the property. It is clear from the various changes in the statute that lawmakers have struggled to strike a balance between these two conflicting objectives.

The Buy-out Provision

Changes to the MPDU program contained in the 1989 modifications to the law allowed a “buy-out” provision whereby developers could provide another affordable unit off-site or make an “in lieu” payment to the HIF where such unavoidable costs as condominium association fees would render the set-aside unit unaffordable to the target population. Subsequently, the County approved a number of developments that included buy-out opportunities for developers, rather than the MPDU units being constructed on-site. A buy-out provision allows the developer to contribute a certain amount of money that is earmarked for building or preserving a set number of units off-site. Between 1989 and 2003, 19 developments were allowed to opt for a buy-out provision. With reference to those 19 developments, the MPDU law would have required the on-site development of 446 units⁹ out of a total of 4,110 MPDU units built during those years. Of the 446 units subject to buy-out agreements:

⁸ Montgomery County Code, Chapter 25A-9, Control of rents and resale prices; foreclosures.

⁹ Calculated from data presented in Table 1. See also Trombka, et al., 2004, pp. D-1,2. All the information on alternative MPDU agreements and the results of the buy-out provisions that are presented in this section are based on calculations from this source.

- 163 MPDU units were produced on-site
- 42 MPDU units were produced at another location
- A total of \$5,751,969 in alternative payments were collected

Thus, about 46% of the total number of required MPDU units were produced either on-site (37%) or off-site (9%). The alternative cash payments would not have been sufficient to cover the cost of building the remaining 241 units that would have been required if the MPDU guidelines had been followed for on-site construction. Only one payment was as high as \$100,000, received in 1996. The lowest per unit contribution was just under \$14,000 and the average per unit payment was \$34,000, far below what it would have cost in any year between 1989 and 2003 to construct a unit of housing in Montgomery County. Thus, the in lieu payments failed to produce as many units as would have been required by the MPDU program, without the buy-out provision. A review of the MPDU program by Montgomery County staff concluded that: “the County should avoid buyouts in all but the most exceptional cases” (Trombka, et al., 2004, p. 14-5).

Currently, the MPDU law offers developers the option to not build MPDU units, and instead to take other kinds of actions to promote affordable housing, when various costs that are inextricably connected to the development (e.g., condo association fees) would be onerous for MPDU residents and render the units unaffordable, or if the inclusion of the MPDU units would be economically infeasible due to environmental constraints. The statute further specifies a formula for developers to make payments to the HIF that equals or exceeds the imputed cost of the land for each unbuilt MPDU unit. Finally, the alternative plan must have a clear public benefit, outweighing the value of locating MPDUs in the specific subdivision.¹⁰

Overall, interviewees underscored that, currently, it is very rare for developments to be approved under alternative plans and there is a strong commitment for MPDU units to be located on the site of the development.

The requirement to provide a certain percentage of MPDUs applies to any new development in Montgomery County with 20 or more units. This includes development that is phased in over time. Furthermore, the law specifically prohibits developers from sub-dividing parcels to create separate developments of 19 or fewer units, as a way of circumventing the statute.¹¹

The following summarizes the current requirements for all developments served by public water and sewer and that have 20 or more units:

- between 12.5 and 15% of the units must be set aside as affordable for moderate-income households; the actual percentage for any particular development is based upon the density bonus attained. Developments that receive no density bonus are still required to provide 12.5% of the total number of units as MPDUs;
- the zoned density may be increased up to 22% to accommodate the affordable units;
- attached units may be built in single family zones;

¹⁰ Montgomery County Code. Chapter 25A-5A and 5B, Alternative payment agreement and Alternative location agreement.

¹¹ http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/mpdu/MPDU_Process_Developers.asp (accessed November 24, 2010)

- for-sale units must be kept affordable for a minimum of 30 years and rental units for 99 years, from the date of initial sale or rental; and
- buy-out provisions are allowed only under conditions that would make the on-site units unaffordable for MPDU residents or if the inclusion of the MPDU units would be economically infeasible due to environmental constraints

The MPDU requirements pertain to even small lots; most single-family MPDUs were built on lots of less than half an acre and condos, which also are built on tiny lots, must also have MPDUs. In terms of eligibility to purchase or rent a MPDU unit, targeted households must have incomes of 65% or less of area median income for rental units, and 70% or less in order to purchase units.

Implementation of the MPDU Program

MPDU units are generally viewed as high quality and attractive. Although they are not always fully integrated with the overall development, they appear to fit in well. MPDU units can be in a different section of the development from the market rate units and they are typically much smaller in size. For example, some MPDU units that look like large single-family homes, actually have two units instead of one.

Over time, units appear to have become better integrated with the rest of the development. Whether MPDU units are readily noticeable varies quite a bit. According to Sally Roman, an HOC commissioner:

In the early years, there were some pretty cheap units that were clearly MPDUs. More recently, MPDUs may be identifiable because they often do not have garages, while other units in the development do, or because they are the only townhouses, in a development of single-family detached market rate housing. When the County created a compatibility allowance, developers were allowed to charge up to 10% more for MPDUs to make them more compatible with the surrounding houses. Sometimes you can't distinguish the MPDU units at all.

The guidelines for single-family developments are somewhat flexible, in terms of how and what types of MPDU units are built. Again, as Sally Roman explained:

An R-60 zone, for example, requires 6,000 square feet per house and considerable setback requirements, if MPDUs are not required. However, under the MPDU program, many more houses can be built because smaller setbacks, denser unit types, and smaller lot sizes are allowed. Some developers have found these incentives so valuable that they have opted to go the MPDU route even if their subdivision was small enough to be exempt.

While MPDU units can be located in a separate section of the development, and can be smaller than the market-rate units, there is a sense that they typically blend in with the other homes, particularly in the more recent developments. According to David Flanagan:

developers got very good at putting in MPDU units; it was seamless. For example, instead of houses being 40 feet deep, they were 30 feet deep. But they fit in. MPDU units were accepted by the public. You just know that you will have MPDU units in your subdivision, unless you are not served by County sewer systems. Neighbors generally were unaware whether a house cost \$600K or \$100K.

Whether MPDU units are fully integrated within a development, or in a separate section, Tedi Osias, Director of Legislative and Public Affairs at the HOC, noted that the MPDU program has been very successful at economically integrating housing.

Potomac is a high-end town, which experienced its boom development with the rest of the county in the 1970s and 1980s. There was a huge amount of upper middle class housing built, including MPDUs. Without the MPDU program, there would not be any kind of economic integration. It just would not have happened naturally. This is a real strength of the program.

Diversity has also been enhanced due to the MPDU program: 51% of MPDU purchasers during 1988-1992 were minority households. In recent years, the percentage of non-white households has increased. Of the 453 purchasers from January 1, 2005 through 2007 who reported their race or ethnicity nearly 73% were minority households (179 were Asian--39.5% and 146 were Black—32.2%; 86 were White—18.9% and 42 were Hispanic with no race reported—9.3%)

In addition, the HOC (as well as nonprofit housing organizations) have been able to purchase over 1,700 MPDU units,¹² contributing to the County's permanent supply of low-income housing. These units represent about 25% of the latter's housing stock. Nonprofits currently own some 231 units of housing that were built under the MPDU program.

One of the key characteristics of the MPDU program is its relative simplicity. However, here, too, day-to-day program requirements are quite complex for builders and program participants and the staff spends a large amount of time explaining the program's requirements. To the extent that the County has now tightened up its regulations concerning not allowing developers to make in-lieu payments, rather than building MPDU units on-site, there are virtually no exceptions to the MPDU program.

Also important is that the MPDU program has operated without any significant public subsidy. According to Sally Roman: "Except in high-rise developments, the program has generally been able to operate on a break even basis, without government expenditure, other than administrative costs. And it has been able to function without raising prices for other buyers in the subdivision." In fact, the MPDU program actually brings money into the County's HIF. Since 2005, MPDU shared profit payments have contributed over \$18.5 million to the HIF.

¹² There may, in fact, be more MPDU units that have been purchased by HOC. However, here we are using the number of HOC units in that database, as described later in this chapter.

Ralph Bennett, Professor Emeritus at the University of Maryland and former HOC commissioner, noted an additional unintended strength of the MPDU program:

Since growth has been slower and less sprawling in Montgomery County than elsewhere in Maryland and the region, we are also seeing a very low foreclosure rate. Many locales without the MPDU requirement grew fast and were very spread out, and they tended to have less expensive developments. Many of those homes were marketed to more marginal buyers and, as a result, many of those homes have been foreclosed.

Despite occasional concerns voiced by the development community, the MPDU Program appears to have enjoyed a substantial amount of support from key stakeholders, including town officials, moderate income homebuyers, and private businesses interested in maintaining a diverse workforce. The Montgomery County website boasts that “MPDUs have not been shown to have a detrimental effect on the value of the market priced housing and the program has never been legally challenged by either developers or citizens” (Montgomery County, 2009).

Nevertheless, as with all inclusionary zoning programs, the MPDU Program is dependent on a robust private housing market. When the economy weakens and private housing development stalls, affordable units are not built. Annual production of MPDU units fell during various economic downturns, such as the late 1980s and early 1990s, in 2000, and again in the last year of the 2000s. During all these periods, annual production was approximately 200-300 units, compared with peak years during which production totaled as many as 900 units (see Table 1).

In addition to being dependent on overall economic activity, the MPDU Program requires available land. With development in the County having mushroomed over the past several decades, less and less buildable land is currently available.

The overall MPDU program was never aimed at assisting very low or low-income households. Nevertheless, while the maximum incomes are 65 and 70% of median income, in practice, the program reaches lower income people—households earning in the 55 to 60% of median income range.

The part of the MPDU program that is explicitly focused on meeting the needs of low-income residents is the low-income set-aside, within the moderate-income set-aside. This provision provides the right to HOC or other nonprofit organizations to purchase up to 40% of the MPDU units in each development. However, partly due to insufficient funds to purchase their maximum allotted units, these entities have not fully utilized the program; only between one-quarter and one-fifth of the total possible number of units that could have been set-aside in this way are under HOC or nonprofit ownership.¹³

Besides financial constraints, the HOC takes into account whether there are already a large number of HOC units in a given area; if there are a lot of units, they will pass on the opportunity to purchase. In addition, if a location is inaccessible, the HOC will not attempt to purchase those

¹³ For most of the program’s history the low-income set-aside within the MPDU set-aside was 33 percent; more recently it has been 40 percent, providing opportunities for nonprofits to purchase units as well as the HOC. Using the total production number of 12,520 units, which was the total as of 2007 and is the figure used throughout this analysis, and assuming the lower set-aside maximum of 33%, some 4,131 units could have been so preserved, rather than the current number of 1,716.

units. For example, until recently, new development in Clarksburg was likely not viewed as desirable from HOC's perspective, since it was considered too remote. However, HOC is now buying MPDUs in Clarksburg as the area has gotten more developed. HOC also rarely buys rental units, since they are affordable in the long-term in any case, and HOC is faced with the same problem of high condo fees in high-rises as with other MPDU buyers.

Tedi Osias also offered that even one-third of the units in a given development may simply be "too big a chunk" for the HOC to purchase due to social concerns and management challenges. She explained:

Providing social service support and monitoring the units is very difficult because they are scattered. For example, we sometimes don't find out that a family is in trouble until they are causing trouble. Sometimes families in MPDUs that HOC has purchased are unaware of various social conventions, like putting away trashcans between pickups. They may also engage in more social activity outside the house than their neighbors. Kids also may cause problems. And, occasionally, there is criminal activity. Problems may get pretty far along before we know what's going on. Neighbors assume that since we own the units, we know about the problems, but we don't until someone tells us.

Embellishing on the management issue, Sally Roman noted some of the problems involved with the scattered-site MPDU inventory:

Since there is no critical mass of units when they are all spread out, it is hard to stay on top of repairs and general maintenance. Also, since each development has its own appliances, there is no way for the HOC to buy replacement parts in bulk and thereby reduce costs. While we like the philosophy of the scattered-site approach, the mechanics of managing the units are challenging.

From an affordable housing perspective, the major weakness of the program is that so many units built through the program are no longer available as affordable moderate-income dwellings and have become part of the private housing stock. Although recent changes to the program should result in many more newly built MPDU units being safeguarded as long-term affordable housing, thousands of MPDU units have been lost from the affordable housing stock as rental and re-sale price restrictions have expired. As discussed in more detail in the section on housing production, only about one-third of the MPDU units (including HOC units) are still under affordability controls.

However, Rick Nelson offered another perspective on the lost affordable units.

MPDU is still a successful program. If it had not been for the MPDU program 8,000 households would not have had a chance to purchase. And we would not have had as many moderate-income units spread throughout the county. And even after the units left the program, after the control period, the prices were not typically as high as other houses in those areas. MPDU homes are generally smaller, or without garages, for example. So, those homes have continued to provide relatively more affordable housing options than elsewhere in the neighborhood.

Nevertheless, County officials have come down on the side of choosing to maintain affordability for a longer period into the future, rather than promoting the speculative benefits of homeownership to the first purchasers of MPDU units.

Sources of Data and Approach to Data Analysis

For the present analysis, housing production data was provided by the Montgomery County Planning Department in two different GIS shapefiles.¹⁴ The first shapefile contained information on 8,259 units built under the MPDU program. Some of these units are still being monitored for compliance in the program, but many are no longer in the MPDU inventory, since affordability restrictions have expired. This shapefile contained information indicating the unit's address and whether or not it is a rental unit. While there was no field in the MPDU database that explicitly indicated whether or not a unit was still being monitored for affordability, there was generally information on the date the contract was executed, the period of affordability governing the unit, the likely date of expiration of the affordability contract, and the affordability period imposed on the purchaser, if any.¹⁵

Based on this data, a unit was marked as affordable if the likely date of expiration was after January 1, 2008. If no likely date of expiration was available, it was marked as affordable if the date of execution of the contract plus the affordability period (the longer of the two, in cases where both were documented) was after January 1, 2008. Where no data was available, DCA staff provided information on whether the units were still affordable.

The second shapefile contained units built under the MPDU program that are no longer being monitored for compliance under that program, but are now owned by the Housing Opportunities Commission (and perhaps other nonprofits) and rented to very-low-income families. Data for 1,716 units were contained in this file.

Unfortunately, there was overlap between the two files. In other words, some addresses were listed in both the MPDU file and the HOC file. However, because many of the units were in multifamily dwellings, and the structure of each database was different, we did not attempt to determine whether units that appeared to be overlapping were really the same unit, or different units within the same building. Since 1,095 units share the same address, and many of these are probably true overlaps (i.e. referring to the identical unit), data on MPDU and HOC units are analyzed separately here, and should not be seen as mutually exclusive groups. In view of the overlap between the two databases and the total number of entries in each, we believe this analysis captures somewhere between 65% and 80% of all MPDUs ever built. However, we are confident that virtually all of the MPDU units that are still affordable are included in our sample.

¹⁴ A shapefile is a database format for storing data used in GIS analyses.

¹⁵ Some units lack full information because the MPDU database currently being used to record and track units was only created and populated within the last ten years. Almost all of the units created within the last 8 to 9 years (with the exception of HOC's units) have most of the fields populated. Since HOC independently monitors its units, these were not consistently tracked in the Department of Housing and Community Affairs database until recently.

GIS software was used to perform demographic analyses similar to the other case studies in this report. As noted elsewhere, most of Montgomery County is unincorporated, so simply matching housing production data to municipal demographic information was not possible. We chose to use census-designated places (CDPs) as our unit of demographic analysis.¹⁶ However, many of the MPDU units were built outside of CDPs. In order to be able to associate units with CDP demographic data, we used the GIS software to “assign” these units to the CDP they were closest to. Some 1,500 units were outside CDPs and had to be assigned in this way; the average distance of these units to the nearest CDP was 1,290 feet, and only three units were located more than a mile away from the nearest CDP. Fifty-four units (49 from the MPDU database, and 5 from the HOC database), were missing spatial information, and so could not be mapped. These units were not included in our analysis. Therefore, this analysis includes 8,210 MPDU units and 1,711 HOC (former MPDU) units.

MPDU Production

The major strength of the MPDU program is that it has produced a significant amount of housing—some 13,133 units through 2010. However, as noted elsewhere in this chapter, only about one-third of the units built under the MPDU program (including units that were subsequently purchased by the HOC) are still under affordability restrictions. Placing the record of the MPDU program in the context of overall affordable housing production in the County, several observers have noted that inclusionary zoning had accounted for one half of the affordable units produced since 1974 and that it had added “more units than the LIHTC and Section 8 project-based programs combined” (Katz et al., 2003; see also Roman, 2008).

Another way to appreciate the contributions of the MPDU is by assessing how much the MPDU program has contributed to overall housing production. In 1980 there were 211,126 housing units in the county and by 2010 this number grew to 376,023 units. Thus, MPDU production accounted for 7.6% of total production.

¹⁶ The Census Bureau defines a CDP as “A statistical entity, defined for each decennial census according to Census Bureau guidelines, comprising a densely settled concentration of population that is not within an incorporated municipality, but is locally identified by a name. CDPs are delineated cooperatively by state and local officials and the Census Bureau, following Census Bureau guidelines. Beginning with Census 2000 there are no size limits.” http://factfinder.census.gov/home/en/epss/glossary_c.html#census_designated_municipality_cdp (accessed November 24, 2010).

As shown in Table 1, as of the end of 2007, a total of 12,520 MPDU units had been produced. Of these, 71% were for-sale units (8,947/12,520). The average annual production was 280 for-sale units and 112 rental units, with the peak years during the 1980s.¹⁷ These are the numbers used in the remainder of the analysis. However, as noted earlier, during 2008-2010, an additional 613 MPDU units were added to the inventory (230 homeownership units and 383 rental units), bringing the total to 13,133 MPDU units produced, since the start of the program.

Table 1 also reveals that in recent years there has been a marked shift toward rental housing production. Through 2007 only 29% of the MPDU housing stock was rental housing (3,573/12,520), whereas from 2008-2010, this housing represented 62% of MPDU production (383/613). Sally Roman further observed that the county is building substantially more multifamily housing, much of it rental, as the supply of buildable single-family land is largely gone.

Table 1: Total Number of MPDUs Produced –1976-2007; 2008-2010

| Year | Homeownership | Rental | Total for Year |
|------------------------|---------------|--------|----------------|
| Sub-Total 1976-2007 | 8,947 | 3,573 | 12,520 |
| Sub-Total 2008-2010 | 230 | 383 | 613 |
| Total | 9,177 | 3,956 | 13,133 |

Sources:

http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/mpdu/Number_of_MPDUs_Produced.asp (accessed November 24, 2010)

http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/mpdu/Number_of_MPDUs_Produced.asp (accessed August 12, 2011)

¹⁷ This table includes units that were eventually purchased by the HOC; those units are listed in the homeownership column and are not considered affordable under the MPDU program, since there are no longer monitored by that program. The affordability of those units shows up as HOC units.

Although rental units accounted for less than one-third of the total MPDU inventory, Table 2 shows that they represent 38% of the units still being monitored for compliance under the MPDU program, based on the database used in this analysis (878/2,294). This reflects both a shift in policy toward building more affordable rental units, as just noted) and the frequently longer affordability periods (e.g. permanent affordability) associated with rental units.¹⁸

Table 2 also shows that data were available, and included in this analysis, for a far higher percentage of the for-sale units (7,206/8,947 = 81%) than for the rental units (1,004/3,573 = 28%). Also noteworthy is that, based on the data available for this study, a far higher percentage of rental units built under the MPDU program are still price controlled and therefore affordable under the MPDU program’s guidelines (878/1,004 = 87%), in comparison to homeownership units (1,416/7,206 = 20%).

Table 2: Description of Housing Production under MPDU Program and of Subset of Data Used In this Analysis

| | Units included in this analysis | | | Total MPDU Inventory | Percent of MPDU Inventory Captured in this Analysis |
|--------------------|---------------------------------|----------------------------|-------|----------------------|---|
| | Still Affordable | No Longer Price-controlled | Total | | |
| MPDU Homeownership | 1,416 | 5,790 | 7,206 | 8,947 | 81% |
| MPDU Rental | 878 | 126 | 1,004 | 3,573 | 28% |
| MPDU Total | 2,294 | 5,916 | 8,210 | 12,520 | 66% |

Sources: Research team analysis based on data provided by DHCA, Montgomery County Planning Department, “All MPDUs,” October 2009; http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/mpdu/Number_of_MPDUs_Produced.asp (accessed November 24, 2010)

¹⁸ The county is also building substantially more multi-family housing, much of it rental, as the supply of buildable single-family land has largely disappeared.

In addition, affordability has been preserved for all 1,711 rental units built under the MPDU program and recorded in the HOC database and for which we were able to map and assign a location. Since our data includes virtually all MPDU units that are still affordable, 18% (2,294/12,520) of the total number of MPDUs ever produced are still monitored for affordability within the MPDU program, and nearly 14% (1,711/12,520) have their affordability permanently maintained by the HOC, for a total of 4,005 units (32%).¹⁹

As noted previously, the MPDU program units included in this analysis have been aggregated by Census-Designated Places, to allow for easy comparison with the other case studies, and to be able to use demographic data provided by the U.S. Census. (See IV, Table V-3 for a summary of demographic data, as well as the MPDU program data, by the 51 CDPs in the county.)

Slightly more than one-half (27) of the 51 CDPs have had MPDUs at some point in time, thus resulting in a fairly low overall median number of MPDU units per locale (10). (See Appendix V, Table V-3). Germantown has had the most MPDUs, with 2,013 units, and also has the highest number of MPDUs still being monitored for compliance, according to our data. Germantown also grew the most of any CDP, growing by 500% between 1980 and 2000. Five CDPs experienced a net loss of housing units; most CDPs in Montgomery County were expanding through the 1980s and 1990s, but with a good deal of variability.

¹⁹ See Appendix IV for additional details about the specific challenges presented by the Montgomery County data.

Table 3 explores whether there are any significant demographic differences between places where MPDU units have been built, and places where they have not. This analysis reveals that CDPs with no MPDUs have significantly higher percentages of white residents and residents with significantly higher median household incomes than CDPs that have MPDU units. It also shows that CDPs with no MPDUs grew more slowly than those with MPDUs. In addition, CDPs with no MPDU or HOC units grew more slowly than those with MPDUs. This suggests that MPDUs are more likely to be built in faster-growing areas than in slow-growing areas.²⁰ Once again, it is important to underscore the caveat that correlations cannot be interpreted to suggest causality.

Table 3: Comparison of Median Demographic Characteristics by Production of MPDU Units

| | Median value for CDPs with no MPDU units built (N=24) | Median value for CDPs with 1 or more MPDU units built (N=27) |
|--|---|--|
| Population density | 3,684 | 3,522 |
| Percent white | 95%*** | 76% |
| Median Income | \$100,784*** | \$72,614 |
| Percent change in housing stock, 1980-2000 | 10%*** | 80% |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by DHCA, Montgomery County Planning Department, “All MPDUs,” October 2009 ; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” P11, “Hispanic or Latino (Total Population), and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), November 2009; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), November, 2009. All census data retrieved for all CDPs partly or fully contained in Montgomery County, MD.

²⁰ Interestingly, of the 15 CDPs that are independently incorporated, 13 do not have any MPDUs; only Gaithersburg and Poolesville have MPDUs (and even those assigned to Poolesville are not actually within Poolesville’s boundaries – they are nearby in unincorporated areas of Montgomery County—but based on the methodology used in the current analysis, these MPDUs were placed in Poolesville). All the places with over 20% housing growth and no MPDUs are incorporated. This suggests that the no-MPDU category is made up of two groups: (1) places that experienced little housing growth and that made little or no use of the MPDU program and (2) incorporated municipalities where planning isn’t provided for by the county.

Table 4 shows differences between CDPs with HOC units, which had been acquired through the MPDU program, and those with none. This analysis yields very similar results to those presented in Table 3, since HOC units are a subset of all MPDUs. CDPs with no HOC-owned former MPDUs have significantly higher percentages of white residents and residents with significantly higher median household incomes than CDPs that have HOC units. And, similar to the findings about MPDU units shown in Table 3, areas without HOC units grew significantly more slowly than areas with HOC units.

Table 4: Comparison of Median Demographic Characteristics by Presence of HOC (former MPDU) Units

| | No HOC units (N=24) | HOC units (N=27) |
|--|---------------------|------------------|
| Population Density | 3,597 | 3,699 |
| Percent White | 95%*** | 76% |
| Median Income | \$94,045** | \$73,241 |
| Percent change in housing stock, 1980-2000 | 10%*** | 72% |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by DHCA, Montgomery County Planning Department, “HOC-Owned,” January 2010; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” P11, “Hispanic or Latino (Total Population), and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), November 2009; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), November, 2009. All census data retrieved for all CDPs partly or fully contained in Montgomery County, MD.

Another way to compare the CDPs is by correlating the various demographic data used in this analysis, to the number of units ever built and to the number of units that are still affordable. In Table 5, all CDPs are included, whether or not they have built any MPDU or HOC-owned, former MPDU units.

The relationships in Table 5 are fairly strong, especially those related to the percent of the population that is white, to median household income, and to rate of growth. This indicates that, in general, MPDU and HOC units are more often situated in CDPs with lower percentages of white residents, with higher percentages of lower-income households, and with higher rates of growth in the housing sector. This confirms the findings presented in Tables 3 and 4. These results suggest that when left up to the private sector, and where there is no government influence on where affordable units get built, wealthier locales, with higher percentages of white residents, are less likely to produce affordable units.

Table 5: Correlations between Demographic Characteristics and Number of MPDU Units Built or Number of MPDU and HOC (former MPDU) Units Still Affordable for all Census Designated Places (N=51)

| | Correlation with MPDU Units | Correlation with still-affordable MPDU Units | Correlation with HOC units |
|--|-----------------------------|--|----------------------------|
| Population Density | 0.01 | -0.01 | 0.03 |
| Percent White | -0.61*** | -0.58*** | -0.61*** |
| Median Income | -0.39*** | -0.38 | -0.33** |
| Percent change in housing stock, 1980-2000 | 0.57*** | 0.51*** | 0.51*** |

* = significant at 10% level

** = significant at 5% level

*** = significant at 1% level (the lower the level, the stronger the significance)

Sources: Research team analysis based on data provided by DHCA, Montgomery County Planning Department, “All MPDUs,” October 2009 and “HOC-Owned,” January 2010; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” P11, “Hispanic or Latino (Total Population), and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), November 2009; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), November, 2009. All census data retrieved for all CDPs partly or fully contained in Montgomery County, MD.

Table 6 shows that there is little correlation between the median race or income of a CDP and the amount of each type of unit produced there (whether homeownership or rental). However, the table shows that the production of rental units occurs more often in denser areas. The number of homeownership units is slightly negatively correlated with the percent of the population that is white, indicating that the larger the white population in a CDP, the fewer MPDU homeownership units it generally has. There is a significant, positive correlation between housing growth and homeownership units, indicating that higher CDP growth rates between 1980 and 2000 are associated with more MPDU homeownership units.

Table 6: Correlations between Demographic Characteristics and Types of Units Built Among All CDPs with MPDU Housing Ever Built (N=27)

| | Correlation with rental units | Correlation with homeownership units |
|--|-------------------------------|--------------------------------------|
| Population Density | 0.44** | -0.03 |
| Percent White | -0.10 | -0.18* |
| Median Income | -0.11 | -0.07 |
| Percent change in housing stock, 1980-2000 | 0.12 | 0.47** |

* = significant at 10% level

** = significant at 5% level

*** = significant at 1% level (the lower the level, the stronger the significance); Wilcoxon ranksum test

Sources: Research team analysis based on data provided by DHCA, Montgomery County Planning Department, “All MPDUs,” October 2009; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” P11, “Hispanic or Latino (Total Population), and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), November 2009; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), November, 2009. All census data retrieved for all CDPs partly or fully contained in Montgomery County, MD.

The several statistical analyses performed point to a consistent finding: CDPs with no MPDU units and no HOC units have significantly more white residents and significantly higher median household incomes than CDPs that have MPDU and HOC units. However, as noted repeatedly in this report, just because we are finding correlations, we cannot conclude that the race or incomes of residents in some CDPs is the reason why there are no MPDU or HOC units. Again, it is important to keep in mind Sally Roman's observation on this point that this relationship is likely due to the characteristics of the areas that were getting developed when the MPDU program was producing the most units. And, interestingly, while there is some evidence that the MPDU program has increased diversity, as previously noted, the data indicate correlations of MPDU production in less diverse locales.

Current Issues and Proposed Changes to the MPDU Program

As with much of the country, new housing construction in 2009 and 2010 was sluggish without much activity in the MPDU program. However, when there was a significant amount of development in the County, the program was used extensively. Tedi Osias reflected on the heyday of the MPDU program:

The program worked best, in terms of creating affordable units, when there was a high volume of moderate-income single-family housing development. This was in the 1970s and 1980s, when the County was really growing. There was almost an assembly line production of single-family units. It was Montgomery County's version of Levittown. That's when the program got its strong reputation, but we're past that.

Looking to the future, as more transit-oriented development occurs, Rick Nelson expected the MPDU program to become more heavily utilized once again. Also, while the MPDU program is not producing many units at the present time, the County's trust fund, the HIF, has become a critical source for financing affordable housing. HIF gets its funds in two major ways: 1) from the profits shared between the homeowner and the County when units are first sold after the period of cost controls ends; and 2) since 2001, from County earmarks totaling 2.5% of annual property tax revenues. These funding sources generate about \$20 million/year; currently, HIF has about \$58 million in its account.

To the extent that the County is seeing any construction at the present time, most activity is in high-rise, high-end development, particularly in the Bethesda and Silver Spring urban cores. According to Sally Roman, it is hard to make the MPDU program work with high-rises, since it is hard, in those situations, to give a density bonus or favorable changes to development standards.²¹

Local residents tend to be opposed to height and therefore people are not happy if buildings are taller than what is specified in the master plan guidelines. While all guidelines and zoning come from the same agency, the Montgomery County Planning

²¹ Sally Roman further pointed out that the issues with multifamily housing center around high-rise buildings only; garden apartment builders have generally been able to make the program work without major issues. Private email communication, August 17, 2010. Cited with permission.

Department, the guidelines tend to call for less density and height than what would be allowed based on zoning. Extra height above the guidelines tends to be allowed only for MPDU units, but there is opposition to added building height.

Another key issue pertaining to high-rises relates to the difficulty of MPDU condo owners in high-end developments being able to afford the condo fees, as well as concerns on the part of developers about the cost of setting aside MPDU units in high priced developments. From the point of view of staff at the Department of Housing and Community Affairs, this is a significant problem and they have proposed a new method of calculating the sales price of an MPDU unit. However, as of September 2011, no changes had been made.

Under the proposed rule, the price of the MPDU units would not be related to the actual costs of constructing the units. Instead, MPDU sales prices would be based on the carrying costs of the unit, including the condo fees. The amount that a household earning 70% of area median income could afford would be calculated and, essentially, whatever is left over after paying condo fees would be the amount set aside for paying the mortgage. In this way, developers would need to “back into” the sales price of the unit. This is in contrast to the current operation of the MPDU program, where the developer can make the project work by charging what it costs to build, the pricing of MPDU units under the proposed plan would not be based on the developer’s costs.

Not surprisingly, developers are far from happy with this proposal and, according to Rick Nelson, they are “pushing back.” “Pushing back” appears to be a gentle way of saying it. While David Flanagan had positive feelings about the original MPDU program and viewed it as totally workable, things started to go sour in about 2007-2008:

The County just won’t leave it alone. They continue to tighten the screws. They are taking a good program and ruining it. The premise in the beginning was to not do any harm to developers. The arrangement was that the County gave us higher density and the ability to build more market rate units. But now they think that it is our responsibility to take over housing low-income people. The way it is structured now developers will lose money. We are not getting the density bonuses we need, because of competing concerns, such as environmental conservation. But the County is telling us that even if we can’t get the density bonus, we have to build the MPDU units anyway. County officials and politicians don’t care if we lose money; that just wasn’t the original intent.

Indeed, proposed amendments to the MPDU program would remove language from the statute, which clearly indicates that developers are not expected to lose money by including MPDU units in their projects. Specifically, a bill which has been before the County Council since at least 2008 would delete the following language that was included in the original law:

Ensure that private developers constructing moderately priced dwelling units ... incur no loss or penalty as a result thereof, and have reasonable prospects of realizing a profit on such units by virtue of the MPDU density bonus...²²

²² Montgomery County. 2009. 25A-2 (6). Declaration of Public Policy. This language is identical to Rockville’s Moderately Priced Housing Ordinance, 13.5-2 (6).

In commenting on the proposal that the cost of affordable units be linked to what individual households can afford, David Flanagan asked: “Is it my problem what average salaries are? How could I underwrite a property, based on some unknown household’s income limits and what they are able to afford? It’s a pure extraction.”

Another proposed change in the MPDU program would eliminate the provision that would allow a waiver to the MPDU requirement by “letting a developer, under specified circumstances, comply ... by contributing to a County Housing Initiative Fund.”²³ It remains to be seen whether the various proposed changes in the MPDU statute will be adopted and, if so, what the implications will be for the viability of the program.

Overall Assessment

Inclusionary zoning has become a popular approach for producing housing that is affordable to low and moderate-income households. From the perspective of the public sector, this strategy is particularly attractive since it relies primarily on the private housing market, rather than public subsidies. But therein also lies one its key weaknesses: when there is little private market activity, the program stalls or shuts down.

While the MPDU program enjoyed quite a bit of support through its first several decades, in recent years it has become far more contentious. Private developers have become increasingly concerned about the ever more demanding requirements of the program, which, they fear, will threaten the viability and profitability of potential projects.

A popular provision of the MPDU program, which was aggressively used between 1989 and 2003, permitted developers to opt out of the program and, instead, to provide in-lieu payments, which were then used to produce affordable housing elsewhere. However, contributions under this rule did not produce as many units as would have been required by the MPDU program, without the buy-out provision. This experience suggests that buy-out provisions should be used very rarely. At the present time, the MPDU program allows buy-out provisions only under conditions that would make the on-site units unaffordable for MPDU residents or if the inclusion of the MPDU units would be economically infeasible due to environmental constraints.

In its more than 35 years, the MPDU program has produced some 13,133 units. However, due to time limits on the number of years units are required to remain affordable, only about one-third of this inventory is still either in the MPDU program, or has been purchased by the county-wide housing authority, the Housing Opportunities Commission. Linking affordable housing production to public housing authority purchases appears to be an important strategy.

A far higher percentage of MPDU rental units are still affordable, in comparison to MPDU homeownership units. This suggests that, in order to maintain a stock of permanently affordable housing, inclusionary housing programs should consider including requirements for the production of rental housing. Requiring affordable units to remain affordable in perpetuity, or as

²³ Montgomery County, 25A-2 (7). The most current version of the amendment would retain the alternative payment provision; the Council subcommittee has expressed its support for maintaining this option, but increasing the per unit alternative payment amount.

long as feasible, is critically important for inclusionary housing programs. In addition, opportunities, and even funding, should be made available to public housing authorities and/or nonprofits to purchase inclusionary units for long-term low and moderate-income occupancy.

Despite the loss of about two-thirds of the housing produced under the MPDU program, informants note that MPDU units tend to be more affordable than neighboring units, even after affordability restrictions have expired.

Ralph Bennett summed up the MPDU program with this enthusiastic assessment:

It has been a huge success—an exemplary program. Everyone steps up and does his part; everyone understands how it works. Developers have learned that it is part of the price of doing business; MPDU becomes a component of the high cost of development of Montgomery County. Developers might have challenged it, but they haven't. There has never been a legal challenge in the more than 30-year history of the program.

Concerning the various statistical analyses, on the one hand,

- slightly more than one-half of Montgomery County's 51 Census-Designated Places have produced MPDU units and/or HOC-owned (former MPDU) units.

On the other hand,

- CDPs with no MPDU units and no HOC units have significantly more white residents and significantly higher median household incomes than CDPs that have MPDU and HOC units. Some of those interviewed for this report suggested that this pattern may be the result of the County's historical development patterns. Specifically, they suggested that many areas were essentially built-out prior to the passage of the MPDU law in 1974. These would likely be the denser areas of the County. While density did not emerge as a factor significantly related to MPDU production, we did find that MPDU production was closely associated with higher growth locales (i.e., those that were less built out).
- the production of rental units occurs more often in denser areas;
- the number of homeownership units is slightly negatively correlated with the percent of the population that is white, indicating that the larger the white population in a CDP, the fewer MPDU homeownership units it generally has.

Key Observations for Massachusetts (and others)

Major Similarities between the MPDU Program and Massachusetts' Chapter 40B

- Both rely on private sector initiation of developments and on a robust housing market (although in Massachusetts nonprofit developments and those that are 100% subsidized also use Chapter 40B).
- Both are viewed as relatively simple to administer.
- The court systems have been infrequently used.

Massachusetts (and others) May Want to Consider These Lessons from Montgomery County

- When buy-out provisions have been allowed, financial payments have not been adequate to allow for a 1:1 construction of units that would have been required under the MPDU program. Therefore, any programs that encourage affordable housing development should ensure that “in lieu” payments provide actual housing units at the level mandated by the program.
- The Housing Opportunities Commission has been able to purchase MPDUs, thereby promoting affordability in perpetuity. It might be desirable for housing authorities or municipalities in Massachusetts to make similar purchases of 40B units. This would be most applicable to rental units produced through 40B, since as of 2006, all homeownership units must be affordable in perpetuity, even if a seller cannot find an income eligible purchaser.
- A higher percentage of units built under the MPDU program have been for-sale than under the 40B program. However, a disproportionate share of the rental units in Montgomery County are still affordable. This suggests that promoting rental housing, accompanied by long-term restrictions or other mechanisms of assuring affordability, is an important strategy.

Chapter 5: New Jersey

Overview

New Jersey presents a complex story about exclusionary zoning and a state's efforts to promote affordable housing across its many jurisdictions. Several books and numerous articles have been written, university symposia have been held, and there have been more than three decades of judicial history.¹ The first Mt. Laurel ruling by the state Supreme Court was handed down in 1975, which determined that a municipality's land use regulations must provide opportunities for a range of housing options for all people who might want to live there. Since that time, there has been a second state Supreme Court decision on Mt. Laurel, many other court cases, several major legislative initiatives, including passage of the Fair Housing Act in 1985, and a number of changes in how the state has attempted to implement the various judicial and legislative mandates. This included the creation of the Council on Affordable Housing (COAH), the administrative branch of government charged with enforcement of the statute. COAH attempts to evaluate housing needs across the state and it strives to develop a rational "fair share" distribution. This statewide "fair share" plan is supposed to lead to more rational planning at the local level. A key area of contention has been how the state has assigned to municipalities its "fair share" and "growth share" affordable housing obligations.

The New Jersey strategy involves the builder's remedy, whereby a developer that demonstrates that the municipality's zoning is exclusionary and commits to a set-aside of low-moderate income units, may seek permission from the courts to build more market-rate units than would be allowed under existing zoning, if the site and project meet certain planning and environmental standards. A municipality that does not produce adequate changes in its zoning could be subject to a court mandate including voiding its existing zoning, as well as other sanctions impacting development. A municipality can be granted immunity from the builder's remedy by submitting a realistic plan to COAH for attaining its affordable housing allocation. The New Jersey experience highlights a number of key differences compared with Massachusetts' Chapter 40B, particularly the former's reliance on a complex formula for municipalities to produce a specified share of affordable housing, immunity from builders' appeals if a submitted plan has been approved and, until mid-2008, the opportunity for municipalities to provide payments to other cities or towns for the production of affordable housing which, in turn, counted as a portion of their obligation.

Background

The first Mt. Laurel lawsuit was filed in 1971 on behalf of a community organization representing a 200-year old African-American community that wanted to build 36 units of low-income housing in Mt. Laurel, New Jersey. The town had refused to change its minimum one-half acre per unit zoning ordinance and local chapters of the NAACP became interested in the case, *Southern Burlington County NAACP v. Township of Mt. Laurel*.

¹ See, for example, Haar, 1996; Kirp, Dwyer and Rosenthal, 1995; Woodrow Wilson School of Public and International Affairs, Princeton University, 2008; Basolo and Scally, 2008.

In 1975, the state Supreme Court ruled that:

As a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income. It must permit multifamily housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirement as to lot size, building size and the like, to meet the full panoply of these needs...²

The court gave Mt. Laurel 90 days or longer, if needed, to adopt appropriate amendments to correct the deficiencies cited in its zoning ordinance. It also directed Mt. Laurel to act without judicial supervision to fulfill “its fair share of the regional need for low and moderate income housing” and stated that “there is at least a moral obligation” to provide housing for poor residents living in dilapidated, unhealthy quarters. The court concluded that if Mount Laurel did not perform as expected, further judicial action could be sought. This last statement proved to be prescient.

Despite the importance of the Mt. Laurel I decision (as it came to be known) and the court’s explicit ban on exclusionary zoning, the issue was far from resolved. A number of court cases were filed and confusion was rampant. Nearly a decade after the first Mt. Laurel decision, in 1983 the state’s Supreme Court ruled on what is now referred to as Mt. Laurel II. In a sharply worded decision, the court noted that the administration of the court’s directive had been ineffective, that Mt. Laurel was “afflicted with a blatantly exclusionary ordinance,” and that the court was committed to making significant changes. Mt. Laurel II reaffirmed what was known as the Mt. Laurel doctrine:

In Mount Laurel I, this Court held that a zoning ordinance that contravened the general welfare was unconstitutional...a developing municipality violated that constitutional mandate by excluding housing for lower income people; that it would satisfy that constitutional obligation by affirmatively affording a realistic opportunity for the construction of its fair share of the present and prospective regional need for low and moderate income housing.³

It took more than 100 pages to articulate the Mt. Laurel II decision, which put into place a much stronger, targeted series of implementation strategies, as follows:

- 1) The State Development Guide Plan was to be used to determine which municipalities were considered growth areas;
- 2) These growth areas were to be assigned a “fair share” target for providing realistic opportunities for low and moderate income households to find housing;

² *New Jersey Atlantic Reporter*, 336 A.2d 713, Section 20-33, pp. 731-732.

³ *New Jersey Atlantic Reporter*, second series, 456 A.2d 390, Section 1.A. pp.413.

- 3) “Realistic opportunities” were to include both the removal of exclusionary zoning barriers, as well as a range of affirmative actions, including inclusionary zoning⁴, density bonuses, and mandatory set-asides;
- 4) The builder’s remedy was authorized; a developer that demonstrates the exclusionary attributes of a municipality’s zoning and commits to a set-aside of low-moderate income units (20% was articulated as an appropriate goal), would be able to seek permission from the courts to build more market-rate units than would be allowed under existing zoning, if the site and project meet certain planning and environmental standards;
- 5) An elaborate judicial system was created to enforce the Mt. Laurel decisions, including the appointment of three specialized trial judges;
- 6) A municipality that did not produce adequate changes in its zoning could be subject to a court mandate including voiding its existing zoning, mandating adoption of zoning conducive to providing “realistic opportunities,” approving pending applications that included low-moderate income housing, and delaying construction of other development.

Two years after Mt. Laurel II was decided, in 1985, the state legislature enacted the Fair Housing Act. A new state agency, the Council on Affordable Housing (COAH), was created to implement the program and to serve as a voluntary alternative to trial court proceedings; municipalities could choose to petition for approval of a plan to meet their constitutional obligation.⁵ A municipality can be granted immunity from the builder’s remedy by submitting a plan, and receiving certification from COAH for the duration of the cycle period (originally six years and now ten years). COAH certification depends on the municipality developing a realistic plan for attaining its affordable housing allocation, which has to include, for example, zoning to accommodate the new housing, the identification of suitable sites, and designation of financial resources.⁶ Failure to submit a plan to COAH can make a municipality vulnerable to the builder’s remedy, which can only be implemented through the courts. However, filing of plans with COAH is voluntary.

⁴ Inclusionary zoning ordinances require developers to construct the required affordable units on site or, alternatively, developers may have the option of providing the units elsewhere in the municipality or making a payment in lieu of the actual production. These payments historically only needed to cover a fraction of the total cost of actually constructing an affordable unit, since the affordable sales price is subtracted from the construction cost to determine the subsidy (or payment in lieu) needed (Larissa DeGraw, Technical Assistant, New Jersey Council on Affordable Housing, Private email communication, January 5, 2009. Cited with permission). The ability of a developer to exercise the in lieu payment option is based on a municipality’s ordinance that might cover, for example, minimum development size thresholds or environmental or site configuration concerns. Based on an average construction cost across COAH’s six regions of \$250,536, as of 2008 the average in lieu payment was \$161,005 (Calculated from information presented in “Chapter 5:97 with amendments through October 20, 2008, Third Round Substantive Rules,” p. 55). In recent years, the general anti-development climate has made municipalities reluctant to use inclusionary zoning.

⁵ However, if a town chooses not to participate in the COAH process, it could be subject to court action, although not by one of the three original judges.

⁶ Municipalities are not required to expend their own finances, but they do have an affirmative obligation to seek outside funding sources such as from the state or federal government.

The 1985 law also created a new mechanism, the Regional Contribution Agreement (RCA), to assist municipalities meet their “fair share” housing allocations. A given municipality could transfer up to one-half of this target to another municipality within its region, so long as the latter was able to provide a realistic opportunity for affordable housing production consistent with sound planning. While these agreements had to be approved by COAH, other details of the arrangement, including the amount of money to be paid, were open to negotiation between the two municipalities, although COAH eventually established a minimum RCA contribution amount of about \$25,000. Diane Sterner, Executive Director of the Housing and Community Development Network of New Jersey, observed that the per unit level of RCA payments was never enough to create an actual unit. Per unit contributions were typically set at whatever the minimum threshold was, which for years was \$25,000 or lower, and finally, just before RCAs were eliminated (in mid-2008), was raised to \$35,000.⁷

Early Implementation of the State Law

When COAH was launched in 1986, the agency set to work developing “fair share” goals to be attained over a 6-year cycle. However, almost immediately, the process became highly bureaucratic. In addition, a numerical formula for developing “fair share” allocations was broadly criticized. Questions were raised about what a “fair share” number was and what a municipality should or could realistically do to attain it. Furthermore, it later turned out that some towns had small “fair share” goals, but with a large amount of development, while others had large “fair share” goals, but with low development. Nevertheless, the allocations were based on historic growth rates, among other factors, and represented COAH’s best judgment about anticipated growth.

In addition to articulating “fair share” goals, COAH also developed detailed rules on how inclusionary zoning would operate, including recommended set-asides for affordable housing based on the density of development, as well as other requirements intended to guide the process. Typically, municipalities have viewed inclusionary zoning as a key vehicle for producing the needed affordable housing. Developers are often supportive of inclusionary zoning, but only if accompanied with the opportunity to increase density, since that allows them to build more market rate units than would normally be permitted on a given parcel, provided that the development also includes a set percentage of affordable units. Many municipalities have granted developers density bonuses through re-zoning or in conjunction with inclusionary zoning.

Shortly after the creation of COAH, the ability of municipalities to charge fees to developers became a major area of controversy. Following numerous cases filed in lower courts, in 1990, the state Supreme Court weighed in again, in the case of *Holmdel Builders Association v.*

⁷ A memorandum by Kathleen McGlinchy provided additional detail on the amount of RCA contributions: In the first round, the unit transfer amounts for the 40 RCAs ranged from \$11,500 to \$27,500; the average was \$19,917 per unit. In 2000, a new rule stated that units transferred prior to January 2, 2001, as part of an RCA, would require a minimum contribution of \$20,000 per unit from the sending municipality. After this date, the minimum RCA transfer amount was set at \$25,000 per unit. As of 2006 (round three), the minimum RCA transfer amount was set at \$35,000 (“The History of RCAs According to Kathy McGlinchy” n.d.).

Holmdel Township, and upheld the validity of developer fees. Developer fees are assessed on developments that do not include any affordable housing and have become a significant source of revenue in New Jersey for affordable housing. Since 1992, one half (284) of New Jersey's 566 municipalities have established trust funds and, in the aggregate as of June 2010, had collected over \$541 million in developer fees. However, only about one-half of this amount, or \$276 million, had been spent, leaving a balance of nearly \$265 million; 83 municipalities (29%) have not spent any of their trust fund money.⁸

The first round of "fair share" housing goals covered 1987 to 1993 and the second from 1994-1999. Lucy Vandenberg, Executive Director of COAH (at the time of the interview), explained the process for determining "fair share" goals during that period.

Need was comprised of three components: prospective need, reallocated present need, and present need (now called the rehabilitation obligation). Prospective need is the municipality's future new construction need. Reallocated present need explicitly attempted to reallocate substandard housing in the cities as a new construction obligation to the suburbs. No urban municipality was given a new construction need goal. All new need was to be absorbed by suburban cities and towns. A "fair share" number was developed for each city and town and they were required to develop zoning or other mechanisms to reach that number.

Thus, not all of New Jersey's 566 cities and towns were assigned a new construction obligation. Urban municipalities, which receive state aid to supplement their municipal budgets because of high poverty rates and low tax revenues, were generally viewed as already "doing their share" and were not assigned a new construction obligation.

By the end of the second 6-year cycle, which ended in 1999, new housing need figures for the third round still had not been published by COAH. As discussed below, this inaction on COAH's part prompted some lawsuits. COAH did not, in fact, release new numbers until 2004, when directed to do so by the courts. When the numbers were finally released, they were below the needs estimated in the 1980s and 1990s. Protests concerning the numerical targets arose from both the advocacy community and the development industry, which prompted another series of lawsuits. Municipalities, however, tended to be comfortable with the new targets, since they were permitted to age-restrict up to one-half of the units and obligations from the 1980s and 1990s were retroactively reduced.

Despite the various areas of controversy raised during the first two 6-year cycles, Alan Mallach, senior fellow at the National Housing Institute, summed up the experience: "the system worked 'after a fashion.' Although people were not exactly happy, most suburbs were participating; units were getting built." By 2001, 271 municipalities had submitted plans to COAH.

⁸ This includes four municipalities, each of which had spent negligible amounts: \$.60, \$8.00, \$22.50, and \$94.92. Calculated from: Council on Affordable Housing, "Affordable Housing Trust Fund Monitoring," as reported through June 16, 2010.

The Emergence of Growth Share and Third Round Fair Share Plans

Starting in the late 1990s a new idea, known as “growth share,” gained popularity as an alternative to COAH’s arcane rules and methodology for calculating “fair share.” Instead of COAH developing an abstract “fair share” number, an affordable housing obligation was articulated that was connected to all kinds of growth—residential and non-residential. An anti-growth or no-growth municipality, for example, would not be required to provide affordable housing. But those municipalities that were in a growth mode would need to meet certain affordable housing goals.

The third round “fair share” numbers were supposed to be announced as the second round was coming to a close. However, due to a number of political delays, as of 2003, a full four years after the end of the second round, there still were no new numbers or rules. Finally, in 2004, the new “growth share” rules, which were to govern the operation of the third round of COAH’s activities, were adopted and called for the creation of 1 unit of affordable housing for every 8 market rate units produced or for every 25 jobs created. However, critics viewed this as an inadequate formula. With the availability of various bonuses and RCAs, there was a concern that little housing would be produced. Further, municipalities were enacting zoning ordinances that failed to consider, for example, the type of affordable housing to be produced or the suitability of the site. Under “growth share,” every municipality with growth had an obligation to produce affordable housing.

“Growth share” elicited a round of court cases. In January 2007, the Appellate Court decided most of the pending lawsuits and overturned substantial portions of the third round rules along with the “growth share” methodology that had determined the level of housing need for each municipality.⁹ Although COAH had attempted to recalculate the prior round obligation to retroactively reduce numbers for many towns, the court rejected this analysis. The court sided with developers and affordable housing advocates and ruled that it is not appropriate to use municipally-determined growth as the key factor in determining a municipality’s affordable housing obligation, since that would result in under representing need and promoting exclusionary zoning. In short, the court underscored the possibility that a town could avoid any responsibility for providing additional affordable housing by avoiding growth altogether and, as a result, the statewide targets would not be met. Essentially, “no growth” could be a subterfuge for no affordable housing being required, or built.

Elaborating on the impact on the impact of the Appellate Court’s ruling on COAH, Alan Mallach observed that:

It threw out a great deal of the COAH rules, including their growth share formula. While they upheld COAH on some points, the weight of the evidence was against COAH. This was also particularly apparent in light of a long line of Appellate Court rulings upholding COAH rules. The court also required “compensating benefits,” such as density bonuses for inclusionary projects, something which flew in the face of prior case law.¹⁰

⁹ For a good critique of the first set of “growth share” numbers and how they substantially underestimated the statewide need and that various assumptions about production were overstated, see Mallach, 2004, p. 3.

¹⁰ Alan Mallach, private email communication. December 5, 2009. Cited with permission.

New third round rules, promulgated in October 2008, took into account the court's several areas of concern and a new "growth share" formula was developed which called for 1 affordable unit for every 4 market rate units produced and for every 16 jobs created, coupled with a growth projection, or target, for each municipality. The latter was specifically aimed at addressing the court's concern regarding exclusionary zoning.

The rules, including appendices detailing how "growth share" goals were developed, span more than 150 pages. Assistance in developing the "growth share" formula was provided by five University of Pennsylvania Wharton School faculty and staff members, as well as consultants from Rutgers University and Econsult Corporation. The bottom line: neither the formula nor its implementation is simple. But in view of the multiple interests that the law attempts to satisfy—municipalities that may be content with the status quo, the court's requirements, and advocates eager to maximize production – the resulting complexity is not surprising.

In late 2008, New Jersey municipalities began submitting their "fair share" housing plans as part of the third round.¹¹ Since submission of plans to COAH is voluntary, David Kinsey noted that there are two important reasons for doing so: a COAH-approved plan enables a municipality to retain the developer fee funds; if not, these monies are contributed to the statewide trust fund. And, second, once a municipality's plan has been certified by COAH, it is immune from builder's remedy lawsuits for the duration of the COAH cycle. However, all plans submitted to COAH must create a realistic opportunity for the development of affordable housing.

As of February 2009, 248 municipalities had submitted plans to COAH as part of the third round. Another 32 municipalities had one or more cases pending in the courts (either by having made a proposal for affordable housing voluntarily or as a result of a builder's remedy litigation) and, as of mid-2009, 19 municipalities were expected to file with the courts before the end of the year. This means that a total of 299 municipalities (out of 566 or 53%) had either filed "fair share" plans or were going through (or likely to go through) the court system. In addition, another 53 in the Highlands region of the state received an extension for submitting their plans for up to one year, as a result of an executive order from the governor (Gordon, 2009, p. 16). This means that 38% of New Jersey's municipalities had chosen not to submit "fair share" plans. In October 2010, the New Jersey Appellate Division threw out the revised third round rules in a decision currently awaiting review by the New Jersey Supreme Court. As of fall 2011, Third round plans were, for the most part, not being processed even for municipalities that had submitted plans.

In articulating why some municipalities file plans with the courts, rather than COAH, Kevin Walsh, Associate Director of the Fair Share Housing Center, provided this explanation:

Some towns feel that they may have a better chance of controlling the review process since the courts may be somewhat more flexible than COAH. Other towns may have been sued and feel that it may be convenient to stay in the court system. Courts also will

¹¹ Each municipality's "fair share" obligation can be reduced if, for example, COAH assumed some land was vacant that isn't. The municipality's petition must demonstrate that its ability to meet its housing obligation is limited by the lack of land capacity. Some towns have negotiated their obligation down to zero. In the third round of plans, over 70 municipalities claimed "adjustments," based on their determination that they do not have sufficient vacant land to meet their COAH obligation, or due to a lack of other resources, such as sewer capacity (Cited in Gordon, 2009, p. 8).

retain a planner to help with the review who is supposed to follow COAH's rules, although towns can argue in special circumstances that they should make an exception for some unique reason... In enforcing the constitutional mandate, courts are required to conform their decisions to COAH's regulations whenever "practicable."¹²

Municipalities that are fully built up, intensely urban, or far from a major urban center, often do not submit plans to COAH. Kevin Walsh further observed that a municipality that does not file a plan with COAH may "believe that it is not vulnerable to a builder's remedy filing, it may lack the political will, or it may simply be a poor decision." But then, of course, they lose the opportunity to retain the developer fee. Fully built up municipalities may still have "fair share" obligations and a few have been sued by developers seeking to redevelop properties. However, in view of the Appellate Division having invalidated third round "growth share" obligations in 2010, municipalities were in limbo (O'Sullivan, 2011).

Additional Key Issues

Rounding out the background of the New Jersey experience, the following provides additional information about RCAs and the 2008 legislation and on the issue of developer fees.

RCAs and 2008 Legislation

As noted previously, RCAs were abolished in 2008. This followed the 2006 election of a new speaker of the New Jersey State Assembly. While supportive of affordable housing, he had been strongly opposed to RCAs. This, despite the fact that the amount of the "fair share" obligation that was transferred to other towns through RCAs was far less than the theoretical maximum of 50%; it was in the range of 15% to 25%. Although Alan Mallach was not personally in favor of RCAs, he offered that:

in practice, they were not a disaster. From a political standpoint, RCAs served as a bit of a safety valve. More communities that might have been opposed used it as a way to meet their obligations. Since towns were able to pocket the healthy developer fee money and pass the money on to the receiving municipality, in most cases the sending municipality was able to execute the RCAs at no net cost. It was a nice system for them.

According to planning consultant David Kinsey, about two thirds of RCA funds were allocated as grants to homeowners for rehabilitation of existing housing, rather than to create new affordable units. Kathleen McGlinchy, Manager of COAH's Monitoring Unit, noted that:

COAH monitors RCAs that were approved in the past, including the expenditure of RCA funds. In addition, the 'receiving' municipality is required to submit a plan to COAH and must receive their approval for how the funds will be spent. The 'receiving' municipality is required to rehabilitate or produce the number of units that were transferred.

Nevertheless, Adam Gordon, Staff Attorney at the Fair Share Housing Center, noted that about one-third of RCA funds have no record of being spent. Whatever one's views of RCAs, in 2008

¹² Pursuant to *Hills Development Co. v. Bernards Township*, 103 N.J. 1, 63 (1986).

the new speaker of the state legislature was successful in getting an omnibus housing bill enacted that, in addition to abolishing RCAs and not grandfathering any agreements except those that had been completely executed, mandated that 13% of the housing created through state action must be affordable at 30% AMI or less and created an up-front statewide developer fee that goes toward affordable housing development, to be discussed in the next section.

The elimination of RCAs has caused some grumbling on the part of the suburban or “sending” municipalities that used this approach. Replacing RCAs, however, is a new strategy that provides municipalities in certain parts of the state, that already have a regional planning body, the opportunity to undertake their affordable housing work through these entities. For a municipality that is covered by a regional planning body, 50% of its obligation can be met by coordinating affordable housing efforts with other cities and towns in a particular region.¹³ However, obligations cannot be transferred to certain high-poverty towns, making this new system very different from RCAs.

Developer Fees

During the latter part of the 2000s, there was a considerable amount of debate about the developer fee, with significant efforts launched to: reverse it altogether; impose a moratorium; eliminate the requirement that 1 affordable unit be created for every 16 jobs; or for municipalities to refund the over \$20 million of fees already collected from developers. This fee amounts to 2.5% of the development cost of equalized assessed value¹⁴; the developer fee for residential development, which has been in effect since 1992, can be levied at the discretion of the municipality, up to 1.5% of equalized assessed value, according to COAH regulations.¹⁵

Up until the summer of 2009, municipalities took the position that they couldn't use the developer fee, since there was a possibility that it would have to be returned. But, as Diane Sterner, Executive Director of the New Jersey Housing and Community Development Network, suggested, “both the weak state of the economy and the threat of the possibility that the developer fees might need to be returned may have been an excuse to not do anything.”¹⁶

¹³ A regional planning body is a state-created entity that, for environmental or other reasons, can regulate municipal zoning in that area. The five regional planning areas are: Pinelands, the Highlands, the Meadowlands, Fort Monmouth, and Atlantic County. According to Kathleen McGlinchy, no transfers had been approved as of December 7, 2009.

¹⁴ The equalized assessed value is tax assessor's data on the value of the property, equalized to a common ratio reflecting true value. This is because different towns assess in different ways.

¹⁵ The state made the fee effective as of the day after the bill was signed. Many developers were unaware of this and received a sudden bill from the municipality for a fairly large sum that had not been anticipated. Expectedly, this caused considerable anger and confusion on the part of the development community. Due to the economic downturn in 2008-09, in 2009 the legislature retroactively repealed this fee for projects approved since 2008 and, going forward, there is a moratorium on the fee for newly approved developments, so long as building permits are granted by 2015. This was viewed as a way to encourage economic growth.

¹⁶ Also concerning the developer fee, legislation enacted in 2008 included the provision that towns must use monies from developers for affordable housing within four years of the initial collection. If not, the money is lost for the exclusive use of the town and it is sent to a statewide fund. The New Jersey Fair Housing Center has suggested that the Governor reduce the “use it or lose it” period down to one or two years. At present over \$238 million is

In the summer of 2009, the state legislature did, in fact, impose a moratorium on the developer fee for any project that received site plan approval prior to July 1, 2010 and a building permit prior to January 1, 2013, later extended to 2013 and 2015, respectively. Municipalities that had developer fees in place prior to 2008 were (for the most part) given permission to keep any money collected or committed up to July 2008. Further, in order to compensate municipalities for any fees they might have lost due to the moratorium, the legislature appropriated \$15 million¹⁷ Nevertheless, as noted earlier, developer fees have helped swell local trust funds, with an aggregate balance of over \$200 million.

While the developer fee controversy did not appear to be active as of fall 2011, there were ongoing legislative efforts on the part of municipalities that were looking for relief from affordable housing obligations. The League of Municipalities has fought in the courts for relief, with financial support being provided by several hundred cities and towns. An oral argument before the New Jersey Supreme Court was expected in late 2011 or early 2012, which would pit those towns against housing advocates, developers, and several amicus groups such as the NAACP, older suburban municipalities, and smart growth organizations.¹⁸

Builder's Remedy Lawsuits and Other State Sanctions for Non-Compliance with "Fair Share" Obligations

Only if a town is neither under COAH or court jurisdiction does a developer have a chance of being successful in Mt. Laurel litigation which, in turn, could result in rezoning that would allow inclusionary development. According to Alan Mallach, builders have used the threat of litigation to "compel towns to grant approvals and make unwanted zoning changes for a variety of projects, with or without affordable housing" (2004, p. 3). David Kinsey noted that: "builder-plaintiffs have also been denied builder's remedies because of bad faith threats of Mt. Laurel litigation against municipalities, which Mt. Laurel anticipated and ruled to be impermissible."¹⁹ And, further, according to David Kinsey:

A developer never takes a case to COAH, in the sense of initiating a case. Rather, developers have an opportunity to object to a municipal petition to COAH seeking "substantive certification," i.e., COAH approval of a municipal housing element and fair share plan. Once an objection is filed, COAH then analyzes the municipal petition,

deposited in municipalities' trust funds, with 71 (13%) having balances in excess of \$1 million. Marlboro leads the municipalities with over \$13 million in its housing trust fund (Gordon, 2009).

¹⁷ This was part of a much larger economic stimulus package, which included a variety of strategies, including tax incentives. However, it was later taken back in a round of budget cutting due to lower than expected revenues in early 2010.

¹⁸ There has been an extended legislative battle over S-1, a bill that was designed to replace COAH. It went through many permutations from January 2010 to January 2011; passed both houses of the Legislature in January 2011 (which would have established a kind of hybrid between MA and NJ systems); was vetoed by Governor Christie because it did not go far enough in repudiating Mount Laurel. As of fall 2011, there had not been any further legislative activity.

¹⁹ Private email communication, December 4, 2009. Cited with permission.

typically requires the municipality to submit additional information, and then conducts mediation between or among the municipality and the objector(s). Sometimes this results in a mediated agreement between the municipality and developer which results in inclusionary zoning of the developer's property.²⁰

COAH also has the authority to grant a builder's remedy—site-specific relief in the form of COAH-ordered rezoning. While this is not referred to as “overturning” the zoning, COAH is directing the municipality to rezone or change the zoning of the builder's property. Yet, according to David Kinsey, “COAH has only exercised this authority exceedingly rarely. I can think of one case in almost 25 years where COAH granted a builder's remedy (i.e., required rezoning).²¹ In further explaining COAH's role, Kevin Walsh noted that:

Builders and developers can appear before COAH to request a rezoning, but they have much less leverage. COAH is where towns voluntarily go to get protection from builder's remedy lawsuits. Towns cannot be brought before COAH against their will; the town makes the decision to file an appeal with COAH. Sometimes a town that has been successfully sued will be transferred from the court system to COAH for monitoring, at the conclusion of the lawsuit. Builder's remedy plaintiffs would almost always bring claims in court.

The great majority of cases are never actually decided in the courts, with developers and municipalities typically reaching an agreement before trial. Such resolutions generally include provisions for affordable units that otherwise would have been omitted; there have been only about 10 builder's remedy court decisions that have forced a change in local zoning.²² Nevertheless, the perception is that there have been far more such decisions and the builder's remedy continues to serve as an implicit threat from developers. This represents a very important part of the development dynamic in New Jersey.

Thus, similar to Massachusetts, the state does not have the power to enforce the “fair-share” requirements proactively. COAH or the courts may only act on the request of a locality, a developer, or a fair housing organization or other non-profit. The builder's remedy is the major sanction available for a municipality's failure to meet its fair housing goals.²³

Another “stick,” although one that also has been used infrequently, allows a trial judge to replace the town's planning board with a court-appointed master who is charged with developing new zoning ordinances consistent with the municipality's “fair share” obligation. In *Tomu Development v. Carlstadt and East Rutherford*, which was decided in 2007, the two mentioned municipalities (located within the Meadowlands regional planning district), were found to be out of compliance with their “fair share” goals and were given 90 days to draft new ordinances. With

²⁰ Private email communication, November 26, 2010. Cited with permission.

²¹ Private email communication, November 24, 2010. Cited with permission.

²² Mallach, 2008.

²³ Kevin Walsh noted that: “I am not aware of anything that would prevent the Attorney General or Public Advocate from bringing suit to enforce the constitution. They would plainly have standing and there's nothing that says they can't bring such litigation. Indeed, the Advocate's office did in its previous incarnation until being done away with in 1994 or so.” Private email communication, January 5, 2010. Cited with permission.

the towns ignoring the mandate, the court stepped in to void existing zoning and to draft new ordinances itself.

Without the ability of municipalities to use RCAs, the need to implement third round plans, and with the housing market in the doldrums, nobody was happy. Moreover, municipalities were concerned that in order to reach their share of the nearly 116,000 unit target of affordable housing production, a much higher level of production would be needed than seemed likely as of fall 2011, in view of the slump in homebuilding pervasive during the prior several years. Adam Gordon further explained that “most units are not being provided through inclusionary zoning and, because of bonuses and other loopholes in the rules, the actual number of inclusionary units proposed in third round plans is closer to 60,000, which is well within housing market demand for the next several years.”

Summing up the experiences of the last decade, Diane Sterner stated:

The situation has been in limbo since 1999. The earlier set of third round rules was contested and COAH had to go back to the drawing board. The many court cases made the situation antagonistic and there was a feeling that there had been little support from the prior state commissioner of the Department of Community Affairs. Meanwhile, advocates were trying to get the state to develop an overall plan that would delineate which income groups needed what type of support and better target scarce resources. The system began functioning again toward the end of the decade, in part due to more supportive state leadership.

This relatively positive outlook, however, is tempered significantly by the general downturn in the housing market and throughout the economy in 2010-2011, with little confidence that a quick rebound is likely. There is also continued animosity toward the system on the part of various politically powerful organizations, which poses ongoing challenges. In addition, in January 2010, a new Governor took office, Chris Christie, who vowed to “gut COAH and put an end to it” (*Politicker NJ.com*, 2009). With his position at odds with the two Mt. Laurel court decisions, he instituted a 90-day moratorium on COAH’s activities and appointed a 5-member panel to review the agency’s effectiveness (Mulshine, 2010). Governor Christie’s executive order suspending COAH was challenged in court by the Fair Share Housing Center and was rescinded on the eve of oral argument. But controversy continued. In October 2010 the Appellate Division invalidated several of COAH’s third round rules and challenged the growth share formula.

While awaiting a Supreme Court decision, on June 29, 2011 Governor Christie attempted an administrative strategy to eliminate COAH. Couched in terms of “making state government smaller, more efficient and cost effective,” the Governor again proposed to abolish COAH and to transfer its responsibilities to the Department of Community Affairs (though the underlying substantive legislative requirements would not change). With rhetoric directly in conflict with the Mount Laurel decisions, Governor Christie stated: “I’ve always believed that municipalities should be able to make their own decisions on affordable housing without being micromanaged and second guessed from Trenton.”²⁴ The advocacy community was far from sanguine about this plan, with Kevin Walsh commenting that: “The governor is attempting to consolidate power so

²⁴ Press release, June 29, 2011. “Governor Christie Takes Action to Streamline State Government Through Common Sense Reorganization Plan.”

he can allow municipalities where the wealthiest New Jerseyans live keep out working folks. The governor has failed to get his way on this issue through the courts and the Legislature. This is just his newest way to enable municipalities to exclude hardworking folks who need good homes” (Walsh, 2011). As this report was being finalized in fall 2011, COAH’s future was uncertain. The legislature’s efforts to dismantle COAH through its S-1 legislation and replace it with a new law with some of the characteristics of Massachusetts Chapter 40B had been vetoed by the Governor with no further indication of what would follow. In addition, a lawsuit was pending, challenging the administrative elimination of COAH.

Sources of Data and Approach to Data Analysis

COAH provided computerized information on affordable housing production since 1980. Included in these figures are units targeted to low and moderate income households. Low income households have incomes below 50% of area median income and moderate income households have incomes between 50 and 80% of area median income. At least 50% of the units addressing a municipality’s fair share obligation must be affordable to low income households.

COAH’s records only include municipalities that have filed plans with them or whose plans have been approved by the Superior Court; affordable housing production in other municipalities is typically not counted by COAH. Therefore, our analysis also includes affordable housing production that is not part of COAH’s database, especially the Low Income Housing Tax Credit developments that have been built in urban areas that do not have affordable housing goal obligations. As shown in Table 1, from 1980 to March 2009, affordable housing production in municipalities that had filed plans either with COAH or with Superior Court, plus completed LIHTC units, totaled 62,071 units. An additional 28,672 COAH units were either approved for construction or were in the pipeline and likely to be built.

This total does not include rehabilitated units, since such units do not typically increase housing opportunities for those not already residing in the municipality; there are no affirmative marketing requirements. The intent of the rehab program is to enable people to stay in their homes by encouraging them or their landlords to make needed repairs, although such repairs can be quite modest. Rehabilitated units are currently restricted for low income occupancy for 10 years, an increase from 6 years.²⁵

In developing the production figures presented here, only actual production is counted; the tallies do not include “credits” or “bonuses” that the State of New Jersey allocates to municipalities based on various alternative strategies for compliance. New Jersey has developed a complex set of formulas for providing bonuses to municipalities for producing certain types of housing

²⁵ The decision about which types of units to include in the production totals was discussed at length with Adam Gordon, Staff Attorney, Fair Share Housing Center. Production totals include units built under the following programs or project descriptions: inclusionary zoning; redevelopment; municipally-sponsored and 100% affordable; accessory apartments; supportive and special needs housing; assisted living residences. In addition to excluding rehabilitated units, the production figures used in this analysis omit units that were converted to affordable dwellings and are designated by COAH as: market to affordable; extension of expiring controls; and others. Since 1980, some 12,490 units became affordable under the various excluded programs, as recorded in the COAH database.

accompanied by various restrictions. However, there has always been a cap on the total number of bonuses, which has varied in its exact nature over the different rounds.²⁶

In addition, the state has developed several mechanisms that enable municipalities to meet the “letter” of their affordable housing obligation, if not the overriding intent of the Mt. Laurel decisions. In other words, municipalities may be in some degree of compliance with the state’s affordable housing goals, without themselves producing the number of units that the state has designated as their affordable housing obligation.

Regional Contribution Agreements, for example, allowed money to be sent from one municipality to another, with the latter, the “receiving municipality,” agreeing to build the housing; the “sending” municipality received credit for this effort. In addition, bonuses are provided to municipalities that develop certain types of housing. So, a municipality is able to receive more than a single credit (e.g., for rental housing or age-restricted housing) even though only one unit has been produced. For purposes of this analysis, however, RCA credits and bonuses for rental housing are not included in the production figures, since the intent here is to present the actual level of production by each municipality. Thus, a municipality may be in full or partial compliance with its affordable housing obligation, even though actual production has not occurred, or at least to the level credited by the state, using the state’s complex methods for calculating credits and bonuses. More municipalities may be in compliance according to New Jersey’s methods of calculating production records than what is described below. This approach is consistent with the way in which the data for Massachusetts was handled: we made a distinction between the units that counted toward the municipalities’ 10% affordable housing goal from those that are truly affordable. The only difference is that for New Jersey we are not, for the most part, noting the units credited, as well as those that are truly affordable within the municipalities.

As discussed previously, New Jersey has delineated housing obligations for its municipalities over three periods, or rounds. The first went from 1987 to 1993 and the second from 1994 to 1999. The rules governing the third round were supposed to be adopted in 2000 and that round was to have started in that year. However, due to various disagreements about those rules, they were not approved until 2008. The start of the third round was in mid-1999 and was slated to go through 2018. The start of the compliance period (the point at which municipalities were expected to submit plans to receive certification from COAH) under the revised third round rules was December 31, 2008. However, as noted above, the status of the third round period is uncertain due to the 2010 Appellate Division ruling.

The length of the third round was increased to 10 years (up from 6 years in the two prior rounds). Assuming the third round is allowed to proceed, the third round would actually cover more than a 19-year period, from mid-1999 through 2018. Table 1 includes production from 1980 through March 2009 and, for purposes of this analysis, all production through the latter date is credited toward the prior round obligation. Therefore, with reference to the extent to which production targets specified in the prior round obligation were attained, this analysis gives the “benefit of the doubt” to the municipalities, since a significantly longer-than-anticipated time frame is being utilized. Whereas the first two rounds included a total of 12 years (6 plus 6), the production data

²⁶ Specifically, in the first two rounds a municipality could receive two credits (rather than one credit) for each rental unit produced if the unit was not age-restricted and so long as it remained affordable for at least 30 years.

presented here covers nearly 3 decades. This presentation of the production record is necessitated by COAH's record-keeping method, which does not distinguish between production that occurred before the two prior rounds (from 1980-1987), *or* that was built during round one or round two (from 1987-1999), *or* that has been built since the official end of the first two rounds (from 2000-2009). In short, all COAH production data from 1980 to March 2009 are aggregated and are viewed as efforts toward compliance with the prior round obligation.²⁷

While COAH was able to provide data (albeit incomplete) on types of housing built (e.g., elderly, family or special need), to be discussed in a subsequent section, they were not able to provide spreadsheets indicating the number of units in each municipality that were homeownership or rental.

In addition, assessing production in relation to need is not a straightforward procedure. This is because the way in which the state has calculated need is quite complex. In a significant understatement, Stuart Meck, an authoritative source on affordable housing strategies stated: "The formula used to allocate the total fair-share need for affordable housing can seem complicated to persons not familiar with the process."²⁸ Meck then went on, over the course of two dense pages, to describe the way in which need was calculated prior to the third round. Nevertheless, this number is obviously important when trying to determine the level of production in relation to need.²⁹ The following is an attempt to understand this record.

Housing Production³⁰

As shown in Table 1, from 1980 to March 2009, affordable housing production in municipalities that had filed plans either with COAH or with Superior Court, plus completed LIHTC units, totaled 62,071 units. An additional 28,672 COAH units were either approved for construction or were in the pipeline and likely to be built [90, 743(-) 62,071]. Table 1 also shows that 494 municipalities (87%) had prior round obligations and that the aggregate obligation for these localities was 85,964 units; 72 municipalities (13%) did not have a prior round obligation. In the case of 50 of these municipalities, they had no obligation because they were, for the most part, urban locales with a history of affordable housing production. The other 22 are municipalities that the state did not view as appropriate sites for affordable housing, because they are either very dense and/or have very little buildable land.

²⁷ For some municipalities this would include surplus units that could be applied to the third round.

²⁸ Meck et al., 2003, p. 35.

²⁹ Based on data presented in COAH's 2001 annual report, 33% of the calculated statewide need for affordable housing was constructed or under construction in municipalities participating in the COAH process. COAH's most recent annual report is from 2002-03 and does not provide a percentage of affordable housing development in relation to statewide need (New Jersey Council on Affordable Housing, 2002; 2002-03).

³⁰ Table A-V-4, in Appendix V, presents summary statistics concerning census data and housing production.

Table 1: Affordable Housing Production by Municipalities With and Without Prior Round Obligations, 1980-March 2009

| | Municipalities with prior round obligations | Municipalities without prior round obligations | Overall |
|--|--|---|----------------|
| Number of municipalities | 494 | 72 | 566 |
| Percent of all municipalities | 87% | 13% | 100% |
| Units mandated under prior round obligation, 1987-1999 | 85,964 | n/a | 85,964 |
| Number of new affordable units completed, 1980-2009 (COAH units only) | 43,161 | 8,999 | 52,160 |
| Number of new affordable units completed, 1980-2009 (includes LIHTC units) | 43,161 | 18,910 | 62,071 |
| Percent of all new units completed | 70% | 30% | 100% |
| Percent of obligation attained | 50% | n/a | 63% |
| Number of municipalities with new units completed | 293 | 50 | 343 |
| Percent of municipalities with new units completed | 59% | 69% | 60% |
| Median number of new affordable units | 11 | 68 | 13 |
| Median number of new affordable units per 10,000 residents | 22 | 33 | 18 |
| Total new and approved units [‡] | 69,697 | 21,046 | 90,743 |
| Percent of obligation to be attained if all approved units are built | 81% | n/a | - |
| Percent total new and approved units | 77% | 23% | 100% |

[‡] Includes new and approved COAH units in all municipalities, and new LIHTC units only in non prior-round obligation municipalities (where not all LIHTC units are COAH units). Data was not readily available on approved but un-built non-COAH LIHTC units.

Sources: Research team analysis based on data provided by COAH, “All Projects Summary,” March 2009, and “Rehabilitation Share, Prior Round Obligation & Growth Projections,” October 20, 2008.

A total of 43,161 new units were completed by 293 of the 494 municipalities with prior round obligations. Of the municipalities with prior round obligations, 201 built no affordable housing. Proportionally more municipalities without a prior round obligation built affordable housing (69%) than those that were required to do so (59%). A total of 18,910 affordable units (COAH plus LIHTC) were produced by 50 out of the 72 municipalities without a prior round obligation. Counting all affordable units produced (COAH plus LIHTC), the total comes to 62,071, of which 30% were produced by municipalities without prior round obligations.

The 43,161 new units completed by municipalities with prior round obligations fulfilled one-half of the statewide prior round obligation. These municipalities completed 70% of all new units produced, while municipalities without prior round obligations completed 30%. Although, in the aggregate, they produced more housing, municipalities with an obligation tend to have fewer new affordable units than municipalities without an obligation, both overall and per 10,000 residents. It is not surprising that the municipalities without prior round obligations were major producers, in view of their predominantly urban locales and track record producing affordable housing.

Many municipalities that have not yet fulfilled their prior round obligations have affordable housing projects in the pipeline. If all these 26,536 additional approved units are constructed, 81% of the total prior round obligation will be met by municipalities with prior round obligations.

Adding together all the new units produced, as well as the approved units in all municipalities (with and without prior round obligations; N=90,743), New Jersey's municipalities may be able to exceed the total prior round obligation, even though 23% of the total number of units would be provided by municipalities that did not have a prior round obligation.³¹

In 1980 there were 2,691,313 housing units in New Jersey and by 2010 this number grew to 3,544,909 units. Thus, COAH units accounted for 6.1% of total production. Adding in the LIHTC units, the percentage equals 7.3% affordable units out of overall production.

A further finding (not shown in any tables) is that out of the 18,910 units produced in municipalities without prior round obligations, 3,029 (16%) were produced through the now-defunct RCA program, which allowed municipalities to make cash contributions to "receiving" municipalities, which did not have prior round obligations. In this analysis, these RCA units are "credited" only to the municipalities in which they were constructed. As noted previously, and in contrast to the state of New Jersey's statutory requirements and record-keeping procedures, no credit is assigned in this analysis to the "sending" locale—the municipality that provided a portion of the funding for the construction of affordable units built elsewhere. Therefore, whenever the term "compliance" is used in the following analysis, the above assumptions are used. Also mentioned earlier, more municipalities may be in compliance with the state's affordable housing targets than what is described below.

³¹ Although current figures are not available on the affordability levels of the newly produced units, Mallach (2004, p. 2) reported that, as of 2000, about one half of new and rehabilitated units were affordable to households earning less than 50% of area median income; the remainder was affordable to households earning between 50 and 80% of AMI. Mallach also pointed out that units built through inclusionary zoning represent about one-half of all newly constructed affordable housing units created in municipalities under COAH or court jurisdiction (2008, p. 7).

Table 2 shows that municipalities with new affordable units tend to have proportionally smaller white populations and higher median incomes, and that their housing stock grew at a faster rate between 1980 and 2000 than municipalities with no new affordable housing. Among all municipalities with new affordable units, the median number of units built was 82 (or 69 per 10,000 residents). Once again, it must be emphasized that correlations such as this, and those that follow, cannot be interpreted to suggest a causal relationship.

Table 2: Comparison of Median Demographic Characteristics by Production of Affordable (COAH or LIHTC) Units (N=566)

| | Municipalities with new affordable units (N=343) | Municipalities with no new affordable units (N=223) |
|---|---|--|
| Population density (residents per sq. mi.) | 1,973 | 2,255 |
| Percent white | 89% | 92%*** |
| Median income | \$64,444 | \$52,550*** |
| Percent change in housing stock, 1980-2000 | 19% | 12%*** |
| New affordable units | 82 | 0*** |
| New affordable units, per 10,000 residents | 69 | 0*** |
| Percent change in housing stock accounted for by new affordable units | 9% | 0%*** |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by COAH, “All Projects Summary,” March 2009, and “Rehabilitation Share, Prior Round Obligation & Growth Projections,” October 20, 2008; Geolytics Census CD 1980 in 2000 Boundaries; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder, April, 2010; LIHTC data for municipalities with no prior round obligation from huduser.org

Production of Housing for Families, Elderly, and Special Needs Populations

COAH was further able to provide data, albeit incomplete, on the type of housing produced by municipalities, sorted by whether units were age-restricted, targeted to special needs households, or for families. They provided this information for some 51,995 units, again aggregated by municipality. Because of different record-keeping methods, this data is somewhat inconsistent with other data used throughout this chapter. Nevertheless, we can still gain insights into the extent to which various municipalities are producing what types of housing, and seek to determine if typically exclusive communities meet their obligations by building housing for seniors, instead of for families and people with special needs. Municipalities often view senior housing as a more desirable way of meeting affordable housing obligations, since elderly residents do not add significantly to municipal costs, particularly schools.

As shown in Table 3, looking at the total number of municipalities that built some type of affordable housing, that was recorded in the COAH database (N=350),³² roughly equal numbers have built each type of housing (Ns = 209, 228 and 216 municipalities), The total adds up to more than 350, the number of municipalities for which we have this data, since most municipalities built more than one type.

Table 3: Municipalities (with and without prior round obligations) that Built Affordable Housing Units Included in the COAH Database, by Type of Housing (completed units only)[‡] (N=350)

| | Municipalities that built each type of housing | | Units built | | Median number of units of that type built per municipality | Housing type as % of all affordable housing built by municipality (median) | Of municipalities that built this type, those that built <i>only</i> this type of housing | |
|---------------|--|----|-------------|----|--|--|---|----|
| | N | % | N | % | | | N | % |
| Elderly | 209 | 60 | 22,219 | 43 | 82 | 57 | 26 | 12 |
| Family | 228 | 65 | 25,388 | 49 | 50 | 53 | 35 | 15 |
| Special Needs | 216 | 62 | 4,388 | 8 | 12 | 17 | 48 | 22 |

[‡]This includes only those completed units reported to COAH; it does not include LIHTC units built by municipalities without prior round obligations that are not reported to COAH.

Sources: Research team analysis based on data provided by COAH, “Project Names and Types: Family and Age-Restricted,” July 2009

³² Note that in prior analyses in this chapter the data showed that 343 municipalities built some type of housing. This small discrepancy does not change the overall conclusions presented earlier.

Table 3 also shows that there more family units were built than any other type of housing, although the percentages of family units and elderly units were quite close: 49% and 43%, respectively,³³ while only 8% were special needs units. Thus, the relatively small number of special needs units does not indicate that fewer municipalities have built special needs units; rather, fewer of these units were produced per municipality – a median of 12 special needs units compared with a median of 82 elderly units and 50 family units. In municipalities with special needs housing, such housing makes up only 17% of their affordable stock, compared with 53% family units for municipalities with that type and 57% elderly in municipalities with that type of housing.

As noted above, few municipalities that have built affordable housing focus on only one type. The outlier is special needs housing: 22% of municipalities that built special needs housing did so to the exclusion of other types of affordable housing. This contrasts with 15% of municipalities that built family housing and no other type and only 12% of municipalities with senior housing being their only type of affordable housing.

³³ Included in this figure are 249 units that are both special needs and age-restricted.

Table 4 shows correlations between selected demographic characteristics of municipalities and the percent of each type of housing that was built. Again, this analysis includes *only* municipalities that built *any* housing based on the data used here (N=350), whether or not they had a prior round obligation. In general, the more affordable housing a municipality built, the higher the percentage of that housing that was built for elderly or family populations (and the lower the percent built for those with special needs).

Conversely, the less housing a municipality built overall, the higher the proportion of it that was designated for those with special needs. In other words, the places that are building a large number of affordable housing units are not building much for special needs populations, while those that are less compliant (or just have a lower obligation), seem to be more likely to build special needs housing.

Table 4: Correlations between Percent of Each Type of Housing Built by Municipalities (With and Without Prior Round Obligations) That Built Any Affordable Housing Units Included in the COAH Database and Demographic Characteristics (N=350)

| | Percent elderly | Percent family | Percent special needs |
|--|-----------------|----------------|-----------------------|
| Population density | 0.22*** | -0.11** | -0.17*** |
| Percent white | -0.14*** | -0.15*** | 0.19*** |
| Median income | -0.06 | 0.09 | 0.12** |
| Percent change in housing stock, 1980-2000 | 0.05 | 0.16*** | 0.20*** |
| Prior round obligation | 0.17*** | 0.19*** | 0.00 |
| New affordable units | 0.35*** | 0.33*** | -0.32*** |
| New affordable units, per 10,000 residents | 0.29*** | 0.30*** | -0.33*** |

* = significant at 10% level

** = significant at 5% level

*** = significant at 1% level (the lower the level, the stronger the significance)

Sources: Research team analysis based on data provided by COAH, “Project Names and Types: Family and Age-Restricted,” July 2009; Geolytics Census CD 1980 in 2000 Boundaries; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder, April, 2010; LIHTC data for municipalities with no prior round obligation from huduser.org.

To conclude this analysis on the type of housing being built by municipalities with various characteristics, we have seen that the production of elderly housing is associated with municipalities that are denser and that have fewer white residents, while special needs housing is associated with higher-income, less-dense municipalities with higher percentages of white residents. Thus, the data do not seem to support the hypothesis that municipalities that have more white residents are less dense, and whose residents have higher incomes will prefer building elderly housing, rather than housing for families.

Compliance with State-Mandated Prior Round Obligations

Of the municipalities not in compliance with prior round obligations, more than one-half (201) built no new affordable units whatsoever. Table 5 presents a breakdown of the extent to which municipalities with a prior round obligation attained the goal set by the state, using the guidelines of the present analysis, which credit only actual units built in a given municipality (i.e., units built pursuant to an RCA agreement are counted in the municipality in which they were built, not in the municipality that paid for the transfer). Over 80% of municipalities with prior round obligations have not produced affordable housing within their own jurisdictions at the level specified in their prior round obligations. And 68% of municipalities with a prior round

Table 5: Extent to Which Prior Round Obligation was Attained by Municipalities With this Obligation, 1980-March 2009 (N=494)

| | Completed affordable units only | | Completed and approved affordable units | |
|---|---------------------------------|------|---|------|
| | N | % | N | % |
| Municipalities that did not complete any affordable housing | 201 | 40.7 | 137 | 27.7 |
| 1-39.99% | 102 | 21.7 | 60 | 13.2 |
| 40.0-49.99% | 28 | 5.6 | 21 | 4.3 |
| 50.0-59.99% | 21 | 3.4 | 24 | 4.3 |
| 60.0-79.99% | 19 | 4.0 | 41 | 8.1 |
| 80.0-99.99% | 25 | 4.7 | 26 | 5.9 |
| 100% or more | 98 | 19.8 | 185 | 36.6 |
| Total municipalities with prior round obligations | 494 | 100% | 494 | 100% |

Sources: Research team analysis based on data provided by COAH, “All Projects Summary,” March 2009, and “Rehabilitation Share, Prior Round Obligation & Growth Projections,” October 20, 2008

obligation attained 50% or less of their obligation. At the other extreme, almost 20% of municipalities with a prior round obligation completely fulfilled their goal and close to 5% additional municipalities had met over 80% of their prior round obligation goals. If the approved units are counted, the record looks significantly more positive; only about 28% of municipalities with prior round obligations are slated to contribute no new affordable housing units and nearly 37% could be in full compliance, attaining 100% of their goal. Nevertheless, over 60% of municipalities will not have fulfilled their prior round obligation goals, even under the generous assumption that all approved units will actually get built. The remainder of the analyses presented in this and the following section are based solely on units that have actually been built, rather than those that have been approved.

Also relevant is the overall number and percent of municipalities that have produced a significant amount of affordable housing, either by reaching the state-mandated goal or because they did not have a prior round obligation due to their already substantial affordable housing stocks. Thus:

- 98 municipalities with a prior round obligation attained 100% or more of that obligation;
- In addition, 72 municipalities were not given a prior round obligation.
- However, of these, 22 municipalities were apparently not given this obligation for reasons other than their high poverty status/high affordable housing stocks.
- Therefore, a total of 148 municipalities (98 +50) appear to be fulfilling the state's expectations concerning affordable housing production, or 26% of all the municipalities in the state.

In view of the fact that most of the localities that did not have a prior round obligation are urban municipalities, many of which have higher poverty rates than the rest of the state, the summary of statistics presented in Table 6 confirms the expected differences between these localities and those with prior round obligations. In municipalities with no prior round obligation, population density is much greater while growth in housing stock is lower than in municipalities with prior round obligations. Residents in municipalities with no prior round obligations have lower median incomes and are more likely to be non-white than in municipalities with prior round obligations.

The number of affordable housing units built or approved in both municipalities with and without prior round obligations has been normalized in terms of completed units per 10,000 residents. As noted earlier, in an attempt to include as many affordable units built in this time period as possible, LIHTC units that are not reported to COAH are included for the municipalities without prior round obligations. Municipalities with no prior round obligations built more affordable housing than those with a prior round obligation, both in absolute terms and on per 10,000 residents.

Table 6: Comparison of Median Demographic Characteristics by Presence of Prior Round Obligation

| | Municipalities with Prior Round Obligation (N=494) | Municipalities with no Prior Round Obligation (N=72) |
|--|---|---|
| Population density (residents per sq. mi.) | 1,626*** | 6,485 |
| Percent white | 91%*** | 69% |
| Median income | \$61,713*** | \$42,288 |
| Percent change in housing stock, 1980-2000 | 19%*** | 3% |
| New affordable units | 11*** | 68 |
| New affordable units, per 10,000 residents | 22 | 33 |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by COAH, “All Projects Summary,” March 2009, and “Rehabilitation Share, Prior Round Obligation & Growth Projections,” October 20, 2008; Geolytics Census CD 1980 in 2000 Boundaries; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder, April, 2010; LIHTC data for municipalities with no prior round obligation from huduser.org

Table 7 looks only at municipalities that had prior round obligations and compares the characteristics of those that met their obligations with those that did not meet their obligations. It shows that municipalities that met their prior round obligations were denser and had somewhat fewer white residents, compared with municipalities that did not meet their prior round obligations. They also had lower obligations. However, the fact that those municipalities met their obligations is not simply a function of their having lower obligations to begin with. As noted earlier, of the municipalities not in compliance, more than one-half (201) built no new affordable units whatsoever. Also interesting is that, although the municipalities in compliance seemed to be growing (i.e. adding to their overall housing stock) between 1980 and 2000 at a faster rate than those municipalities not in compliance, that difference is not statistically significant.

Table 7: Median Demographic Characteristics of Municipalities by Compliance with Prior Round Obligations (N=494)

| | Municipalities in compliance (N=98) | Municipalities not in compliance (N=396) |
|--|-------------------------------------|--|
| Population density | 2,208** | 1,577 |
| Percent white | 89%*** | 92% |
| Median income | \$63,985 | \$60,990 |
| Percent change in housing stock, 1980-2000 | 26% | 19% |
| Prior round obligation | 55** | 83 |
| New affordable units | 138*** | 0 |
| New affordable units, per 10,000 residents | 118*** | 0 |

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

Sources: Research team analysis based on data provided by COAH, “All Projects Summary,” March 2009, and “Rehabilitation Share, Prior Round Obligation & Growth Projections,” October 20, 2008; Geolytics Census CD 1980 in 2000 Boundaries; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder, April, 2010; LIHTC data for municipalities with no prior round obligation from huduser.org

Table 8 shows the correlations between the extent to which a municipality with a prior round obligation met that obligation, and selected characteristics of municipalities. Median income, change in housing stock, and ratio of new affordable units to all new units are positively associated with the percent of obligation met, while the percent of the population that is white is negatively associated with the extent to which the obligation was attained. Thus, municipalities with smaller white populations and higher incomes are associated with greater success meeting their prior round obligations. This finding presents a mixed picture concerning the hypothesis that higher income areas with more white residents will be less likely to produce affordable housing, but is consistent with the overall picture presented in Table 2, that municipalities with affordable housing had smaller white populations but higher median incomes.

Table 8: Correlations between Percent of Prior Obligations Attained and Demographic Characteristics of Municipalities (N=494)

| | Percent obligation met |
|--|------------------------|
| Population density | 0.03 |
| Percent white | -0.18*** |
| Median income | 0.22*** |
| Percent change in housing stock, 1980-2000 | 0.16*** |

* = significant at 10% level

** = significant at 5% level

*** = significant at 1% level (the lower the level, the stronger the significance)

Sources: Research team analysis based on data provided by COAH, “All Projects Summary,” March 2009, and “Rehabilitation Share, Prior Round Obligation & Growth Projections,” October 20, 2008; Geolytics Census CD 1980 in 2000 Boundaries; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder, April, 2010; LIHTC data for municipalities with no prior round obligation from huduser.org

Third Round Obligations

The state's third round "fair share" numbers indicate that there is a statewide need for 115,566 new affordable units to be added from between 1999 and 2018.³⁴ Currently, "fair share" obligations are a combination of three factors: the prior round obligations from 1987-1999; the need for rehabilitation of existing physically inadequate units and a portion of the future statewide third-round need. However, some 12,000 of these units were to be in the Highlands region, where former Governor Corzine had modified the target to conform to the Highlands Regional Master Plan; municipalities in that area still have to meet obligations based on the actual growth that occurs. Further, more than 11,000 units were not allocated to any municipality, but the expectation was that these units would be provided as development occurred in areas throughout the state where growth had not been projected.

Plans submitted by municipalities as part of the third round indicate anticipated production of 39,189 units. Plans that are still in the process of being developed (when the data were being collected) would add another 7,243 units for a total of 46,432 homes. This is obviously far short (only about 40%) of the total statewide need for affordable housing and the "fair share" obligations that are designated to most of the state's 566 municipalities.³⁵ And, as noted previously, since the Appellate Court has invalidated the third round rules, the process has stalled. If the Supreme Court upholds the decision, new rules will have to be promulgated.

Overall Assessment

The climate for affordable housing production in New Jersey does not appear to have improved over the past decade: zoning has actually gotten more restrictive and exclusionary in many areas as suburban and rural towns have increased minimum lot sizes to as much as 10 acres. A recent study examined production in two New Jersey counties through 2007 and found the continued existence of exclusionary zoning. The report stated that: "large lot subdivisions are locking in a residential land use pattern that excludes many New Jersey households that cannot afford a large-lot single-family home the ability to live near their jobs" (Hasse, Reiser and Pichacz, 2011, p. 3).

In addition, Kevin Walsh observed that:

Open space acquisition has become a key tool being pursued by suburban towns to preclude development. Often, the parcels these towns are acquiring are not even being put toward sensible uses, such as bike paths or a park. Instead, land is being acquired for the sake of barring additional development, not even involving affordable housing. One town halted a 23-unit market rate single family development after it calculated that it would be less expensive to take the land by eminent domain, thereby stopping growth, rather than incurring new costs to support the housing, particularly education expenditures. Other towns are doing this as well and the state is going along with it.

³⁴ New Jersey Council on Affordable Housing, Third Round Substantive Rules, Chapter 5:97, with amendments through October 20, 2008.

³⁵ Cited in Gordon, 2009, p. 8.

While New Jersey provides a “stick” to municipalities, as noted earlier, the builder’s remedy has been more of a threat than a reality; there have only been about 10 cases where the state has over-ruled local zoning to provide the permits to developers to build housing against the desires of the municipality. Many more have reached settlements, often with the encouragement of the courts. But it is important to emphasize that this, in itself, is an important contribution of the builder’s remedy; it has provided a point of leverage for reaching an agreement that is satisfactory to all parties.

Diane Sterner summed up the New Jersey experience with this observation:

The whole premise of the Fair Housing Act—that you can rely on inclusionary development as the primary means of getting housing built, with the only enforcement mechanism being the builder’s remedy—has not been successful. Having the builder’s remedy has allowed developers to challenge towns trying to determine their own destiny. Sometimes this has led to a project that only included a small number of affordable units, but served as a wedge to get a much larger development. For example, some of the inclusionary developments had only 2.5% affordable units; COAH was so toothless that they couldn’t get a higher percentage.³⁶

Another broad set of criticisms about Mt. Laurel came from the late Professor John Payne of Rutgers University, who devoted a significant portion of his career studying the New Jersey Mt. Laurel story. He saw three major shortcomings: voluntary compliance, decision making skewed toward municipalities and what he calls “circular deference,” making it “difficult to get to the underlying constitutional issues.” The first two points are explained in some detail below:

[First] It is incoherent as a matter of constitutional law for the court to hold, in Mount Laurel II, that every municipality in the state has an affirmative obligation to create affordable housing opportunities, and for the legislature then to declare that COAH is the “preferred” mechanism for addressing Mount Laurel obligations but make it voluntary...COAH [is] in the unseemly position of having to entice municipalities to avail themselves of its certification process. This helps to explain why COAH’s need and fair share calculations have been so municipal-friendly over the years and why COAH has offered participating municipalities so many imaginative discounts from their nominal fair share obligations.

[Second] The largest block of seats on COAH, mandated by the Fair Housing Act, is allocated to “elected officials representing the interests of local government.” [Therefore], municipalities are given what amounts to a “control block”... It is incomprehensible, therefore (politics aside), to structure a solution to the problem by giving so prominent a voice to those who caused the problem in the first place (Payne, 2008, pp. 10-16).³⁷

³⁶ Adam Gordon further noted that it is also possible that the municipality may have been close to meeting its prior round obligation and so it didn’t need to add many additional affordable housing units. Private email communication, December 7, 2009. Cited with permission.

³⁷ Professor Payne acknowledged that Department of Community Affairs Commissioner Doria was successful in balancing the interests of municipalities and advocates. However, he also pointed out that the actions of the judiciary

Production certainly has not occurred easily. Implementation is extremely complex—from how “fair share” or “growth share” figures have been calculated to how the state has provided bonuses and credits to municipalities, beyond the actual production of units. Numerous court cases have stalled the affordable housing process in New Jersey.

The New Jersey experience in implementing the Mount Laurel decisions and, later, its Fair Housing Act, presents a mixed record. On the one hand,

- municipalities with new affordable units have higher median incomes;
- municipalities with higher income residents are associated with higher levels of affordable housing production and greater success at meeting their prior round obligations.

On the other hand,

- over 80% of the municipalities with prior round obligations have not produced affordable housing within their own jurisdictions at the level specified in their goals;
- municipalities with new affordable units are associated with proportionally smaller white populations;
- municipalities that met their prior round obligation are associated with higher densities and somewhat fewer white residents, compared with municipalities that did not meet their obligations. Similar to Massachusetts, development in higher density areas could also mean that suburban development is, indeed, occurring. Municipalities that built no housing have higher percentages of white residents and lower median income residents compared with municipalities that built at least some housing.
- municipalities with smaller white populations are associated with greater success at meeting their prior round obligations. Thus, municipalities with larger white populations are associated with building less affordable housing.

Further, as noted earlier, the preceding analyses use production figures spanning nearly thirty years (1980-2009), all of which is credited toward the prior round obligation. However, it should also be pointed out that, in terms of New Jersey’s calculations, more municipalities may have attained the “letter” of their obligation, due to the way in which the state assigns various bonuses and credits and because this analysis does not include all the units that the state includes, such as rehabilitated units.

A range of solutions to New Jersey’s problems have been sought. Advocates are trying to revise the program, while opponents would like to see it essentially disappear. In early 2011, planning consultant Stuart Meck wrote an editorial advising New Jersey to adopt a process similar to Massachusetts’ Chapter 40B, which he praised as follows:

The advantage of this system is that it emphasizes affordable housing production as opposed to merely promising housing through the adoption of plans no one intends to carry out, which is in part the problem with the Fair Housing Act. Further, measuring compliance is simple and understandable. Finally, there is a state role, but it is minimal.

in invalidating the first iteration of the third round rules may have, at least in part, prompted this response. Commissioner Doria left the state in July 2009.

Taking a very different position is Governor Christie, who is committed to abolishing COAH altogether, leaving a great deal of uncertainty about how compliance with the state law will occur. As a radio station reported: “The challenge here is to comply with the court’s mandate on the housing front while allowing municipalities to control their own development without answering to state bureaucrats.”³⁸

While production has certainly occurred under the Fair Housing Act, affordable housing has not been constructed at a rate that has fulfilled the state’s affordable housing production goals. Further, anticipated production, as designated by municipalities in their third round plans, will continue to fall short of the statewide need.

Key Observations for Massachusetts (and others)

Major Similarities between the New Jersey Approach and Massachusetts’ Chapter 40B

- Both states have created affordable housing production goals that municipalities are encouraged to meet.
- In both states there is a statewide authority that can overturn local zoning. However, in Massachusetts it has been used more frequently.
- Neither state has the power to enforce the “fair-share” requirements proactively. In New Jersey, COAH or the courts may only act on the request of a locality, a developer, or a fair housing organization or other non-profit. In Massachusetts, the developer initiates a 40B application.

Massachusetts (and others) May Want to Consider These Lessons from New Jersey

- The attempt to create specific goals for individual municipalities has been extremely difficult to implement and has resulted in numerous court cases. Massachusetts’ 10% across-the-board goal appears preferable to the New Jersey strategy and Massachusetts should not, therefore, consider creating municipality-specific affordable housing goals. In fact, legislation was passed by both houses of the New Jersey legislature but vetoed by the Governor that would have instituted a similar across the board 10% goal as in Massachusetts.
- In New Jersey, immunity from the builder’s remedy is provided to municipalities that have submitted plans, while in Massachusetts immunity also may be granted to municipalities that have not yet met the 10% statewide affordable housing target but that have either made significant progress toward meeting the goal and/or that have met the goals stated in their housing production plans. Massachusetts should continue to follow its seemingly stronger guidelines.
- When payments were allowed through RCAs, the funds were not sufficient to cover a unit of housing. Therefore, any such arrangements, including in-lieu options for inclusionary housing, should require adequate contributions to enable a unit of housing to be constructed, in the same municipality, consistent with the intent of the guidelines.

³⁸ KYW News radio 1060 Philadelphia. February 14, 2010.

- The option for municipalities to charge developers a fee, which is then earmarked for affordable housing development, appears to be a good strategy for creating a dedicated source of revenue.
- In addition, Massachusetts may want to consider adopting a statewide mandatory developer fee that is earmarked to an affordable housing fund and that would be available for appropriate development, particularly in municipalities that have had weak affordable housing production records.
- Massachusetts should monitor New Jersey's new regional planning approach that attempts to coordinate affordable housing production among several municipalities.

Chapter 6: California

Overview

Since 1969, California law has required all cities and counties to complete a housing element, as one of the components of their general plan. The element must detail the level of housing needs, taking into account residents at all income levels, as well as regional needs, and indicate how, exactly, these needs will be met. Available land must be identified and, if insufficient, rezoned to accommodate all the community's housing needs. In addition, if there are any regulatory barriers standing in the way of using that land for housing (e.g., large lot zoning, or prohibitions about multifamily housing), the plan must outline the steps that the local government is taking to remove these barriers. While the state reviews housing plans to make sure that they meet the various guidelines and that they demonstrate how affordable housing can be developed, the state does not demand that municipalities and counties actually build the units to meet the needs specified in the plans. The state holds local jurisdictions accountable for what they can control—land use regulations that allow for affordable housing—rather than housing production. Although infrequently used, the major sanction for non-compliance comes through the judicial system; a judge has the power to approve a plan that a local jurisdiction has turned down, if it finds that there are no legal reasons for the denial or to halt all development within a local jurisdiction. Despite the lack of a requirement to actually produce affordable housing, the California model is viewed as one of the best efforts to counter exclusionary zoning, within a strong comprehensive planning framework.

Background

The overriding purpose of the housing element is to encourage each local government in the state to do its part to facilitate the development of adequate housing to meet the needs of all economic groups. One of the driving forces behind the adoption of the California housing element strategy was the federal Comprehensive Planning Assistance Program, which was administered by HUD, and encouraged state and local governments to tackle complex planning issues. One of the eligibility requirements for the matching funds provided by the government was the drafting of a statewide housing plan.

An additional impetus behind the housing element, according to Dianne Spaulding, Executive Director of the Non Profit Housing Association of Northern California, came from the legal services and advocacy communities. “We wouldn't have the statute without affordable housing advocates.” Still another push came from the extensive publicity surrounding New Jersey's Mt. Laurel decisions (see Chapter 5).

During the first few years of the housing element program, in the early 1970s, HUD viewed the state's performance as “less than exemplary” (quoted in Lewis, 2003, p. 15). However, during under Governor Jerry Brown's term in office, which spanned the mid-1970s through 1983, the law as it is known today began to take shape. In its earliest years, there was little focus, for example, on how local governments were assigned housing need numbers. But that changed during the Brown administration, with a more aggressive approach to establishing fair housing goals. The original statute was only a few paragraphs long; today it spans over 60 pages and is

enormously complex, covering the state's sophisticated housing need allocation procedures and standards for compliance.

Implementation of the Housing Element

The housing element is one of seven required components of a city or county's general plan; the other six required elements are: land use, circulation, conservation, open space, noise and safety. The housing element requirement recognizes the need for local governments to create land use plans and regulatory systems that will foster private market and below-market rate housing development. In California, there are 535 separate legal jurisdictions; 58 of these are counties and cover the unincorporated areas of the state. In these cases, county governments have the same kinds of land use powers and responsibilities as municipalities.

Legislation enacted in 1980 explicitly gave California's Department of Housing and Community Development (DHCD) an advisory role; localities were directed to take DHCD comments into account before adopting their housing element. In addition, the local allocation process, using the state's Councils of Governments as intermediaries, was expanded during this period.

In 2008, new state legislation mandated that, as of 2014, for most locales (depending on the region) the planning period would be increased to eight years, up from five years. Assuming an eight-year cycle, the unit of local government must submit a plan for the state to review. The housing element is the only part of the locality's plan that must be reviewed on a regular cycle, it must involve local residents in the planning process, and it must include a number of distinct parts:

- An assessment of housing needs for each income group, as well as for a number of special needs groups, such as people with disabilities, those in need of emergency shelter, farm workers, seniors, and female headed-households;
- An inventory of specific sites that can accommodate these needs and an analysis of resources and constraints to meeting these needs;
- A statement of the community's goals and quantified objectives. These objectives must estimate, by income level, the number of units likely to be constructed, rehabilitated or conserved/preserved during the planning period.
- A description of the policies relative to the maintenance, preservation, improvement, and development of housing.
- A program which sets forth a planned schedule of actions, over the upcoming planning period, that will satisfactorily implement the policies and attain the goals and objectives.
- A review and evaluation of the previous element, including an evaluation of the appropriateness of the goals and policies, the effectiveness in attaining the goals and objectives, and the progress in the implementation of the element's programs (California Affordable Housing Law Project, 2009, pp. 12-13).

DHCD delineates several distinct steps and guidelines for producing and implementing housing elements. In addition to the locality providing an inventory of possible sites for development, it must provide an indication that the zoning, as well as the infrastructure, is appropriate and adequate to meet the community's need for housing during the upcoming planning period.

Further, where appropriate and legally possible, the housing element must state how the locality will address the ways in which governmental constraints to housing development will be removed, taking into consideration the needs of persons with disabilities. In addition, each jurisdiction must:

- conserve and improve the condition of the existing affordable housing stock;
- preserve assisted housing developments at-risk of conversion to market-rate; and
- promote equal housing opportunities for all persons.

The housing element law uses a “fair share” type of allocation process. For each planning period, the DHCD assigns a share of the statewide regional housing need to one of the state’s Council of Governments (COGs), broken down for four income categories (very low, 0-50% of AMI; low, 51-80% of AMI; moderate, 81-120% of AMI; and above-moderate, over 120% of AMI). This is known as the Regional Housing Needs Assessment (RHNA). Each local government is then assigned a share of the regional housing need by their regional COG; this figure must be included in the housing element. Not surprisingly, “conflicts between [the state agency] and local governments, and between local governments and the regional agencies that determine the fair-share numbers, have been common over the years” (Basolo and Scally, 2008, p. 752).

No local government is exempt from being assigned a housing need, even those areas that already have a significant amount of affordable housing. However, the statute requires the COG to allocate a lower proportion of housing need to an income category when a jurisdiction already has a disproportionately high share of households in that income category, as compared to the countywide distribution of households in that category.

The housing element submitted by each local government must demonstrate that it has a concrete plan for satisfying the various needs that it has been assigned to meet. In particular, communities are directed not to allow exclusionary zoning provisions and that the housing element must include a mechanism for removing local government rules or ordinances that constrain the development of affordable housing. The housing element must further include the assurance that there is adequate local zoning to provide “enough sites at appropriate densities, and served with adequate infrastructure to meet the locality’s ‘fair share’ of the regional need for affordable housing, and in most cases the community must allow development at multifamily densities *by right...*” (California Affordable Housing Law Project, 2009, pp. 2-3). If there is not enough available land to meet the needs, the housing element must include a plan to rezone the land, as appropriate; this must occur early in the planning period. The local government’s housing element also must specifically list all the sites available to accommodate the needed housing.

Thus, local governments must fulfill their commitments in the housing element—(e.g., rezoning, applying for affordable housing funds, reducing regulatory barriers) and penalties have been recently added if a local government does not complete any rezoning that may be needed.

DHCD is responsible for reviewing each municipality’s plan to assess whether it will likely accommodate the targeted number of housing units. The state can either certify the local government’s housing element or it can request modifications. If the housing element is adopted by the locality, but does not satisfy the DHCD’s requirements or if the housing element is not updated according to schedule, the local government is deemed to be out of compliance.

Local governments typically view compliance as a distinct advantage, since DHCD certification means that, in any legal dispute, California law directs judges to presume the legality of a certified housing element. More specifically, noncompliant communities are not eligible or would be less competitive for various federal and state loans and grants that are administered through DHCD and they are more vulnerable to lawsuits on development issues. Concerning the latter, a local government that is not in compliance with the state law runs the risk that the court will invalidate local land-use decisions or intervene in the local government's ability, for example, to grant building permits.

In 2004, Assembly Bill 2348 clarified a number of issues that had been unresolved. Specifically, the law now clearly states that the inventory of land and suitable sites must be site-specific. The municipality's land inventory must include a listing of:

- Vacant sites zoned for residential use;
- Vacant sites zoned for nonresidential use that allows residential use;
- Sites zoned for residential use that can be developed at higher density; and
- Sites zoned for nonresidential development that can be redeveloped for, and as necessary, rezoned for, residential use.

Each locality must determine for *each site* in the inventory whether it can accommodate some portion of the jurisdiction's share of the RHNA, by income category, during the planning period. In addition, the housing element's action plan must detail how the sites will be made available, if the current zoning renders the site unavailable to fulfill a portion of the need. Furthermore, if the inventory reveals insufficient sites to accommodate the RHNA-specified needs for all income levels, the housing element must state how it is going to create developable "by right" parcels, including those that would be suitable for multifamily housing.

California law is explicit about its desire that the sites zoned or rezoned for housing are, in fact, adequate to accommodate the housing specified in the jurisdiction's fair share allocation, taking into account the size of the property, existing uses, and environmental and economic constraints. More specifically:

Jurisdictions may establish the adequacy of a site for very low- or low-income housing by demonstrating that the site realistically allows the densities established in statute (commonly referred to as the "Mullin" densities) or by providing an analysis of how a lower density can accommodate the need for affordable housing. The safe-harbor Mullin densities are 30 units per acre for jurisdictions in metropolitan counties, 20 units per acre in "suburban" jurisdictions, 15 units per acre in cities in non-metropolitan counties, and 10 units per acre in unincorporated areas in non-metropolitan counties ... With respect to sites rezoned to accommodate its need for very low- and low-income housing, the new zoning must allow multifamily residential use by right (i.e., without discretionary review of individual projects other than design review) (Stivers, 2007).

Rob Wiener, Executive Director of the California Coalition for Rural Housing, observed that:

while Mullin is helpful in forcing localities to zone for housing, especially affordable housing, at higher densities than they might actually do if left to their own devices, in practice, developers may opt for lower densities than the maximum permissible densities, especially in low-density rural and suburban communities where 10-20 units per acre would be a large project and stand out from the rest of the community. Some localities, in actual practice, may not approve developments at the upper end of these density ranges because of NIMBY opposition. Moreover, some developers, such as those working in rural communities, will develop below the maximum allowable densities because they would rather accommodate communal space and want to build units compatible with the existing lower densities to avoid opposition.

According to Mike Rawson, Co-Director of The Public Interest Law Project and Director of the California Affordable Housing Law Project: “The position of DHCD has always been that a housing element does not comply with the purpose of the statute unless specific sites are identified. Without a site inventory, it is impossible to know what type of re-zoning is needed. There are always sites that can get redeveloped, even in areas that are essentially built-out. There are ways to increase the opportunities for housing development, even when there are few undeveloped sites.”

In late 2007, Governor Arnold Schwarzenegger signed a new law, which requires local jurisdictions to strengthen the provisions for addressing the housing needs of the homeless, including the need to identify a zone or zones where emergency shelters are allowed as a permitted use without a conditional use permit.

Further, in 2010 a Superior Court judge ruled that the housing element takes precedence over a municipality’s efforts to cap its growth in the number of housing units. In deciding *Urban Habitat vs. City of Pleasanton* the court found that the city’s housing cap was in violation of state law and ordered the city to complete the re-zoning needed to allow it to meet its share of the region’s affordable housing.¹

In addition to housing element law, the state enacted the Housing Accountability Act in 1990 to statutorily limit the reasons why a proposed affordable housing development can be turned down by a local government, as follows:

- The jurisdiction has met its RHNA need for that income group;
- The development would have a significant adverse impact upon the public health or safety that cannot feasibly be mitigated;
- The project is in conflict with some state or federal law;
- The project is on land zones for agriculture or resource preservation and does not have adequate water or wastewater infrastructure;
- The project is inconsistent with the zoning, provided that the jurisdiction has sufficient sites zoned to accommodate its RHNA housing need.

¹ <http://www.publicadvocates.org/ourwork/housing/index.html> (accessed July 13, 2010).

Mark Stivers, a consultant to the Senate Transportation and Housing Committee pointed out that: “Previously, local governments could reject a project if it was found to be inconsistent with zoning. But the current law says that a local government can’t use zoning inconsistency as a defense if it has not created the appropriate zoning.” While developers rarely sue under this section of law, its existence gives affordable housing developers more leverage in their negotiations with cities and counties opposed to a particular project.

The housing element law sometimes has been used as a way to organize residents and encourage their participation. For example, Dianne Spaulding noted that: “We selected the 40 fastest growing cities out of the 110 in the Bay Area and organized local people to come to meetings when the housing element was being discussed. Residents had the opportunity to provide input concerning whether the element would really enable the production of housing.” Further commenting on the participation issue, Ilene Jacobs, Director of Litigation, Advocacy & Training for California Rural Legal Assistance, Inc. added that:

State law and guidelines require public participation, and include recommendations for how local jurisdictions can do that effectively. Some locales do a better job than others and the type of participation varies widely. It can range from local jurisdictions having housing element advisory committees made up of various stakeholders, to others holding one or two public hearings, or much more than that. CRLA advises our clients about their right to participate in developing the housing element and that a housing element must be in compliance with state law.

Rob Wiener explained how the advocacy community was able to promote resident participation in the planning process:

During the 1990s, the California Coalition for Rural Housing was successful in hiring an organizer to mobilize low-income Latinos in targeted jurisdictions to involve them in housing element preparation, as well as decisions to apply for and commit CDBG and HOME funds for affordable housing. The hearings would be packed with hundreds of local residents. After exerting this kind of pressure on local governments, nonprofit housing developers can become involved as “good cops,” and adopt a more conciliatory style, promising to work with residents and the city or county.

Criticisms of the Housing Element

Through the years, there have been a variety of criticisms about the housing element law. First, as noted previously, the way in which the state assigns housing need figures to the COGs and that they, in turn, assign specific housing goals to local governments, has often stimulated controversy.

Second, and very troubling to housing advocates is that if the housing need has been met, the development can be rejected. This, they feel, should serve as a minimum threshold for what is needed, not a cap, and should not be grounds for rejecting an otherwise suitable development that would bolster the affordable housing stock. This is reminiscent of the Massachusetts’ and

Rhode Island's 10% threshold, which provides protections to compliant communities from the builder's remedy.

Third, Bill Higgins, from the League of Cities, noted that: "While each municipality gets a target number and it must plan and zone to meet the stated needs, municipalities are not required to explicitly zone for affordable housing. Even if a local government zones for 30 units/acre, it does not necessarily mean that those units will be affordable. The state uses density as a proxy for affordability. But it's a fiction." This problem has been termed "density as a proxy for affordability."² On the other hand, according to Cathy Creswell, who was Deputy Director of the California Department of Housing and Community Development at the time of the interview: "it is also true that without some high density zoning, affordable housing will not be built—especially in the volume needed. There are not enough subsidies in the world to subsidize low density development to address affordable housing needs."³

A fourth criticism about the housing element relates to the lack of state funding to help COGs assign local needs numbers and to help local governments develop their plans. For their part, COGs argue that they don't have adequate resources and, similarly, local governments feel that the preparation of the housing element amounts to an unfunded mandate. There is, according to Bill Higgins, "no way for many governments, particularly smaller ones, to pay for it. If we wanted to do this right, there would be dedicated money to assist with the preparation of housing elements."

Fifth, there also has been opposition to the housing element since growth is assumed to be occurring, although this may not be happening in all locales. Sixth, concerns have been raised about how or whether the rehabilitation or subsidization of existing units should count toward meeting local housing element goals. And, finally, the question of whether or how compliance should be tightened has been a recurring theme.

The Compliance Issue

Concerning California's housing element, "the devil is in the details." In this case, a critical chunk of the details relates to compliance with the statute. Virtually all those interviewed for this report noted that this is the weakest aspect of the law. And, according to a team of researchers: "the consequences for noncompliance are considered minimal, especially for localities with little desire for growth" (Basolo and Scally, 2008, p. 752). The following examines three aspects of the compliance issue: the link between compliance and production; historical and current levels of compliance; and the various types of incentives and sanctions that have been considered to increase compliance levels.

² In fact, the state explicitly notes that "With respect to the zoning, density is used as a proxy for affordability" (Stivers, 2007).

³ As of January 3, 2011, Cathy Creswell was named the Acting Director of DHCD.

Compliance and Production

Certainly, a key assumption behind the housing element requirement is that localities in compliance will be more attuned to the housing needs of existing and future residents and that the existence of a plan that meets the state's standards will have a positive impact on the attainment of those goals. An analysis of the compliance issue was undertaken by Paul G. Lewis in 2003, for the Public Policy Institute of California. The study looked at the compliance status of local governments in 1991 and used housing production data from the 1990s to explore whether compliance status was a significant factor in housing production. To obtain production data, Lewis used overall changes in housing growth, as well as data from the Construction Industry Research Board on the number of housing units constructed in each locale. No data on actual affordable housing production was used, for reasons discussed later in this chapter.

Lewis concluded that housing element compliance or non-compliance was not a significant factor in determining the overall rate of housing production. However, the study found a positive relationship between compliance and the percentage share of new production that was multifamily housing. In other words, compliant communities were not more likely to build more housing overall, but of the housing they built, they were more likely to build multifamily units (Lewis, 2003).⁴ Lewis further found that noncompliant local governments had slightly more white residents and higher median household incomes, but these differences were not statistically significant. However, a final test did reveal a statistically significant difference: noncompliant locales had lower population densities than compliant locales, thereby providing evidence that the former were not constrained by a lack of vacant land (Lewis, 2003, p. 44).

The methodology of the Lewis report was, however, broadly criticized. According to Cathy Creswell:

The Department of Housing and Community Development and other housing organizations and advocates noted that the study did not appropriately analyze the relationship between housing element compliance and actual housing production. When analyzing the relationship between building permits and compliance, the data consistently show that jurisdictions with a housing element in compliance approve more housing than those out of compliance. For example, between 2000 and 2007 jurisdictions in compliance issued 86 percent of all multifamily permits and 80 percent of total residential permits.

Clearly, how compliance with the housing element law is connected to affordable housing production is a key question. However, such an analysis is dependent on the development of a statewide data collection system that tracks affordable housing production and compares this information to each municipality's housing element plans.

⁴ Lewis (2005) essentially repeated the analysis using compliance data as of 1994 and compared that to production levels through the remainder of the decade. The results were the same as in the earlier study.

Levels of Compliance

The results of Lewis's research notwithstanding, there has been continued interest in tracking the level of municipality compliance with the housing element law. According to DHCD, the history of compliance is as follows:

- In 1991, 19% of localities were in compliance;
- In 1993, 37% were in compliance;
- In 1995, 52% were in compliance (cited in Lewis, 2003, p. 22).⁵

Through the 2000s, levels of compliance continued to increase. In 2004 about two-thirds of municipalities and three-quarters of the counties were in compliance (Lewis, 2005). And, as of December 31, 2007, the state boasted that 80% of California's local governments had adopted a compliant housing element—the highest compliance rate ever attained (California Department of Housing and Community Development, 2007).

Since then, however, the state stopped publicizing or updating aggregated compliance figures; compliance figures for each local government in the state are updated frequently. In other words, the compliance status of each local government is listed, but overall levels of compliance are not tallied.

Each jurisdiction in the state is required to submit its housing element based on its location—the COG area it falls within. At the beginning of each cycle, one would expect a high level of noncompliance, since many submissions are late or the jurisdiction has not identified a sufficient number of sites to attain the housing goals. As time goes on, the compliance rate should go up. Thus compliance levels appear to be a “moving target,” with fairly large variations based on when the tallies are compiled, in relation to when each local government is required to submit its plan.

In an effort to get an indication of aggregate compliance levels among California's 535 local governments, hand calculations were performed at two points in time, just over one year apart. At the time of the first analysis, in July 2010, the due date of the plans ranged from mid-2008 to summer, 2009. Thus, even those jurisdictions whose plans were required in closest proximity to the date on which the compliance data was published, had had about one year to file.

⁵ It is possible that the increased levels of compliance during the 1990s were due to the technical assistance provided by DHCD, as well as the threat of legal action if localities were not in compliance.

Table 1 demonstrates that compliance levels are a “moving target,” with fairly large variations based on when the tallies were compiled. And this was undoubtedly related to the fact that when the second analysis was done, local governments had had an additional year to submit their plans. This point was also underscored by Cathy Creswell, who noted:

Timing is an important factor; it is not uncommon for housing element compliance to be lower at the beginning of an update cycle. This is particularly true for the current cycle as the land inventory requirements were significantly amended since the last update and it is taking local governments some time to complete the more thorough reviews.⁶

Table 1 also shows that in July 2010, only about 42% of California’s local governments were in compliance with the housing element requirement; this number grew to 67% thirteen months later. Local governments whose housing elements were either out of compliance or due, fell from a combined nearly 42%, to just under 30%, from 2010 to 2011. (It seems appropriate to combine the local governments whose housing elements are due with those locales that are out of compliance, since the former had had adequate time to do submit their plans, as noted above.

Table 1: Compliance Status with Housing Element Requirement among California’s Local Governments at Two Points in Time

| Time 1-- Compliance as of July 14, 2010 | | | | | | Time 2—Compliance as of August 22, 2011 | | | | |
|--|---------------|-------------------|----------------------|--------------|-------|--|-------------------|----------------------|--------------|-------|
| | In compliance | Out of compliance | Housing elements due | Under review | Total | In compliance | Out of compliance | Housing elements due | Under review | Total |
| Number | 223 | 142 | 80 | 90 | 535 | 359 | 115 | 44 | 17 | 535 |
| % | 41.7 | 26.5 | 15.0 | 16.8 | 100% | 67.1 | 21.5 | 8.2 | 3.2 | 110% |

Source: <http://www.hcd.ca.gov/hpd/hrc/plan/he/status.pdf> (accessed July 14, 2010 and August 29, 2011).

⁶ Cathy Creswell also observed that “if you look at the number of jurisdictions that have submitted an adopted housing element, in most regions more than 80 percent are in compliance—indicating a positive trend for overall compliance rates.”

Consistent with his overall criticism of the lack of state funding to help local governments prepare housing elements, Bill Higgins observed that this is an important factor explaining the less than full levels of compliance.

Many of the cities that do not have an approved plan have populations of less than 20,000. And for many of these locales, it's a cost issue. While there are some rich suburbs that are not in compliance, often it is financially too draining for a local government to comply. Planning departments are decimated. And who has the money to pay for a housing element when you need to figure out whether to keep the fire department?

There are several reasons why local governments resist creating compliant housing elements, in addition to inadequate funding. Some local governments may simply not want to house low income households; there may be real or perceived shortages of vacant land; and conflicts between the requirements of the housing element and local growth control policies (Lewis, 2003). Regardless of the reasons, as of August 2011, one-third of California's local governments were not in compliance. The level of compliance continues to be a concern for state officials and have resulted in efforts to tighten the process. The next section summarizes the existing incentives and sanctions that are aimed at encouraging compliance.

Incentives and Sanctions to Increase Compliance

There are two key ways that the state attempts to put “teeth” into the housing element requirement—through administrative incentives and through the judicial system.

Administrative “incentives” – As noted earlier, if a local government is not in compliance, it may not qualify for certain categories of state and federal housing assistance, including state-administered CDBG and HOME grants to non-entitlement communities. A policy promulgated by DHCD states: “To incentivize and reward local governments that have adopted compliant and effective housing elements, several housing, community development and infrastructure funding programs include housing element compliance as a rating and ranking or threshold requirement.” (California Department of Housing Community Development, 2009).

However, most of the thresholds are represented as bonuses, not demerits. For programs that are targeted specifically and exclusively to local governments, compliance may be a pre-requisite for considering an application for funding. Nevertheless, if the program is available to nonprofit organizations (in addition to governmental bodies), such a penalty may be unfair if the locale in which the developer is located is not in compliance. But, in general there is a sense that funds should be used in locales that are meeting state needs. Although Cathy Creswell offered that linking limited state resources to jurisdictions with compliant housing plans is an effective incentive, good data on the extent to which this strategy has increased compliance is not available. Anecdotally, however, according to Creswell, the state sees a “rush of local governments trying to bring the element into compliance right before applications for funding are due. Some consider that these resources act as “carrots big enough to be sticks.”

Rob Wiener noted that:

there are really only “soft sanctions” for noncompliance. If you’re a local government and your housing element is not in compliance, you may be disqualified or lose points in the rating process for certain housing and community development programs operated by DHCD. Since these programs are highly competitive, local governments can’t afford to have any points deducted. Localities that don’t care about having a compliant housing element probably also don’t care about qualifying for state housing programs. If the state were really serious about using the sanction of a possible loss in funding, they would tie funds to non-DHCD transportation and parks/recreation programs that local governments typically care about. Those are the monies that local governments covet, but the state does not use that threat.⁷

Similarly, Ilene Jacobs observed that enforcement could be improved by creating “clearer consequences for non-compliance, such as withholding things jurisdictions care about (e.g., funds for roads or taking the local sales tax). If there were serious sanctions, then municipalities would feel more compelled to comply with state law.”

Even without this type of sanction, the loss of housing funds is a very real outcome for non-compliant local governments and can hurt the residents of these jurisdictions. For example, the San Luis Obispo County website posted a story about a local nonprofit being awarded a \$1.5 million matching grant from DHCD, under Proposition 1C. However, “Since the money will be available for use only in jurisdictions that have a DHCD certified housing element, they cannot be used in Atascadero or Pismo Beach. All other areas of the county are eligible for the money.”⁸

The state legislature has considered several mechanisms to improve compliance through administrative strategies. For example, in 2001-02 the state legislature considered a bill that would have levied a fine on noncompliant localities. While passing the senate, it died in the assembly. In 2004-05 there was a bill before the state senate that would have created a statewide appeals entity for anyone wanting to argue against a locality’s decision against a development that is consistent with its housing element. This would have provided a non-judicial, administrative process for hearing appeals, such as in Massachusetts and Rhode Island, without the developer (or another interested party) going to court. However, the bill was not successful in getting enacted.

⁷ Nevertheless, Cathy Creswell noted: “That is why the state has developed funding resources that link non-housing funds to housing element compliance, including our prior Jobs Housing Balance Improvement Program, Workforce Housing Program and, most recently, our housing-related parks program.

⁸ SLO County Roundup, July 22, 2010. <http://www.sanluisobispo.com/2010/07/22/1225091/slo-county-roundup.html> (accessed July 27, 2010).

The judicial system – The judicial remedy may be pursued under two circumstances: if a particular project has been denied or if the adequacy of a housing element is challenged. Concerning the first, the remedy is a court order requiring the city or county to approve the project or come up with legal reasons for denial. Concerning the second, a building moratorium is a potential remedy. Thus, despite the existence of a housing element that fulfills all the requirements mandated by the state, projects can still be denied at the local level. When this occurs, there is no statewide recourse to argue the denial, other than by a citizen bringing a lawsuit (under the Housing Accountability Act) through the court system. However, this process is seldom used because of the costs involved and the adversarial nature of the judicial system.

Despite the infrequency of its use, the judicial threat is compelling. According to Cathy Creswell:

Enforcement is reliant on private litigation. If a local government does not adopt a housing element or if the state finds that it is not in compliance, the locality's general plan may be vulnerable to litigation. The most extreme remedy the court can order is a moratorium on all development, including commercial. This remedy is very rarely used. I can recall only one case in the last few years where the court issued a moratorium on development; all construction had to stop. However, the potential threat of this sanction has helped bring all parties to the table.

In short, a local government that is not in compliance with the housing element requirement could lose all permitting authority for any type of project, even the ability to issue a building permit for a modest home renovation.

The challenges involved in filing a lawsuit notwithstanding, The California Affordable Housing Law Project assists groups and people who want to pursue that strategy. Mike Rawson noted such an enforcement mechanism is critical for getting locales to take the law seriously. And, further:

Citizens have the opportunity to file a “writ of mandate.” This means that a resident or other person unable to find affordable housing in the community has standing to bring a case compelling the local jurisdiction to pass an adequate housing element. The “teeth” are in the remedial provisions. The court can issue an order directing a locality to adopt an element within 120 days. Along with that order, the court must issue an order restraining other development that may be taking place. For example, in an active case (as of July 2010), the court decided to restrict any commercial development until the housing element is in place. The possibility of the imposition of this sanction provides a powerful incentive for local governments to comply. The strength of this provision has produced very effective housing elements. But there is limited capacity to bring these cases. It takes someone rattling the saber.

While recourse through the courts has been in place since 1983, there do not appear to have been many cases that have followed this path. Mike Rawson offered that the 30-40 cases⁹ brought by Legal Services and public interest law programs, including his office, represent the great majority of the total number of cases. Obviously, he added, this is: “Not a lot of cases for that

⁹ This approximation was confirmed by several other interviewees.

length of time” averaging only a little more than one case per year. Most of the cases are settled, with the municipality agreeing to a development moratorium while negotiating an outcome. Of those cases that have gone to court, the court remedy (of suspending development) probably has occurred no more than 10 times. Even those cases that do not get decided in the courts, the process of litigation is typically a sufficient prod to encourage a local government to create a compliant housing element.

Summarizing the strength of the court’s authority, a report by the California Affordable Housing Law Project (2009) noted that if a local government either does not adopt a housing element, or if it is found to be inadequate, “a court can order the local government to halt all development until an adequate element is adopted *or* order approval of a specific affordable housing development.” And, more specifically:

The general plan is more than a vision of possibilities. The courts have found that the general plan is the “*constitution*” for future development in the community. It is the preeminent planning document, sitting atop the hierarchy of local land use measures. Once adopted, it has binding effect on the locality. All actions taken by the jurisdiction must be *consistent* with the general plan. This is known as the “consistency doctrine” and it imbues the general plan with the force of law...” (California Affordable Housing Law Project, 2009, pp. 3, 10-11).

Further, Rob Wiener observed that:

The main sanction is the judicial route. It’s a great club if you have legal services people who can do the work and clients who can stick it out. We’ve had a number of victories, but there aren’t enough of those people to go around. When the courts have been convinced, there have been some pretty severe outcomes. In the case of the City of Folsom, for example, the court imposed a moratorium on issuance of new residential building permits. The adoption of an inclusionary zoning ordinance helped convince the court to lift the moratorium.

Ilene Jacobs noted that the housing element is a powerful planning tool, but a key weakness is that “enforcement relies only on private individuals. This type of private enforcement is difficult, time consuming and resource intensive. When you think about the number of jurisdictions that are out of compliance, it would cost a lot and legal services resources are limited. Enforcement by the state attorney general also might inspire compliance among recalcitrant jurisdictions.” She further noted that:

The housing element gives builders and developers a sense of good planning and stability, in terms of land use policies, approvals and processes. They do not mind it at all. Local jurisdictions, on the other hand, often chafe under the law. Litigation can be the only alternative to attain compliance with state law. Cases often settle before going to court, but there have been times when the courts have invalidated housing elements and ordered compliance. A case can be tied up in the courts for a long time, but even considering the high percent of non-compliance, litigation is still a very good tool for ensuring that housing is produced, particularly for protected groups.

Although, California's housing element law has been criticized for its weak enforcement, Evelyn Stivers, Field Director at the Non-Profit Housing Association of Northern California, offered that "in suburban jurisdictions you can trace nearly every affordable housing development to the housing element. It would be hard to find a suburban jurisdiction that does not have at least one affordable housing development and that's because of the housing element." So, beyond the issue of whether local governments are complying with the submission of the housing element, more important is the question of the extent to which local governments are ultimately producing the needed housing as a result of the statute.

The Housing Element Requirement and Housing Production

This chapter previously cited research (although refuted by state officials) which revealed that having a compliant housing element was not associated with higher levels of housing production. In view of the goals of this project, an attempt was made to further this analysis by trying to locate aggregated affordable housing production data, over the life of the housing element requirement, by local government. This proved to be a futile exercise. The following provides a sense of the affordable housing production data situation in California.

Early in my research, I read this statement written by a team of land use experts (*emphasis added*):

The statute does not require HCD or COGs to report on the number of affordable housing units actually constructed in compliance with the regional housing needs assessments...[Local governments must prepare regular reports on progress in providing housing units. Not all city and county planning departments have submitted reports...]

Therefore, it is not possible to determine how many units of affordable housing have been constructed on a statewide basis as a result of the law...it could be that the law has been providing opportunities for the construction of affordable housing...however, these opportunities may not be translating into the actual construction of affordable housing units (Meck, Retzlaff and Schwab, 2003, pp. 44-45)."

Unfortunately, the situation has not changed since the above was written. Housing elements are submitted to the state by each local or county government. However, the housing production goals contained in each housing element only appear in that document and production goals can only be determined by examining each plan individually. For many years, cities and counties have been required to report to DHCD on the units produced in relation to the "fair share" or regional housing allocations planned for in the local housing elements. These reports are not online, and it does not appear that the department has ever performed a comprehensive tabulation; they have been required since 1990.

As of October 2010, DHCD had just promulgated regulations that defined how local governments are to report on the results of their housing elements, including production.¹⁰ In addition, legislation was adopted that now penalizes local governments for not reporting. Cathy

¹⁰ See <http://www.hcd.ca.gov/regulations/> (accessed November 20, 2010).

Creswell was optimistic that, as a result, “from this point on, the State will have access to good data on housing production including affordable housing.”

Mark Stivers added that the data DHCD received prior to 2010 was not comparable, from locale to locale, in addition to being incomplete, therefore making a tally or any kind of cross-jurisdiction analysis impossible:

While some cities and counties have sent in their annual housing element reports, the absence of guidelines and forms issued by the state has meant that each has used its own definitions, terminology, and counting methods. As a result, it is not possible to tally numbers across jurisdictions. I personally looked at all the elements from Orange County at one point, and it was absolutely impossible to compare and aggregate data across cities and the county. If someone tried to do this, the numbers would be inaccurate and misleading.

Through a number of communications with key informants in California, this was the situation, as of mid-2010, concerning the compilation of affordable housing production data that has occurred as a result of the housing element.¹¹

- 1) There was no centralized database that tracks affordable housing production by municipality. California has four state agencies, each with its own data; production numbers may overlap. In addition, locally funded projects may be developed without state assistance, so those units would not show up in any statewide database.
- 2) While it may have been possible to merge several data sources, one knowledgeable informant estimated that this might capture something like 50-75% of the production in the state.¹²
- 3) Regardless of how much production that one might be able to document, it was not possible to compare that to what the housing element outlined. In other words, communities can promise to produce “x” units, but it was not possible to determine if that had been fulfilled. At best, we could have simply learned that “y” units were built.

Therefore, until a consolidated database is available, there is no way to determine the effectiveness of housing elements in producing the housing that is delineated in the plan, without analyzing each locality’s housing element and then gathering the needed data from each local government to determine actual production.

Apparently, state officials and housing advocates have talked about the need for a central database, dating back many years, but that has not happened yet. Since this project seeks to understand how a particular state-wide intervention impacts affordable housing production, this

¹¹ Here is a typical response that led to the conclusions described in the text: A doctoral student at the University of Wisconsin who has been researching housing in California noted: “In essence, you have hit the nail on the head. There is a lack of data. During a housing element update, each municipality must comment on how it has, or has not attained its quantified objectives. But no agency has that consolidated data. When Lewis (2003) conducted his investigation on affordable housing and Landis et al. (2000) did the statewide housing plan update, both used permit data from the Construction Industry Board as a proxy for affordable and market-rate housing units.” (Darrel Ramsey-Musolf, private email communications, February 2 and September 7, 2010; cited with permission).

¹² Rob Wiener private email communication, February 22, 2010. Cited with permission.

question cannot be answered given the lack of consolidated information in California and the resources available to carry out this study. Therefore, this case omits the kind of quantitative analysis presented for the other states included in this report. This finding, itself, is important. Given that California is frequently cited as a model for a statewide intervention that is effective at producing affordable housing, the question is: “Based on what is this assertion made?”

One response is that the housing element policy in California “measures success primarily based on inputs (plans) rather than outputs (housing built)” (Lewis, 2003, p. 194). Another is that the policy “creates constituencies for housing and local planning staff who can work to make housing happen” (Pendall, 2008, p. 266). But we cannot assert that the housing element law has produced the needed affordable housing in California.

In concluding his study Lewis, (2003, p. 192), posed the question: “Can state review of local planning increase housing production?—the answer, in the case of California, appears to be a qualified no... that state’s method for overseeing local housing elements did not appear to result in a faster pace of residential development among municipalities that were seen as meeting their planning requirements, at least for the mid- to late 1990s. Much scrutiny is given to housing element status, in part because the assumption is that noncompliant cities are those that artificially slow the growth of their housing stock. But the results reported here indicate that housing market and socioeconomic factors swamp the influence of compliance status in contributing to variation in growth. This is true of both single-family and multifamily development.”¹³ Despite this statement, as noted earlier, state officials and other advocates have refuted the study’s methods and the overall conclusions.

DHCD has been working on developing forms with which locales can report annual housing production. Apparently, as of mid summer 2010, these forms were completed and it was hoped that local governments would be more likely to provide the required information on a regular basis in a way that should be uniform and comparable, allowing for aggregation of the data statewide. Up to now, submission of housing data by localities has been lax.

Another effort by DHCD involves their collecting data on the amount of land that has been rezoned over the last years to accommodate affordable housing. According to Cathy Creswell, preliminary data from 2007 to 2010 found 63 jurisdictions already had or have programs to rezone more than 3,100 acres of land to higher densities (with more than 95 percent zoned for a minimum of 20 units per acre. The Department is finishing work on a database and tracking system that will capture all information on planned and completed rezonings.

¹³ This observation about the importance of housing market issues and socioeconomic factors notwithstanding, there is still a need for planning and for local land use patterns and zoning to support the needed production.

Current Issues and Proposed Changes

Several issues concerning the housing element recently have attracted the attention of housing advocates and public officials: the length of the cycle of state approvals of the housing element; local inclusionary zoning ordinances; the connection between the housing element and the availability of subsidies; and the length of time interested citizens have to protest an inadequate housing element.¹⁴

Length of the Cycle of State Approvals

Eight years is being questioned as the appropriate length for the approval cycle. For example, Rob Wiener commented: “Advocates were opposed to this provision (in SB 375) from the outset. Since adoption, many advocates remain concerned, especially with the upheavals and volatility in California’s housing markets. In view of all the changes that have occurred over the past two years alone, it is clear that 8 years is just too long a planning period and that shorter periods allow for mid-course corrections and greater accuracy.”

Inclusionary Zoning

This issue has become intertwined with the housing element. While homebuilders and the state building association are invariably opposed to such inclusionary zoning statutes, since they feel that they are the ones that bear the costs, about two-thirds of the local governments in the Bay Area have adopted inclusionary zoning. One of the key characteristics of these ordinances, however, is how different they are, from place to place. As Dianne Spaulding noted: “We’re better off embracing flexibility, one size does not fit all. It sounds crazy, but it works as a reflection of local needs and priorities.”

In using inclusionary zoning, Dianne Spaulding commented that there should not be a rigid approach to off-site set asides. For example, if an inclusionary zoning ordinance would require the developer to provide 20 affordable units, it is fine, in her opinion for these units not to be integrated with the market rate development. “Twenty units are better than no units in the context of flexibility, and zoning ordinances that do not allow for off-site development may actually result in no affordable units being built at all.”

Countering the views of many other members of the advocacy community, who argue that the affordable units should be located on-site, Spaulding indicated that she could point to many good partnerships between nonprofits and for-profits, where the nonprofits are being given the opportunity to do what they do best: to build affordable units off-site. In some cases, the

¹⁴ A fifth issue, as of the time of my interviews in late summer and early fall 2010 was whether the funds earmarked for affordable through Tax Increment Financing projects would, indeed, be used for that purpose, as opposed to the state having access to those funds. In November 2010, a ballot initiative, Proposition 22, was approved that requires the state’s redevelopment agencies to make sure that funds earmarked for affordable housing do, indeed, get directed to that purpose. Twenty percent of the Tax Increment Financing funds that are paid to these agencies are required to be spent on low- to moderate-income housing. With the state in a dire fiscal situation, it recently appropriated billions of dollars of funds from redevelopment agencies to balance the budget. Prop 22 now prevents the California legislature from raiding redevelopment agency funds in this way. In fall 2010, Dianne Spaulding stated that: “This last year has been the worst in terms of state funding and lay-offs. The local-state fiscal relationship is closely linked, so that there is a domino effect. A lot of local governments are really suffering.”

development may appear to be a single project, with the same architecture, but the affordable units are, in fact, separate. And, Evelyn Stivers added: “It is not really desirable for people with low incomes to live way out by a golf course, for example. Our goal is to get the most units built, at the deepest level of affordability. The important thing is for the contributions to the off-site developments to be sufficient to build the affordable housing so that it will remain available to low income people over the long term.”¹⁵

State policy has also varied with regard to its level of support for local governments to adopt inclusionary zoning. A prior director of DHCD, Lucetta Dunn, was more restrained in her endorsement of inclusionary zoning than the DHCD Director (as of late 2010), Lynn Jacobs, both of whom articulated the Department’s policy on inclusionary zoning through letters to various homebuilding associations in California.¹⁶ Although both letters cautioned that mandatory inclusionary programs “have the potential to negatively impact the overall development of housing,” Rob Wiener explained how the more recent letter was somewhat more supportive of inclusionary zoning. “The main distinction between the two letters was that the latter made the case that: ‘Many local governments adopt mandatory inclusionary programs as one component of a comprehensive affordable housing strategy and have demonstrated success in increasing the supply of housing affordable to low- and moderate-income households.’” The earlier letter used the word ‘some’ rather than ‘many’ and failed to note that there could be any positive outcomes from inclusionary housing. While this may appear to be a subtle difference, according to Wiener, “it helps to defuse the negative views about inclusionary zoning and dispels the myth that DHCD is strongly opposed to this approach.”¹⁷

Bill Higgins provided some details about why there is a perception that the state is not supportive of inclusionary zoning.

Probably more cities in California have inclusionary zoning than any other state. But the state does not credit planned inclusionary units as affordable, when they are listed in the housing element. The state’s position is that it will not give credit, because it does not know if the units will be built and there is no way to tell if a unit will be affordable. Not until the unit is built can you have it count. The philosophy of the state appears to be to maximize local zoning for housing. If the state does not count planned or proportional inclusionary units, then in effect the state forces more zoning than is necessary to accommodate the RHNA.

The level of state support for inclusionary zoning may be moot in the economic climate of the first few years of the second decade of the 21st century, which saw the erosion of these policies in many areas of California. For example, Dianne Spaulding noted that: “San Francisco recently deferred the payment of its in-lieu fees for 5 years until the units are actually completed. This is viewed as a real help to the developers and the City is confident it will get the money into its

¹⁵ A counter argument would say that this type of policy may create concentrations of poor households, a concern that has been explicitly addressed through several federal housing programs.

¹⁶ The first letter, dated November 30, 2004, was to Paul Campos, Esq., Home Builders Association of Northern California. The second, dated December 13, 2007, was to Kristine E. Thalman, Building Industry Association of Orange County.

¹⁷ Private email communication. August 2, 2010. Cited with permission.

affordable housing fund eventually. But, needless to say, housing advocates worry about this type of change.” Again according to Spaulding, in mid-September 2010, “the City of Hayward (in Alameda County) voted to suspend its in-lieu fee requirement for rental housing until the housing market and economy improve. There are several other examples of this happening. It means that, once again, the affordable housing and legal services communities will have to keep a watchful and vigilant eye on all of these ordinances to make sure we get changes restored and we continue to adopt new ordinances.”

Connection between the Housing Element and the Availability of Subsidies

A third current issue relates to the extent to which creating a progressive land use framework does not necessarily result in housing production. Certainly, there is a need for additional subsidies, particularly since we have seen how the value of the LIHTC can be significantly diminished by and economic downturn. Given the overall problematic state of California’s finances, interviewees were generally pessimistic about the likelihood of additional appropriations for housing in the near term. Mike Rawson observed that a real estate transfer tax is a possibility and that other revenue sources can come from tax increment financing, where 20% of the funds going to the redevelopment agency can go toward low to moderate income housing.

Length of Time Interested Citizens Have to Protest an Inadequate Housing Element

This concern revolves around a court case that limited the period for suing a local government about the housing element. Under the recent decision, a potential litigant would have to send a notice citing the deficiencies in the housing element to the local government within 90 days after the element was adopted. The city or county then has 60 days to respond, and thereafter the litigant must file the lawsuit within one year. This conflicted with the previous practice, which allowed such a notice to be sent at any time during the planning period, effectively allowing litigation at any time. As of late August 2010, the state assembly passed a bill (AB602) that will restore the provision that allows plaintiffs to sue any time.

Overall Assessment

The story of California’s housing element is one of pluses and minuses and there are two possible summations to the California housing element story. On the one hand, local governments are held accountable for land use decisions—an activity that is uniquely within their domain. They are required to create appropriate plans and regulatory frameworks that are conducive to attaining their housing goals. This view stresses that the California model is one of the best efforts to counter exclusionary zoning, within a strong comprehensive planning framework. State officials, such as Cathy Creswell, put it this way:

the housing law ensures that local governments plan for the amount of housing needed to accommodate growth for all income levels. And with penalties being provided if plans are not implemented, higher housing production (especially for affordable housing) is the result and preferable to a builders remedy alone, which only addresses housing needs on

a case by case basis and is not related at all to the total amount of housing actually needed.

On the other hand, while local governments are required to create plans that would enable them to attain their housing goals, they are not, required to produce the needed housing. In this view, the housing element is certainly a positive step and a critical planning tool and it creates an overall policy direction and awareness of the need for housing across all regions of the state. But it does not, in itself, create the housing and the sanctions for either not submitting a housing element or producing one that does not follow the state's guidelines are not sufficient to result in anything approaching full compliance across the state's local jurisdictions. Based on the analyses done for this report, no more than two-thirds of California's local governments were in compliance over a period of just over one year. Therefore, it is arguable whether one could call the California law "mandatory." Further, while there are strong penalties for non-compliance, these penalties can only be imposed through the court system, which is costly, cumbersome, and time-consuming to utilize. From the point of view of the development community, they like the fact that local governments are required to zone land for more intense development, but they dislike the fact that all development can be stopped if a local government is found to be out of compliance by the court.

Mike Rawson provided a thoughtful summation of the housing element law.

California gets the kudos it gets because of the state mandate to plan for affordable housing. The core obligation is on target; the planning aspects of the statute are probably the best of any state. They have gone a long way toward removing constraints to affordable housing. Yet, it is a complex statute and I would not say that California should be the model because it provides only half the solution. Even if the planning is in place, the process can stall at the local level, if officials simply say, "we are not going to do anything." You can have the greatest planning but still nothing may get done. It seems to me that Massachusetts' 40B has worked out the other half of the story, in terms of having a statewide appeals body. Judicial enforcement being the sole way of enforcement causes some jurisdictions to not take the housing element as seriously as it should. Enforcement mechanisms are good to a point, but they need to be better. It would be good if there were some state consequences other than not getting affordable housing funds; there should be some other administrative consequences, such as financial penalties. Being denied access to state infrastructure or highway funds would be a strong sanction.

Mark Stivers further underscored that: "Cities and counties have done a huge number of things to get housing built that would not have occurred without the housing element. But zoning is just one piece of the story; cities can do the zoning and still frustrate developers when they come forward with a proposal." A number of interviewees offered the view that "If we had the builder's remedy, we'd have the whole package, so that people would not have to sue in the state." Yet, even without that tool, Cathy Creswell noted that: "As in Massachusetts, the housing element is also under attack; local governments don't like state control."

The lack of deep federal subsidies for affordable housing, combined with the ongoing financial crisis in California, has highlighted the need for additional state funding. As Bill Higgins stated: "No one wants to admit that the real problem is the need for long-term subsidies. There is not enough of that to go around, so we pile lots of requirements onto the housing element." Rob

Wiener offered that at least part of the solution lies in the possibility of a new state housing trust fund:

Clearly, we need a dedicated source of money for housing. But since the budget deficit is so dire, the idea was dropped this year. Hopefully, we will get a bill next year that will create an earmark for housing based on various recordings of documents tied to real estate transactions. With recordation fees of, perhaps, \$75-\$225 for each transaction, the fund could accrue as much as \$1 billion during good economic times. Some of these proceeds could conceivably go toward helping local governments prepare their housing elements.

It is something of an understatement to say that the California economy has been suffering. As Dianne Spaulding noted, “the approximately 36,000 building permits issued in 2009 was the lowest number in the state’s history for the collection of this data.” And with the problems in the housing market, there has been the perception that with all the foreclosed homes, and more generally, a lot of homes for sale, that there is no longer an affordable crisis and that therefore the housing element is not as important.

Rob Wiener asked: “How do you prepare a plan that is durable for the next 8 years, when so much is up in the air? And where is the money going to come from, when the budget provides very little for affordable housing? And with the generally weak state of the credit markets, it is very hard to get lenders to lend.” Thus, the unsettled nature of the housing market may make it more difficult to create and implement housing elements for the foreseeable future.

Key Observations for Massachusetts (and others)

Major Similarities between the California Housing Element and Massachusetts’ Chapter 40B

- The extent to which local jurisdictions within each state are able to meet the statewide goals keeps shifting. In California, whether or not a local government is in compliance with the state-mandated submission of a housing element is due, in part, to when in the submission cycle the analysis done. Similarly, the number of Massachusetts’ municipalities that have reached the 10% goal under Chapter 40B is affected in part by how close to the most recent decennial census the analysis is performed—the more years since the last census, the higher the number of municipalities that have reached the 10% goal is likely to be (the number of year-round housing units in each municipality is adjusted only ever ten years, while the number of affordable housing units may increase through the decade).
- A level higher than the municipality (in California it is the courts and in Massachusetts it is the Housing Appeals Committee) has the power to invalidate local land use decisions.
- In both states, contesting a local land use decision regarding an affordable housing development is dependent on an individual filing a complaint, which is time consuming and can result in increased costs.

Massachusetts (and others) May Want to Consider These Lessons from California

- California represents one of the best models in the country of state-mandated comprehensive planning, with an explicit emphasis on how localities will meet the housing needs of residents at all income levels. Massachusetts should carefully study this approach and assess how it could be adapted.
- Similar to New Jersey, California’s attempts to assign “fair share” numbers to each municipality has resulted in a complex system that has provoked a great deal of controversy. This does not seem advantageous in comparison to Massachusetts’s 10% affordable housing goal, which is applicable to all municipalities.
- Requiring municipalities to inventory available sites for the production of affordable housing and requiring that zoning be supportive of meeting the various housing needs “by right” are critical approaches that could be required of Massachusetts municipalities.
- Another noteworthy strategy developed in California allows the courts to remove the right of municipalities to grant any type of building permit if a municipality is not in compliance with the housing element law.
- The lack of an administrative enforcement mechanism, with extensive reliance on the courts to implement the housing element, has proven to be problematic. This underscores the importance of the Massachusetts Housing Appeals Committee.
- Municipalities that do not have a certified housing element are either ineligible or in a less good position to compete for various federal and state loans and grants that are administered through DHCD. This could be a useful “stick” in Massachusetts.
- Although never implemented in California, a number of informants suggested that the state could make funding of non-DHCD transportation and parks/recreation programs contingent on having an approved housing element. This is another strong strategy that could be explored in Massachusetts.

Chapter 7: Cross-State Comparisons and Recommendations

Overview

Each of the programs discussed in this report represents a strong statewide or, in the case of Montgomery County, a strong county-wide commitment, within the state's context and history, for developing affordable housing in locales that would otherwise be unlikely to produce such housing. In Massachusetts, for example, we noted that 3 of the most affluent municipalities in the state are among those that have attained the state's 10% affordable housing goal.

In each case presented, the program reflects the locale's traditions regarding home rule and its relationship to planning. Each program has evolved over many years, making many modifications since its inception, to make it more responsive to articulated concerns. However, the many programmatic changes have resulted in increasing levels of complexity.

Interviewees repeatedly noted the extent to which locales are borrowing or copying details of other programs, learning from each other, and using the experiences from other states to inform and, in some cases, to modify their own initiatives. Recently, for example, the New Jersey legislature attempted to institute the same affordable housing goal as in Massachusetts—the 10% across-the-board mandate. And, over the past several years, Massachusetts has incorporated some of the aspects of the Rhode Island and California statutes, by encouraging municipalities to prepare housing production plans, with incentives for making progress toward meeting those targets.

In retrospect, perhaps the assumption of this study—that a cross-state comparison would be possible—was overly ambitious. Different methods of collecting data, missing data, and other methodological challenges described earlier have made the quantitative analyses difficult to carry out and also difficult to compare the experiences in the several states studied.

Another important consideration in a study such as this is the extent to which variations in market conditions create unique challenges in the various locales. Indeed, even without good comparative information, the role of the market in all programs should be underscored. As discussed in the cases, all programs are currently being challenged by the general downturn in the economy that has persisted from the latter years of the 2000s and into the second decade of the new century. Indeed, the Montgomery County inclusionary zoning program as well as Massachusetts Chapter 40B, are both highly dependent on a vibrant housing development environment. And, while it would be easy to recommend that the economy pick up so that the affordable housing agenda could become more robust, this is beyond the reach of state or local officials.

Demographic differences, from one location to another, represent another confounding dimension of a comparative study. For example, work by the Brookings Institution has found a major trend toward the “suburbanization of poverty” (Kneebone and Garr, 2010). While this phenomenon is far more prominent in some places than others, this study did not consider the extent to which these kinds of changes are occurring within each of the case study locales.

In view of the many challenges in developing quantitative comparisons, the importance of the qualitative findings should be emphasized. There is no such thing as simplicity or the proverbial “magic bullet” when it comes to devising a state (or county-level) strategy for overcoming local land use patterns that limit the opportunities for lower income households to find decent, affordable homes in a wide array of locales across the region. This chapter presents the key qualitative and quantitative observations, including a summary of the findings from the statistical analyses, for each of the 4 locales where the needed quantitative information was available (Montgomery County, New Jersey, Rhode Island, and Massachusetts). The chapter concludes with some recommendations both for policy makers and for researchers, with an explicit focus on Massachusetts.

Key Qualitative Comparative Observations

Programmatic Elements

- 1) There is, perhaps, a trade-off between how well-targeted a program is to each municipality, and how easy it is to administer. Massachusetts, Rhode Island and Montgomery County, Maryland provide examples of a uniform approach, whereas California and New Jersey try to craft a plan that reflects each individual community’s needs. In these two locales, the method by which the “fair share” allocations of affordable housing were assigned, are complex and the object of much debate and contestation. The uniformity with which Chapter 40B is applied, for example, means that municipalities do not have to engage in an on-going, protracted battle with the state, or through the courts, to define “local need,” or spend months and even years developing a local land use plan, which could be rejected by the state (as in California).
- 2) Informants from several locales commented that Massachusetts Chapter 40B is an exemplary model of a state-based effort to overcome local exclusionary zoning.
- 3) A key reason why the Massachusetts approach has been praised is The Housing Appeals Committee, which is viewed as a highly effective tool for the state to implement its affordable housing goals. Rhode Island’s State Housing Appeals Board has similar functions to Massachusetts’s HAC. In addition, the SHAB has a legislative mandate to consider whether the proposal being discussed is in conformance with the local Affordable Housing Plan, while no such guideline is required of the Massachusetts HAC.
- 4) In those states that rely on the courts, rather than an administrative agency such as HAC or SHAB, to implement the statewide statute (New Jersey and California), the process has often gotten bogged down in legal proceedings.
- 5) In Massachusetts, Rhode Island, New Jersey, and California, the state does not have the power to enforce its mandate proactively; a complaint or court case must be filed by an individual or entity with “standing” to protest a specific action by the local jurisdiction, which is time consuming and costly. In New Jersey, for example, COAH or the courts

may only act on the request of a locality, a developer, or a fair housing organization or other non-profit. In Massachusetts, the developer initiates a 40B application.

- 6) In the locale that experimented with local governments being given the option to make “in lieu” payments to other municipalities, (New Jersey) rather than building the housing in their own jurisdictions, the result has been fewer units being produced than what would have been required by the statute.
- 7) Similarly, in Montgomery County, when developers were given the option to opt out of developing units on-site and, instead, could make a donation to a fund to be used elsewhere, the per unit contributions were inadequate to provide an actual housing unit, as would have been required under the MPDU program.
- 8) An inclusionary zoning program (as in Montgomery County), or other affordable housing built through other statewide initiatives, working in conjunction with a local housing authority, can be an effective way to create a stock of long-term affordable units. However, the ability to do this is dependent on sufficient funding being able for the housing authority to purchase the housing units from developers.
- 9) A higher percentage of units built under the MPDU program have been for-sale, as opposed to rental units. However, a disproportionate share of the rental units in Montgomery County is still affordable. This suggests that promoting rental housing is an important strategy for creating a long-term stock of affordable housing.

Progress toward Meeting Goals

- 1) Assessments of the progress municipalities are making toward meeting a given statewide goal may vary depending on when the analyses are done. In California, whether a local government is in compliance with the state-mandated requirement to submit a housing element is partially dependent on when in the submission cycle the review takes place. The longer the period since the deadline for submission, the greater the number of local governments that will be in compliance. Similarly, in Massachusetts, the ability of municipalities to meet the 10% goal is dependent on how close to the most recent census tallying the number of housing units in a given municipality the analysis is performed—the more years since the last census, the higher the number of municipalities likely to be in compliance, since the data is dependent on census counts of year-round housing units, from the beginning of the decade. The same situation holds in Rhode Island.
- 2) Various strategies to encourage the attainment of statewide goals have been developed. However, these primarily serve as threats, albeit important ones; very few cases actually come before the Massachusetts Housing Appeals Committee, the California Courts, the Rhode Island State Housing Appeals Board or the New Jersey courts. The various appeals mechanisms encourage developers and local jurisdictions to come to a resolution through negotiation.
- 3) All the locales studied, with the exception of Montgomery County, have state-mandated goals that local jurisdictions are expected to meet. However, in all cases, attainment of

the goals lags behind the state mandates. In the two locales that require the submission of housing elements (New Jersey and California), the actual submission of these plans is far below 100%. In the two locales that have a 10% affordable housing goal (Massachusetts and Rhode Island), the great majority of municipalities have not attained the goal.

Zoning and Comprehensive Plans

- 1) Mandated comprehensive planning, with a housing element that requires localities to detail how they will meet the housing needs of residents at all income levels, is a powerful tool, particularly when coupled with the threat of negating local zoning (as in California). Massachusetts, New Jersey and Rhode Island have linked progress toward attaining affordable housing goals with immunity from a state over-ride of the proposal in question.
- 2) Rhode Island has made the housing plan requirement a much more central part of its program than in Massachusetts. The Rhode Island housing element must detail how the state-mandated low and moderate income housing goals will be attained and all zoning decisions must be consistent with the plan.
- 3) In Rhode Island, it is not yet clear whether immunity will actually be granted for locales that are making “adequate progress” toward meeting their state-mandated affordable housing goals. Also, in the case of California, perceptions concerning the effectiveness of the statute must be tempered by the lack of a centralized database on housing production. Such a database would allow, for each jurisdiction, comparisons of housing needs, as specified in the housing elements, with housing production outcomes.

Key Quantitative Comparative Observations

Our effort to quantify programmatic success in attaining dispersal of affordable housing units throughout a state or county was a complex undertaking, with some ambiguous results. Ideas for further research and possible ways to improve on our quantitative analyses are discussed in a subsequent section of this chapter.

While each program appears to have stimulated the production of housing affordable to lower income households, there are mixed findings on the extent to which the new units are being located in higher income areas with higher percentages of white residents, and that have lower densities. Chart 1 presents a number of the key quantitative findings, for each of the 4 locales where such information was available. The key observations are summarized below. In most cases, the information can be found both in the following figure as well as in the chapter pertaining to the specific program, or in Appendix V.

Overall Affordable Housing Production and Long-term Affordability

- 1) In locales where local jurisdictions may be exempt from the state statute (MA, NJ, RI), primarily because they already provide a significant amount of affordable housing, affordable units have continued to be produced.

- In Massachusetts: 57,798 units have been constructed using comprehensive permits, of which 30,703 are reserved for low and moderate income households. These units are located in 246 (70%) of Massachusetts's 351 municipalities. Production came both from the 53 municipalities that had reached the 10% goal as of April 1, 2010 (6,902 units) as well as from the 298 municipalities that had not (23,801 units). Between 1972 and 2011, 127,363 affordable units were added to the state's Subsidized Housing Inventory. This development took place in municipalities that had attained the 10% goal prior to the start of the 40B program, that attained the 10% goal during this period, and that were making progress toward attaining the goal. Boston, alone, which has exceeded the 10% goal since the inception of Chapter 40B, has 48,503 units listed on the SHI, or about 20% of the total.
 - In Rhode Island: There has been a net gain of 5,301 affordable units across the state since the policy was enacted; 2,547 of these units were built in the 29 municipalities that had not already reached one of the housing goals when the policy was enacted. Thus, 2,754 units (52% of the total) were produced by municipalities that had met one of the state's housing goals.
 - In New Jersey: A total of 43,161 new units were completed by 293, out of the 494 municipalities (59%) with prior round obligations; 18,910 units (COAH plus LIHTC) were produced by 50 out of the 72 municipalities (69%) without prior round obligations. This means that proportionally more municipalities without a prior round obligation built affordable housing (69%) than those that were required to do so (59%). Counting all affordable units produced (COAH plus LIHTC), the total comes to 62,071, of which 30% were produced by municipalities without prior round obligations.
- 2) Massachusetts had the best record of affordable housing production as a percentage of the growth in the state-wide (or county-wide for Maryland) housing stock from the start of the program (13.7%); Rhode Island had the second best record.
 - 3) In the one locale where long term-affordability restrictions did not accompany the program from the outset (Montgomery County), only about 32-34% of the total number of units produced through the program are still affordable, due to short-term restrictions on affordability in the early years of the program. In contrast, to the best knowledge of state officials, virtually 100% of the units produced by the three other states (MA, NJ and RI) continue to be affordable.
 - 4) While the Montgomery County MPDU program had the highest affordable housing production record per 10,000 residents, in comparison to the other states' programs, only 45 units produced through the MPDU program per 10,000 residents are still affordable.
 - 5) Counting only the affordable units produced through the program per 10,000 residents, the Massachusetts record was slightly lower than two of the other three states, and slightly higher than Montgomery County, Maryland's still- affordable stock. However,

adding all affordable housing production (whether or not through the program), Massachusetts's production per 10,000 residents was second to Montgomery County, Maryland's (185 and 286, respectively), with New Jersey and Rhode Island substantially lower. As already noted, Montgomery County, Maryland's record is tempered by the significant loss of affordable units in the MPDU. The extent to which affordable units have been lost in the other programs is not known.

- 6) Aside from the loss of affordable units in Montgomery County, the mandatory inclusionary zoning mechanism resulted in a very high rate of production. However, as discussed below, this production tended not to be located in higher income areas with higher percentages of white residents.
- 7) Massachusetts had, by far, the highest total production and annual production of affordable units (including both program and other units) (117,150 and 2,789). Montgomery County, Maryland had the highest annual affordable housing production per 10,000 residents, followed by Massachusetts (8.9 and 4.4, respectively).
- 8) Rhode Island had the highest percentage of municipalities producing and/or experiencing a net increase in affordable housing and Massachusetts had the second best rate (92% and 72%), respectively. The records in New Jersey and Montgomery County were lower; 60% and 53%, respectively.

Variations in Types of Affordable Housing Produced

- 1) Only limited data was available on the types of housing produced. Based on available information, there was substantial production for both families and elderly households. In Rhode Island, more elderly housing was produced than family housing, while in New Jersey and Massachusetts the percentages of each type produced were quite close.
- 2) Massachusetts produced considerably more affordable rental housing units than homeownership units, while in Montgomery County, the reverse was true.

Progress toward Meeting Goals

- 1) New Jersey and Rhode Island had the best records in terms of the percentage of municipalities that attained the statewide goal overall, whether or not through the program (30% and 28%, respectively). New Jersey also had the best record in terms of the percentage of municipalities that attained the goal through the program (20%); Massachusetts had the second best record (14%).
- 2) Massachusetts had the best record in terms of municipalities' attaining 50% of program goals, with 49% of the municipalities attaining this threshold. About one-third of the municipalities in New Jersey and 28% in Rhode Island had attained 50% of their state's affordable housing goals. Massachusetts and New Jersey had the same percentage of municipalities attaining 80% of program goals (25%). Rhode Island ranked third on that measure.

- 3) In both Massachusetts and Rhode Island, municipalities that attained their statewide goals are denser, have smaller white populations, have lower median incomes and grew at a slower rate, than municipalities that have not met their housing goals.

Variations in Production Related to Race, Income, Density

A series of statistical analyses were performed to determine what, if any, relationships exist between affordable housing production and various demographic characteristics. Our goal was to explore affordable housing production in municipalities that are typically associated with exclusionary communities – less dense, more white residents, and residents with higher median incomes. As discussed in the case studies, the quantitative analyses often yielded mixed results or results that could be open to various interpretations. The following are some of the key findings that emerged.

- 1) In Rhode Island there is a significant positive correlation between LMIH production per 10,000 residents and the percent of white residents.
- 2) In both Massachusetts and New Jersey, affordable housing production is positively correlated with higher median incomes. This suggests that affordable housing production can be produced in high income areas, as well as lower income areas. However, our analyses did not explore the extent to which some higher income areas also have certain characteristics that would make them more likely to produce housing, such as available land.
- 3) Yet, municipalities that attained the statewide goal tended to have some combination of lower incomes, fewer white residents and higher densities, than municipalities that had not reached the state goal. This was the case in Massachusetts and Rhode Island, where all three relationships prevailed; in New Jersey municipalities that had met their prior round obligations tended to be denser and to have lower percentages of white residents. In Montgomery County, MPDU units tended to be built in locales where there were fewer white residents and with lower median incomes.
- 4) Thus, municipalities that are working toward the statewide goal are showing some promising signs that exclusionary patterns are changing. But, for the most part, the municipalities that have attained their state goals or obligations are those that historically are associated with producing more affordable housing.

Chart 1: Summary Comparison of Key Quantitative Findings

| | Massachusetts | Rhode Island | Montgomery County, MD | New Jersey |
|---|--|---|---------------------------------|--|
| Year Program Startedⁱ | 1968 (data starts in 1969) | 1991 | 1974 | 1975 (data starts in 1980) |
| Total Number of Municipalities in State (Census-Designated Places in case of Montgomery County) | 351 | 39 | 51 | 566 |
| Production | | | | |
| Total units produced through the program | 57,798 | 5,301 ⁱⁱ | 12,520 | 52,160 |
| Total affordable units produced through the program | 30,703 | 5,301 | 12,520 ⁱⁱⁱ | 52,160 |
| Affordable units produced (program and other) since start of program ^{iv} | 117,150 | 5,301 | 25,000 ^v | 62,071 ^{vi} |
| Affordable (program only) units produced per 10,000 residents (2000 population) since start of program ^{vii} | 48 | 51 | 143 Still affordable =45 | 62 |
| Annual affordable production (program and other) since start of program (through most recent year for which data were available) | 2,789 | 279 | 781 | 2,140 |
| Annual affordable production per 10,000 residents as of 2000 population (program and other) since start of program | 4.4 | 2.7 | 8.9 | 2.5 |
| Affordable (program and other) units produced per 10,000 residents (2000 population) since start of program | 185 | 51 | 286 Still affordable = ? | 74 |
| Affordable housing production (program and other) as a percentage of the growth in the state-wide (or county-wide for Maryland) housing stock from the start of the program to 2010 ^{viii} | 13.7% | 10.9% | 7.6% Still affordable = 2.4% | 7.3% |
| Affordable housing production through the program, by type | | | | |
| <ul style="list-style-type: none"> Number (percent) elderly family | 14,121 (46%) 14,007 (46%) ^{ix} | 3,022 (57%) 2,069 (39%) ^x | N.D. | 22,219 (43%) 25,388 (49%) ^{xi} |
| <ul style="list-style-type: none"> Number (percent) homeownership Rental | 4,874 (28%) 25,829 (64%) | N.D. | 8,947 (71%) 3,573 (29%) | N.D. |

Continued next page

| | Massachusetts | Rhode Island | Montgomery County, MD | New Jersey |
|--|--------------------------|--------------|-------------------------|------------|
| Municipality involvement in affordable housing production and progress toward meeting goals | | | | |
| Number (percent) of municipalities that were included in statewide goal (e.g., had the obligation or that had not met state goal at the start of the program) | (N=347) | (N=29) | N/A | (N=494) |
| Number of municipalities that have utilized the program (out of total number of municipalities with the obligation or that had not met the goal at start of the program, if such a goal existed) | 246 (71%) | 26 (90%) | 27 (53%) ^{xii} | 343 (69%) |
| Number (percent) of municipalities with no new affordable housing since program was created (out of total number of municipalities) | 97 (28%) ^{xiii} | 3 (8%) | 24 (47%) | 223 (39%) |
| Number (percent) of municipalities that have produced and/or experienced a net increase in affordable housing (out of total number of municipalities) | 254 (72%) | 36 (92%) | 27 (53%) | 343 (61%) |
| Number (percent) of municipalities that, prior to the program, had not attained the state goal, but that attained the goal through the program (out of total number of municipalities with this goal; e.g., for Massachusetts N = 347; New Jersey, N =494) | 49 (14%) | 1 (3%) | N/A | 98 (20%) |
| Number (percent) of municipalities that, prior to the program, had not attained the state goal, but that attained 50% or more of the program goal (out of total number of municipalities or, in the case of New Jersey, out of total number of municipalities with this goal, N =494) | 173 (49%) ^{xiv} | 11 (28%) | N/A | 163 (33%) |
| Number (percent) of municipalities that, prior to the program, had not attained the state goal, but that attained 80% or more of the program goal (out of total number of municipalities; or, in the case of New Jersey, out of total number of municipalities with this goal, N =494) | 87 (25%) ^{xv} | 7 (18%) | N/A | 123 (25%) |
| Number (percent) of municipalities that attained the state goal overall (out of total number of municipalities or, in the case of New Jersey, out of total number of municipalities with this goal, N =494) | 53 (15%) ^{xvi} | 11 (28%) | N/A | 148 (30%) |

NOTES:

N.D.= no data

N/A= not applicable

ⁱ The years in place for a statute and the number of years used in analyses are often different, because we didn't always have data for all years.

ⁱⁱ Rhode Island number is not a production number, but a net change number, as explained in Chapter 3.

ⁱⁱⁱ Montgomery County's affordable housing production record is tempered by the high number of units that are no longer affordable; only about 4,005 to 4,294 units are still affordable (32-34%). This includes former MPDU units that were purchased by the HOC. We do not have any data indicating the loss of any affordable units for New Jersey, Rhode Island and Massachusetts. As far as we know, based on information from informants, all affordable units listed are still affordable.

^{iv} For Montgomery County, Maryland and Rhode Island the number includes program units only (with an assumption that this covers all production). For Massachusetts, we use the net change in units as listed in the state's Subsidized Housing Inventory, starting in 1972. For New Jersey, we include units recorded by COAH plus LIHTC units.

^v It will be recalled that this number was an estimate from Roman (2008).

^{vi} This includes affordable housing production that is not part of COAH's database, especially the LIHTC developments that have been built in urban areas that do not have affordable housing goal obligations.

^{vii} Population figures from 2000 census are as follows: Massachusetts = 6,349,097; Rhode Island = 1,048,319; Montgomery County, Maryland = 873,341; New Jersey = 8,414,350.

^{viii} Since 2010 census figures were released shortly before the completion of this report, fall 2011, we thought it would be useful to provide updated numbers for this analysis.

^{ix} Two additional categories of housing are not shown: various types of special needs housing, totaling 1,277 units and age-restricted, over 55 housing, totaling 1,298 units.

^x The third type of housing, not shown, is special needs housing, totaling 210 units.

^{xi} The third type of housing, not shown, is special needs housing, totaling 4,388 units. We have production data, by type of housing, for only 51,995 units. Therefore, percentages are based on this total, not the total production noted.

^{xii} For Montgomery County, out of total number of CDPs in County.

^{xiii} This number is different from – though inclusive of – the 35 municipalities that have no affordable housing, as noted in the Subsidized Housing Inventory. There are 62 municipalities in Massachusetts that have affordable housing, but none of the units were produced using Chapter 40B. These units were presumably built through an earlier program, such as the public housing program or the Section 8 New Construction Substantial Rehabilitation program.

^{xiv} Based on 2010 census figures for the number of housing units in the state, the number dropped to 167 (48%)

^{xv} Based on 2010 census figures for the number of housing units in the state, the number dropped to 73 (21%).

^{xvi} Based on 2010 census figures for the number of housing units in the state, the number dropped to 39 (11%).

Recommendations

It is important to underscore an overriding recommendation: Federal funding for affordable housing is essential, both for capital costs and ongoing management. Producing housing affordable to a broad range of the population, particularly those who are least able to afford market prices is an expensive undertaking and generous funding from the public sector is needed. It is one thing for states to create affordable housing targets for municipalities to fulfill. But without adequate federal and state subsidies, the ability of municipalities to attain affordable housing goals is likely problematic. Although we suggest that resources for rental housing should be a major priority, subsidies to enable qualified low-income people to become homeowners are also essential.

Most of the programs explored in this study depend on significant resources to promote their affordable housing programs. However, other than providing funds to assist the local public housing authority to acquire inclusionary housing units, the MPDU program essentially runs without state appropriations. In contrast, Massachusetts has, for decades, made affordable housing programs an important priority. It, like other states included in this inquiry has developed various mechanisms for supporting affordable housing production goals, whether through direct budgetary appropriations, bond issues, the development of trust funds, state-based housing tax credits, or other special initiatives to raise money. Despite the precariousness of many state budgets, it is still important to emphasize that the development of affordable housing is a costly endeavor and that state-based efforts to encourage such production should be coupled with funding opportunities. There is a policy disconnect when states articulate housing (or other) goals, but do not provided the resources to help attain them.

The following recommendations are specifically targeted to Massachusetts. However, they are all applicable to other state or regional governments that are interested in developing strategies for overcoming restrictive local land use ordinances. This section answers the question posed at the outset: What can be learned from the various initiatives that might assist Massachusetts, as well as other states in creating more optimum programs?

Programmatic Elements and Best Practices

- 1) A single state-wide affordable housing goal is likely preferable to individual “fair share” mandates.**

Attempts to create specific affordable housing goals for individual municipalities have been extremely difficult to implement and have resulted in numerous court cases, particularly in New Jersey. Massachusetts’ 10% across-the-board target appears preferable to the various efforts to create municipality-specific affordable housing goals. Although it is conceptually appealing to try to devise a formula that takes into account the growth patterns of each city and town, as well as its unique needs and challenges, the experiences so far suggest that it is very difficult to attain an outcome that will be viewed as fair and appropriate.

- 2) Long-term affordability restrictions are critical.**

The problems associated with units losing their affordability due to short-term affordability restrictions has been well understood for decades. Experiences with a number of federal

programs have underscored the need for public subsidies for affordability to be maintained for long periods into the future, preferably in perpetuity. A 20-year affordability period for example, is far from adequate. Looking at the Montgomery County experience, short restriction periods (5 years at the start of the program) have resulted in the loss of most of the units produced under the MPDU program. So, while that initiative was successful in producing the largest number of affordable units per 10,000 residents, its lack of long-term affordability restrictions at the outset of the program has resulted in a loss of thousands of units affordable to the original target population.

3) Set-aside appropriations for rental units to be purchased by public housing authorities or nonprofits could contribute to a stock of long-term affordable housing.

Montgomery County's MPDU program has been an innovator in terms of its strategy of providing funds to enable the county housing authority to purchase a percentage of the inclusionary units developed. This approach appears to work best for rental units, since a public housing set-aside within a condominium development would also need a significant annual subsidy to help cover the condo fees, which are a problematic cost for low income households. Therefore, the state should provide funds for local housing authorities to purchase units built through the Chapter 40B program or other state-based initiatives such as those discussed in this report.

4) Inclusionary housing programs need additional incentives or sanctions to encourage state-wide development of affordable housing.

Although the MPDU program has produced a large number of units, it has not managed to overcome exclusionary land-use patterns. Any inclusionary zoning program would benefit by a companion set of state incentives or disincentives to locales that traditionally exclude affordable housing.

5) The development of affordable rental housing should be encouraged.

The Montgomery County experience also revealed that rental housing units represented a disproportionately larger share of the still-affordable housing stock than the homeownership units. This suggests that there may be fewer pressures on rental housing to be converted to market rate units and that public policies should make the production of affordable rental housing a priority.

6) In-lieu payments and other arrangements for off-site housing should, in general, be discouraged.

These types of initiatives may result in some amount of affordable housing, but in the programs studied here, payments have not resulted in 1 for 1 development opportunities. In addition, the ability of localities to pay "receiving" cities and towns to produce the affordable housing runs counter to the spirit of statewide mandates to provide opportunities to households at a range of income levels in diverse socio-economic communities. Therefore, the opportunity for a municipality to get credit for affordable housing production that does not occur within its boundaries, should be discouraged. On the other hand, if off-site construction of affordable housing is allowed within the same municipality as the original development, such an

arrangement may be desirable under certain circumstances, as long as the per unit contributions are sufficient to produce a unit of housing.

7) The potential of instituting a statewide developer fee applicable in strong market areas should be explored.

The state could create a new developer fee targeted to municipalities that are experiencing a high rate of growth. The funds would then be earmarked for affordable housing development, thereby creating a dedicated source of revenue. Affordable housing development in municipalities that have had weak affordable housing production records would be given priority for accessing these funds.

8) The record of state-based incentive programs for stimulating the production of affordable housing should be assessed.

Along with developing stiffer sanctions for non-attainment of statewide goals (outlined below), it is important to better understand the types of incentive programs that are having the greatest success in producing affordable units. Massachusetts' Community Preservation Act, as well as its Chapter 40R and 40S programs (discussed previously), for example, warrant further investigation.

9) Consistent and comparable forms of record-keeping on affordable housing production should be developed.

As noted many times throughout this report, difficulties in how each state collects data has hampered both our ability to present a comprehensive view of the particular initiative being studied, as well as to draw comparisons between states. The problem is most glaring in California where there is no centralized source for data on each jurisdiction's affordable housing production. HUD could play a useful role in developing a consistent record-keeping process and then providing modest funds to encourage states to institute such a system. It could look to the several states with exemplary record-keeping systems for guidance on how to develop a nationwide database.

In the process of instituting a consistent record-keeping format to track affordable housing production, it would be very helpful if all states could adopt HUD's terminology and guidelines for what constitutes affordable housing. As noted in Chapter 1, each case relied on the definitions of affordable housing used in that locale. For more comparable comparisons from state to state, a standard definition would be far preferable.

10) Data should be compiled on impacts of affordable housing, in general, and multifamily housing, in particular, on municipal costs, traffic, and property values.

There is an increasing body of knowledge about whether affordable housing and multifamily development contribute to adverse impacts. As noted in Chapter 1 and in Appendix II, a number of studies have been undertaken that refute the view that property values are negatively impacted by affordable housing development. This type of information is invaluable for states to collect and could be used to counter efforts that are opposing or attempting to weaken statutes aimed at overcoming exclusionary zoning. In Massachusetts, opponents to Chapter 40B did not use the "adverse impacts" arguments, perhaps because of the research that had been done refuting such

claims. In addition, there was a timely release of a report presented data that demonstrated the positive effects of Chapter 40B on economic activity and job creation.

Progress toward Meeting Goals

1) State aid should be more closely linked to attainment of housing goals; significant sanctions for not attaining goals should be instituted.

A number of informants emphasized that greater compliance with state housing goals could be attained if state funding were withheld or reduced for expenditures for roads, infrastructure improvements and parks/open space, for example. This, however, could mean that lower income towns would bear a disproportionate burden, since the wealthier towns may not be concerned about a loss of state aid. Nevertheless, states should continue to explore the kinds of sanctions that would have a greater chance of leveraging greater compliance with statewide housing goals. California's "stick" is particularly noteworthy: courts have the power to suspend all local zoning and remove the right of municipalities to grant any type of building permit if a municipality is not in compliance with the housing element law. This is a powerful threat and, even if it is used infrequently, the ability of the state to essentially stop all local development until the goal is attained, is a sanction that has real "teeth." Nevertheless, while it invariably captures the attention of a municipality if there is a threat of litigation, short of such a direct action, it does not appear that the threat itself is sufficiently powerful for jurisdictions to comply with housing element requirements.

2) Progress toward meeting housing goals should render a municipality exempt from sanctions for non-attainment of the goal.

In New Jersey, immunity from the builder's remedy is provided to municipalities that have submitted plans. Massachusetts has adopted a stronger policy, which provides municipalities with immunity from state zoning over-rides, if progress is being made toward attaining the 10% affordable housing goal. The Rhode Island statute also has such a provision. In the latter case, it is unclear what, exactly, constitutes progress and whether such progress will be sufficient to preclude state intervention in local land use decisions. However, this type of incentive may be a desirable strategy for encouraging local compliance with statewide housing goals, particularly if municipalities have a clear understanding of how progress will be measured and how immunity will be provided. (Note: for areas that allow for immunity from sanctions associated with non-compliance with the statute, such as Rhode Island, guidelines should be adopted that clearly articulate what, exactly, constitutes compliance with the plan and how progress toward attaining the statewide goal will be measured.)

3) It would be desirable to explore whether other interested parties should be allowed to pro-actively initiate a claim if a municipality has not attained the state's goal.

In Massachusetts, only developers or municipalities (in the case of the Local Initiatives Program) can file for a comprehensive permit under Chapter 40B. As discussed in several of the cases, the inability of others with a stake in the availability of affordable housing in a particular locale do not have the right to file a complaint. Providing this right could create more public awareness of the need for affordable housing and stimulate additional production.

Zoning and Comprehensive Plans

- 1) The state should require municipalities to develop and submit comprehensive plans, including detailed housing goals for addressing a full range of housing needs. As part of this, comprehensive plans for housing must be consistent with local zoning. The state should hold municipalities responsible for meeting housing goals.**

California has been a leader in demanding that local jurisdictions adopt zoning ordinances that can accommodate the housing needs of all residents. While locales are responsible for providing the appropriate land use framework to enable development to take place, they are not accountable for whether the housing market responds. Creating opportunities for higher density development does not automatically translate into that development actually taking place or, indeed, serving the range of income levels specified in the housing element. Thus, states should require municipalities to develop zoning consistent with their plans and devise mechanisms for holding municipalities responsible for actually executing the plans that they develop.

As part of any discussion concerning the requirement for comprehensive planning, it is important to take into account the relationship between the state and its municipalities. As noted in Chapter 1, municipalities in states such as Massachusetts that do not conform to Dillon's Rule have more leeway than other locales that operate within a Dillon's Rule framework. Nevertheless, the state legislature has the ability to alter the prevailing patterns and to provide local governments with the level of autonomy or control that it feels would best meet its overall land use agenda.

- 2) Zoning should allow for multifamily housing development.**

States could mandate that each city and town set aside a certain percentage of land that could be developed "as of right" for multifamily housing, preferably along with set-asides for affordable housing. It is important to emphasize that Chapter 40B would be much less needed if each city and town in Massachusetts made a commitment to re-zone parcels of land to accommodate a diverse range of housing types, particularly multifamily housing. Municipalities can be in charge of their own development and avoid situations where unwanted projects are proposed (and approved) if they create zoning ordinances that allow for diverse development opportunities.

- 3) Requiring an inventory of available land is a desirable part of a planning effort.**

California's initiatives in this area are exemplary. As part of such a comprehensive planning requirement, locales should be required to inventory all available land and to make sure that these parcels are zoned so that a wide array of housing types could be built, "as of right." If there is little vacant land available, municipalities should assess which locales would be appropriate for re-zoning, to allow for alternative uses that would accommodate the needed housing.

Future Research Suggestions and Opportunities

Given the time and resources available for this project, various questions could not be addressed. In some cases, the inability to gather the needed data was due to the ways in which individual states maintained their databases. California, of course, is the most extreme example: it does not have a centralized method for tracking affordable housing production in each municipality, and it

does not have a system that allows for easy comparisons between goals specified in the plans and actual outcomes. As noted above, HUD could play a constructive role in encouraging and supporting state-wide efforts to collect, in a standardized form, the data detailed in Appendix III. The following includes some suggestions for future quantitative and qualitative studies.

Quantitative Research

First, future research efforts may want to consider other ways to quantify the differences between the urban areas that have traditionally been the main providers of affordable housing, and the suburbs that have typically avoided such housing. In this study, we looked for correlations between housing production and certain demographic characteristics, on the assumption that higher-density, less-white, poorer areas were indicative of urban areas, while everything else was indicative of areas where more affordable housing needed to be built. This approach may have over-simplified the issues involved in the exclusionary zoning debate. For example, rural areas which are far from job centers are not the target of anti-exclusionary zoning policies as much as wealthy suburbs.

In addition, our results concerning density tended to be ambiguous. While we assumed that affordable housing production in high density areas was a sign that the policy was not targeting exclusionary municipalities, this may result in misleading conclusions. Indeed, in Massachusetts (and other locales), the higher density in municipalities that were using the Chapter 40B comprehensive permit process may have been reflective of the kind of outcome to which the program was most targeted: suburban affordable housing development. A productive approach to this issue might be to categorize both a municipality's importance as a target for affordable housing, and its likelihood of having exclusionary zoning, by looking at "core cities" versus all other cities in a metropolitan area. This could result in a more nuanced interpretation of the kinds of locales where affordable housing is/is not being built.

A second worthwhile research effort could involve attempting to quantify a community's exclusivity before and after a policy's enactment. Again, we looked for linear relationships between demographic factors and affordable housing production. A more direct approach may have been to look at how exclusive a community was before the policy's enactment (e.g., median income compared to the state median), and examine how that changed. This approach was used with some success for New Jersey in Vladeck (2010), but could be expanded to the other states in this study.

Third, including one or more "baseline" states could be a valuable addition to future studies. This project only looked at states that tried various interventions to address exclusionary zoning policies, since our goal was to identify other policies that may be applied in Massachusetts. For a more rigorous, quantitative study of the effectiveness of each program, however, the inclusion of "baseline," or control, states that have not adopted any such policies may help give a sense of where the states we examined for this study might be without the interventions they adopted as much as 40 years ago.

Fourth, given the highly non-normal distribution of the affordable housing production numbers examined in this study, an ordinary least squares (OLS) regression model was inappropriate. However, there are other statistical tests that are able to build models by categorizing the

dependent variable (in this case, affordable housing production), and they may be useful in view of the nature of this data (For a discussion of these tests, see Vladeck, 2010, pp. 67-68).

Fifth, further research examining affordable housing production would benefit from analyses using Geographic Information Systems. Mapping locations where there is/is not affordable housing production, along with data on various demographic characteristics, would provide an additional and useful way of understanding this issue.

Sixth, future researchers also may want to consider what other measures would provide the information needed to assess and compare states' accomplishments. The following information would be helpful to round out a fuller assessment of the state initiatives. These include:

- How long does it take for approvals to be given (for units to be developed) and for the units to actually get built? How streamlined is the process? What is the level of state involvement in reviews?
- How long has it taken for localities to get approval for plans or housing elements (where states have that requirement)? How do planning requirements, where they exist, relate to actual production?
- How does the development physically fit in with the surrounding neighborhood? Do the units fit with Smart Growth principles, including locations in compact centers and access to public transportation?
- How can housing production data be normalized in the context of changes in employment rates? This would enhance our understanding of how housing production relates to general changes in the area's economic growth.

Qualitative Research

A number of additional questions arise that could be pursued more fully through additional qualitative research efforts. First, it could be fruitful to explore the extent to which various types of incentive programs are encouraging locales to produce affordable housing. The Massachusetts Community Preservation Act and Chapters 40R and 40S programs represent several possible models. But there are certainly other initiatives that warrant further study. For example, New Jersey's new regional planning initiative, which attempts to coordinate affordable housing production among several municipalities, should be closely watched and evaluated.

Second, and also in the general category of "best practices," it would be desirable to better understand how some communities, particularly those that may be viewed as "exclusionary," have managed to meet state affordable housing goals. As of 2011, two Massachusetts municipalities—Concord and Northborough—had made significant progress in expanding their affordable housing stocks, with each surpassing the 10% threshold. In addition to Concord, two other affluent Boston area suburbs, Lincoln and Lexington, have met the state's 10% affordable housing threshold. In addition, in Rhode Island, a very high cost and low density community, New Shoreham, was also successful in meeting the 10% goal. Having a clear understanding about how these municipalities attained their affordable housing goals would be beneficial and could serve as a stimulus and guide to other locales. Perhaps, for example, the fact that these are relatively affluent towns may be less important than other factors, such as the availability of sites suitable for development.

A related question to the strategies that municipalities have used that have been successful in producing affordable housing would be to focus specifically on how infrastructure constraints have been overcome. For example, a limiting factor in developing multifamily housing in many outer suburban or rural areas might be the lack of water and sewer line hook-ups. To what extent have innovative and cost-effective technologies made the development of higher density housing feasible?

A final research area could further explore how the “suburbanization of poverty” in various metropolitan areas is connecting to the issue of exclusionary zoning. Strategies for overcoming zoning barriers may look and feel very different in view of the changed demographic patterns in many locales, which are seeing much higher concentrations of poor people in suburban areas than ever before. To what extent do state and regional governments need to better target their policies to locales that continue to be exclusionary, as opposed to the broader group of suburban municipalities, which may already have large concentrations of lower income and nonwhite residents?

Final Note

Each of the five programs explored in this report deserves praise. In all five cases, the problems created by exclusionary zoning were acknowledged and a bold set of strategies were developed, often over several decades. Also, in each locale, a significant amount of affordable housing was produced in areas that likely would not have experienced this growth if the statute had not been in force.

In Massachusetts, Chapter 40B has been rightly credited for its success in producing tens of thousands of units of housing, most of which are affordable to very low income households. But public officials and advocates are well aware of the ways in which the state’s approach to planning is problematic. For over a decade, there has been concerted effort toward land use reform. If enacted, the Comprehensive Land Use Reform and Partnership Act would help to improve current shortcomings in the land use landscape. Specifically, the act would require that zoning by-laws and ordinances should be consistent with master plans and it would explicitly bar exclusionary zoning. These would all be positive changes.

Hopefully, the material presented in this study will serve to further the debate and discussion about how the housing needs of all residents in Massachusetts and other states can be met through a joint effort between state and local governments, and with the support of nonprofit and philanthropic organizations, as well the for-profit development community.

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Appendices

Appendix I: Excerpts from Governmental Commission Reports on Exclusionary Zoning

The Report of the President's Commission on Urban Housing, 1968

“Too often...zoning has had harmful side-effects, and has frequently been misused by communities to zone out social or fiscal “undesirables...Communities may also use subdivision regulations and building codes to prevent sites from being used for the construction of low-cost housing...It is recommended that limited power be granted to the Secretary of HUD to pre-empt local zoning codes from application to Federally subsidized low or moderate income housing projects. This limited power of pre-emption should also apply to any state codes or other local ordinances—such as sub-division regulations—which are exclusionary in purpose or effect.” [pp. 142-144].

National Housing Policy Review, 1973

“The reluctance of municipalities to encourage development is manifest in their refusal to grant zoning changes or variances necessary to proceed with construction—especially of multi-family housing, and particularly subsidized housing.” [p. 5-33]

Report of the U.S. Commission on Civil Rights, 1974

“The exclusion of apartments from a municipality tends to exclude lower-income families, who cannot afford the higher cost of a single-family house. This exclusion is found in many suburban communities...The primary purpose of the zoning power, under most State enabling acts, is to regulate land use, and to regulate the racial or economic position of the population. Yet the result...is often the same...Suburban zoning has had the effect of both displacing and of excluding low-income and minority families, and its use toward this end has often been intentional. [pp. 32, 33]

The Report of the President's Commission on Housing, 1982

“...land-use regulations often have been used for exclusionary purposes...the changes proposed by the Commission would limit the ability for government bodies to use zoning restrictions for discriminatory purposes...To protect property rights and to increase the production of housing and lower its cost, all State and local legislatures should enact legislation providing that no zoning regulations denying or limiting the development of housing should be deemed valid unless their existence or adoption is necessary to attain a vital and pressing governmental interest...States should adopt constitutional or legislative enabling provisions that prohibit restrictive local zoning...” [pp. 199-200]

Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing, 1991

“...the separation of districts and land uses resulting from the zoning process has not always been guided solely by the compelling considerations of health or safety.,, exclusionary criteria based on community sentiments sometimes prevail. In some places

single-family homes are chosen as the standard for preserving neighborhood homogeneity, and desires for such intangibles as community ambiance influence the zoning process. The more affordable housing types, including multifamily housing... are often cited as incompatible uses.” [p. 2-6]

An Update to the Report of the Advisory Commission on Regulatory Barriers to Affordable Housing, 2005

Since 1991, regulatory barriers to development of market rate, rental, and affordable housing have become more widespread... Generally, regulatory tools that were barriers then remain barriers today. Regulatory mechanisms, such as restrictive zoning, excessive impact fees, growth controls, inefficient and outdated building and rehabilitation codes, multifamily housing restrictions, and excessive subdivision controls have been in use for decades. These controls have become more sophisticated and prevalent. The current regulatory framework makes building a range of housing types increasingly difficult, if not altogether impossible... Many suburban communities continue to pass affordable housing restrictions, make the approval process increasingly complicated, use exclusionary zoning practices, impose excessive subdivision controls, and put in place tactics to delay project approvals. These barriers can exclude rental and affordable housing developments in a community.” pp. 5 and 7

Report of the Bipartisan Millennial Housing Commission, 2002

However well intentioned, regulations may either increase the cost of housing production (making units less affordable) or effectively discourage production. [The Commission recommends, among other initiatives] a demonstration program to provide planning grants to localities committed to combining land-use regulations into a comprehensive “balanced growth code” that has “workforce housing affordability” as a key ingredient.” [pp. 75,76]

A Bipartisan Platform for National Housing Policy, 2004 (Cisneros, et al.)

“Today, many suburban communities and towns employ exclusionary zoning practices....[The report recommends that the Administration and Congress:] Link funding within federal transportation programs and the HOME and CDBG programs to the production of workforce housing...Recognize local and state efforts to eliminate regulatory barriers, and promote the formation of public, private, and nonprofit coalitions to facilitate barrier removal.” [p. 36, 51-52]

Appendix II: Summary of Studies Exploring Impacts of Affordable Housing on Property Values

A number of research studies have found that if housing is well designed, fits in with the surrounding neighborhood, and managed well, there are no negative impacts of affordable housing on the property values of neighboring single family homes. The following provides some details gleaned from a number of key studies.

- A thorough review of seventeen research projects that attempted to measure the effect of affordable housing on property values revealed that “the extent to which property values are lowered depends on a variety of factors” that are often independent of the subsidized nature of a particular development or the fact that the development is multifamily. Specifically, the quality of design and management of the housing were among the most important criteria in explaining property value changes. (Nguyen, 2005).
- A sophisticated econometric analysis of the impacts of CDC development work on property values, found that these groups have been able to “spark a chain reaction of investment that leads to dramatic improvements to neighborhoods.” Specifically, the study showed that “CDC investments in affordable housing and commercial retail facilities have led to increases in property values ... that are sometimes as great as 69 percent higher than they would have been in the absence of the investment” (Galster, et al., 2005).
- Another rigorous research study conducted in Massachusetts concluded that the “introduction of large-scale high density mixed income rental developments in single-family neighborhoods does not affect the value of surrounding homes.” The authors concluded that “the fear of potential asset-value loss among suburban homeowners is misplaced.” (Pollakowski, Ritchay, and Weinrobe, 2005).
- A highly respected analyst from NYU both reviewed existing studies as well as carried out an investigation in New York City. The study concluded: “The evidence clearly fails to support the notion that subsidized housing will, as a general matter, depress neighborhood property values or otherwise undermine communities... the neighborhood impacts of subsidized rental housing will differ depending on where it is built, the scale of the development, the characteristics of its tenants, and the nature of ownership and management” (Ellen, 2008).
- Between January and April 2009, a group of four graduate students working under my direction at Tufts University examined four affordable housing developments built under the guidelines of Massachusetts’ Chapter 40B that had been strongly opposed by local residents or town officials. They reviewed the arguments that were presented before the developments were built and they assessed the outcomes some 2-3 years after the buildings were occupied. We were interested in determining the extent to which the fears and concerns that had been articulated when the developments were proposed, actually materialized. Interviews with over 40 individuals who were knowledgeable about the developments revealed that none of the predicted negative outcomes and fears have materialized. The buildings are attractive, environmental impacts have been negligible, municipal services have been able to meet the increased demand, traffic problems have not occurred, site planning has maximized open space, and property values have not decreased. While at least one development contributed to an increase in the number of

students in the school system, pre-construction estimates were far higher than the actual outcome. Moreover, these additional costs are partially or fully offset by the property taxes paid by the development. Finally, there is no evidence that the new residents of the developments have created adverse social conditions in the community. The cases also reveal how the 40B process provides significant opportunities for residents to voice their concerns and for developers to work through these issues with town officials, resulting in high quality housing that serves community needs. Further, it seems that the controversies surrounding the development of the 40B projects have contributed to a better understanding of the need for communities to provide a diverse set of housing opportunities, particularly for town employees and lower income households (DeGenova, et al., 2009).

Appendix III: Qualitative and Quantitative Information Collected

Open-Ended Questions that Guided Phone Interviews

- 1) What is the history of each program/strategy being used? When/why initiated?
- 2) Why was this strategy chosen over other options? Did it encounter significant opposition or was it passed overwhelmingly?
- 3) How does each operate? What are the major obstacles to implementation?
- 4) What are the mechanisms for enforcement? What are the sanctions, if any, for noncompliance?
- 5) How do opponents and proponents frame their positions?
- 6) How has the program/policy been modified over time? How?
- 7) What is the assessment of the strengths and weaknesses of the program, in general? To what extent are modifications (if any) viewed as beneficial?
- 8) How could the state's initiatives be improved and/or what types of more optimal solutions to exclusionary land use patterns are recommended?
- 9) Are there some locales within the state that outperform other places? How?
- 10) How does the state assist jurisdictions attain housing goals?

Production Data Sought

Although there was a great deal of unavailable information, data on the following was requested from key informants in each locale studied:

- i. single family
- ii. multifamily/rental
- iii. income targeted—percent at 30, 50, 80 100 or 120 percent AMI; percent at market rate
- iv. number of bedrooms/unit
- v. special needs-targeted (e.g., elderly, over 55, people with disabilities)
- vi. “green” development
- vii. number of units/acre
- viii. total number of units
- ix. annual production
- x. changes in production trends over time
- xi. number of units in relation to need
- xii. length of affordability restrictions
- xiii. how is affordability of units monitored

Appendix IV: Additional Details Pertaining to Statistical Analyses and Data Limitations

At the outset of this project, the research team hoped to be able to construct a series of statistical models (i.e. regression equations) that would allow us to explore the dynamic, complicated relationship between the demographic characteristics we are interested in and affordable housing production. However, this was not feasible for the reasons detailed below.

Most of the data we obtained was not distributed symmetrically around the mean. In some cases, the distribution of values for a given variable was skewed to the right, and in other cases the distributions were truncated or clustered at zero. For this reason, we relied primarily on Spearman correlations and Wilcoxon rank-sum tests in lieu of the standard Pearson correlations and t-tests because they are more appropriate for analyzing non-symmetrical data.

A Spearman correlation produces results similar to a standard Pearson correlation. The correlation coefficient is a number between -1 and 1, with -1 indicating a perfect inverse correlation (as one variable goes up, the other goes down), 1 indicating a perfect positive correlation (both variables go up or down together), and 0 indicating no correlation. The closer to 1 or -1 a correlation coefficient is, the stronger the relationship between the two variables being measured. However, a correlation does not necessarily imply causation; just because two variables are highly correlated does not mean that one is changing because of the other.

A Wilcoxon rank-sum test is like the more standard t-test, in that it is a test of statistical significance. It allows us to make comparisons between two groups, and determine if, for example, municipalities with no affordable housing exhibit a statistically significant difference in characteristics from municipalities that have affordable housing.

In addition to the tests detailed above, it is worth noting that, because of the non-normal distribution of the data, we relied more heavily on the median than the mean as the main measure of central tendency. This is because the mean is more sensitive to outliers, whereas the median (the number at which exactly half of all the data points lie above, and half below) will not be affected as strongly by the extremities—extremely high or extremely low numbers – and is therefore the measure of central tendency more often used with non-parametric data.

The biggest data limitation in this report results from the fact that cross-sectional data of the type used here is static, and represents only a snapshot in time, whereas the set of decisions that go into planning for and building affordable housing is incredibly dynamic. Throughout this report, we only examine the relationship between the *current* distribution of affordable housing and recent demographic information; we have not examined how this relationship may have changed over time (whether as a result of the policies being studied or not).

In dealing with geographic information at a certain point in time, there also is a concern that geographic boundaries are arbitrary, bringing the potential for error into statistical analyses. Municipal boundaries have important meanings and where one lives determines where one's children go to school, the taxes one pays, how quickly snow is removed, etc. But attitudes do not stop at the municipal boundary; these are likely formed through family and community ties and may or may not take place in one's "hometown." Nevertheless, this analysis is based on information from discrete municipalities (or, in the case of Maryland, Census-Defined Places, an

even more tenuous geographical concept), placing information that is continuous in real life, into somewhat arbitrary groups.

Montgomery County, Maryland

There is some disparity in our data with information provided by Maryland's Department of Housing and Community Affairs. This discrepancy in nearly 300 affordable units is likely due to different methods of calculating affordability termination periods in our analysis, but was based on recommendations from Sharon Suarez and Chris Anderson, employees of Montgomery County.

According to DHCA, as of 2007, 1,430 homeownership units and 1,153 rental units were still being monitored by MPDU for a total of 2,583 units, or 21% of the total MPDU inventory of 12,520 units. This total does not include HOC units (See Table 1, Chapter 4).

Based on the updated MPDU production data through 2010, DHCA reports that there were 1,236 for-sale units still under control and 1,125 rental units, not including units owned by the HOC, for a total of 2,361 MPDU units under price controls. This represents 18% of the total number of MPDU units through 2010. Compared with the total MPDU still-affordable housing stock through 2007, there has been a net reduction in the number of MPDU units under price controls, with all of the loss coming from a net reduction in the number of for-sale units; there was a slight increase in the net number of rental units under price controls.

If we assume that none of the 1,711 HOC units in our HOC database overlaps with the DHCA's production totals, there are currently about 4,294 still affordable units, or 34% of the total production under the MPDU program. This is very close to our calculations, above, concerning the percentages of still-affordable units: 18% of the units in the MPDU database and all the HOC units in our second database, or 14% of the MPDU units ever produced. However, due to the problem of overlap in the two databases, we cannot simply add the two numbers and state that 32% of the units in our two databases are still affordable. Nevertheless, in view of the calculations provided by the DHCA, it appears appropriate to conclude that approximately one-third of the units ever built under the MPDU program are still affordable. This calculation would be about the same even if we were using the 2010 tally of MPDU production, which showed a net reduction of some 222 still affordable MPDU units (2,583-2,361).

Appendix V: Summary Statistics

1 – Massachusetts

Table A-V-1

Summary Statistics of Census Data and 40B and LIHTC Production, by Municipality (N=351)

| | Median | Min | Max | Mean | Standard Deviation |
|---|----------|----------|-------------------|----------|--------------------|
| Population density (residents per sq. mi.) | 502 | 6 | 18,868 | 1,264 | 2,364 |
| Percent white | 97% | 49% | 100% | 94% | 59% |
| Median income | \$54,077 | \$22,344 | \$153,918 | \$58,315 | 18,597 |
| Percent change in housing stock, 1970-2000 | 60% | -12% | 391% | 75% | 59% |
| Percent of housing stock considered affordable (listed in Subsidized Housing Inventory) | 5.0% | 0 | 26% | 5.6% | 4.2% |
| Percent change in housing stock accounted for by 40B units | 4% | n/a | 94% | 7% | 13% |
| Number of 40B comprehensive permits issued | 2 | 0 | 24 | 3 | 3.7 |
| Number of units built under 40B | 68 | 0 | 1,918 | 164 | 253 |
| Number of 40B units that count toward 10% goal | 38 | 0 | 1,208 | 129 | 203 |
| Percent of 40B units that count toward 10% goal | 63% | 0% | 131% ⁺ | 54% | 41% |
| Number of 40B units that are affordable | 36 | 0 | 930 | 87 | 127 |
| Percent of 40B units that are affordable | 42% | 0% | 100% | 45% | 37% |
| Number of affordable units overall (including LIHTC developments) | 40 | 0 | 14,010 | 164 | 787 |
| Number of affordable 40B and LIHTC units per 10,000 residents | 47 | 0 | 959 | 61 | 78 |

⁺ The town of Southborough received credit for 30 units built in neighboring Marlborough after a lengthy deliberation. Since the units are counted in Southborough's total of 40B units while being physically located elsewhere, the town has more units that count toward the 10% goal than it has units built through the 40B process. Several other municipalities also exceed 100% in this category, based on various DHCD guidelines which, over time, have used different definitions to count what does/does not qualify as a residential unit (the denominator in this category).

Sources: Research team analysis based on data provided by CHAPA, "40B list January 2010"; Massachusetts Department of Housing and Community Development, "Chapter 40B Subsidized Housing Inventory (SHI) as of April 1, 2010" (<http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm>); Geolytics Census CD 1970; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, "Race (Total Population)," and GCT-PH1, "Population, Housing Units, Area, and Density: 2000," retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, "Median Household Income in 1999 (Dollars), retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April, 2010; LIHTC data for municipalities where no Comprehensive Permits were issued from huduser.org.

2 – Rhode Island

Table A-V-2

Summary Statistics of Census Data and Low- and Moderate Income Housing Production 1991-2009, by Municipality (N= 39)

| | Median | Min | Max | Mean | Standard Deviation |
|--|---------------|------------|------------|-------------|---------------------------|
| Population density (residents per sq. mi.) | 776 | 84 | 15,652 | 2,071 | 3,145 |
| Percent white | 96% | 55% | 99% | 93% | 10% |
| Median income | \$51,491 | \$22,628 | \$74,591 | \$50,313 | \$11,539 |
| Percent change in housing stock, 1990-2000 | 4.6% | -0.9% | 39.8% | 10.2% | 8.6% |
| Net change in LMIH units, 1991-2009 | 56 | -80 | 2,102 | 136 | 338 |
| Percent LMIH units | 5.6% | 0.1% | 16.5% | 6.4% | 4.1% |
| Net change in LMIH units per 10,000 residents, 1991-2000 | 31 | -42 | 396 | 55 | 81 |

Sources: Research team analysis based on data provided by Rhode Island Housing, “2009 Low- and Moderate Income Housing by Community,” “1991/1992 Low/Mod Chart”; U.S. Census Bureau Summary Tape File (STF1) 1990 data, Table H001, “Housing Units”; U.S. Census Bureau Summary File 1 (SF1) 2000 data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000”; and U.S. Census Bureau Summary File 2000 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars). All census data retrieved using American Fact Finder.

3 — Montgomery County, Maryland

Table A-V-3

Summary Statistics of MPDU and HOC Production and Census Data, by Census-Designated Place (N=51)

| | Mean | Median | Standard Deviation | Min | Max |
|--|----------|----------|--------------------|----------|------------|
| Population Density | 5,061 | 3,669 | 11,190 | 133 | 81,992 |
| Percent White | 84% | 92% | 14 | 50% | 98% |
| Median Income | \$92,724 | \$82,544 | 34,678 | \$45,945 | \$200,000+ |
| Percent change in housing stock, 1980-2000 | 71% | 36% | 96.7% | -13% | 484% |
| Total MPDU units | 161 | 10 | 341 | 0 | 2,013 |
| Number of MPDU rental | 20 | 0 | 62 | 0 | 303 |
| Number of units still in MPDU program | 45 | 0 | 123 | 0 | 779 |
| Number of HOC (formerly MPDU) units | 34 | 1 | 68 | 0 | 404 |

Sources: Research team analysis based on data provided by DHCA, Montgomery County Planning Department, “All MPDUs,” October 2009 and “HOC-Owned,” January 2010; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” P11, “Hispanic or Latino (Total Population), and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), November 2009; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), November, 2009. All census data retrieved for all CDPs partly or fully contained in Montgomery County, MD.

4 – New Jersey

Table A-V-4

Summary Statistics of Census Data and Affordable Housing Production, by Municipality (N=566)

| | Mean | Median | Standard Deviation | Min | Max |
|---|----------|----------|--------------------|----------|-----------|
| Population density (residents per sq. mi.) | 3,359 | 2,100 | 5,096 | 2 | 56,012 |
| Percent white | 84% | 90% | 16% | 2% | 100% |
| Median income | \$63,455 | \$59,238 | \$22,357 | \$22,250 | \$152,262 |
| Percent change in housing stock, 1980-2000 | 37% | 16% | 57% | -75% | 464% |
| Prior Round Obligation (N=494) | 174 | 78 | 270 | 1 | 2,458 |
| New affordable units | 110 | 13 | 260 | 0 | 3,913 |
| New affordable units, per 10,000 residents | 62 | 23 | 142 | 0 | 2,778 |
| Amount of Prior Round Obligation Attained (N=494) | 118% | 17% | 703% | 0 | 12,800% |

Sources: Research team analysis based on data provided by COAH, “All Projects Summary,” March 2009, and “Rehabilitation Share, Prior Round Obligation & Growth Projections,” October 20, 2008; Geolytics Census CD 1980 in 2000 Boundaries; U.S. Census Bureau Summary File 1 (SF1) data, Tables P7, “Race (Total Population),” and GCT-PH1, “Population, Housing Units, Area, and Density: 2000,” retrieved from American Fact Finder (http://factfinder.census.gov/home/saff/main.html?_lang=en), April 2010; and U.S. Census Bureau Summary File 3 (SF3) data, Table P53, “Median Household Income in 1999 (Dollars),” retrieved from American Fact Finder, April, 2010; LIHTC data for municipalities with no prior round obligation from huduser.org

Appendix VI: Interviews and Contacts

1 – Massachusetts

Aaron Gornstein, former Executive Director, Citizens' Housing and Planning Association (currently Undersecretary of Housing and Community Development, Commonwealth of Massachusetts)

Keri-Nicole Dillman, Senior Researcher, Mathematica Policy Research (formerly at NYU and MIT)

Lynn Fisher, Associate Professor, MIT

Philip Herr, Principal, Philip B. Herr & Associates

Sharon Krefetz, Professor, Clark University

Peter Lowitt, Land Use Administrator/Director, Devens Enterprise Commission

Jennifer Raitt, Chief Housing Planner, Metropolitan Area Council

Karen Wiener, Interim Executive Director, Citizens' Housing and Planning Association

Ann Verrilli, Director of Research, Citizens' Housing and Planning Association

Clark Ziegler, Executive Director, Massachusetts Housing Partnership

2 – Rhode Island

Annette Bourne, Assistant Director of Policy at Rhode Island Housing

Brenda Clement, Director of the Statewide Housing Action Coalition

Colin Kane, partner, Rumford, RI Peregrine Group, LLC

Tom Kravitz, Director of Planning and Economic Development, Burrillville

Katherine Maxwell, Planner, Rhode Island Housing

Steve Ostiguy Church Community Housing Corporation,
Executive Director and State Housing Appeals Board, member

Amy Rainone, Director of Policy, Rhode Island Housing

Jonathan J. Reiner, Director of Planning and Development for the Town of North Kingstown

Noreen Shawcross, Chief of the Office of Housing and Community Development
and Executive Director of the Rhode Island Housing Resources Commission (retired May
2010)

3 – Montgomery County, Maryland

Christopher Anderson, Manager of Single Family Housing Programs (administers MPDU program),

Montgomery County Department of Housing and Community Affairs

Ralph Bennett, Prof. Emeritus, University of Maryland, former Commissioner and Chair, Housing Opportunities Commission

Jim Cohen, Lecturer, University of Maryland

David Flanagan, President. Elm Street Development, Inc., McClean, Virginia

Richard Y. Nelson, Jr. Director, Montgomery County Department of Housing and Community Affairs

Tedi Osias, Director, Legislative and Public Affairs, Housing Opportunities Commission

Sally Roman, Housing Opportunities Commission Commissioner; former Master Planner, Montgomery County Planning Department

Sharon Suarez, Coordinator for Housing Research & Policy, Montgomery County Planning Department

4 – New Jersey

Adam Gordon, Staff Attorney, Fair Share Housing Center

Larissa DeGraw, Technical Assistant, Council on Affordable Housing

Robert A Huether, Assistant Director, Program Development, New Jersey Housing and Mortgage Finance Agency

Kathleen McGlinchy Manager, Monitoring Unit, Division of Plan Administration, Council on Affordable Housing

David N. Kinsey, Partner, Kinsey & Hand; Principal, Realty Innovations, LLC;
Visiting Lecturer in Public and International Affairs, Princeton University

Alan Mallach, senior fellow, National Housing Institute

Diane Sterner, Executive Director, Housing and Community Development Network of New Jersey

Lucy Vandenberg, Executive Director, Council on Affordable Housing (resigned February 2010).

Kevin Walsh, Associate Director, Fair Share Housing Center

5 – California

Victoria Basolo, Professor, University of California, Irvine

Nico Calavita, Professor, San Diego State University

Cathy Creswell, Acting Director, California Department of Housing and Community Development; Deputy Director at the time of the interview

Peter Dreier, Professor, Occidental College

Bill Higgins, California League of Cities

Dowell Myers, Professor, University of Southern California

Ilene J. Jacobs, Director of Litigation, Advocacy & Training,
California Rural Legal Assistance, Inc.

William J. Pavão, Executive Director, California Tax Credit Allocation Committee

Randy Quezada, Housing Preservation Specialist, California Housing Partnership Corporation

Darrel Ramsey-Musolf, Doctoral Student, Special Committee Degree in Housing
and Policy Analysis, University of Wisconsin, Madison

Geeta Rao, Program Manager, Citizens' Housing and Planning Association

Michael Rawson, Co-Director, The Public Interest Law Project and
Director, California Affordable Housing Law Project

Diane Richardson, California Housing Finance Agency

Matt Schwartz, President, California Housing Partnership

Dianne J. Spaulding, Executive Director, Non-Profit Housing Association of Northern California

Sean L. Spear, Executive Director, California Debt Limit Allocation Committee

L. Steven Spears, Acting Executive Director, California Housing Finance Agency

Evelyn Stivers, Field Director, Non-Profit Housing Association of Northern California

Mark Stivers, Consultant to Senate Transportation and Housing Committee (staff position)

Lindy Suggs, Policy Analyst, Division of Housing Policy,
Department of Housing & Community Development

Rob Wiener, Executive Director, California Coalition for Rural Housing