

Residential Development in Massachusetts:
Chapter 40B and the Trojan Horse

by

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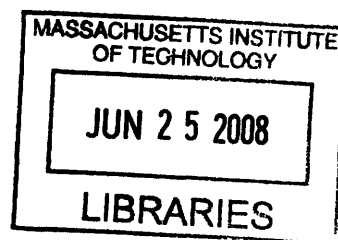
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Abstract

Massachusetts General Laws Chapter 40B, also known as the “anti-snob zoning law”, has become one of the state’s most prolific affordable housing development tools: in the years since its passage in 1969 its provisions have facilitated the development of over 48,000 housing units, including approximately 26,000 units reserved for residents at or below 80% of area median income. However, controversy has followed 40B hand in hand for almost the entirety of its four-decade existence.

I argue that in recent years 40B opponents have created a new rhetorical strategy, turning the traditional pro-affordability stance on its head to argue against 40B. In this newest iteration of the 40B debate, opponents of the law are cast as supporters of affordable housing. Tracing a history of traditional 40B opposition tactics and the ways in which pro-affordable housing advocates have responded, I arrive at the present time and describe the manner in which this new argument is applied in public discourse.

Because of its novelty, relatively little research has been undertaken to address the claims of the pro-affordability, anti-40B position. I examine current arguments, concluding that the claim 40B developments provide only a minimal level statutorily required affordable housing, while catering to the rich, offers the most promising research opportunity to bring quantitative analysis to a current point of contention in the 40B debate.

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Introduction

*"Homeless and other low-income families are facing an unprecedented crisis in Massachusetts today. While Massachusetts has a deep commitment to, and sophisticated infrastructure for, creating affordable housing, the affordable housing created often fails to reach the most vulnerable, lowest income families."*¹ (Citizens' Housing and Planning Association)

*"It is obvious that 40B has been manipulated to allow for unprecedented market-rate growth that would otherwise be illegal while affordability was allowed to deteriorate to record low percentages. Sadly, with banks and lending organizations managing Chapter 40B production since 2000, the Commonwealth finds itself in the midst of a devastating housing meltdown with no safety net...the number of market rate homes in 40B projects skyrocketed while affordability plummeted."*² (Coalition to Repeal 40B)

Massachusetts General Laws Chapter 40B, also known as the "anti-snob zoning law", has become one of the state's most prolific affordable housing development tools: in the years since the law's passage in 1969 its provisions have facilitated the development of over 48,000 housing units, including approximately 26,000 units reserved for residents at or below 80% area median income (AMI).³ However, controversy has closely followed 40B for almost the entirety of its existence.

I argue that in recent years 40B opponents have created a new rhetorical strategy, turning

¹ Citizens' Housing and Planning Association, Inc., Building the Stock: Targeted Project-Based Rental Assistance to Create More Deeply Affordable Permanent Housing, 2008).

² Moving Massachusetts Forward, <<http://www.repeal40b.com>>.

³ Unsigned (Citizens' Housing and Planning Association), Fact Sheet on Chapter 40B The State's Affordable Housing Zoning Law, 2007).

the traditional pro-affordability stance on its head to argue against 40B. In this newest iteration of the 40B debate, opponents of the law are cast as supporters of affordable housing. I seek to examine this new argument, and in doing so distill specific claims that future studies can test using empirical evidence. Focusing on the current claim that seeks to join the pro-affordable and anti-40B positions will allow my work to: A. Shed light on a class of arguments that has not been subject to the same level of academic scrutiny as the historic anti-40B arguments.⁴ B. Focus on a contemporary claim that has been regularly invoked in recent debates, most notably those surrounding the ballot repeal initiative. Because the argument has been frequently used in recent political debates in the absence of research data, it is hoped that the questions to come out of this investigation will be of value to future researchers seeking questions through which empirical data may be brought to bear upon such claims.

Much of the controversy stems from the fact that developers working in eligible towns may bypass most local zoning requirements⁵ and entitlements processes by directly applying to town zoning boards with a comprehensive permit. In response, zoning boards may accept, accept with conditions or reject comprehensive permit applications. Developers may appeal rejections, or the conditions of accepted applications, to the state Housing Appeals Committee (HAC). Most commonly the comprehensive permit is employed by developers to gain density bonuses that allow for an internal cross-

⁴ Examples of existing scholarship include in “All in Together”, on the topic of insider/outsider income mixing, and MIT/Housing Affordability Initiative study, “Effects of Mixed-Income, Multi-Family Rental Housing Developments on Single-Family Housing Values”

⁵ With exceptions, most notably environmental and wetlands regulations.

subsidization between market units and units affordable to households earning no greater than 80% AMI (which must comprise at least 25% of units). Alternately, 20% of units in rental projects may be provided at rents affordable to households at no greater than 50% AMI.

Towns become exempt from 40B regulation if at least 10% of the town's housing stock (measured in DHCD's Subsidized Housing Inventory) is affordable. Towns may also reject comprehensive permit applications if there has been significant recent progress toward reaching the 10% affordability threshold. This is defined as, "either: an increase in affordable housing units that is at least 2% of the town's year-round housing units over the previous 12 months or a .75% increase plus an approved housing plan over the previous 12 months."⁶

The theoretical basis for 40B opposition can be grouped into several general categories, two which I discuss here:

1. The first is defined in the terms of a broader debate regarding mixed income housing. In this context, the viability of 40B developments are called into question because of the mixing of incomes that occurs within developments and between developments and existing neighborhoods. In such cases individual residents, rather than buildings themselves, are at the center of the debate. Fear of the outsider – residents of lower incomes or from other neighborhoods - is a typical motivating factor.⁷ Such arguments

⁶ Unsigned (Citizens' Housing and Planning Association, 40B Fact Sheet)

⁷ 40B regulations now permit up to 70% of affordable units to be reserved for local preference.

feature less centrally in contemporary public 40B housing discourse relative to their prominence in debates surrounding mixed-income housing programs of the 1960's and 1970's.

2. Perhaps owing to relative political palatability, the anti-outsider sentiment saw wider use when its expression shifted from people to characteristics of buildings themselves. In this version, contempt for 40B is focused not on its function as the vehicle through which low income urban dwellers are brought to the suburbs, but rather its function as the vehicle through which the physical form of the dense urban slum is brought to the suburbs. This approach allows for a critique of 40B projects without necessarily addressing the topic of those living in them. Indeed, it would not be inconsistent with such a position to acknowledge that 40B density is necessary to support affordable unit development. The problems lie in the application of this principle in a manner that pushes projects to an extreme, creating negative externalities. Examples include negative impacts on adjacent land values or public resources such as parkland and natural habitats.⁸

In both of the categories described above, support of affordable housing development is closely associated with 40B support. In contrast, a new iteration of the debate has turned this framework on its head, with 40B opponents claiming the mantle of affordable

⁸ Also falling into this category are a subclass of arguments addressing the consumption of a disproportionately large share of public resources (e.g. use of schools and transportation infrastructure) relative to the tax contributions of 40B residents, negative environmental impacts and negative impacts related to scale and size. All of these claims will be addressed in greater detail in later sections.

housing advocacy themselves. In this version, the pro-affordability and anti-40B positions are aligned in a single argument which holds that the law should be repealed on the grounds that it is not beneficial to the provision of affordable housing. One strain of the pro-affordability anti-40B argument that is particularly interesting – forming the basis for this investigation – is the critique of 40B on the grounds that the housing it provides is for the rich, at the expense of the provision of housing to the truly needy.

This argument evolves from the two major themes of 40B opposition discussed above: fear of the outside individual and fear of the dense built environment. A clever inversion of the outsider argument, to refocus on the *rich* outsider, allows it to be married with the pro affordability ideology. The dense building full of rich residents is then expressed in terms of a Trojan Horse: developers employ affordable housing policies under false pretenses to gain zoning relief for projects that do not actually fulfill purported affordable housing development goals. Marx turns Hegel on his head as two historically anti-affordable housing themes are repurposed to create a cohesive pro-affordability argument against 40B.

In the following section I begin by outlining a brief history of exclusionary zoning and its relation to the development of 40B legislation in Massachusetts. I next sharpen the scope of 40B opposition strategies I will be considering, placing the arguments I am concerned with in the larger context of 40B historic opposition strategies. In the following section I closely analyze the contents of public testimony at 40B legislative hearing as a heuristic device to better understand the exact arguments of this novel anti-40B approach, and the

manner in which these arguments enter the public discourse. I then look at the way in which new arguments against 40B fit into more traditional arguments against density. I conclude with an analysis of the contents of the pro-affordability, anti-40B positions that are well suited to direct quantitative analysis.

Land Use Regulation

Central to the logic behind 40B was the recognition on the part of the law's sponsors that exclusionary zoning measures in Boston's suburbs (such as large lot zoning requirements and multifamily residential development restrictions) have a direct negative impact on regional housing affordability. In drafting the law to permit the use of comprehensive permits in towns below the 10% affordability threshold, legislators simultaneously provided a carrot and a stick to towns subject to regulation. The law provides a carrot in the sense that the 10% affordability threshold provides an incentive for towns to encourage the development of affordable housing *on their own terms*, either through the public, private or non-profit sectors, and if necessary, to alter zoning to facilitate such development. The symbolic stick is provided in the sense that towns under the 10% threshold are vulnerable to direct project-specific overrides of local land use regulations through the use of comprehensive permits. In the following section I trace a brief history of land use regulation that is relevant to understanding the development of large lot single family zoning in Boston's suburbs and the decision to invoke of state-level regulation to overcome its exclusionary effects.

In "Regulation and the Rise of Housing Prices in Greater Boston" Edward Glaeser writes that land use regulation is directly correlated with increased land costs in Boston's suburbs. He examines minimum lot sizes, a common, if unstated tactic to maintain home values. Controlling for distance to Boston, presence of institutes of higher education and

other relevant characteristics, “a one acre increase in minimum lot size is associated with a 11.5 to 13.8 percent increase in housing prices.”⁹

If we accept the positive correlation between minimum lot size and home prices, it should be expected that individuals seeking to protect the value of their properties would reason that the inverse relationship also holds true: increased density in a suburban context leads to decreased property values. Is it then expected that homeowners, through their municipalities, will seek to employ legal means to protect minimum densities (as is the case when local land use regulations are overridden by 40B developments).

The Supreme Court’s 1926 decision in *Euclid v. Ambler* upheld the constitutionality of municipal zoning codes. In the landmark case, the court ruled in favor of the city of Euclid’s efforts to block industrial development on a residentially zoned private property. Subsequent interpretations of the decision have focused on separation of land uses (i.e. industrial from residential) as the primary rationale for zoning. In “An Economic History of Zoning and a Cure for its Exclusionary Effects”, William Fischel seeks to provide an economic explanation for the development of zoning in the United States. In revisiting the central thesis of his earlier book, *The Homevoter Hypothesis*, he states, “The way to understand local government behavior is to see it through the eyes of home-owners – and

⁹ Edward Glaeser, Jenny Schuetz, and Bryce Ward, Regulation and the Rise of Housing Prices in Greater Boston: A Study Based on New Data from 187 Communities in Eastern Massachusetts Rappaport Institute for Greater Boston, 2006, p. 4

not renters, developers, business interests, or machine-politicians...”¹⁰ His hypothesis states that homes represent the single largest asset of most American homeowners.

Because homeowners cannot diversify this asset (i.e. by spreading it among multiple municipalities) their fear of asset loss provides a significant motivation for local political participation. These “home voters” support zoning that restricts use of their own private property, but collectively increases land values in their municipality. He writes, “The dominance of home-owners and their touchiness about their main asset explain why nearly every suburban zoning ordinance puts the single-family, owner occupied home at the pinnacle of uses to be protected.”¹¹

The Massachusetts State Legislature passed Chapter 40B amid the racial strife of the late 1960’s, manifest nationally in the assassination of civil rights leaders and locally, in Boston’s school desegregation plan. Ostensibly designed to expand the stock of affordable housing and promote racial diversity in the state’s suburbs, the legislation was also motivated by the (perhaps misguided) desire of Boston legislators to address or retaliate against the hypocrisy of suburban supporters of school desegregation laws aimed primarily at Boston.¹² These facts indicate that the legislation was likely the result of an unusual confluence of events that could not easily be replicated today, and in practice the

¹⁰ W. A. Fischel, "An Economic History of Zoning and a Cure for its Exclusionary Effects," *Urban Studies* 41.2 (2004): 317, p. 319

¹¹ Fischel, p. 319

¹² Unsigned (Citizens’ Housing and Planning Association), Using Chapter 40B to Create Affordable Housing in Suburban and Rural Communities of Massachusetts, 1999, p. 7

same tensions continue to be played out as the program as a whole, and individual developments, are often highly contested.

Round Up of the Classic NIMBY Arguments

The following classic NIMBY arguments have been employed throughout of the history of the 40B program to oppose individual projects. Their use is characterized by inclusion in NIMBY campaigns seeking to demonstrate that developments are inappropriate for *specific sites*, rather than in a critique of the objectives of the 40B program, and its success in reaching its policy objectives. Often employed by localized coalitions, these arguments are used to prove that the zoning bonuses achieved through comprehensive permits will allow a development that would overwhelm a given site, neighborhood or city's capacity to handle the impact of development.

The following section is intended to give an introduction to the political background of “traditional” arguments for and against 40B, before a more in depth discussion of the new pro-affordable housing, anti-40B argument. In order to best understand the novelty and context of the new class of 40B argument, it is helpful to first review the cast of traditional arguments and the manner in which they have been employed. These classic arguments have been played out over the four-decade history of the 40B program, with a cast of institutional and project-specific players the have argued on behalf of each side. Specifically, organizations such as CHAPA and the Massachusetts state agencies charged with the provision of affordable housing such as DHCD, MassHousing and the Massachusetts Housing Partnership have argued on behalf of the law, while local project-specific opposition groups have argued against the law, often with the institutional backing of local governments and environmental organizations.

Schools

The classic schools argument holds that the development of additional housing units in new 40B projects will attract a sufficient number of families as to overburden the existing public school system with a quantity additional school-age children that exceeds its current capacity. The logic holds that given the typically higher than as-of-right densities allowed by comprehensive permitting, a greater number of housing units per acre will be constructed, facilitating particularly dense concentrations of households, and therefore school age children. Compounding the problem, with higher densities each household that contributes children to the school system provides a disproportionately small share of tax revenue due to lower tax contributions from smaller, and presumably lower value, homes. Additional demand on schools cannot be met with additional capacity because new 40B housing units do not provide sufficient revenue to fund a proportional increase school system capacity.

40B proponents also acknowledge many of the same problems. A leading affordable housing advocacy group, the Commonwealth Housing Taskforce writes, “The fear of rising school costs is the single most frequently cited reason for communities to oppose the production of modestly-priced housing. In contrast, million dollar homes typically generate sufficient tax revenue to support the public school children living in them...40R and 40S give us all an unprecedented opportunity to change that dynamic at the local

level to stimulate the production of housing affordable to municipal workers, teachers, nurses...”¹³

In addition to the density aspect, the schools argument often holds that the relative affordability of 40B units – both market and affordable – in relatively affluent municipalities poses an attractive target to families seeking to circumvent Tiebout sorting. This public choice theory holds that consumers of housing shop among municipalities offering differing levels of public services at differing tax rates. Families choose a town that offers the level of service (e.g. quality of public education) they are willing to pay for through property taxes.

40B developments offer such consumers of housing the opportunity to “buy into” particular school systems below the market price paid by typical household in a given town. In the case of market 40B units, the value of quality schools is likely capitalized in a higher rent/imputed rent for such units relative to units of comparable size, density and quality in towns of lower quality schools.

However, an important distinction lies in the relative in the comparison of market 40B and non-40B units across towns of similar school value. Here the value of quality schools is likely capitalized in the high rents/imputed rent of all market rate homes.

DiPasquale and Wheaton write that consumers pay for advantages such as quality school

¹³ Eleanor White, Barry Bluestone, and Ted Carman, Commonwealth Housing Task Force, Quarterly Summary of Progress as of December 31, 2005.

through, “housing rent or prices [that] compensate consumers for locational advantage.”¹⁴ However, the authors also write that negative housing attributes are subject to compensation, in the form of lower prices. Thus while market 40B and non-40B units all exhibit a capitalized price premium for quality schools, market 40B units undercut the resulting price barrier to entry for families with children through lower base line price due to greater density. DiPasquale and Wheaton write, “density should tend to reduce a unit’s value through the loss of open space green area, and privacy.”¹⁵ The locational advantage of quality schools thus comes at discount in dense market 40B units.

Because the price of 40B affordable unit are detached from market pricing – and pegged to area median incomes – the concept described above is pushed one step further.

Residents of affordable 40B units can still gain the locational advantage of good schools (in addition to any other advantages such as job access and lower crime) for a price that is not directly pegged to the advantage of such schools.¹⁶ In this case, any difference in rent/imputed rent and taxes between and 40B affordable units and non-40B market units with access to similar school quality is discounted beyond compensation for greater density, to an even lower price, based statutorily, on low income affordability.

¹⁴ D. DiPasquale and W. C. Wheaton, Urban economics and real estate markets Prentice Hall Englewood Cliffs, NJ, 1995, p. 67

¹⁵ DiPasquale and Wheaton, p. 73

¹⁶ While beyond the scope of this discussion it could be argued that affordable unit values are indirectly linked to locational advantages because of their pricing, which is based on area median income (AMI). Conceivably (though not likely) each Metropolitan Statistical Area offers a homogenous set of locational advantages across all towns. Such advantages are capitalized into higher housing costs, which restricts access to the MSA those housing consumers with sufficiently high income. The increased median income across the entire MSA equates to a higher AMI. As a factor of AMI, “affordable” limit incomes rise with increased AMI’s, allowing for greater monthly housing expenditures and thus higher allowed “affordable” unit prices.

Thus affordable 40B units allow families with school-age children to buy into high quality school districts at an even lower price than market 40B units. The ability to receive such locational advantages at a relative discount supposedly makes 40B projects an even greater threat to overwhelming school systems not only because of the greater density of housing units per acre, but also the increased likelihood that households with school age children will occupy such units.

We observe that the classic schools argument borrows from and reverses the logic underpinning large lot single-family zoning: denser housing allows for lower development costs per unit, which in turns gives a greater number of potential residents across the income spectrum access to a municipality's public services. In contrast, low density as-of-right development sustains high home prices and tax revenue while limiting the number of housing units (and potential children) in the school system.

Environment

Environment, perhaps the most widely used NIMBY argument, is one of the most frequently cited in campaigns opposing 40B developments and has been for many decades. 40B opponent John Belskis writes, "The bottom line is that 40B facilitates and even encourages a pace of development that threatens our shared environment and ignores sound land-use policy."¹⁷ 40B developments are subject to the same environmental regulations as all other developments and exemptions must be approved

¹⁷ <http://www.repeal40b.com/faqs/environment.htm>

on a case by case basis.¹⁸ Further, all projects are subject to the Wetlands Protection Act and, when appropriate, review by local conservation commissions. Still, the program is frequently criticized on environmental grounds.

Because of the nature of developer incentives, 40B projects are often located on parcels of unbuilt land in otherwise more fully developed towns. Because the program selects out towns that have less than 10% affordable housing, most urban areas of the state are exempt from 40B regulation. At the opposite end of the spectrum, most rural or semi-rural communities with low densities are ruled out by private developer market preferences. Private developers of mixed-income projects are incentivized to seek communities with high residential land values to extract maximum profit after accounting for affordable unit development costs and profit caps.¹⁹ This incentive leads developers to select sites in established or rapidly growing suburbs where a scarcity of land, combined with attributes such as access to high quality education or employment lead to high land and home values.

The remaining undeveloped parcels in such contexts are often so expensive, or contain such unusual site conditions that profitable as-of-right development remains impossible. Such parcels continue to be unbuilt upon as long as as-of-right, low density development outside of the 40B process remains unprofitable. At the same time, infill development in

¹⁸ Unsigned (Citizens' Housing and Planning Association),

¹⁹ CHAPA 40B Fact Sheet states, "Developers (whether for-profit or nonprofit) must also agree to restrict their profit to a maximum of 20% in for-sale developments and 10% per year for rental." Unsigned (Citizens' Housing and Planning Association, 40B Fact Sheet)

established suburbs and greenfield development in semi-rural towns swallow most other unbuilt land that is not specifically protected by deed restriction or public ownership, making such pockets a scarce commodity of natural land.

Arguably, there need not be any particular environmental value to a given parcel at the center of a 40B debate relative to other parcels that had already been developed outside the program. Seeking to preserve limited open space, which has remained in such a state, for instance due to economic rather than environmental reasons, anti-development advocates come into a conflict with developers who seek to overcome such obstacles with the tool of 40B. While there is likely no inherent flaw in the 40B law that could be considered a direct cause of developer preference for environmentally unsuitable sites, the incentives described above often lead to 40B being the most attractive permitting and entitling tool for areas that represent a significant natural resource in towns lacking open space.²⁰

Professor of environmental law and policy at Tufts University's Department of Urban and Environmental Policy and Planning, Robert Russell writes, "A strain of local environmentalism animated by variations on the NIMBY theme can add to this tension. The problem arises when local environmental solicitude serves as camouflage for less wholesome agendas...The cost of municipal services that these residents demand may exceed their property tax allotment, whether paid directly or through rent. Education

²⁰ Indeed, at a superficial level, the typical alignment of single-family homeowners arguing against multi-family 40B development seems at somewhat insincere given the ability of denser multi-family development to spare the unbuilt environment from suburban sprawl-style growth.

costs incurred by families will nearly always exceed tax receipts, unless the family owns an expensive home. Given these conditions, the meaning of environmental protection takes on increasing subjectivity. To housing advocates and those who seek affordable shelter in suburban communities, saving the local environment may serve as code for exclusionary zoning and all it conceals.”²¹

*“It's all about the environment; it's not about the housing, There's no exception. All of us want affordable housing. But not there.”*²²

The Silver Maple Forest in Belmont Massachusetts exhibits many of the classic traits of the environmentalist anti-40B strategy. Formerly known as portion of the Belmont Uplands, the 15 acre parcel was given the unofficial designation of “Silver Maple Forest” by a coalition of Cambridge and Belmont residents which mobilized in opposition to a proposal for 40B residential development. The site abuts the Route 2 highway on one side and the Alewife Brook Reservation on another. In spite of its proximity to public parkland, controversy related to development on the parcel has only recently reached its current level of contention among community members and elected officials.

In 1999 private developer, O’Neill Properties of Philadelphia Pennsylvania, purchased the 15-acre parcel. After holding the land for three years, the owner applied for a zoning

²¹ R. Russell, "Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia," *BC Env'tl. Aff. L. Rev.* 30 (2002): 437

²² Belmont Activist Barbara Passero. (O'Brien, Keith O'Brien, "Fight pits affordable housing vs. 15 green Belmont acres," *Boston Globe*, 2008)

change to allow for the development of a 245,000 square foot office park. The Belmont Town Meeting approved of the plan in May 2002, and town accordingly rezoned the area from residential to commercial use. Town Meeting member Sue Bass commented to the Boston Globe, “The town wanted the money, the tax money, Belmont is always starved for tax money. And the people thought this was an opportunity to get a lot of additional revenue, frankly, without the expense of schoolchildren to educate.”²³

Due to changing market conditions the landowner subsequently sought to change its development program to multi-family rental residential. Because Belmont’s affordable housing stock of 321 units represents only 3.2% of all housing units in the town, it is subject to 40B regulations for mixed income developments. After O’Neill Properties proposed a development of 299 units – including 60 affordable units – the number of activists opposing development on the site grew significantly. This group even included those who had formerly supported commercial development on the site.

State Representative William Brownsberger of Belmont is one such opponent of development on the Silver Maple Forest site. As a member of the Board of Selectmen, Brownsberger had voted for the 2002 rezoning of the parcel to enable commercial development, stating that it was, “the best possible deal we could get.”²⁴ However, in a recent Cambridge Chronicle opinion piece entitled “Saga of the Silver Maple Forest Isn’t Over Yet” Brownsberger writes that the site is “a valuable urban wildlife habitat. A great

²³ Keith O'Brien, "Fight pits affordable housing vs. 15 green Belmont acres," Boston Globe, 2008

²⁴ O'Brien,

many people care about it. It serves very diverse neighborhoods in Belmont, Arlington and Cambridge. And it is accessible via the bike path and by public transportation. It also augments storm water storage in the area, which is severely affected by flooding.”²⁵

While such concerns were not likely at the forefront of Representative Brownsberger’s concerns while voting in favor of commercial development, he has recently filed state legislation seeking funding for the public purchase of the site for preservation as parkland. An earmark in a recent environmental bill sets aside \$6 million in state funding toward the purchase of the site. A spokesman for O’Neill Properties stated to the Boston Globe that the company is not interested in selling the property, and if it were, the \$6 million would not be a sufficient offer.²⁶

In spite of the funding gap, Brownsberger continues to advocate for the legislation, which provides that the state of Massachusetts would. “appraise the property and give Belmont, Arlington and Cambridge 6 months to contribute the necessary balance. The state would then acquire the property by purchase or, if necessary, by eminent domain taking.”²⁷

²⁵ William Brownsberger, "Brownsberger: Saga of the Silver Maple Forest isn't over yet", Cambridge Chronicle, 2007

²⁶ While property is assessed at \$14 million, current uncertainty in residential property market make it difficult to estimate exact market value.

²⁷ William Brownsberger, "Brownsberger: Saga of the Silver Maple Forest isn't over yet", Cambridge Chronicle, 2007

Scale and Size

Scale and size differs from other classic NIMBY complaints in that this argument directly addresses an intended consequence of the 40B legislation: greater density, to overcome on the income exclusionary effects of low Floor Area Ratio (FAR) and large lot size zoning. This stands in contrast the issues addressed earlier in this section, which can be construed as unintended byproducts of the 40B program, arising on a case-by-case basis.

The 40B statute was written with the specific intent of overcoming exclusionary zoning practices in Massachusetts's suburbs. At the heart of the 40B program is the comprehensive permit, which allows developers to override local zoning regulations that make the development of mixed income housing "uneconomic".²⁸ Thus, not surprisingly, greater density is a favored tool of developers seeking a comprehensive permit. Given the sales price and rent caps of affordable units, developers essentially subsidize the difference profit derived from sales and rent of income-restricted units as compared to market units. Because development costs, on per unit basis, presumably exceed the income received from affordable units, the developer provides at a loss, an internal subsidy equaling the difference between affordable unit development cost and income.

²⁸ Uneconomic conditions are defined by the Massachusetts DHCD as "any condition imposed by a Board in its approval of a Comprehensive Permit, brought about by a single factor or a combination of factors, to the extent that it makes it impossible (a) for a public agency or a nonprofit organization to proceed in building or operating a Project without financial loss, or (b) for a Limited Dividend Organization to proceed and still realize a reasonable return in building or operating such Project within the limitations set by the Subsidizing Agency on the size or character of the Project, or on the amount or nature of the Subsidy or on the tenants, rentals, and income permissible, and without substantially changing the rent levels and unit sizes proposed by the Applicant." M.G.L. Chapter 40B Comprehensive Permit Projects, Comprehensive Permit Guidelines, 2008, <<http://www.mass.gov/Ehed/docs/dhcd/legal/intro.doc>>.

DiPasquale and Wheaton write, “Greater density reduces the value and, hence, profit from each unit, but increases the number of units that can put on the land. The former reduces the value of land, while the latter increases it. A developer must balance these two forces in seeking the highest return on a site.”²⁹ Thus in developing residential programs for 40B-enabled projects, developers will seek to build optimal density to maximize allowable profits and residual value. As discussed in earlier sections, many Massachusetts towns are below 10% affordable threshold precisely because of zoning that mandates below sub-optimal density.

An often-cited issue related to density is that large 40B projects build in low density suburban communities will diminish the value of adjacent homes. Pollakowski, Ritchay and Weinrobe (2005) directly test the impact of large-scale, mixed-income, multi-family rental developments on home values in neighborhoods of single-family houses. The authors selected six 40B developments that were among the most dense and contentious in the Boston area, in their words those that were “a suburban home owner’s worst nightmare.” Impact areas were delineated to include neighboring houses that were either: direct abutters, part of a contiguous network of streets radiating from the development site, in the direct line-of-sight of the development, or adjacent to open space connections to the site.

²⁹ DiPasquale and Wheaton, p. 73

Similar houses outside the impact area were selected to for control groups. The authors then used hedonic models to generate quality-controlled sales price indexes for houses in both the impact areas and the control areas. Using these models, the authors assigned a price to each home based on the weighting of individual characteristics (square footage, number of bathrooms, etc.). They next tracked price trends between 1983 and 2003, comparing the impact and control areas before and after 40B construction to determine if any price variation had occurred in the impact area as a result of development. The authors found that “sales price indexes for the impact areas move essentially identically with the price indexes of the control areas before, during, and after the introduction of a 40B development.”³⁰ They conclude the presence of multi-family low-income rental developments enabled through Chapter 40B do not decrease the value of adjacent properties.

Another frequently cited concern regarding dense 40B development is the impact on the “character” or “charm” of low density towns. A clarification of its terms aids in better understanding this argument: in certain contexts “character” can serve as a convenient proxy for anxiety, not over the buildings themselves, but the people living in them. Just as other classic NIMBY causes can mask efforts to exclude low income individuals, arguments against density can be motivated by efforts to perpetuate the exclusionary effects of existing zoning.

³⁰ H. Pollakowski, D. Ritchay, and Z. Weinrobe, "Effects of Mixed-Income, Multi-Family Rental Housing Developments on Single-Family Housing Values," Center for Real Estate, MIT April (2005), p. xiii

In contrast to the perpetuation of low density zoning and its attendant low income exclusionary effects, arguments casting 40B developments as not “fitting in” can also be motivated by genuine design concerns. Often towns subject to 40B development are at the edge of the urban periphery, where optimal density is in the process of shifting from low density agricultural and rural land use to higher density suburban use. We also find at a further stage of urbanization, towns which have already grown into suburbs, seeking to restrict further infill development or development at densities greater than existing neighborhoods. In both cases, the desire to cling to an agrarian heritage and identity is expressed through land use regulation that restricts new residential development to sub-optimal density.

It may be impossible to always precisely discern the context-sensitive meaning of character and charm, but it is certain that motivations such as those described above often restrict as-of-right development to lower densities than profit-seeking developers would otherwise elect to build. By using 40B comprehensive permits, developers can bypass local zoning to build at, or closer to, optimal density. The density sought by developers using comprehensive permits is thus often greater than that of existing development, and almost always greater than could be built as-of-right.³¹

³¹ DHCD regulations offer broad density guidelines: “Appropriate density of residential dwellings depends upon a myriad of interconnected factors and must be determined case by case. However, the following guidance indicates a range of density (units per buildable acre) that can be achieved for each building typology while maintaining appropriate ratios of dwelling space to parking and open space across a broad range of local development patterns. Low Rise/Town Houses 8 – 40; Garden Style Apartments 25 – 70; Midrise 40 – 160” Unsigned (Massachusetts Department of Housing and Community Development, Comprehensive Permit Guidelines M.G.L. Chapter 40B Comprehensive Permit Projects)

Legislative Hearing: The New Argument in Action

Controversy related to 40B has recently appeared in local and regional print media with unusual frequency and prominence. As I began to contemplate this research, a statewide coalition was gaining momentum in collecting signatures for a ballot repeal initiative, their petition seeming to quickly approach the threshold needed to place the repeal of 40B on the next election ballot. By October of 2007 the Massachusetts State Legislature Joint Committee on Housing had taken a total of 49 bills related to Chapter 40B under review. In February 2008 the Supreme Judicial Court heard seven cases related to 40B, almost as many cases as had been heard in the previous 10 years. In the same month, the DHCD issued a set of new regulations governing the use of 40B, intended to streamline and update a patchwork of amendments that had evolved in the 40 years since the law was first put into action.

There are many claims and allegations against the Chapter 40B program ranging from charges that it inherently enables greed and corruption to the accusation that its use is actually detrimental to the production of affordable housing. Most references to the pro-affordability, anti-40B position do not date to any earlier than the middle of the current decade. To demonstrate the novelty and significance of this argument it is necessary to first paint a picture of the variety of arguments currently in use, and describe the manner in which this new argument has entered the public discourse. While I do not seek to imply causation, it is clear that the prominence of 40B criticism in the last year has been associated with the timing of several governmental inquiries into the program.

On October 23, 2007, the Committee on Housing hosted a public hearing to draw commentary on the group of 49 bills related to Chapter 40B. Given the large number of bills simultaneously under consideration, a wide range of speakers attended the hearing and shared views for and against the program. Comments submitted to the Committee on Housing in advance of the hearing provide written testimony of the range of views presented at the hearing, and the ways in which multiple arguments are combined in critiques of the law. Delving into the content of written testimony submitted for the hearing offers an opportunity to paint a picture of the players and how their arguments interact and enter the public discourse.

“Beacon Hill should be ashamed of 40B's record.”³²

The authors of written testimony against 40B can be divided into three general groups: State Legislators, local City Councils and Boards of Selectmen, concerned citizens and participants in the organized ballot repeal initiative. Critical comments were directed at either specific 40B reform bills, efforts to repeal the entire program or general criticism regarding the law's use. Often criticisms from different categories were grouped together, blurring the line between fundamentally different critiques. One general class of claims fall under the umbrella of arguments that the law itself is fundamentally flawed. In other words, even when the comprehensive permit program is used legally and in accordance with 40B regulations, the program still produces fundamentally flawed results. A second class of arguments focus on *use* of the program, drawing the

³² Repeal40B.com, quote of public testimony from the Committee on Housing 40B hearing.

conclusion that the manner in which the program is used to develop housing (or invoked as a threat) produces undesirable results. Within in each of these categories are multiple claims used against 40, which are often mixed and combined in singular statements that may imply a causal relationship or blur the distinction between criticisms that the program itself is fundamentally flawed, and that its use is fundamentally flawed.

The most common charge against 40B in testimony from the Housing Committee hearing is that developers “bypass”, “override” or “thumb their noses” at local zoning. While presented in a range of normative tones, all such claims point to the legitimate use of the most essential tool of 40B: comprehensive permits use to override local zoning. One 40B abutter wrote, “I appeal to you to fix this loophole developers have found to circumvent the town bylaws.” This comment implies that the purpose of 40B itself is flawed (the *comprehensive permit program* is a loophole) another member of the public wrote, “40B pretends to be a law that provides affordable housing for those in need. In fact, it is a law that provides developers with weapons to bypass local zoning bylaws that were put there for a reason and thumb their noses at anyone who tried to stop it.” While framing the use of comprehensive permits in terms such as “thumbing noses” implies malice on the part of developers, the overriding of local zoning is an appropriate and legitimate use of 40B. While some critiques related to the bypassing of local zoning are constructed with value neutral language, and others in tones that imply developer abuse, all attack the fundamental purpose of the comprehensive permit program and, by extension, attack 40B as fundamentally flawed, on the grounds that it is used by developers in the manner in

which it was intended – to override local zoning- it still produces undesirable impacts: the overriding of local zoning itself is the undesirable impact.

Tina Brooks, Undersecretary of DHCD, Robert Ruzzo, Deputy Directory of Mass Housing and Clark Zeigler, Executive Director of Massachusetts Housing Partnership all submitted testimony in favor of 40B, opposing any significant changes or amendments to the program. Their testimony stands in contrast to the testimony of a majority of public officials who either wrote to register general opposition to 40B or to show support for acts to designed to make significant changes to its implementation. Inspector General Gregory Sullivan stands out as the only public official outside of the state legislature and town councils to submit comments harshly criticizing 40B.

The Inspector General’s comments imply that, in practice, the use of 40B comprehensive permits facilitate developer greed and illegal profit. In a similar vein, Representative Geoffrey White asserts that flaws lie in the implementation of the law rather than its fundamental purpose, “While we acknowledge that over the last five years, this provision of law was responsible for the creation of over 80% of so-called affordable housing in the Commonwealth, we must also recognize inherent flaws in the law’s application.”

The first issue in the Inspector General’s testimony relates to excess developer profit following the designation of the New England Fund as a subsidy source.³³ The Inspector

³³ The Supreme Judicial Court ruled in *Stuborn Ltd. Partnership v. Barnstable Board of Appeals* (1999) that “subsidizing agency” could be interpreted broadly to include the New England Fund, part of the Federal Home Loan Bank of New England.

General traces a link between the entrance of the New England fund into 40B finance and a significant increase in the number of private developers using the program to obtain comprehensive permits. 40B legislation stipulates that public financing agencies are assigned to provide financial oversight over the projects they subsidize. Financial monitoring includes developer cost certification, enforcement of affordability requirements and the enforcement of developer profit limits. He writes that in allowing the New England Fund to oversee cost monitoring and profits limits, the DHCD opened the program to abuse by profit seeking developers and a lender with conflicted interests. This conflict of interest represents another flaw in the administration of the 40B law.³⁴ While not fundamental to the purpose of the program, a problem in manner in which it is administered has left the program prone to abuse in the form of a conflict of incentives between the regulation of developer profit, and the profit seeking behaviors of the lender itself.

A second alleged abuse of the 40B program highlighted by the Inspector General is related-party transactions. In such cases developers hire an affiliated party to perform work related to a given project at inflated rates, or to purchase units at a discount. Both strategies allow the developer to claim losses on a specific 40B project, ensuring dividends remain below required limits, while recouping the losses back through the

³⁴ In response to this criticism, Robert Ruzzo of MassHousing notes, “DHCD issued guidelines for developments funded under the New England Fund program and MassHousing became the project administrator for all of these developments...Subsequently, MassHousing worked very closely with DHCD and the Massachusetts Housing Partnership [MHP] on new guidelines, which were issued by MHP in November 2005. Finally, just two months ago, MassHousing published new cost certification materials that offer guidance to both developers and to municipalities.”

affiliated parties. “The current Chapter 40B cost certification oversight process is ineffective in rigorously certifying developers’ costs and profits. This office has determined that certain developers are able to inflate their expenditures and underreport their profit.” The Inspector General again points to stronger DHCD oversight as a solution to abuse resulting from the unchecked behavior of developers: a form of excess resulting from lax oversight of 40B regulations.

In contrast to the testimony of the Inspector General, which focuses on specific flaws in the administration of the 40B program, comments from members of the public and public officials often merge multiple claims across the categories of fundamental flaws and flawed administration, into single arguments against the program. One such example is found in comments submitted by Representative Frank Hynes, co-sponsor of 10 bills aimed at revising 40B: “We are all acutely aware that the Commonwealth is in dire need of affordable housing. However, the provisions in Chapter 40B have instead become a vehicle for encouraging the development of fair-market housing while skirting local zoning regulations and in many cases raising concerns of environmental impacts such as a development’s proximity to a drinking water source.”

In one sentence Representative Hynes has packed three distinct criticisms of 40B. First, the stage is set by acknowledging a lack of affordable housing in Massachusetts. Then the next sentence, beginning with the conjunction “however”, implies a causal connection between unaffordable housing and the use of 40B as a “vehicle” for the development of market rate housing. This association is followed by the observation that it is enabled by

a skirting of local zoning regulations. The final charge, a classic environmental argument, is that 40B's pose a threat to water sources. There is no mention of a particular example of such a threat, nor a discussion of why 40B enabled developments would pose a more significant threat to drinking water than any other residential development, which would be subject to the same environmental regulations.

Thus having unpacked the statement we observe three distinct charges: development of market rate housing, skirting of zoning and environmental degradation. These distinct arguments are linked, and then joined to an observation regarding the "dire" state of affordable housing. Together they form the narrative: Massachusetts needs affordable housing. Instead of addressing this need, 40B promotes the development of market rate, non-affordable housing, counter to local zoning requirements and sound environmental principles. From this parsing of Representative Hynes' testimony we can infer several empirically testable claims: One example could be a statistical analysis of the environmental impacts of 40B on drinking water. Second, most relevant to this thesis, is the implication that Massachusetts housing is not affordable, and the use of 40B comprehensive permits to skirt local zoning in building market rate housing is to blame. In other words, a narrative of the Trojan Horse, which can be directly tested by looking at who is actually living in market 40B units.

Another aspect of the law frequently criticized is its ability to provide affordable units. The issue is addressed in three general contexts:

1. The law has not done enough to stimulate the production of affordable housing.

Representative Geoffrey Hall writes, “After nearly 40 years of the law’s existence only about 47 communities have exceeded the 10% requirement. We firmly believe that a better policy and a better plan could both lessen the burden on communities while raising affordable housing stock.”

2. The affordable housing that is not produced in great enough quantities.

Representative Hall continues, “Allowing developers free rein...is not only unfair but unwise. Clearly, to achieve maximum affordable housing production, we need all elements of society – local, state and federal officials, developers, planning boards and residents all working in the same direction towards the same goal. Significant opposition from any of these quarters will only delay and destroy our affordable housing stock.”

State Senator Richard Moore writes that reforms to the program should, “Increase the percentage of required affordable housing in a 40B development from 20-25% to 33%.

In the last 3 years 30% of all new construction has been proposed under 40B. This leaves little doubt that developers can afford to build more units in each project.”

3. Housing produced beyond minimal statutory requirement is luxury, and inappropriate

for the middle class and the truly needy. Boxborough resident Scott Robinson writes that while collecting signatures for the Repeal 40B ballot initiative, “The most popular objection was ‘What will happen to affordable housing?’ Our people are not ‘snob zoners’ or ‘NIMBY’s.’” Similarly, public testimony from the hearing that is quoted on repeal initiative’s website (Repeal40B.com) draws a link between use of 40B and the

development of unaffordable housing: “Housing built by 40B is far too expensive and isn’t helping the people who need it most”

Text from the Repeal 40B website also seems to imply a causal relationship between use of land for 40B development and a scarcity land for “real” affordable housing development: “Beacon Hill and developers are advocating for the construction of more than 17,000 new homes per year despite the highest vacancy rates in two decades! If this new 40B construction occurs, even less affordable housing will be produced and our land will be gobbled up by developers leaving nothing for real affordable housing programs.”

Reinforcing the link between flaws in the program’s administration addressed at the hearing and a lack of affordable housing production, the Repeal 40B website states, “The Deputy Director of MassHousing called 40B ‘truly innovative’ and said ‘the issue of oversight has been addressed.’ This claim is ridiculous coming from the ‘state’s affordable housing bank’ since it was this very agency that recently awarded \$20 million in loans meant for affordable housing to a single, high-end luxury condominium complex!”

Thus we see a range of arguments used in opposing 40B, from criticisms of its fundamental goals to charges that its mechanisms are vulnerable to abuse. Contained within each of these broad categories are multiple subsets of arguments against 40B. In their portrayal of the Housing Committee hearing, the authors of Repeal40B.com combine arguments from these subsets to create arguments against the program. One

particular approach taken by the group is the association 40B with the provision of housing for the rich, and by extension, the impedance of housing development for the needy. By linking 40B and its attendant woes to the development of luxury housing, the anti-40B camp is able to meld the pro-affordability argument with its own. A remark taken from public Housing Committee testimony and posted to repeal40B.com makes this sentiment clear: “Stop using 40B to force the development of upscale homes that we do not need and do not want. It is time for this state to start to build some affordable housing instead.”

Density and Undesirable Consequences

Density bonuses from the use of comprehensive permits is an essential tool in enabling the development of affordable units. The traditionally understood logic of 40B is that the shortage of affordable housing is driven by increased development costs due to exclusionary zoning which, in turn, can be alleviated through greater than as-of-right density. From the perspective of 40B opponents, all of the conditions forming the basis of the classic NIMBY arguments – including size and scale that are “out of character” – are undesirable consequences of the program. Yet a key difference is the recognition of density as deliberate outcome of the 40B statute: a necessary condition for the development of mixed income housing the suburbs.

In a crucial distinction, density is not an undesirable byproduct of the program, but rather it is an essential innovation in enabling the development of affordable housing. While the overburdening of infrastructure or development on an environmentally significant parcel is not a necessary condition for 40B development, density almost always is. In the appropriate context, where the facts support a likely negative consequence from development, it may be relatively straightforward to successfully argue the merits of an environment based case. However, the opponent who seeks to maintain a pro-affordability stance while opposing 40B development on the simple grounds of aversion to density faces a more difficult rhetorical task as density, unlike the other classic NIMBY arguments, is almost always a necessary condition for 40B affordable housing development.

Other classic NIMBYs often boil down to fear of context sensitive negative externalities.

The validity of such fears often relate directly to unique conditions presented by individual developments: Will the town's sewer system be overwhelmed by the additional units of a new 40B development? Can the rare toad survive development adjacent to its vernal pool? Such cases are contested and resolved on a case-by-case basis, and are centered on the facts surrounding individual developments. When many contentious 40B approval processes occur at the same time – such as during strong periods in housing market cycles – there are enough opponents simultaneously battling 40B development that the movement can shift from individual town-based opposition to a form of

collective

conciseness.

Such a shift in

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opposition.

Rather than

Affordable Housing Now - Helping Massachusetts Recover From Chapter 40B

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Our affordable housing crisis has made me realize that 40B doesn't work for me

Welcome to Affordable Housing Now

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We thought that the Comprehensive Permit Statute (40B) was meant to produce affordable housing. The problem is that it helps only a tiny range of people, and works to block affordability for almost everyone else. No other state has anything like it. We need to work to provide real affordable housing now. To read people's stories, [click here](#)

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- Half of Massachusetts renter households are paying more than a third of their

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focusing on individual projects, the statewide scope of such a coalition (facilitated by internet communications) allows the movement to set its sights on the entire state law itself. The most recent direct evidence of this behavior was the 2007 ballot repeal initiative. This petition effort was notable for its statewide scope and linking of allies via the internet through websites such as affordablehousingnow.org (pictured above) and repeal40b.com, the website of John Belskis, Chair of the Coalition For The Reform of 40B.

With a statewide coalition, and the state-level ambition of repealing all of 40B it is somewhat more difficult to attack the entire law through non-density NIMBY arguments, because such attacks often depends on the unique circumstances of each development. The rhetorical heart of the statewide anti-40B movement would instead be more effective if it were rooted in one universally offending aspect of almost all 40B developments: density.

How then to argue against the concept of density in the abstract? Critiquing density as out of character with existing low density development runs directly counter to the central purpose of the law: that every municipality – no matter how dense or urban – is obliged to carry its “fair share” of affordable housing, even if the only means to develop such housing is through unwanted density. The masterful strategy lies in the framing of density as inconsistent with the spirit of the 40B law: affordable housing development. The traditionally understood logic of 40B is that the shortage of affordable housing is driven by increased development costs due to exclusionary zoning which, in turn, can be

alleviated through greater than as-of-right density.

The newest strategy cleverly links these premises in a manner that clouds the logic, drawing an opposite conclusion: 1. Use of 40B comprehensive permits allows developers to take advantage of density bonuses to create projects inconsistent with the size and scale of existing neighborhoods. 2. These larger projects bring greater profits to the developer than would be achieved through as-of-right development. 3. Therefore, the true loss is in the missed opportunity to create truly affordable housing, and the narrative of the 40B development as Trojan Horse is born.

The New Argument Has Arrived: What Next?

We see the discourse is cast in a new light: all sides are in support of affordable housing, yet 40B is equated with developers profiting from high density, unaffordable housing. In its latest iteration 40B opponents have turned the most essential pro-40 argument - need for affordable housing - on its head to argue against the law, on the grounds that it does not provide enough truly affordable housing production. Why are Massachusetts suburbs suddenly concerned with affordability? Are such activists disingenuous in arguing that 40B is problematic on the grounds that it does not create *enough* suburban low-income housing? Lack of affordable units in 40B developments is perhaps a genuine concern for opponents, yet the evolution of suburban zoning demonstrates an attitude inconsistent with this position. As earlier discussions suggest, zoning in most towns below the 10% affordability threshold has been purposefully crafted to prevent low-income housing development.

Alternately, the pro-affordable housing approach to 40B opposition could be a more purely rhetorical device. The absence of evidence regarding who lives in the developments is perhaps the primary reason that opponents have seized on the issue of the effectiveness in producing affordable housing. In contrast, earlier focal points in the 40B debate are now grounded by published literature directly addressing such points of contention. For example, to the question of whether tenants of mixed incomes can

successfully reside together, studies such as *All in Together*³⁵ provide examples of successful income mixing, thus removing the issue from debate. Similarly, studies by the MIT Center for Real Estate Housing Affordability Initiative³⁶ document no negative impacts on adjacent single family home values from 40B development. In the absence such evidence addressing “who lives” in 40B developments, opponents have taken the opportunity to craft the narrative of a profit-hungry developer who takes advantage of the 40B program in order to permit projects that offer a statutorily acceptable, yet insignificant, number of affordable units in developments that are full of rich residents.

40B opponents have either correctly, and presciently, identified a major flaw in the law and seek to correct it. Or they have engaged in a masterful exercise of agenda setting by taking an issue for which very little evidence existed and turned it into the center of a debate against the law, generating a perception of the program that formed the rhetorical basis for a serious threat to its existence through the 2007 ballot repeal campaign.

Adding to this narrative is the perception that the predominant form of tenure in 40B new developments is ownership. Building on the Trojan Horse analogy, developers use 40B to get multifamily developments approved in towns, only to build housing appropriate for the rich, without providing much needed rental units. Citizens for 40B Reform writes, “40B developers are building fewer apartments and more expensive houses even with a huge oversupply of upscale homes on the market. 40B developers are making millions

³⁵ William Ryan and Massachusetts Housing Finance Agency, *All in together : an evaluation of mixed-income multi-family housing* (Boston: Massachusetts Housing Finance Agency, 1974) 24.

³⁶ Pollakowski, Ritchay, and Weinrobe

churning out ill-conceived, high-density projects while destroying open space undermining all planning and zoning efforts and negatively impacting our state's economy and sustainability despite the highest home vacancy rate in decades." Yet, in contrast to this image, recent research by Lynn Fisher has shown that while the number of proposed 40B ownership projects outnumber rental projects, the number of proposed *units* is split almost evenly between the two forms of tenure.³⁷ Interestingly, the study shows that in contrast to the image of developer preference largely influencing the development of unnecessary and unaffordable ownership units, town behavior may also be responsible. "Rental projects are denied by ZBAs at nearly twice the rate of owner-occupied projects. And while the rate of developer appeal to the HAC is about equal for the two types of projects, rental projects are almost twice as likely as owner occupied projects to be involved in *other* litigation."³⁸

In the Boston Globe, reporter Steve LeBlanc writes that ballot initiative leader John Belskis believes, "the law hasn't produced affordable housing fast enough and makes it harder for cities and towns to control their development. [Belskis] said the effort to repeal the law isn't motivated by a desire to keep affordable housing out of the suburbs -- the 'not in my back yard' phenomenon. 'Every one says we are NIMBYs. That's wrong,' Belskis said. 'We want to see a law that produces affordable housing.'

Before directly testing the merits of the narrative through quantitative analysis, I first propose a qualitative framework for better understanding the history that has led the

³⁷ Lynn Fisher, Chapter 40B Permitting and Litigation
A report by the Housing Affordability Initiative, 2007).

³⁸ Fisher

opposition to its current advocacy position. While the law has been subject to criticism since its creation, 40B has recently risen to a position of prominence in Massachusetts policy debate. What factors drive the cyclical shifts in public perception and media accounts of “the 40B problem” as it changes from scattered critiques of individual projects to a debate over the efficacy and risks of the program as whole?

Throughout the history of 40B there have been clear and vocal supporters and opponents. In its first iteration, the alignment of interests on either side took place within the Massachusetts legislature, with urban lawmakers generally in support of the program and suburban representatives generally aligned against it. As the bill became law, the two sides evolved, with supporters developing a more institutionalized approach, working through organizations such as CHAPA to build an organization with greater geographic reach and long-term institutional presence. In contrast, the 40B opposition position has been represented by a diverse array of actors, employing a differing array of advocacy strategies and exhibiting varied levels of institutional capacity.

I propose that to a large extent the arguments and advocacy tactics of 40B opponent are determined their organizational structure, which in turn is shaped by market cycles. In weaker housing markets there is less of an incentive for developers to undertake new projects, with fewer resulting comprehensive permit applications. During such periods media reports regarding 40B tend to be diffuse: local newspapers focusing on individual projects. In this economic climate, local context tends to dominate the points of negotiation for comprehensive permits, often touching on the areas of environmental

protection, density and burdens on local infrastructure. These debates are drawn out through the permitting process: from the time projects are initially presented to local planning boards, through discussion and ultimate approval or rejection, and then usually in the case of rejection, on to the state Housing Appeals Court (HAC) where most developments are approved for comprehensive permits.

A typical alignment of interests occurs with local residents – often in the immediate vicinity – enlisting local public officials in efforts to block 40B development. Knowing full well that such efforts put the town at risk of remaining below the 10% affordability threshold, local planning boards follow the lead of elected officials and citizens in refusing permits for 40B projects and continuing to zone out densities and residential uses that would facilitate as of right affordable and mixed-income development.

Regardless of whether such concerns are genuine, or accurate, local public officials adopt an approach to transmitting resident anti-development sentiment by conveying a fairly standardized set of arguments.

These arguments tend to center of fears relating to negative externalities including, for example, overburdening of infrastructure and educational systems. Project-specific concerns then become the signature for public debates and media accounts of the permitting process. Typically when a contested development is appealed all the way to the HAC, the court finds in favor of developers and a comprehensive permit is issue. The development moves forward, and while debate over the individual project slowly dissipates, the arguments used against it live on as they are recycled by the protagonists

involved in the permitting processes for other individual projects.

In regard to the newest argument, by directly examining “who lives” in 40B developments, and in particular how residents of market units compare to those living in affordable 40B units and general market housing in the same towns, one could develop a better understanding of the essential issues in the contemporary program-wide critique of 40B. Such an inquiry could bring evidence to bear on the question of who lives in 40B projects. By looking at the demographic data of inhabitants of market rate and affordable units in 40B projects in comparison to data for residents of similar surrounding towns one could shed light on the specific set of claims that residents of 40B projects are different than those of surrounding towns, specifically claims related to the argument that 40B residents are wealthier than their neighbors and that as result, beyond the statutorily mandated percentage, 40B project to provide a meaningful contribution of affordable housing.

Doing so will allow the community of 40B observers to better understand the quantitative basis for the predominant qualitative anti-40B narrative. This analysis can demonstrate either: A. 40B opponents are correct and were able to call to attention a significant flaw in the 40B program which should be investigated further for potential remedies, or B. Opponents are incorrect: 40B developments do provide a meaningful contribution to affordable housing development, through the contribution of both market and affordable units in mixed-income projects. In the absence of direct supporting evidence, opponents were successful in crafting a narrative that was able to influence public opinion and the

policy development process. Further research could address how this narrative and others are created and sustained, and how claims of this narrative compare in a quantitative analysis between 40B versus non-40B resident demographics.

Demographic data from residents of market and affordable 40B units, such as age, household size, income as well as commute distances could be compared to the census demographic data for residents of non-40B market rate housing in towns of similar income or school quality. While it is expected that affordable 40B unit residents would likely have lower incomes, comparisons between market rate 40B residents and market rate non-40B residents could shed interesting light on the question of 40B developments being built for rich people. If it were shown that 40B market unit residents were similar, or less wealthy, than their surrounding non-40B market unit counterparts, the image of the Trojan Horse might be disproved.

An objection could be raised on the grounds that such developments do not provide housing to the most needy. At the workforce level of affordability, housing needs of the most needy are certainly not met. This issue is as much a reflection of weakness in contemporary US housing policy as it is a flaw unique to 40B. Within the framework of workforce housing, presence of market 40B unit residents that are similar to those residing non-40B units could demonstrate another type of affordability: affordability for typical town residents. Such a comparative analysis of demographic data between residents of market 40B, affordable 40B and market non-40B is certainly warranted and would contribute greatly to the current political debate on the program.

Appendix

Problem Definition Literature

For a clearer understanding of the ways in which conditions get defined as public problems, we turn to the body of public policy literature that addresses the question of problem definition. Historically, media accounts of 40B have tended to focus on the contentious nature of individual projects, while contemporary press accounts often refer to the entire program as controversial. While the law has been subject to criticism since its creation, how and why has 40B risen its current prominence in Massachusetts policy debate? What factors cause the cyclical changes in public perception and media accounts as the 40B “problem” shifts from accounts of scattered individual projects to a debate of the program as whole?

Market cycles certainly impact the perception of 40B as a policy “problem”: in a strong market the demand curve shifts, with the price consumers are willing to pay for a given quantity of housing rising. Scare land and restrictive zoning and entitlements processes create high barriers to entry for housing development, leading to supply constraint and a continued rise in prices. In such a climate, high home prices and the promise of bypassing suboptimal zoning make comprehensive permits attractive to developers. Logically, the story goes, a rise in the volume of comprehensive permit applications increase number of contentious approval processes. However, in addressing causes beyond the sheer volume of applications, problem definition literature offers a basis for better understanding the forces driving the evolution of the macro, state-level 40B policy

debate.

McBeth, Shanahan, Arnell and Hathaway observe that contemporary problem definition literature is dominated by three major themes: Kingdon's policy streams, Baumgartner and Jones' punctuated equilibrium, and the Advocacy Coalition Framework.³⁹ The three approaches attempt to explain the relation between policy change and public understanding of and attitudes toward policy issues. Why do issues change in public perception from being undesirable conditions, to becoming public policy problems? Who sets the terms of the policy and framework for resolution of the policy debate? How does definition of the problem impact the alignment of advocates? I will next address these questions in the context of Massachusetts affordable housing legislation to better understand the reasons why the 40B debate has evolved to its current form as a dispute over efficiency as a affordable an housing production tool.

Kingdon identifies four distinct stages in the policy making process: 1. agenda setting, 2. specification of alternatives, 3. choice among alternatives, and 4. implementation of decisions.⁴⁰ He writes that the first two stages are most relevant to problem definition: agenda setting, or the process by which a public condition rises in prominence to become to be redefined as a public policy issue. And equally important, is the specification of alternatives, by which actors in the policy debate seek to influence final policy outcomes by shaping the perception of choices. I will next briefly expand on Kingdon's concepts

³⁹ Mark K. McBeth, et al, "The Intersection of Narrative Policy Analysis and Policy Change Theory," *Policy Studies Journal* 35.1 (2007)

⁴⁰ L. Kingdon, "Agenda, alternatives and public policy 2nd edn Longmans," *New York* (1995), p. 3

of agenda setting and specification of alternatives, connecting these concepts to the current 40B policy debate.

Kingdon writes, “problem recognition is critical to agenda setting”⁴¹ in that it is the mechanism by which problems become recognized as policy issues. He adds that he recognition of a condition as a problem is a necessary, but not sufficient condition for participants to achieve policy change. Kingdon proposes that problem recognition is the first of three policy stream processes: following the recognition of problems, advocates then generate proposed policy changes (second stream), from which the political process renders a final policy product (third stream). Thus the policy decisions are not simply the product of a one-dimensional rational policy debate, but are also significantly shaped by processes, or policy streams, that influence the issues that become policy agendas and shape the terms of the debate.

Applying Kingdon’s policy streams approach, the evolution of the 40B policy debate can be evaluated in more nuanced terms than its common conception as a decades-long intractable debate between inclusionary and exclusionary zoning, and the developers who seek to profit from it. The birth of the 40B program was entwined in classic Massachusetts political wrangling. Sharon Krefetz writes that advocates in the Massachusetts legislature were “apparently motivated in part by a desire to create an awkward situation for Republican Governor Francis Sargent, and by the opportunity for retaliation against the suburban ‘armchair liberals’ who had voted for the Racial

⁴¹ Kingdon, p. 198

Imbalance Act.”⁴² In this framing of the debate, the suburban/urban divide over racial integration of schools is as relevant to agenda setting and alignment of interests as pure housing policy debate.

As the 40B debate evolved, with each new incarnation has come a new agenda setting strategy, formulation of alternatives and political process. In its first iteration, the inclusionary zoning movement benefited from a prescient understanding that zoning practices of Boston’s suburbs have a direct exclusionary on lower income households. Krefetz explains, “Indeed, the Massachusetts statute was based on a remarkably early recognition by its proponents that exclusionary zoning practices, such as large minimum lot size requirements and bans on multi-family housing, play a significant role in driving up housing costs and causing the dominant spatial pattern of economic and racial segregation found in most metropolitan areas of the United States.”⁴³

Further, a national mood shift in the wake of the assassinations of John F. Kennedy, Martin Luther King and Robert Kennedy contributed a shift in perception of housing rights as an economic and civil condition worthy of legislative remediation. Such factors combined to bring the issue to the attention of the Massachusetts legislature through what Kingdon refers to a rise in prominence in the political stream. He writes, “Participants perceive swings in national mood, elections and bring new administrations to power and

⁴² S. P. Krefetz, "The impact and evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of experience with a state legislative effort to overcome exclusionary zoning," Western New England Law Review 22.2 (2001): 381-430, p. 385

⁴³ Krefetz, 381-430, p. 382

new partisan or ideological distributions...and interest groups of various descriptions press (or fail to press) their demands on government.”⁴⁴

Once an issue is brought to bear in the political system, advocates engage in the process of generating policy alternatives. In an interview with Aaron Gornstein, Executive Director of CHAPA, he recounted that the initial framing of 40B legislation posed the comprehensive permit as a threat, rather than development tool. It would be almost inconceivable that a town would allow itself to be vulnerable a comprehensive permit application: under the threat of losing land use regulation power, towns would be compelled to meet the 10% affordable units threshold either through direct development of public housing, zoning reforms or partnerships intended to stimulate the production of affordable housing.

Thus we see that from the diffuse condition of need for affordable housing, the agendas of inclusionary zoning, suburban fair-share and state-level intervention in form of a “punishment” for not reaching affordability thresholds were set as the specific parameters of the policy debate. The process moves from recognition of a problem, to policy debate, to creation of terms of debate. Specific parameters are embedded in the choices put forth for political debate: direct state control of local zoning was excluded from the debate, making the choices debated in the legislature either the status quo or a more hands-off approach mandating locally led change under the threat of comprehensive permit use in towns below the 10% threshold. Any state-level efforts to stimulate affordable zoning

⁴⁴ Kingdon, 1995, p.198

through regulation of residential zoning would be a radical break from the tradition of local control discussed earlier.

While the political debate process represents the third stage of policy development following problem recognition and definition of alternatives, an in-depth analysis of the legislative negotiation leading the initial passage of 40B would be beyond the scope of this document. Rather, I seek to focus on the evolving shape and impacts of 40B problem definition: agenda setting that brings the issue to public attention, and specification of alternatives that set the frame for public debate. 40B represents an interesting case for a Kingdon-style policy analysis, as the cycles of the housing market produce periods of increased comprehensive permit applications that place the issue on a the policy agenda with some measure of regularity.

Here I propose that while the causes of agenda setting remain largely unchanged: a preponderance of homeowners and local officials seeking to reassert control of land use regulation in the face of increased comprehensive permit applications. It is the terms of that debate which has changed. With each new iteration of the debate, agents seeking policy change alter the terms of the discourse in an effort shape the outcome of what is essentially an extension of earlier policy debates.

In its current form, opponents of the 40B program have cast affordable housing production volume as the measure of policy success, and opposition to the current program as the position most consistent with that end. The Trojan Horse serves as the

rhetorical tool that enables this narrative and helps to move the 40B debate from a project-by-project fight to a state-level policy question. In practice, the device allows the pro-affordability stance to be leveraged against 40B, and at its heart is the accusation that 40B allows density in communities under false pretenses. Thus we are left with the question: Who really lives in these units?

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