

THE ANTI-SNOB ZONING LAW: THE EFFECTIVENESS OF CHAPTER 774
IN GETTING AFFORDABLE HOUSING BUILT

By

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ABSTRACT

Massachusetts' Chapter 774 of the Acts of 1969 allows local Zoning Boards of Appeals to issue a comprehensive permit for low and moderate income housing developments proposed by public, non-profit, or limited dividend organizations. The Board has the power to override local zoning regulations. A Board is obligated to issue a permit if fewer than 10% of the community's housing units are subsidized low or moderate income units, and if the proposed housing development does not threaten health and safety. If a local Board denies a comprehensive permit, the developer may appeal to the quasi-judicial state Housing Appeals Committee. The Committee hears the case and can sustain the local decision or overrule it and order the local Board to issue a permit.

The research was undertaken to determine the effectiveness of Chapter 774 in getting affordable housing built. The thesis concludes that the law has been effective and has resulted in the construction of 205 low and moderate income housing projects comprising 11,266 units. Of the applications to local Boards of Appeals, 70% resulted in built projects. According to the data collected, the likelihood of a project being built is greatest when the comprehensive permit is granted on the local level and decreases as the appeals process continues.

Four Chapter 774 cases were studied to determine whether developers withdraw permit appeals to the state Housing Appeals Committee because of the law itself or the appeals process it mandates. Four additional cases were studied to determine conditions under which negotiated settlements between the developer and the community are possible. Recommendations are made concerning how negotiated settlements can be encouraged.

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CHAPTER 1. INTRODUCTION: CHAPTER 774 AND HOW IT WORKS

Chapter 774 of the Acts of 1969 established standards under which local Zoning Boards of Appeals can override overly restrictive zoning ordinances and by-laws and grant a comprehensive permit for the construction of subsidized low or moderate income housing. Since the law's enactment in 1969, almost 300 public, non-profit, and limited-dividend developers have applied for comprehensive permits to build low and moderate income housing projects in communities throughout the Commonwealth (Housing Appeals Committee study, 1986). This thesis attempts to evaluate the effectiveness of the law in getting housing built.

1.1 Low and Moderate Income Housing in Massachusetts

Massachusetts has a history of strong local autonomy. Over the years cities and towns have created their own land use policies. In many cases, these policies have taken the form of exclusionary zoning regulations such as restricting development to single family housing, and instituting large lot zoning. As a result of these regulations, communities have purposely or unintentionally excluded low and moderate income housing development within their boundaries. In more recent years, as they face increasing development pressure,

community leaders have defended these policies as a mechanism for controlling and preventing unwanted growth.

Within this context of local autonomy, the Massachusetts state government has been committed to providing affordable housing to all the citizens of the Commonwealth. The Executive Office of Communities and Development (EOCD) administers many programs in which the agency works with local governments to provide housing for individuals and families. Chapter 705, 667, and 689 programs provide local housing authorities or other local agencies with funds to construct family, elderly, and handicapped housing. The Massachusetts Housing Finance Agency (MHFA) provides low interest loans to private developers who agree to include some low and moderate income units in their developments. More recently, EOCD introduced two programs that combine low interest loans with rental subsidy certificates. Private and non-profit developers have since built many rental units using the SHARP and TELLER programs. In the newest state program, the Homeownership Opportunities Program (HOP) administered by the Massachusetts Housing Partnership (MHP), communities and developers team up to build housing units to be purchased by low and moderate income Massachusetts residents. Chapter 774 is a vehicle by which those wishing to develop low and moderate income housing under all these programs can bypass overly restrictive local regulations to get their projects built.

1.2 How the Comprehensive Permit Process Works¹

Chapter 774 was voted into law in 1969. According to Robert Engler, it was passed by a coalition of urban legislators in retaliation for the passage of a racial imbalance bill four years earlier that "Boston legislators...felt.. was being shoved down their throat by liberal suburban legislators." (1972, p. 72). The impact of the racial imbalance bill, which made it illegal to have more than 50 percent nonwhite children in a classroom, was felt primarily in Boston. The suburban liberals who were in favor of this proposal did not support Chapter 774 "which attempted to drive a wedge into the "Home Rule" so jealously guarded by their constituents." (1972, p. 72). Engler quoted a newspaper article:

One of the most embarrassing sights of the legislative session was the spectacle of the so-called "liberal" legislators, who strongly advocated the racial imbalance law, casting their votes against a bill which would really do something about the problem (1972, p. 73).

Thirty-seven legislators, many of them conservative urban representatives, who had voted against the racial imbalance bill voted for the zoning bill, which passed by a two-vote margin.

¹This paper discusses comprehensive permits issued under the Chapter 774 statute. No conclusions about the nature or effects of comprehensive permits issued under other statutes or regulations should be drawn based on statements written here.

The statute describes the law as "an act providing for the construction of low and moderate income housing in cities and towns in which local restrictions hamper such construction." (1969, p. 1). The law is commonly known as "the Anti-Snob Zoning Law," "the Massachusetts Zoning Appeals Law," and the "Ten Percent Rule." An analysis prepared by the Metropolitan Area Planning Council in 1974 describes the law's intent as follows:

The intent of Chapter 774 is to stimulate the construction of housing for low and moderate income households in the suburbs. The law seeks to accomplish its intent by providing relief from local zoning, building, and other codes if such codes are determined to be an unreasonable impediment to the development of new housing (1974, p. 2).

According to the law, a public agency, a non-profit organization, or a limited-dividend organization planning to build subsidized low or moderate income housing may apply to the local Zoning Board of Appeals (ZBA) for a comprehensive permit. The Board must notify other local boards and town officials, hold a public hearing, and issue a decision. The ZBA can take one of three forms of action: approve the application and issue the comprehensive permit; approve the application with conditions and requirements; or deny the application.²

²When the community is in favor of granting a developer a comprehensive permit and the local ZBA does so, it is commonly known as a "friendly 774." When the community opposes granting a permit and the ZBA denies, it is known as a "hostile 774."

The Board may deny the application only under one or more of the following conditions: 1) 10% or more of existing housing units in the city or town are already subsidized low or moderate income units; 2) sites used for subsidized low or moderate income housing already equal at least one and one half percent of all land zoned for residential, commercial, or industrial purposes; or 3) the application would result in the construction of low and moderate income housing on more than 0.3 percent of the total land, or ten acres, whichever is larger, in any calendar year. The ZBA may also deny the permit in order to protect health and safety, promote better site and building design, or preserve open space, if these needs outweigh regional and local need for low and moderate income housing and the requirements and regulations apply equally to subsidized and non-subsidized housing. The ZBA may issue the permit subject to conditions if the developer is still able to build and operate without financial loss, or, in the case of a limited dividend organization, realize a reasonable return within the limits set by the subsidizing agency.

1.3 The Housing Appeals Committee's Authority

If a permit is denied or issued with conditions that will render the project economically unfeasible, the developer may

appeal to a five-person Housing Appeals Committee (HAC) appointed each year by the Governor and the Secretary of EOCD. The HAC must include one employee of EOCD, one City Councilor, and one Selectman. When an appeal is filed with the HAC, members and staff work to encourage the parties -- the developer and the local municipality -- to settle their differences. The HAC legal counsel often serves as an informal facilitator or mediator during the negotiations.

If a settlement cannot be reached, the HAC hears the case. The Committee reviews all the evidence provided by the community and the developer and can rule to uphold the local decision or overrule the decision and order the ZBA to issue the permit. The HAC's power is limited to sustaining or overruling the ZBA decision; it does not have the same right as the ZBA to apply conditions to its decision.

1.4 The Permitting Process Timetable

The statute specifies the procedures for filing for local approval under Chapter 774. The local ZBA must hold a hearing within 30 days of receiving a comprehensive permit application. It must render its decision within 40 days of the hearing termination. An applicant denied a permit or receiving a permit subject to conditions he or she deems

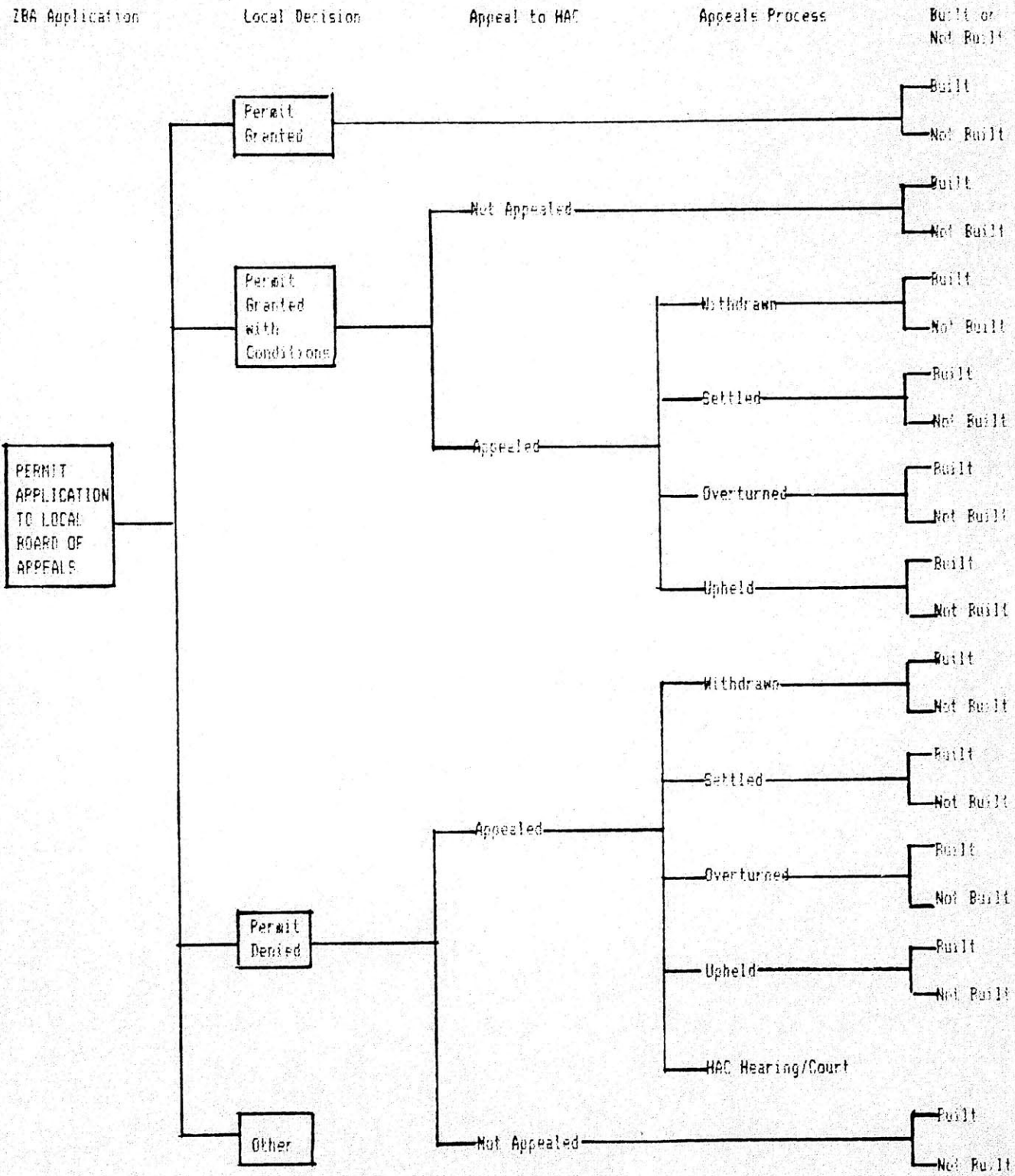
unreasonable has 20 days after the local ZBA decision to appeal to the state Housing Appeals Committee (HAC). The Housing Appeals Committee must then hold a series of hearings in which both parties present their cases. While some cases only need one day of hearing after which the HAC can render a decision, others may need several. Because of the HAC's schedule and other constraints, hearing days are often two or three or more weeks apart. According to the statute, the HAC must hold the first hearing within 20 days of receiving the applicant's statement.

After all hearings are completed, the HAC has 30 days to render a written decision. If the HAC overrules the local ZBA decision, the ZBA must grant a comprehensive permit within 30 days of the HAC ruling. This entire process is illustrated graphically below:

APPLICATION --- (30 days) ---> PUBLIC HEARING --- (40 days) --->
ZBA DECISION --- (20 days) ---> APPEAL FILED --- (20 days) --->
FIRST HAC HEARING --- (unknown number of days) ---> LAST HAC
HEARING --- (30 days) ---> HAC DECISION --- (30 days) ---> ZBA
GRANTS PERMIT

In sum, when a developer applies to a local Zoning Board of Appeals for a comprehensive permit, the board may grant the permit, grant the permit subject to conditions, or deny the

CHART 1 - Comprehensive Permit Process Decision Points



permit. If the permit is denied or granted with conditions, the developer may choose to appeal to the HAC. During the appeals process the permit application may be withdrawn or settled; if neither of these two options is exercised, the HAC hears the case and either sustains or overturns the permit denial. Finally, projects granted permits at the local or state level are either built or not built. This entire process is illustrated graphically in Chart 1.

1.5 Research and Literature on Chapter 774

Surprisingly little has been written during the past ten years about the effects of Chapter 774. In 1972, Robert Engler wrote that twelve developers had appealed to the state Housing Appeals Committee. The committee had heard arguments and overturned denials in two of the twelve cases. Both these cases were appealed to the State Superior Court. He concludes:

In sum, no housing has actually been built as a result of the enactment of Chapter 774 two years ago. Its primary effect thus far probably has been educational, i.e., forcing many towns to confront the issue of the need for low and moderate income housing throughout the state, the region, and within their own confines (1972, p. 77).

Engler goes to on explain why, in his opinion, the law had been ineffective. He states that the law has vague standards, that the terms "reasonable" and "consistent with local needs" are not sufficiently defined. He also states that the

procedures under which the Housing Appeals Committee must operate were not clearly defined. In addition, the vague standards of the act "leave the door open to extensive judicial intervention", and discouraged developers from applying for comprehensive permits.

The Metropolitan Area Planning Council (MAPC) presented a series of three "interpretive analyses" of the law as part of its Planning Information Series on housing. The first report was written in 1969. The last MAPC report, entitled "Chapter 774: Four Years Later" (1974), provides an excellent summary of the law, HAC actions to date, and planning issues consistently raised by local communities. It explains how community eligibility guidelines are calculated and lists the number of housing units and subsidized units in the communities in the council district in that year. The report points out that as of August, 1974, only four MAPC communities had fulfilled the statutory maximum subsidized housing unit guideline of ten percent. According to HAC data, as of December 1985 only 22 of the Commonwealth's 351 municipalities exceed the 10% limit or the 1.5% land area limit established by the law (HAC file, January, 1986).

The MAPC report states that the HAC had overturned comprehensive permit denials in eleven communities and upheld

a denial in one. The report does not indicate how many of these projects were built and occupied.

EOCD and Citizens Housing and Planning Association (CHPA) undertook the first comprehensive evaluation of the law's effects in 1979. The authors surveyed all municipalities for information on number and type of permit applications at the local level, decisions by local boards, appeals to the state HAC, decisions by the state HAC, and whether or not projects were constructed. The CHPA report concluded that 3,400 units for families and older people had been constructed throughout the state using the comprehensive permit process.

The report goes on to say:

It is clear, however, that the effort needed to get a comprehensive permit and work through to construction is not easy. Many proposals failed to materialize. Opposition to housing for families has been greater than housing for older people. In addition to local opposition, problems of financing costs, building costs, and local taxes have discouraged many developers. A significant number of proposals could not proceed with building because of the lack of funding from federal or state governments (Ruben and Williams, 1979, p. 10).

The Housing Appeals Committee recently re-surveyed municipalities to update the data presented in the CHPA report. A comparative analysis of the CHPA survey and the new data appears in Chapter 3 of this report. The committee plans to issue a written analysis of its findings. In addition, an HAC intern is preparing an in-depth analysis of the issues presented in Chapter 774 hearings and how the HAC has addressed them. The intern points out that many attorneys

have prepared papers on the legal aspects of the law for their clients. These papers are, however, proprietary and have not, to this date, been published or made available to others (Kane, 1987).

CHAPTER 2. INTERPRETING THE LAW

Most who have worked with Chapter 774 agree with Engler's assertion that statute was poorly written. Many criticize its vague standards. Among the most troublesome of its directives is that a denial by the local board will be upheld if it is "reasonable" and "consistent with local needs." In addition, the statute provides no guidelines on how to determine whether or not health and safety issues outweigh the need for housing. However, since Engler wrote his analysis of the law, these and other vague standards in the Act have been clarified to a certain extent through precedents put forth in Housing Appeals Committee and court decisions.

To date, the HAC has issued eighty-one decisions on Chapter 774 appeals cases in which seventy-four ZBA permit denials were overturned and seven were upheld (Kelly Memo, 1/30/87). Approximately twenty-six additional appeals are "active:" decision pending, active hearing, under negotiation, or in litigation.

2.1 Issues Addressed by the Courts: Landmark Decisions

Chapter 774 has been legally challenged on many occasions. Several court decisions have clarified aspects of the law as

well as the powers it grants to the local Zoning Boards of Appeals and the Housing Appeals Committee.

The Law is Constitutional: In 1972, the State Superior Court issued a joint decision on two cases: Country Village Corp vs. Board of Appeals of Hanover and Concord Homeowner Corp. vs. Board of Appeals of Concord. In what is commonly known as the Hanover decision, the court ruled that Chapter 774 confers power upon both the HAC and the local Zoning Boards to override zoning regulations which hamper the construction of low and moderate income housing; and this power to override zoning regulations is constitutional.

Outside Impacts of the Housing Need not Be Considered by the HAC: In the Norwood case, the HAC determined that it would not considering impacts such as increased school costs went beyond its jurisdiction. This was challenged in the Superior Court and the HAC decision was sustained.

The ZBA/HAC has Jurisdiction over Off-Site Activities Connected to the Housing Project: The town of Maynard in made the argument that the ZBA/HAC did not have the power to grant permits in which off-site activities, such as sewer hook-ups, were included. The court ruled that they did indeed have that power.

The ZBA/HAC has Subdivision Control Powers of the Planning Board in 774 Cases: In the North Andover case, the court ruled that the ZBA/HAC could take unto itself the powers of the planning board vis-a-vis subdivision control.

Mixed Income Housing is a Low/Moderate Income Development: The Supreme Judicial Court ruled in the Well^sley case (1982) that a mixed income development of both market and low and moderate income units is eligible for a comprehensive permit, and that the entire development is low and moderate income housing. This decision resulted in all units in mixed income development being counted toward the 10% low and moderate income housing threshold.

The Term "Reasonable" is Surplus Verbiage: The Dartmouth Superior Court in 1978 established that the term "reasonable" is surplus verbiage and is included in the concept "consistent with local needs."

2.2 Issues Addressed by the Housing Appeals Committee

Several Housing Appeals Committee decisions have clearly established that health or safety factors, or valid planning objections must outweigh the regional and local need for low and moderate income housing. Clarifications of specific

health, safety, and planning issues written in HAC decisions follow.³

Inadequate Drainage: In all cases but two, the HAC ruled that inadequate drainage was not sufficient to outweigh the regional and local need for low and moderate income housing. In two cases with extremely severe drainage problems, the developer did not present a plan to mitigate drainage, flooding, or runoff. One site "is practically continuously under water." [Glen Realty Trust vs. Woburn Board of Appeals, 1974] The HAC upheld local permit denials in both cases.

Site and Building Design: One ruling stated that a developer is not obligated to produce the best possible site and building design. Approval of the design by the subsidizing agency is sufficient.

Properly Zoned Sites Exist: One ruling stated that developers are not obligated to look for or find properly zoned sites.

Availability of Other Sites: In one decision the HAC ruled that the issue is not whether the site is the "most ideal site" but whether it is suitable. It is not relevant that better sites may be available.

³The following issues were discussed in HAC written decisions on Chapter 774 appeals cases. Cases in which significant issues were addressed are cited individually.

Technicalities in the Appeals Process: One decision established that denials will not be upheld on the basis of technicalities in the appeals process.

The Developer is not a Limited Dividend Organization: The HAC rules and regulations state that to qualify as a limited dividend organization, a developer must a) propose to sponsor housing under Chapter 40B (774) b) not be a public agency and c) be eligible to receive a subsidy from a state or federal agency after a comprehensive permit has been issued (1978, p. 410).

Inadequate Access: In all cases but one, the HAC ruled that inadequate access was not sufficient to outweigh the regional and local need for low and moderate income housing. The HAC ruled in one case that the combined length and steep grade of the access road was a planning defect and a health and safety hazard (this was an elderly housing development) and upheld the local permit denial. The grade was in excess of the maximum grade permissible under the municipality's subdivision control regulations (Sherwood Estates vs. Board of Appeals of the City of Peabody, April, 1982).

Inadequate Fire Protection: In one of several cases in which the ZBA used inadequate fire protection as a reason for permit denial, the HAC upheld the local decision. The Committee

ruled that water volume and pressure was inadequate and that the financial burden incurred by the town to correct these inadequacies would be too great. The developer did not offer to share or take on expenses for correcting the problem.

The Developer is Not Financially Responsible: This is not the jurisdiction of the HAC. It defers to the subsidizing agency's decision on questions of financial responsibility.

Insufficiently Detailed Plans: One ruling established that detailed construction documents are not needed to issue a comprehensive permit. The plans need to be as detailed as those submitted by any other developer to the planning department or to the subsidizing agency.

Inconsistent with the Master Plan: In one case the HAC ruled that if the Master Plan is:

totally unreasonable with respect to present land uses or reasonable potential future uses; or there is more than a suspicion that the Master Plan is simply a sophisticated maneuver to perpetuate precisely the abuses which Chapter 774 was designed to eliminate; or is simply an ancient planning exercise ignored and gathering dust for years, and now dusted off to frustrate housing in which there is a clearly demonstrated need, the Master Plan will not prevail." [Harbor Glen Associates vs. Hingham Board of Appeals, 1982]

In this case a 750 acre tract of land had been rezoned from industrial to a variety of uses. The Harbor Glen proposal called for a housing project on a 36.2 acre parcel of land in the tract zoned for an office park. Eighty-four acres of the

tract was zoned for multi-family housing. The town had previously issued a comprehensive permit for one project within the fifty-seven of these 84 acres already developed. The HAC ruled that the town had no past history of opposition to low and moderate income housing. Rather, it had zoned part of the tract for multi-family housing and had already issued one comprehensive permit for a low income project on this land. In sum, the town had not only created a Master Plan that specifically included low and moderate income housing, it was actively implementing the plan. The HAC upheld the permit denial.

Inadequate Location: In all cases but one where this issue was raised, the HAC ruled that a less than ideal location was not sufficient to outweigh the regional and local need for low and moderate income housing. In one case, a potential catastrophic propane gas explosion, traffic hazards and railroad noises, and the commercial and industrial character of the surroundings made the site unsuitable for residential development. The HAC upheld the local permit denial (Forty-Eight Company vs. Westfield Zoning Board of Appeals, August, 1976).

Not Priced to Fill the Most Immediate Need: In one case the HAC ruled that it is not the developer's responsibility to meet the most immediate or severe housing need.

Environmental Impact Report: The Executive Office of Environmental Affairs exempted the HAC from requiring an EIR because the subsidizing agency (MHFA) must do so. The HAC, however, must request an EIR for projects consisting of more than 100 units.

Economic Hardship on the Developer: If conditions imposed by the ZBA place undue economic hardship on the developer, the HAC will invalidate those conditions.

Economic Issues: The cost of the housing units or the rents to be charged are the jurisdiction of the subsidizing agency and not the HAC. Denials based on high housing costs or rents will not be upheld.

Counting Existing Subsidized Units: A case in which the local permit denial was upheld established that when counting existing subsidized units to determine whether they exceed 10% of all housing units in the municipality, the term "exist" includes those units "under construction", "under permit," and "under firm subsidy commitment" (Pioneer Homes Sponsors vs. North Hampton Board of Appeals, April, 1985).

Boards of Appeals have raised the following additional issues as reasons for not granting a comprehensive permit: Inadequate Privacy Buffering; Inadequate Water Supply;

Inadequate Water Pressure; Lack of Sidewalks; Isolation of the Site -- Distance from schools, churches, etc.; Rubbish Disposal; Noise; Impact on Schools; Lack of Services; Traffic Impact; Inadequate Sewer Lines; Open Space Preservation; Not in Character with the Surrounding Neighborhood; High Density; Lack of Transportation; Inadequate Parking; Negative Impact on Tax Base. In all cases brought before the Housing Appeals Committee, the committee ruled that the development proposal provided adequate mitigation measures, and that the perceived problem with the development proposal did not outweigh the regional and local need for low and moderate income housing.

2.3 Summary

In each case heard to date, the Housing Appeals Committee has made it clear that it will consider only whether or not perceived health, safety, and planning issues outweigh the local and regional need for low and moderate income housing. Concerns pertaining to existence of other sites, the developer's credibility, high quality design, and rent or purchase prices are not within its jurisdiction. In upholding only seven local denials, the HAC has demonstrated that housing needs outweigh all but the most severe problems put forth as reasons for low and moderate income housing to be prohibited.

CHAPTER 3. IMPACT OF THE LAW: THE COMPREHENSIVE PERMIT PROCESS AND ITS EFFECTIVENESS IN GETTING PROJECTS BUILT

Since its creation in 1969, many developers have used Chapter 774 to produce subsidized housing. The number of projects built as a result of the law is one measure of its effectiveness. In 1978 and 1979, researchers at EOCD and Citizens Housing and Planning Association in Boston surveyed the 351 municipalities in the Commonwealth in order to obtain information on all Chapter 774 comprehensive permit applications. Three-hundred thirty-six municipalities responded to the questionnaires. Eighty-six communities had received applications for 111 comprehensive permits. The communities supplied the following information on each permit application: type of developer, type of funding, number of units proposed, number of units built, type of housing, ZBA decision, Appeal to HAC, and HAC decision (Ruben and Williams, 1979).

In 1986, the HAC again surveyed the state's municipalities, requesting the same information, for purposes of updating. Information was requested on each comprehensive permit application from 1969 to the present. To date, 317 municipalities have responded to the questionnaires.¹ The

¹All statistics reported in this document referring to the entire 18-year life of the law are derived from the data collected by the HAC in 1986.

data collected indicates that there have been 292 applications to local Zoning Boards of Appeals for comprehensive permits since the law was enacted in 1969. Comparing activity during the first eight years of the Act with activity over the entire eighteen year life of the law reveals that its impact is indeed increasing: more permits are granted on the local level (Table 1); developers are more often appealing a permit denial to the HAC (Table 2); and permits granted are more often resulting in built projects (Table 3).

3.1 Permits Granted

Local Zoning Boards of Appeals are more likely to grant permits today than during the first few years of the law's existence. From 1969 to the summer of 1978, developers submitted 111 applications for comprehensive permits to local Zoning Boards of Appeals. Of these applications, only 17 permits were granted. In contrast, between 1969 and 1986, of 292 applications, 146 permits were granted. In sum, as Table 1 shows, half (50%) of the permit applications have been granted during the entire life of the law compared to only 15% during the first few years of its existence.

It is not difficult to speculate about the reasons for this turnaround. During the first few years after it was passed,

no one knew how the HAC and the courts would interpret the law. Since then, the Housing Appeals Committee has sustained

TABLE 1 - Comprehensive Permit Applications

	1969 - 1978		1969 - 1986	
	#	%	#	%
Granted	17	15.3	146	50.0
Granted with Conditions	38	34.2	49	16.8
Not Granted	47	42.3	96	32.9
Other*	9	8.1	1	0.3
TOTAL	111	100.0	292	100.0

*This category represents cases in the permit application process.

Source: "Comprehensive Permits for Housing Lower Income Households in Massachusetts" and data collected by Emily Kane for the Housing Appeals Committee.

the local ZBA permit denial in only seven of the 156 cases appealed (HAC file report, 1/30/87). This provides a very clear message to communities that if a developer chooses to appeal a decision, the HAC is very likely to rule in his or her favor. Further, the courts have backed up HAC decisions over and over again. Provided with this information, many communities probably choose to grant the permit rather than go through the entire appeals process and lose. In addition, while it may be difficult to prove, many assert that the law's existence has forced communities to address the need for low

and moderate income housing. They may be choosing to grant more comprehensive permits as part of this effort.

One might ask, then, why are so many permits still being denied on the local level? Many Zoning Boards of Appeals believe they have valid health, safety, and planning reasons for denying comprehensive permits. In several cases, even if the ZBA wants to grant the permit, it often denies it based on public opinion that the proposal is unpopular. According to Murray Corman, the head of the Housing Appeals Committee, the ZBA would rather let the HAC be the "bad guy." In cases in which the ZBA grants the permit in spite of public sentiment opposing it, the developer can face a court challenge brought by abutters or other community residents. Details of several local ZBA decisions denying permits will be discussed in later chapters.

3.2 Cases Appealed

Developers are more likely to appeal permit denials or permits granted with restrictive conditions now than during the first few years of the law's existence. The HAC's repeated actions to overturn a large majority of the ZBA denials indicate to developers that an appeal is worth the time and effort in terms of the ultimate outcome. As Table 2 shows, between 1969

and 1978 applications denied and granted with conditions totaled 85 potential appeals to the state HAC. During that time period, 60 cases (71%) were actually appealed. During the entire 18 year life of the law, 49 permits were granted with conditions and 96 were denied for a total of 155 potential appeals of which 133 (92%) were appealed.

TABLE 2 - Appeals to the Housing Appeals Committee

	1969 - 1978	1969 - 1986
Maximum Possible # of Appeals (applications denied or granted with conditions)	85	145
Actual # of Appeals	60	133
Percentage Appealed	71%	92%

Source: "Comprehensive Permits for Housing Lower Income Households in Massachusetts" and data collected by Emily Kane for the Housing Appeals Committee.

3.3 The Law's Success: Projects Built

Chapter 774's ultimate effectiveness can best be judged by the number of projects built as a result of the comprehensive permit process. As authors pointed out in the literature and as CHPA data verified, the first eight years after the law was enacted saw few projects built compared to the number of permits sought on the local level. Table 3 indicates that only 35 of the 111 (32%) permit applications from 1969 to 1978

resulted in built projects. While it is difficult to discern the reasons for the turnaround, more recent data suggests that this trend has not continued into the present; that is, many more permit applications are now resulting in built projects. In fact, 70% (205 of 292) of the comprehensive permit applications recorded between 1969 and 1986 have resulted in built projects.

TABLE 3 - Projects Built

	1969 - 1978			1969 - 1986		
	Total	#Built	%Built	Total	#Built	%Built
Granted	17	11	65	146	133	91
Granted w/Cond.	38	16	42	49	32	65
Not Granted	47	8	17	96	40	42
Other*	9	0	0	1	0	0
TOTAL	111	35	32%	292	205	70%

*This category represents cases in the permit application process.

Source: "Comprehensive Permits for Housing Lower Income Households in Massachusetts" and data collected Emily Kane for the Housing Appeals Committee.

3.4 Decision Points and Projects Built

Permits can be granted at one of the three points in the comprehensive permit process: when the developer first

applies to the local Zoning Board of Appeals; as a result of a negotiated settlement between the ZBA and the developer after an appeal has been filed with the HAC; or after the HAC issues a decision. The likelihood of a project being built decreases as the process continues: 91% of those permits granted on the local level, 79% of settlements, and 69% of permits issued by HAC order resulted in built projects. Chart 2 illustrates the permit granting process; the numbers indicate how many cases fell into each category. Chart 3 combines two categories in the "Local Decision" stage of the process -- "Permits granted with conditions" and "Permits denied" -- so that all cases appealed to the HAC appear in one category.

As Chart 3 illustrates, of the 146 permits issued by local ZBAs during the past eighteen years, 133 (91%) resulted in built projects. Denied permit applications that enter the appeals process are not as likely to result in built projects: of the 133 cases appealed to the HAC between 1969 and 1986, only seven permit denials were upheld; that is, the HAC agreed with the ZBA that a permit should not be granted. However, only half (69 or 52%) of the remaining 126 "appeals cases" ever resulted in built projects. These remaining cases fall into 4 categories: denial overturned, appeal withdrawn, settlement or stipulation reached, and in HAC hearing or litigation.

CHART 2 - Comprehensive Permit Cases: 1969 - 1986

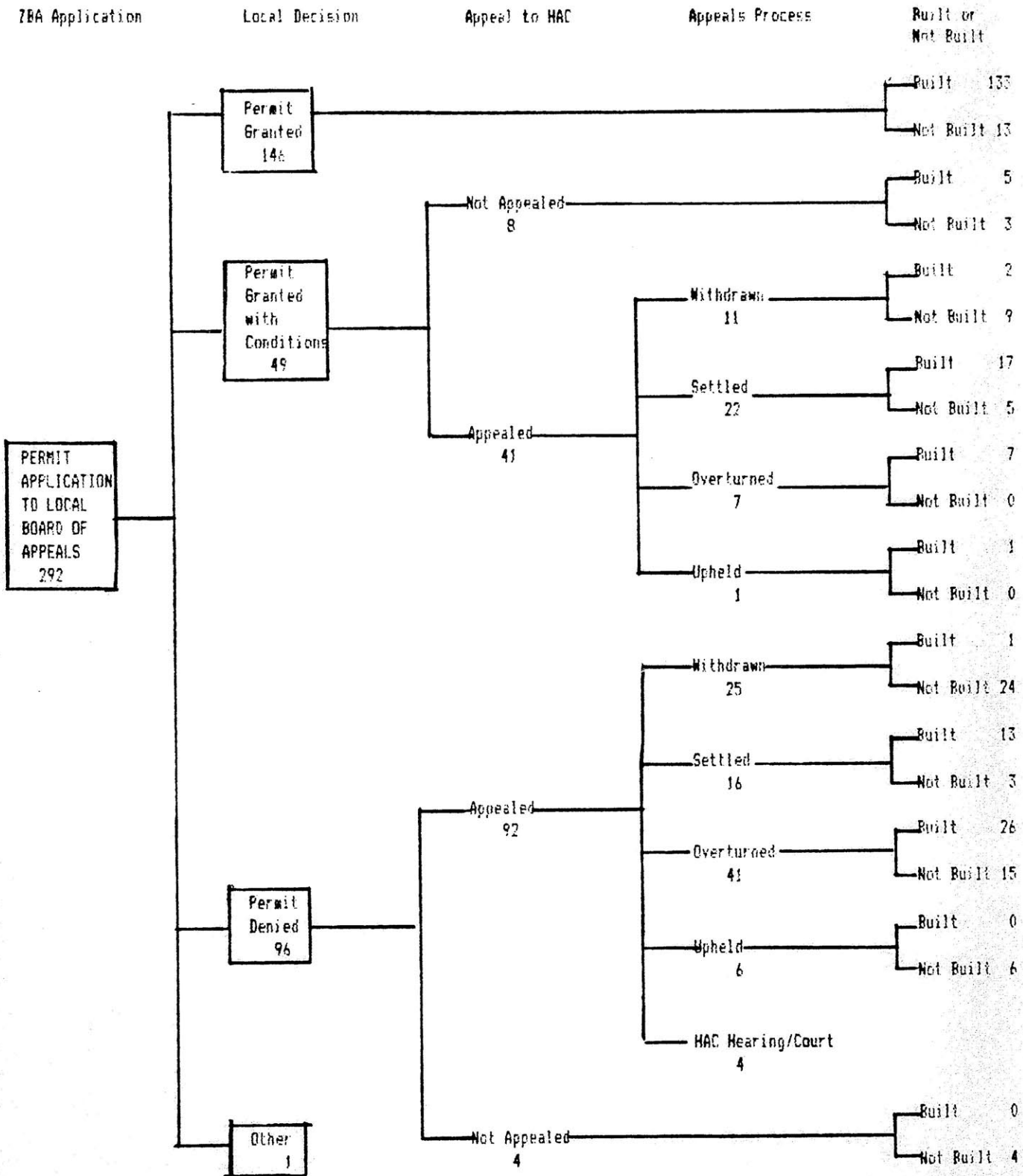
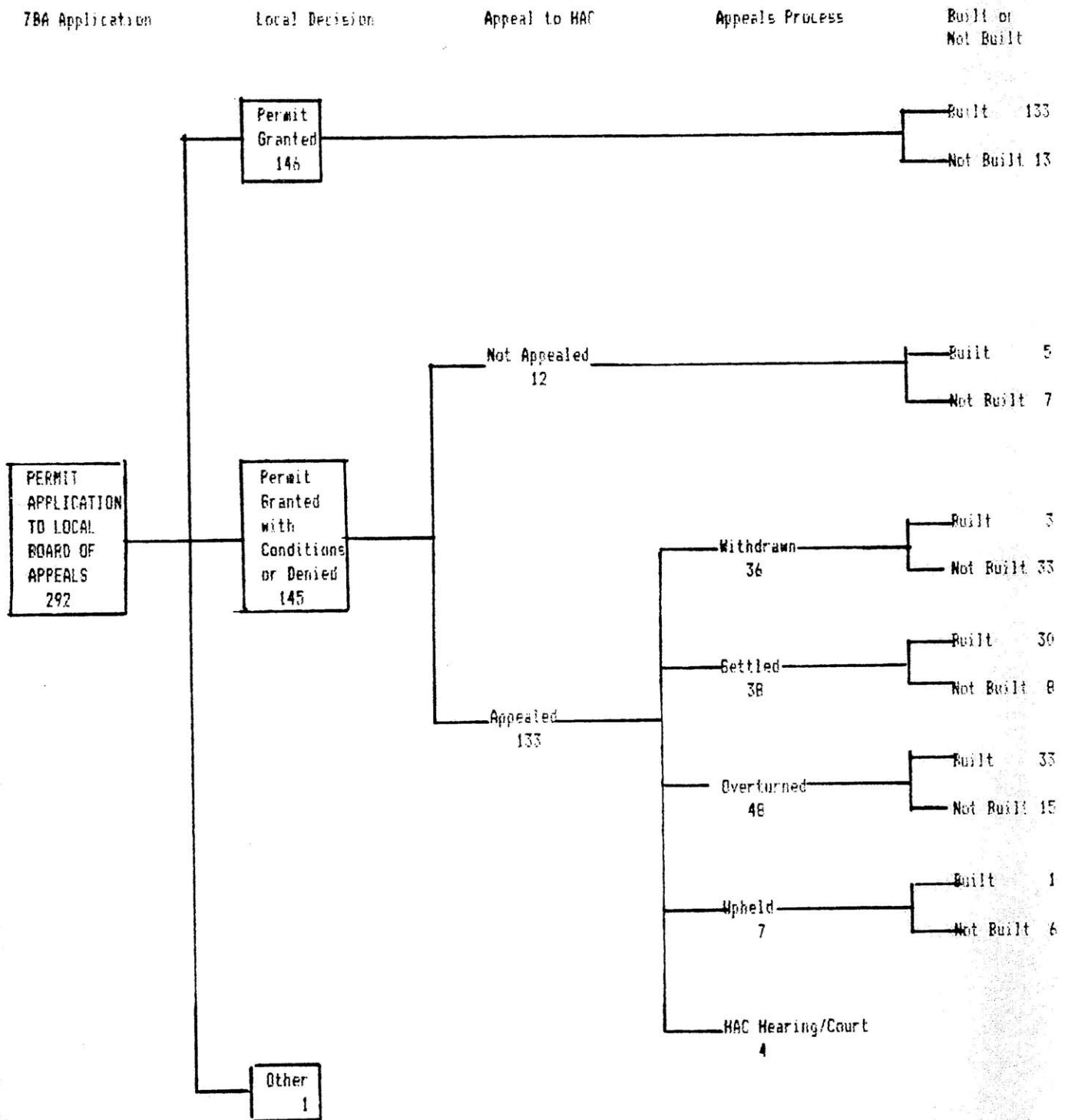


CHART 3 - Comprehensive Permit Cases Appealed: 1969 - 1986



Forty-one permit denials were overturned by the HAC of which 33 (69%) resulted in built projects. Thirty-six applications were withdrawn at some point in the appeals process of which only 3 (8%) were built. Thirty-eight applications resulted in settlements between the community and the developer before the HAC was to issue a decision. Thirty (79%) of these projects were eventually built. Four cases were in HAC hearings or litigation.

Projects that enter the appeals process are less likely to be built than those receiving permits on the local level for a number of reasons. First, a developer who appeals to the HAC and the community in which the permit has been denied often become adversaries. If all interest groups and regulating bodies in a community are in favor of a low or moderate income housing project, a developer is likely to receive a comprehensive permit. A relatively cooperative relationship is formed between the developer and the community and the developer has a conducive atmosphere in which to build her project. In contrast, when a community denies a comprehensive permit and the developer appeals to the state, community members become angry that their power has been usurped. Even if the developer makes its through the appeals process and receives her permit, the environment in which she must work is much more hostile.

Second, the appeals process often takes a long time. According to the rules outlined in the statute, the maximum time from the day a developer applies to the local ZBA for a comprehensive permit to the day the HAC issues a decision is 140 days or about four and one-half months. In reality, the process often takes much longer. Public hearings at the local level can go on for weeks. HAC hearings can take months. In many cases, the entire process has taken one to two years.

Third, many appeals are withdrawn before the HAC is able to reach a decision. A reason often cited for withdrawing an appeal or not building a project after a permit was granted is losing funding (HAC data, 1986). Funding agencies often attach a time limit to their commitment. In other cases, developers have been granted preliminary funding approval only to discover that during the months they were in the appeals process, funding pools dried up.

In at least two cases, the town seized the land on which the developer intended to build his project. In other cases, developers decided to use the land for other purposes such as a conventional housing development or a shopping center (HAC data, 1986).

Litigation, or the threat of litigation, is another reason cited for withdrawing an appeal. It is, unfortunately, a powerful weapon for a community who wants to stop a project. Many comprehensive permit applications result in law suits after the local ZBA grants a permit, while the case is in the state appeals process, or after the HAC has overturned the local decision to deny a permit. In more than one case, the ZBA has granted a comprehensive permit to a developer only to be challenged in court by abutters or other citizens who do not want to see the project built. Although many developers win their cases in court and go on to build their projects (12 of these cases were documented in the recent HAC survey), many others have neither the time, the energy, nor the money to go through a court process. Despite the fact that the courts have upheld HAC decisions over and over again, communities who choose litigation know that they do not have to win, they only have to wear the developer down so that he withdraws from the fight.

3.5 Summary

In sum, the existence and use of the comprehensive permit process has resulted in the construction of many low and moderate income housing projects. However, only half of the

projects that enter "appeals" phase of the permit process get built. Of the 133 projects that entered the appeals phase,

those withdrawn least often resulted in built projects, and those settled most often resulted in built projects.

A more in-depth analysis of withdrawn and settled projects can provide a better understanding of what happens to projects during the appeals process, why they are withdrawn, and why they are settled. The premise that projects withdrawn from the appeals process are very unlikely to result in built projects, while those that are settled are very likely to result in built projects, leads to the following questions: Is there anything about the nature of the comprehensive permit process that causes developers to withdraw appeals? What is the nature of settlements between developers and communities? What are the conditions under which a settlement can be reached?

The next two chapters describe four cases in which appeals to the HAC were withdrawn and four cases in which the developer and the community reached a settlement. An analysis of these cases will attempt to answer the questions posed.

CHAPTER 4. WITHDRAWALS

Developers cite many reasons for withdrawing affordable housing development as well as other types of development proposals. The following cases represent four different scenarios in which developers chose to withdraw their comprehensive permit applications instead of going through the entire appeals process. The question to be answered is: In which cases does the nature of the 774 appeals process become the cause of withdrawing a proposal?

4.1 Barnstable

Donald Laskey was in the theater business in Boston for many years before he moved to Cape Cod and founded Merchant's Bank. He became involved in community issues in Barnstable and wrote a weekly column in a local newspaper. In September 1971, Laskey and his wife Eleanor filed an application for a comprehensive permit with the Barnstable Zoning Board of Appeals. They proposed to build the first MHFA financed project on Cape Cod: 300 rental units for families in a development to be called Leisure Village of Cape Cod.

Three months later in December of the same year, the ZBA denied the permit. The board stated that the application was

suitable in matters of design, construction, health and safety. The board claimed, however, that there was no local need for low and moderate income housing and that it was not obligated to consider the regional need. The board claimed that more than 10% of the housing units in Barnstable were for low and moderate income residents (ZBA Decision, 1971).

The Laskeys filed an appeal with the HAC two weeks after their application was denied. The HAC held its first hearing in February 1972. Discussion on this day centered around whether a need for low and moderate income housing existed in Barnstable and the region (HAC Hearing Transcripts, 1972). A second day of hearings was scheduled but the Laskeys withdrew their appeal at the end of February. They decided they did not like the negative publicity their project was receiving and felt that there was not enough community support to justify continuing with the project (Dunning, 1987).

4.2 Bridgewater

In August 1971, Gerald Zide applied for a permit to build 100 MHFA-financed units of family housing on 9 acres of land on Center St. in Bridgewater. The proposal called for 8 three-story buildings comprising 15 one-bedroom, 69 two-bedroom, and 12 three-bedroom units. The ZBA put forth a decision denying the permit in March 1972.

The board claimed that the public drainage system could not adequately support runoff from the project; the sewer hook-up was too far away; because of 1000 other units in various stages of construction in other parts of the city, the sewer system did not have adequate capacity for this project; the sewer treatment plant was at capacity; schools would become overcrowded; the project would generate too much traffic; the project would not fit into the character of the neighborhood which was made up of single-family homes; and there was no need for low income housing in Bridgewater (ZBA Decision, 1972).

The developer appealed to the HAC in April, 1972. In May, the Bridgewater Zoning Board of Appeals filed a Motion to Dismiss with the HAC stating that the developer had applied for a special permit which came under Zoning Bylaws Chapter 40A and not Chapter 774; the applicant was not a public agency, limited dividend corporation, or a non-profit organization; and there was no need for low income housing in Bridgewater. Later that month, the HAC agreed that the developer had indeed applied for a special permit instead of a comprehensive permit. For this reason, it allowed the Motion to Dismiss and advised the developer to reapply - this time for a comprehensive permit. However, the developer did not resubmit his application to the Bridgewater ZBA.

4.3 Canton

In May 1980, John and Leo Corcoran applied to the Canton Zoning Board of Appeals for a comprehensive permit to build 79 MHFA-financed family rental units. Meeting House Village was to consist of one 6-story building with 71 elderly units and two 2-story buildings with 4 unit family units in each. In August of that same year, the ZBA denied the permit stating that the 6 variances required by the project were too many (ZBA Decision, 1980).

Specifically, the board stated that elderly residents could not safely cross Route 138 to access public transportation; one entrance/exist to the project was not adequate enough to provide police and fire emergency service; Canton's zoning by-laws allowed a maximum building height of 2 1/2 stories and the proposed project was in a single-family neighborhood; the ZBA had to date approved all subsidized housing applications; the traffic impact would be too great; and the site was inaccessible to shopping. In October 1980, after one day of hearings, the developers withdrew their appeal because their application for financing had been denied. The developer believes that the permit was denied strictly because of the low and moderate income nature of the project (Lashley, 1987).

4.4 Mashpee

In February 1981 Marvin Blank of Quaker Run Associates applied to the Mashpee Zoning Board of Appeals to build 132 MHFA financed family and elderly units on 27.2 acres in Mashpee. Quaker Run was to comprise 64 one-bedroom elderly apartments and 68 two-bedroom family apartments. After the ZBA had taken no action, the developer applied for a second time in April 1981. The Board held a public hearing in May and issued a decision denying the permit in June of the same year (ZBA Decision, 1981).

The ZBA stated that more than 10% of Mashpee's housing units were subsidized. The board argued that although the town had 2,982 housing units, half of those were seasonal and should not be used in the calculation. Therefore, the town's 149 subsidized units made up more than 10% of its 1491 year-round dwellings. The Board listed the following additional reasons for denying the permit: the site was within the Otis Air Force Base glide path and therefore health and safety would be endangered; the developer could not guarantee adequate water quality; the development proposal did not give evidence that the developer could provide adequate septage treatment; the project did not have enough parking spaces; the project was next to a projected sanitary landfill and therefore the residents' health and safety would be endangered.

The developer appealed the ZBA decision to the HAC in July 1981. The HAC held the first hearing in September 1981. Ten months and ten appeal hearings later the developer withdrew his appeal. In a letter to the HAC legal counsel, the developer's attorney stated "given the scarcity of available state and federal funds for such projects at this time and given the need of [the developer] to act with respect to this property, [he] proposed a conventional project" for which the ZBA granted a special permit (1983). The developer's attorney stated that the availability of FHA funds needed to make the project financially feasible was becoming extremely uncertain. Because of the opposition to the project, the developer feared that even if he won the HAC appeals case, he would be challenged in court. He therefore decided not to pursue the low and moderate income project any longer (Dunning, 1987).

4.5 Summary

In Barnstable, the Laskey's believed there was not enough community support for their affordable housing project. This type of subsidized housing was new to the Cape Cod area, and they were using a permit process that was new and untested. Donald Laskey has since passed away. We could speculate, however, that if he had the benefit of hindsight in knowing that most affordable housing projects are criticized by

communities in which they are to be built, and that the Housing Appeals Committee overrides most local ZBA decisions denying a comprehensive permit, he may have chosen to continue with the appeals process, receive his permit, and build his project.

The case in Bridgewater is an example of a procedural error that perhaps resulted because the law was new and some did not understand the process by which it worked. Again, we can assume that this error is a result of no fault in the law or the procedures which it outlines.

Canton represents a third example in which circumstances having nothing to do with the 774 permit process caused a developer to withdraw his proposal. Funding shortages are a product of our times and must be addressed in forums outside Chapter 774. The Canton project developer stated in a phone interview that his organization has used the 774 process several times and believes it works well. He explained that hearings average about six months but for the most part the HAC has not dragged them out. He stated that the major expense involved in the Chapter 774 process are legal fees and while it "sometimes cuts into [their] profits," the project still make sense from an economic point of view. It has been his experience that communities oppose low and moderate income projects not because of their design or density but because of

the "emotional sentiment" attached to low income housing. It is his opinion, therefore, that the Chapter 774 process is a necessary one (Lashley, 1987).

The Mashpee case represents an example of the lengthy time commitment involved in the 774 process directly resulting in the developer's decision to withdraw his permit application. It is interesting to note that the same Zoning Board of Appeals that denied the comprehensive permit for low and moderate income housing granted a special permit for a conventional housing project of relatively the same density. This example reinforces the Canton developer's assertion that communities are protesting the "low" and the "moderate" and not necessarily the "housing."

In sum, many withdrawn appeals appear to be the result of issues not directly related to Chapter 774, such as lost funding. However, in some cases the length of the appeals process may discourage a developer and lead him to pursue a less time-consuming alternative.

CHAPTER 5. SETTLEMENTS

Settlements reached between the developer and the local community resulted in built projects 79% of the time. This is second only to the 91% "success rate" for permits granted on the local level (HAC data, 1986). A stipulation or settlement can occur after the local ZBA denies a comprehensive permit or grants a permit subject to conditions the developer deems unreasonable, and the developer has appealed to the HAC. During or before appeals hearings, the two parties often realize they are near agreement on many issues. They enter into negotiations and reach agreement stipulating the conditions under which the ZBA will grant the comprehensive permit. The terms of the agreement become part of the official HAC decision.

Settlements most often include concessions made by both parties. John Carney, legal counsel for the HAC, works with many communities and developers in assisting them in reaching an agreement. He states that "trade-offs" fall into several categories. Some of the most common in his experience include density, building height, building set-backs, quality of streets and sidewalks leading to the development, quality of site buffers, and unit mix. Carney points out that the developer is almost always constrained by the rules and regulations governing financing for the project.

Consequently, the subsidizing agency often becomes party to the negotiations (Carney, 1987) to ensure that any changes in the project meets with its approval. The following four cases represent examples of settlements reached between a developer and local community. They range from a relatively simple "dispute" over one issue that was easily resolved to a situation in which the developer and the ZBA disagreed on many issues but were still able to reach an agreement. All settlements resulted in built projects. Chart 4 summarizes issues and outcomes of the four cases.

5.1 North Attleboro

In December 1981, the North Attleboro Housing Authority applied for a comprehensive permit to build 50 units of state-funded family and elderly housing in a commercially zoned area. The first story of the six-story building was to be commercial with the upper five stories to be residential. The Housing Authority planned to demolish existing commercial buildings on the site in order to build the structure. The ZBA held a public hearing in January 1982 and issued its decision the following month. The ZBA agreed to grant the permit subject to five conditions (ZBA Decision, 1982). Later that month, the developer appealed to the state HAC claiming that one condition would render the project economically unfeasible (Letter to HAC, 1982).

CHART 4 - Settlements: Issues and Outcomes

	Proposed	ZBA Objections/ Conditions	Developer Concessions/ Built	Apparent Legitimate Issues
North Attleboro	50 units state- funded family and elderly	Install sprinkler system throughout building	50 units Install exposed sprinklers in common hallways	Fire Safety
Sharon	24 units state- funded elderly and handicapped	Install traffic light; Improve emergency access; Improve vehicle access	24 units Install light if permission is granted; Compromise access improvement	Traffic; Fire Safety
Marsh- field	30 units federally- funded elderly and handicapped	Inadequate drainage; Septic system improperly installed - Danger to public health; Density	30 units Drainage mitigation; Widen driveways; Install fire hydrants	Drainage; Fire Protection
Rock- port	36 units federally- funded elderly and handicapped	Density; Inadequate Parking; Inadequate buffers; Fire Safety; Isolated site; Poor road conditions	30 units Built emergency access road; Added fire protection mitigation measures	Density; Fire Protection

The ZBA conditions were as follows: the developer was to comply with all state and local building codes; all signs needed to be flush with the building; a pump was to be installed to insure proper water pressure throughout the building; an emergency generator was to be installed; and sprinkler system was to be installed throughout the entire building.

The Housing Authority stated that the state building code required a sprinkler system in buildings over 70 feet high and its building would not reach that limit; it claimed that it could not afford to install the sprinkler system. Two months after the appeal was filed, before any hearings were held, the two parties reached a settlement. The Housing Authority agreed to install exposed sprinklers the entire length of each hallway on all residential floors of the building (Consent Judgement, 1982).

5.2 Sharon

In April 1982, the Sharon Housing Authority applied for a comprehensive permit to build 24 units of elderly and handicapped housing on 38.75 acres of town-owned land in Sharon. The units were to be funded through the Massachusetts Chapter 667 elderly and 689 handicapped housing subsidy

programs. The development was to consist of three attached 2-story buildings with 8 units in each. The Housing Authority already owned 64 units of low and moderate income housing on the site. A 13.5 acre portion of the land was to be sold to the South Norfolk Elderly Housing Services (SNEHSI), who planned to build more units in the future.

The Zoning Board of Appeals held four public hearings on the permit application during May, June, and July of that year. In August the ZBA, acknowledging that Sharon had not yet reached the 10% limit, granted the permit subject to conditions (ZBA Decision, 1982). In September the Housing Authority, stating that several conditions would render the project economically unfeasible, appealed to the HAC (Letter to HAC, 1982).

During the hearings, neighbors on Stonybrook Road expressed concern that their street not be used as an access road to the development because traffic might threaten their children's safety. The conditions for granting the permit addressed this and other safety and environmental concerns. The Housing Authority agreed to six of the nine conditions. The following three conditions were, however, unacceptable: The entrance at Hanson Farm Road was to be widened, plantings removed, and a flashing light installed at its intersection with North Main Street. The emergency access road was to be 14 feet wide,

connected to an access road around the existing 64 units, and continue through to North Main Street. The Housing Authority was to maintain the existing turnaround and construct a new one on the land to be conveyed to SNEHSI.

The Housing Authority claimed that the flashing light requirement was subject to state and local approvals beyond its control. It did not have funds in its budget to widen the present emergency access road to 14 feet and construct a new one of the same width; Maintaining the present turnaround and constructing a new one would make it necessary to relocate a proposed leeching field; the Housing Authority could not afford to do this.

Before the first scheduled hearing date, the Housing Authority and the ZBA reached an agreement (Stipulation, 1982). The ZBA modified the conditions as follows:

1. The Housing Authority was to install a flashing light at the aforementioned intersection subject to state Department of Public Works approval.
2. Although the new access road was to be 14 feet wide, the existing road did not have to be widened. The new road did not have to extend all the way to North Main Street.
3. The existing turnaround did not have to be maintained (resulting in only one turnaround in the development).

5.3 Marshfield

In March 1980 South Shore Housing Development, a non-profit organization, applied for a comprehensive permit to build 30 units of federally-funded handicapped and elderly housing on two sites in Marshfield. The ZBA held a public hearing in April and issued a decision denying the permit later that month (ZBA Decision, 1980). The developer appealed the decision in May.

In its decision, the board acknowledged the need for low and moderate income housing in Marshfield. It stated, however, that:

1. The plans were not definitive (both sites).
2. The ground water line fell 6" above the base of the proposed septic system and this posed a health and safety hazard to the residents (site 1).
3. Surface run-off from the site would drain onto abutting properties and into the street which contained no storm drains resulting in possible flooding (both sites).
4. The town well was located near the first site; the septic system problem therefore posed a health and safety problem to the entire town.
5. The density on both sites was too high; there was not enough green and open space, parking, and space for deliveries, visitors, and emergency vehicles.

In June, the developer's attorney sent a letter to the town's attorney proposing conditions upon which a stipulation could be built (1980). In October, an agreement was reached based on these and other conditions (Stipulation, 1980). Five of the conditions addressed mitigation measures for the drainage problem. The developer agreed to: place a strip of crushed stone around buildings on both sites to collect roof runoff; regrade both sites so that as much water as possible was absorbed into the ground; install catch-basins in both parking lots; and install underground drywells to collect water draining onto both sites from the street. In addition, the developer agreed to widen the driveways from 22 to 25 feet as requested by the fire department; provide adequate site lighting that would be inoffensive to neighbors; install fire hydrants and fire call boxes on both sites; and add one additional parking space to one site.

5.4 Rockport

In February 1985 Frederick Cefalo of Curtis Street Associates applied for a comprehensive permit to build 36 FHA-funded units of elderly housing in Rockport. Cefalo proposed to build a single 2-story building with two wings at a slight angle to each other. Each wing would include 18 one-bedroom

units. Four of the 36 units were to be designed for handicapped residents. The ZBA held a public hearing in March and issued a decision denying the permit in April (ZBA Decision, 1985). The next day, the developer appealed to the HAC.

In its decision, the ZBA acknowledged that a need for low and moderate housing existed in Rockport, but stated that Cefalo's proposal did not adequately meet the needs of the town. The proposed building violated 3 density and 4 parking zoning bylaw provisions. The bylaw called for 1 unit per 10,000 square feet of land, a maximum of four units per building, and a maximum of 3 units to be built per year. In contrast, the proposal called for 1 unit per 3823 square feet of land, 36 units in one building, and 36 units to be built in one year.

The bylaw called for 1.5 parking spaces per unit, 200 square foot parking spaces, greenbelt, fence and shrubbery, requirements to shield the site from neighboring sites, and that no parking spaces be located between the building and the street. In contrast, the proposal called for 1.2 parking spaces per unit, plans showing 180 square foot parking spaces, a request to be excused from buffer requirements, and all parking spaces to be located between the building and the street.

In addition, the ZBA cited many health and safety issues in its decision to deny the permit: The water main serving the site was too small and may have been insufficient for fire fighting; there was inadequate access to the site for fire equipment and other emergency vehicles; the site was too isolated for elderly residents; the sidewalk leading to the site was in poor repair and the town could not afford to repair it; the site subsurface was unstable; there were wetland and drainage issues related to the site; and Curtis Street was in poor condition. The board pointed out that the developer refused to modify his proposal or agree to assume a portion of the added financial burden to the town.

The developer responded to the ZBA's concerns in several documents presented during the public hearing process before the ZBA denied the permit (Supplemental Information Memoranda, 1985). He pointed out that while he proposed to build 11 units per acre, several other developments in town exceeded this ratio. In response to the Board's concern that the site was too isolated, he claimed that the elderly should be allowed to choose to live in a more rural setting; that transportation would be provided; and that the market would respond with delivery services and so on. In addition, he stated that the ocean view would more than make up for the fact that amenities were not close by. It was the developer's

understanding that the water main serving the site was about to be upgraded and that during that time the road would be improved.

In response to the Board's requirement that the parking space/unit ratio be respected, he pointed out that the court had declared in the Hanover case that 1 space per 2.4 units was sufficient for an elderly housing development. MHFA's regulations stated that 3 spaces per 4 units was sufficient. He claimed that a development of detached housing that would meet the bylaw's requirements was financially unfeasible because there was too much ledge and too many wetlands on the site. His budget could not accommodate the cost of expanding the water main. He pointed out that the bylaw stated that parking and greenbelt requirements could be modified by special permit. In addition, the growth rate bylaw calling for only 3 units per development to be built each year applied only to subdivisions.

In June 1985 legal counsel for each party met with the HAC legal counsel to present statements of issues to be discussed in the HAC hearings (Preliminary Conference Memoranda, 1985). The developer presented the following: Does the town have sufficient water resources? Is the Curtis Street water distribution system sufficient? If the answer is no to either question, is it technically or financially feasible for the

town to provide resources to upgrade them? Does the building design present safety hazard from a fire fighting standpoint? Are the Curtis Street roadbed and sidewalk unsafe? If the answer to either question is yes, can the town upgrade fire fighting capabilities or repair the road/sidewalk? Do any of the following present health and safety hazards to the future tenants or other residents of the town: The site location vis-a-vis transportation and other services? Constructing one 36-unit building as opposed to smaller 4-unit buildings? Excusing the density, parking, rate of growth, and greenbelt requirements? Do Proposition 2 1/2 provisions (capping the amount that a town can collect in local taxes to make improvements and so on) supercede Chapter 774 provisions? Do the towns regulations and requirements discriminate against low and moderate income housing?

The town's list of issues questioned the adequacy of: public and private access, water supply, fire protection, water pipes and fixtures, roads and sidewalks, public transportation, and physical site conditions. In addition, they asked: Is the proposed density appropriate to the community? Can the proposal be modified to meet stated needs? Does the proposal meet legitimate concerns of the community? Will the proposed facility meet the needs of those it is designed to serve?

Two days of hearings took place in July 1985. Two more hearing date were scheduled for August but were canceled. The parties reached an agreement and signed a stipulation during that month (Stipulation, 1985). The developer agreed to limit the building to 30 units. This translated to a new design with one wing shorter and consequently further away from the southeast site line. This allowed for an emergency access road to be constructed around the rear of the building, a ZBA requirement agreed to by the developer. In addition, the developer agreed to address the board's fire protection concerns by complying with all fire codes; and by installing smoke detectors in units and corridors, heat detectors in corridors, at least 6 fire alarm pull stations in the building, an 8 inch water main, and one fire hydrant on site. He also agreed to prohibit parking on the interior access driveway connecting to the emergency access road.

The developer agreed to provide not less than 36 parking spaces at 10 feet by 20 feet each. He also agreed to provide a turnaround so cars, vans, and ambulances could enter and exit without having to back up. The developer agreed to other stipulations regarding drainage, utilities, and water saving devices. The ZBA agreed, that in the event the decision was appealed by any other party, it would defend the decision.

5.5 When are Negotiated Settlements Possible?

Of the 133 appeals recorded in the 1986 HAC study, 38 resulted in negotiated settlements or stipulations. Based on the cases described above, it appears that settlements become possible when certain conditions exist.

The most obvious condition is, perhaps, a permit granted subject to conditions. In this case, both the ZBA and the developer agree that a permit should be granted. Often, conditions that render the project economically unfeasible can be modified while the ZBA's interests are still met. In fact, half (22) of the 41 cases appealed to the HAC in which permits had been granted with conditions unacceptable to the developer were eventually settled (HAC data, 1986). Both the Sharon and North Attleboro cases provide examples of relatively straightforward negotiations in which both parties' interests were met. In both cases, the ZBA was concerned about fire protection. Without compromising that goal, the means to achieve adequate protection were modified to benefit the developer.

Although they denied the comprehensive permits, the ZBAs in the Marshfield and Rockport cases acknowledged the need for low and moderate income housing in their communities. This acknowledgement represented a starting point for negotiations.

In communities where the need is not publicly recognized by the ZBA, there is often no basis for negotiation, and hearings center around arguments over the 10% limit and whether or not a need exists.

The most important condition for a negotiated settlement is an understanding on the part of the ZBA, that it has much to gain through negotiations and nothing to gain if the Housing Appeals Committee issues a decision in the developer's favor. According to Anthony Matera, legal counsel for the developer in the Marshfield case, the ZBA's lawyer convinced the board that the town would probably lose the case at the HAC appeal and would consequently be better off trying to convince the developer to address some of its concerns (Matera, 1987).

In the Rockport and Marshfield cases as well as many other cases, the ZBA and the town did not want the housing built. Consequently, they listed many reasons for denying the permits. In most cases, a number of the reasons are legitimate and others are not. Once it is clear that Chapter 774 is the appropriate means for resolving the dispute, a first step in the negotiation process must be determining which issues are important to the town. Legitimate issues can be distinguished from "proxy" issues if a precedent has already been established, or a decision has been previously made concerning the issue, i.e. a moratorium. In the

Marshfield case, drainage proved to be a major concern to the town while the septic system problem was not addressed. In Rockport, the ZBA determined that fire protection issues needed to be addressed but did not insist upon the developer complying with the parking space/unit ratio regulation.

In sum, the following conditions can provide useful starting points for negotiations around a Chapter 774 appeal: a permit granted with unacceptable conditions; an acknowledgement by the ZBA that a need for low and moderate income housing exists in the communities; an understanding that both sides can gain a lot through negotiations and may lose a lot if the appeals process continues. In addition, the developer and the community must determine the real issues to be addressed, and put aside those that were added to "pad" the list of reasons for denying the permit.

CHAPTER 6. CONCLUSION

Chapter 774 has resulted in the construction of 205 low and moderate income housing projects comprising 11,266 units throughout the Commonwealth during the past seventeen years. An additional 1543 units are under construction and 1524 are in planning (HAC data, 1986). It is a commonly held belief that most of these projects would not have been built if the law did not exist. While the first few years after the law's passage saw challenges in court; very few developers willing to experiment with an untested process; and few units ultimately built; today we see a very different situation. The comprehensive permit process is a known, legitimate vehicle for getting low and moderate income housing built.

6.1 The Imperfect Nature of the Law

Many inadequacies of Chapter 774 and the comprehensive permit process have been discussed in previous chapters of this document. One important constraint is the nature of the power the law gives to the Housing Appeals Committee. The statute gives local Zoning Boards of Appeals not only the right but the obligation to grant comprehensive permits. If that obligation is not fulfilled, the state HAC has the power to step in. This aspect of the law is unpopular with many

community residents and officials who feel their power is being unjustly usurped.

In contrast, the Housing Appeals Committee has only two options: it can sustain the local permit denial, or it can overturn that denial and order the local ZBA to grant a permit for the project as it was proposed. Consequently, in a community lacking the minimum number of subsidized low and moderate income housing units, (as long as health and safety is not threatened) the law allows a developer to build a development of any size on any parcel of land. The HAC has no power to order the developer to comply with regulations or requests that would make the project better meet the community's housing and non-housing needs.

If we acknowledge this fault in the law's design and execution, what can we do to correct it? Few would advocate giving planning authority to the Housing Appeals Committee. The type of planning needed to ensure that a development meets a community's housing needs and does not result in negative impacts, is best done on the local level. The law, therefore, must continue to exist as a "stick," albeit an imperfect one. The existence of this "stick," however, provides an incentive for a more positive approach to a negotiated solution.

Members and staff of the HAC encourage each and every community/developer team involved in an appeal to attempt to reach a negotiated agreement. They acknowledge that the solution reached by both parties will be much better than any they have the power to impose. The law's existence and design puts both parties in good trading positions. The developer has the "stick" behind her as well as the knowledge that she is very likely to win the appeal. Given that the appeals process, as it is designed, can go on for many months, the community has time as its bargaining chip. Allowing both sides to be on relatively equal footing is, then, the more positive aspect of Chapter 774. The fall-back position, for those communities who do not actively seek and work on solutions to provide low and moderate income housing and refuse to negotiate with developers who come forward, is the quasi-judicial "all or nothing" 774 appeals process.

Given these two 774 processes: the negotiated process, and the quasi-judicial appeals process, how can procedures be improved so that both function as efficiently as possible?

6.2 Timing Issues

The process by which a developer obtains a comprehensive permit under Chapter 774 is prescribed by the law and has been

clarified by HAC and court decisions. The maximum time from the day a developer applies to the local ZBA for a comprehensive permit to the day the HAC issues a decision should be 140 days or about four and one-half months (Statute Summary, 1969). In reality, however, the process often takes much longer than the time stipulated in the statute. Often public hearings are extended over several weeks. Cases that are appealed often have several hearing days. Because the Housing Appeals Committee is involved in several cases at any one period in time, hearings on one case can be spread out over several weeks.

Should we attempt to shorten the appeals process? Probably not. A shorter appeals process would upset the "trade-off balance" between developers and communities by removing the incentive for developers to negotiate with communities in order to save time. Once it is clear that a community is not willing to negotiate, however, the process should be conducted as quickly as possible. Most believe that it is. Many developers and attorneys interviewed stated that the appeals process is not dragged out and is conducted in a timely manner. John Carney, legal counsel for HAC, echoes this sentiment. "Attorneys know we hold hearings two days a week" and do not pressure us to hold them sooner than possible.

HAC hearings are conducted in accordance with the administrative procedure act of Chapter 30A. As for the fact that some appeals run for several days of hearings, Carney explains that the attorneys for both parties "try" the cases and are responsible for introducing evidence and witnesses (Carney, 1987). Attorneys from either side may object if they believe that evidence about to be introduced is irrelevant. Hearings go on for several days because both parties and the HAC agree that the discussion is necessary (Carney, 1987). One attorney interviewed believes the process is very efficient: "in light of other waits in the judicial process, the wait [for 774 hearings and decisions] is very short" (Matera, 1987).

6.3 Getting Projects Built: Negotiating Sooner and More Often

The evidence -- 91% of permits issued at the local level resulted in built projects (HAC data, 1986) -- presents a strong argument for the following conclusion: for more projects to be built through the comprehensive permit process, developers and communities must be urged to negotiate so that more permits are issued by the local ZBA when they are first requested. The "next best thing" is a negotiated settlement after an appeal has been filed: the HAC data indicates that only 69% of ZBA comprehensive permit denials overturned by the

HAC resulted in built projects while 79% of the denials that were negotiated and settled resulted in built projects (1986). In addition, negotiated settlements result in projects that are more acceptable to both the developer and the community.

Based on these findings, a logical step is to encourage and provide assistance for communities and developers to negotiate before the permit is denied, while the public hearing process is taking place. This probably does occur to a certain extent -- the Rockport case is an example -- but without the assistance of a third party "neutral." The Housing Appeals Committee becomes involved as a negotiation facilitator or mediator only after the permit has been denied and the case is formally appealed.

6.4 Recommendations

Negotiation or mediation services should be provided to communities while the 774 process is still at the local level. In addition, communities may need technical assistance in determining whether incurring costs, relaxing standards, or a combination of both, will best meet their short and long-term needs. This would create an environment for a positive 774 process to take place in which all parties stand to gain a great deal. Those gaining the most from this process are the

future low and moderate income residents of a housing development planned and accepted by the community in which it exists.

METHODOLOGY

This thesis combines both quantitative and qualitative analysis. Data was collected from books and reports; letters and documents; data on Chapter 774 projects collected in 1978 and 1986; and personal interviews.

The two data bases are similar in that the same questions were asked of each Massachusetts municipality during two separate periods in time. However, a small number of communities did not respond to both studies. Therefore, the data collected in the second study for the period between 1969 and 1978 is not identical to the data collected in the first study. For this reason, a comparison between the two time periods was not possible. The data was, in my opinion, of sufficient quality to compare the first eight years of the law's existence with its entire eighteen year life and make the general conclusions stated in the text.

Case studies were used in an attempt to generate general conclusions based on qualitative analysis. They were chosen randomly and through suggestions made by individuals interviewed. An attempt was made to choose cases that varied in terms of year permit application was made, type of developer, type of housing, and whether or not the permit was denied or issued with conditions.

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INTERVIEWS

Murray Corman, Chairman, Massachusetts Housing Appeals Committee, November, 1986.

Carol Baldassari, Metropolitan Area Planning Council, November, 1986.

Don Borchelt, Metropolitan Area Planning Council, November, 1986.

Philip Herr, Massachusetts Institute of Technology, November, 1986.

Clark Zeigler, Massachusetts Housing Partnership, November, 1986, and April 30, 1987.

John Carney, Legal Counsel, Massachusetts Housing Appeals Committee, April 14, 1987, and April 30, 1987.

Emily Kane, Intern to the Housing Appeals Committee, January, 1987.

DATA

Data collected by Emily Kane for the Housing Appeals Committee, 1986.

HOUSING APPEALS COMMITTEE FILES

Information for each of the case studies was taken from Housing Appeals Committee file (located at the Executive Office of Communities and Development, 100 Cambridge Street, Boston, Massachusetts, 11th floor) and personal interviews.

Barnstable

File name: Barnstable 774-1: Leisure Village of Cape Cod vs. Barnstable Zoning Board of Appeals.

Town of Barnstable Zoning Board of Appeals, Decision on Appeal No. 1971-54: Lawrence and Eleanor Laskey d/b/a Leisure Village of Cape Cod, 9/21/71.

Housing Appeals Committee Hearing Transcripts, Lawrence G. Laskey and Eleanor Laskey d/b/a Leisure Village of Cape Cod vs. Bridgewater Board of Appeals, Boston, MA, 2/7/72

Interview: Michael Dunning, Attorney for Lawrence Laskey, 4/10/87.

Bridgewater

File name: Bridgewater 774-1: Gerald P. Zide vs. Bridgewater Zoning Board of Appeals.

Decision letter to Mrs. Jennie W. Carroll, Town Clerk, Bridgewater, from Harold G. Peter, Acting Clerk, Zoning Board of Appeals, 3/24/72.

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Canton

File name: Canton 774-1: Meeting House Village Associates vs. Canton Board of Appeals.

Zoning Board of Appeals, Canton, MA, Meeting House Village Associates, John and Leo Corcoran, Request for Comprehensive Permit Decision, 8/7/80.

Interview: Donald Lashley, Project Manager, Corcoran Development Company, 4/10/87.

Mashpee

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Letter from Michael Dunning to John Carney, 7/5/83.

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File name: Housing for Independent Living Inc. vs. Marshfield Board of Appeals.

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Rockport

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Associates, 8/7/85.