



A Legislator's Introduction to Chapter 40B

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Brief History

In 1969, Chapter 40B became law as a result of a legislative commission's study of unmet housing needs in Massachusetts. The law was seen as a way to help build affordable housing and its intent was demonstrated by the actual title of the legislation, "*An Act providing for the construction of low or moderate income housing in cities and towns in which local restrictions hamper such construction.*" Journalistic shorthand later dubbed Chapter 40B the "anti-snob zoning law" because of its use by developers to bypass exclusionary zoning practices of certain communities. Chapter 40B is also known as the comprehensive permit (CP) law, which is how it is referred to in this brief.

Chapter 40B works by allowing developers to override local zoning regulations for the production of affordable housing and providing them with a streamlined permitting process.

In order to use the CP law, a developer must agree to set aside 25% of the units built for low or

moderate income residents. The remaining 75% of the housing built using Chapter 40B is unrestricted, and may be sold or rented at market rates.

In return for setting aside the affordable units, CP developers may submit a single application to local authorities to permit a project. By using that application, CP developers may also gain relief from density regulations, setback requirements and most other local zoning controls.

A developer can file a CP application in any community. However, in cities and towns where less than 10% of the total housing meets specific subsidized housing criteria, the community is hard-pressed to either deny or set restrictions on a pending application. A developer can appeal a community's denial and/or conditioned approval of a CP to the state's Housing Appeals Committee (HAC).

Chapter 40B is monitored by the state's Department of Housing and Community Development (DHCD). The HAC is an administrative law division of DHCD. The Director of DHCD

appoints one employee and two at-large members and designates the HAC Chairperson; the Governor appoints a town selectman and a city councilor.

Defining Subsidy

Subsidized housing is tracked for the purpose of Chapter 40B for every community in the Commonwealth via a subsidized housing inventory (SHI) maintained by DHCD.

The SHI tracks properties *built* with subsidies that carry deed restrictions and are reserved for occupants below certain income caps, often 80% of the regional median income or less. Generally, properties *not built* with subsidies don't count on the SHI. For that reason, many types of subsidized housing are not counted toward 40-B, including tenant-based federal and state Section 8 certificates and homes purchased with subsidies under a first-time home buyer's program.

The 10% threshold has been established for every community in the Commonwealth. A developer has great latitude in cities and towns with a SHI of *less than 10%* and can appeal a CP denial to the HAC. In communities *where more 10%* of the housing is listed on the SHI, a developer cannot appeal a decision

to deny a CP application. Further, in an appeal before the HAC, the burden of proof is on the community to demonstrate that a Chapter 40B project is *not consistent* with local needs.

The way the statute works essentially gives developers tremendous leverage to secure comprehensive permits in communities with less than 10% subsidized housing and very little leverage in communities with more than 10%.

Recent Developments

While there is little disagreement about the Commonwealth's need for more affordable housing, there is significant debate over whether or not Chapter 40B is – or has been – the most effective tool for providing it. In the 35 years of Chapter 40B's existence, just 33 of the state's 351 communities have reached the 10% affordable housing goal. Currently, about 230 are at levels of less than 5%.

During the first 30 years of Chapter 40B, about 485 comprehensive permits were used to build about 28,000 units of housing. That was an average of 16 different projects and 933 units annually.

However, the last five years have been quite different. In the

period between March 2001 and January 31, 2004, some 436 applications were initiated proposing 29,763 units, according to DHCD records. That's an annual average of 160 projects and 10,000 units annually, or about 10 times the historic average of 40B.

The number of units in the pipeline right now is greater than the number built over Chapter 40B's history.

That's exactly why so many communities have been overwhelmed by the number and size of Chapter 40B permit applications. This ten-fold increase in the use of Chapter 40B to develop housing may have been the single most important factor driving the call to reform the law.

Defining the Problem

Over time, the use of Chapter 40B has changed dramatically. Since 1969, about 40% of all comprehensive permits have been sought by non-profit public housing authorities, while 60% have gone to private, for profit, limited dividend organizations.

During the statute's first decade, 97% of the units produced under the law were affordable. (*An exact breakdown of how much rental housing and how much*

ownership housing was built is not available, because detailed records of CP application activity were not kept until recently. DHCD began collecting data on the increased use of Chapter 40B in the spring of 2001 and emergency regulations to require reporting of CP decisions took effect in August, 2002.)

However, the high degree of affordability during these first 10 years implies that most of the units built were in rental developments.

Since 2000, the opposite has been true: just 27% of the units created using the law are affordable. This 70% shift is partly the result of a reduction in the number of state and federal housing subsidies available to developers and an increased reliance on the private sector to meet the housing needs of the Commonwealth. Accordingly, most of the housing proposed using Chapter 40B today is for ownership units, including single family houses and condominiums.

This rental-ownership distinction is important because the law currently counts rental and ownership housing quite differently, which was originally intended to encourage multi-family rental development.

In an attempt to provide an incentive to create mixed-income rental housing, the HAC ruled in 1981 that when rental projects are

proposed, *all units* (affordable and market-rate alike) count on a community's subsidized housing inventory. Very differently, when ownership projects are proposed, *only the affordable units* count on that community's inventory.

That means when a developer proposes ownership housing like single family houses or condos using Chapter 40B, four units have to be built for every one a community can add on to its SHI. In the twenty years since DHCD put the counting incentive to produce rental units into its regulations, the percentage of actual affordable housing produced using the law has steadily diminished: from 97% through the

70s, to 67% in the 80s, to 54% in the 90s, to 27% today. (Figure 1).

While less and less actual affordable housing is being developed as a percent of the total housing produced under the law, more and more CP projects are being proposed for ownership units. This trend exists despite the state's desire to provide an incentive for rentals.

A closer look at the permitting pipeline illustrates the trend. Before a project is reviewed by the local Zoning Board of Appeals (ZBA), it must receive a letter of site eligibility from a subsidizing agency. Issuance of a site eligibility letter signifies that a developer has a fundable project but does not guarantee a developer any funding.

Figure 1

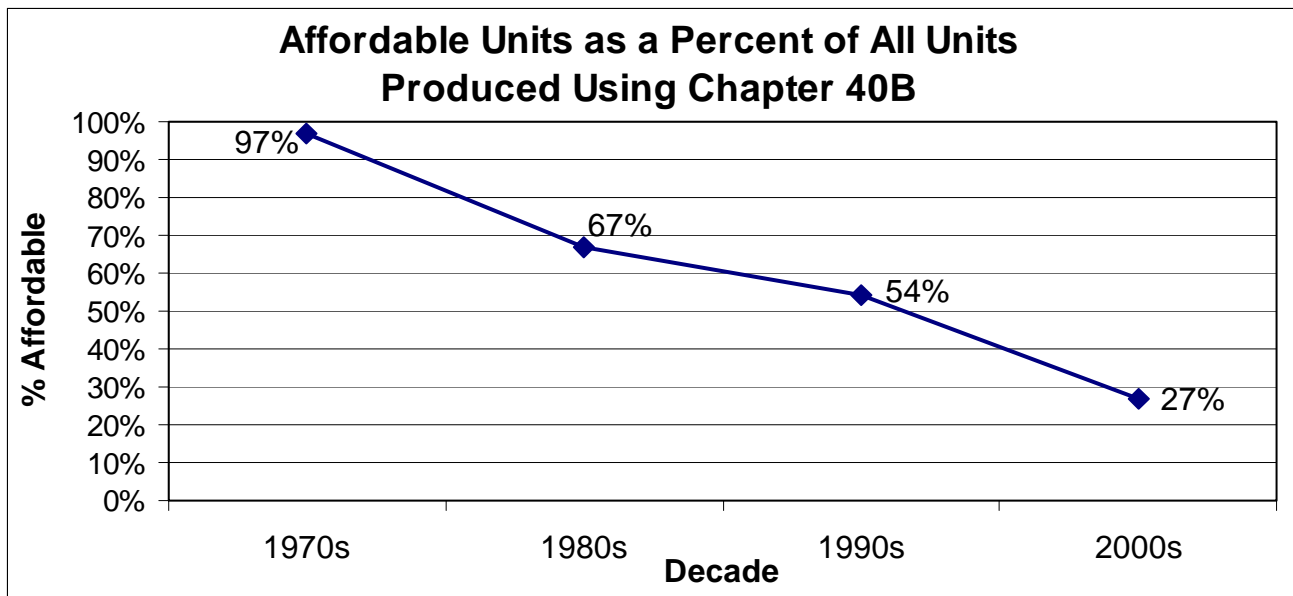
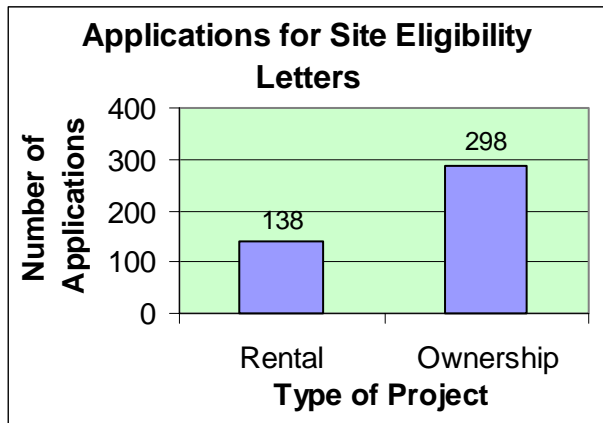


Figure 2



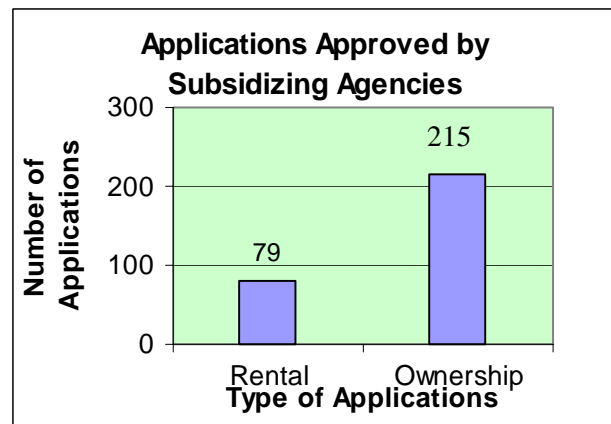
Between March of 2001 and February 2004, 436 applications for site eligibility letters were filed for 11,970 rental units and 17,793 ownership units. Of those applications, 138 were for rental projects and 298 for ownership projects. (Figure 2)

Subsidizing agencies have issued about 294 site eligibility letters in that time frame, representing 8,793 rental units and 13,334 ownership units. Of those applications that have received eligibility notices, 79 propose rental

developments and 215 propose ownership projects. (Figure 3).

That means Chapter 40B ownership projects are entering the pipeline at a more than 2:1 ratio to rental projects, and are currently under review by local ZBA's by a margin of nearly 3:1.

Figure 3



Of those units under review right now, 3,520 in the ownership projects and 2,282 in the rental proposals would be affordable.

The Local Response

As more and more Chapter 40B development proposals appeared, residents, planners and officials began trying to figure out what it would take to hit the 10% threshold and regain local control over zoning and development. The answer wasn't easy because of the inconsistent counting policy.

If a community of 10,000 households was starting at zero, and

needed to add 1,000 affordable units to its inventory, it would take 4,000 single family homes. If the same community were to hit 10% via rental development, it would only need to add 1,000.

One result of the counting discrepancy is that if a series of ownership only proposals were made in a town, that community could be forced to carry as much as a 40% growth rate.

That very dynamic is happening all over the state.

Chapter 40B projects are currently pending in 147 communities. Of those, 33 communities are reviewing two or more ownership proposals without any rental units in the pipeline.

That makes the counting inconsistency a problem for every community working toward the 10% threshold. Based on current regulations and the actual figures of the subsidized housing that exists in Massachusetts, Chapter 40B could be used to permit 54,000 more apartments or up to 254,000 more single family homes statewide before the 10% threshold was met.

Currently, the average size of CP ownership projects as proposed is 57 units, meaning the

communities would stand to count just 14 per proposal. That's not substantial progress for the city or town that needs to add 200, 300, or 500 units. It's also a reason why so many communities are making little progress toward the 10% threshold despite having numerous units in the permitting pipeline.

Why Ownership?

There are several reasons for Chapter 40B developer's shift toward ownership units. One is the huge appreciation in real estate, with single family homes and condos leading the list.

In fact, there's nothing about Chapter 40B to limit the sale price of the market rate units that make up 75% of most proposals. That means Chapter 40B can be -- and is -- used to permit \$800,000 houses outside of the zoning code as long as developers provide 25% affordable units *and* limit their profits to 20% of the total development costs.

Chapter 40B proponents maintain that at a time when state and local funds are scarce, this market driven piece eliminates the need for government subsidy. The profit from the market rate units pays for the affordable units. Chapter 40B critics have another view, which is that the use of the ability to override zoning regulations (which was initially

established for public housing agencies and non-profits) has been substantially shifted to for-profit, private development interests.

The unintended consequence is that affordable housing -- initially the goal of the statute -- has been relegated to secondary status by many developers.

Finally, there's another aspect of the CP regulations that simply makes it easier to build and recoup one's investment via single family houses than apartments.

The developer who permits ownership units via Chapter 40B can build his units and sell them with two primary requirements: 1) the affordable units must carry deed restrictions and be sold using a housing lottery or other affirmative marketing plan that ensures equal access to subsidized units; and 2) profit is capped at 20% of the total developments costs. (Although the 20% profit appears to be much less than the market average of 30%-40%, it is not. Total development costs cover all carrying costs associated with the property, including interest, insurance, legal expenses, as well as all design and construction.)

Beyond those restrictions tied to the initial development activity, the developer of ownership units

under Chapter 40B has no long term ties to a project.

The situation is quite different for the rental developer using Chapter 40B. Rental developers recoup their profits using a formula that entitles them to 10% of the owner's equity in the project annually. Or, they may sell the development to a subsequent operator. In that case, profits are capped at 10% of the development costs, half of that available to ownership developers.

Either way, under Chapter 40B, the ownership developer has access to profit sooner *and* has fewer long term ties to a development. The result is that fewer developers are in the 40B business for rental projects. Those that are tend to be national rental housing corporations, several of them publicly traded, and housing agencies. Private, for-profit developers can be done with ownership projects as soon as all the units are sold.

The Response

Concerns and complaints about the fairness of Chapter 40B and the enormous amount of permitting activity using the law inevitably brought the 40B debate to the Legislature.

During the 2001-2002 session, there were more than three dozen bills seeking to reform the law. After nearly two-years of ended with Governor Swift's veto during the summer of 2002.

For this 2003-2004 session, there have been more than 70 bills proposed, ranging from technical corrections to total rewrites of the Chapter 40B law.

In fact, the pressure to “do something about Chapter 40B” became so intense that the law became a campaign issue in the 2002 gubernatorial campaign.

Within five weeks of taking office, Governor Romney announced formation a Chapter 40B Task Force to review the law and develop a set of detailed recommendations to overhaul the way comprehensive permits work. Made up of 24 members from the construction industry, housing advocacy and agency organizations, local and state government, the Task Force met frequently from March to May and issued its recommendations on May 30 in a 300 page report. The entire report is available on the web at: <http://www.state.ma.us/dhcd/Ch40Btf/report/default.htm>

As this guide is written, many of the Task Force recommendations,

discussions, a legislative compromise was reached in the last weeks of the session. That effort

as well as components of Chapter 40B bills filed this session have been included in a bill reported out of the Joint Committee on Housing and Urban Development (JCHUD).

The Recommendations

One of the central recommendations of the Task Force and the JCHUD bill is a compromise proposal to address the discrepancy in the way the state counts ownership units permitted via Chapter 40B.

The proposal is to add two units to a community's subsidized housing index for every one ownership unit that gets permitted with a comprehensive permit. This way, 50% of the houses and condos permitted by the law are added to a community's SHI, instead of the current 25%.

The ownership adjustment was a compromise forged by the Task Force. Many felt that 100% of ownership units should be counted by the state because all units enjoy the same relief from zoning, all benefit from the same streamlined permitting process and all qualify for the same low-interest construction financing used with the affordable units. Others

Task Force members felt that there should be no change at all.

The compromise would reflect the reality of Chapter 40B, which is that about 66% of the units in the pipeline are part of ownership proposals. It would also more closely reflect the actual number of units gaining zoning relief through the statute.

The second central reform recommended by the Task Force, would give communities more control over the development of affordable housing in return for taking initiative to plan and encourage affordable housing where they want it.

The recommendation would give communities credit for making “planned progress” toward their 10% goal and would address the all or nothing nature of the statute.

The planned progress approach first appeared in the Chapter 40B bill passed during the last session, when the legislature approved a program to allow communities to take a one year break from Chapter 40B *if* they had adopted an affordable housing plan *and* added .5% to their SHI in the past 12 months.

Combined with the proposed change in counting method of

ownership units, the planned progress proposal recommended by the Task Force and JCHUD Committee puts realistic yearly Chapter 40B goals within reach of most communities. The result is an incentive program for communities to become pro-active rather than reactive in the development of affordable housing.

Ultimately, these recommendations together form the core of the Chapter 40B changes recommended by the Task Force and the JCHUD committee. They are changes that most help communities that help themselves.

Chapter 40B remains a powerful tool for developers to use to permit housing. In cities and towns that are not proactive with their affordable housing plans, developers will retain the ability to permit projects over the objections of local officials. In those communities taking the lead, however, Chapter 40B could become a more cooperative process between developers, local planners and officials.

Sources

Data in this report came from information provided to the Chapter 40B Task Force and spreadsheets prepared by DHCD tracking Chapter 40B Application notices and Project Eligibility Notices 3/2/01 – 02/1/04.

The document was written by Rep. Harriett L. Stanley and Todd Prussman, 2nd Essex District Director. It was reviewed by

Chairman Kevin Honan, Chairman Harriette Chandler and the staff of the Joint Committee on Housing and Urban Development.

| Data Summary* | | | | | | |
|---------------------------------|--------------|-------------|--|------------|-----------|--------------|
| Category | Applications | Total units | | Affordable | Ownership | Rental units |
| Rental with site letter | 79 | 8,793 | | 2,282 | 142 | 8,651 |
| Ownership with site letter | 215 | 13,334 | | 3,520 | 13,334 | 0 |
| Rental - site letter pending | 59 | 3,463 | | 789 | 152 | 3,311 |
| Ownership - site letter pending | 72 | 3,945 | | 1,005 | 3,945 | 0 |
| Site letter denied | 11 | 228 | | 62 | 220 | 8 |

| Total Project Figures | | |
|--------------------------------|--------|--------|
| Total applications | 436 | |
| Total rental applications | 138 | 31.65% |
| Total ownership applications | 298 | 68.35% |
| Total units | 29,763 | |
| Total affordable units | 7,658 | 25.73% |
| Total ownership units | 17,793 | 59.78% |
| Total rental units | 11,970 | 40.22% |
| Denial % of total applications | 11 | 2.52% |

| Projects with Site Letters | | |
|---------------------------------------|--------|--------|
| Total applications | 294 | |
| Total rental apps | 79 | 26.87% |
| Total ownership apps | 215 | 73.13% |
| Total units | 22,127 | |
| Total affordable units | 5,802 | 26.22% |
| Total ownership units | 13,334 | 60.26% |
| Total rental units | 8,793 | 39.74% |
| Denials as % of site letter decisions | 11 | 3.74% |

* The pipeline data is tracked by DHCD via notice requirements for applications for and issuance of site eligibility letters. The data set used for this paper is based on DHCD's Application Notice and Site Eligibility Notice database 3/2/01-1/31/04. The responsibility to report the issuance of actual comprehensive permits resides with municipalities. For that reason, the review of some projects listed with eligibility notices may be complete. A copy of the actual data is available from the office of Rep. Harriett L. Stanley.