

# Affordable Housing in Massachusetts

## *Failed Strategies and New Directions*



A Comprehensive Assessment for Improving Affordable Housing

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## Credits

### **The Massachusetts Affordable Housing Education Initiative**

The Massachusetts Affordable Housing Education Initiative is a growing non-profit organization striving to raise awareness about and promote policy solutions to the current affordable housing crisis in Massachusetts. The organization collaborates with and seeks the support of other affordable housing advocacy groups and professionals in producing affordable housing policy solutions for working families in the Commonwealth. It actively welcomes creative collaboration among diverse professionals to assist in providing real solutions to a growing affordable housing crisis.

**Failed Strategies and New Directions** is the first in a series of comprehensive reports and white papers sponsored by the Massachusetts Affordable Housing Education Initiative. This initiative is actively supported to provide insights and diverse advice on confronting issues of worsening housing affordability in Massachusetts. For more information, please contact the Massachusetts Affordable Housing Education Initiative.

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## Executive Summary

- Existing alternative affordable housing plans are more successful at producing affordable housing than 40B
- 40B is directly responsible for inflated land and housing costs and, accordingly, worsening housing affordability
- Massachusetts must prioritize redevelopment over new development to achieve worthwhile results
- Massachusetts must support more cost-effective approaches to affordable housing production
- Massachusetts must enforce its Sustainable Development Principles for all residential development.

Massachusetts is one of the most prosperous states in the country, with a high median income and high levels of education. Its population is stable or declining and thus it does not have the population growth pressures of other states. Contrary to the notion that Massachusetts does not have enough homes, the state has an over-supply of single family homes<sup>1</sup> and is experiencing historically high vacancy rates.<sup>2</sup> The underlying problem of worsening housing affordability can be attributed to the continued production of housing units that are not affordable enough (either by price or type of housing) and escalating land prices. As a statute, 40B completely ignores the working poor at the low end of the “need” spectrum. This is a fatal flaw and ensures that certain demographics remain unassisted. Despite a multitude of existing alternative affordable housing policies, Massachusetts has invested nearly all of its available financial and programmatic support to the “Comprehensive Permit Statute” or M.G.L. Chapter 40B,<sup>3</sup> a housing development plan that subsidizes and develops market rate units at three times the rate of affordable unit production.

Under 40B, developers are allowed to bypass local zoning, substantially increasing their profits due to their ability to overdevelop parcels of land. 40B has, in the name of promoting affordable housing, allowed developers to violate sound land-use policy and to extract more profit from the land they invest in, regardless of whether or not developers are increasing the proportion of affordable housing in a community. This practice allows for significantly higher profits than normal housing production and has encouraged the practice of developers buying land at exaggerated prices, effectively driving up the price of land and, in turn, the cost of all housing, including existing units. Land prices will continue to rise so long as developers can continue to use 40B to yield high profits on land by developing mostly unaffordable housing. Poor profit oversight and shoddy management have also exacerbated the high cost of housing by allowing developers to add price premiums to market-rate units to surreptitiously increase profits, a practice that artificially drives up the cost of housing. The results, after nearly four decades of the Comprehensive Permit Law, are not surprising: housing affordability in Massachusetts has drifted steadily downward, with the state now ranking 49<sup>th</sup> in the country.<sup>4</sup>

The Comprehensive Permit Law has been unsuccessful when compared to alternative affordable housing programs in Massachusetts and is an outright failure when compared to affordable housing plans in other states.<sup>5</sup> When housing becomes out of reach for the majority of working families, all residents share the burden. Low- and medium-cost housing is rapidly disappearing and more families are forced to move further away from jobs, friends and family. Others, with fixed incomes, are confronted with more dire circumstances and are faced with homelessness, debt and hunger. All recent housing reports reveal that families are becoming less able to afford homes across the Commonwealth, leading to justified concerns about the state’s future economic vitality.

Affordable units usually have “deed restrictions” or “covenants” that effectively mandate standards for not only the present owner of the land, but subsequent future buyers as well. These deed restrictions typically create conditions of ownership such as that the affordable unit is rented only to qualifying tenants at fixed rental rates and upon established rental terms. For owner-occupied units, deed restrictions require that the affordable unit only be sold to qualified buyers at a set resale price. Most often, deed restrictions will establish the maximum amount that the affordable unit is sold at including restrictions on how much buyer’s can borrow for financing. Sadly, the majority of the state’s affordable housing stock is at risk of having deed restrictions expire. These

deed restriction expirations will cause existing units to revert back to current market rates, meaning that they will no longer be restricted within certain affordable price ranges.

Because of the counterproductive regulations surrounding the state's Comprehensive Permit Law, the state's existing stock of affordable units is precarious at best. Many of the existing units are in disrepair because funding is expended on expensive programs like 40B leaving inadequate amounts for state agencies to meet their legal obligation to help pay for the maintenance of existing units. An October 2006 report by the Massachusetts State Auditor concluded that myriad examples of health and safety plagued the state's supply of affordable housing. Documented issues included: "cracked and damaged foundations; deteriorating concrete on stairs and sidewalks; extensive mold and mildew damage to interior walls; rotted and weather damaged window frames, siding and shingles; and areas damaged by rodent and insect infestation." Despite the deplorable conditions of many units, the working poor and lower middle class still can barely afford to live in most units, even those classified affordable by state government standards.

The means of producing affordable housing is as important as the resulting housing itself. In order to succeed in improving housing affordability, Massachusetts must fundamentally change the means by which it produces affordable housing. Local and regional affordable housing initiatives have had some success even under the restrictions of current regulations. State level agencies and state regulations effectively block regional planning, do not provide adequate funding for successful affordable housing initiatives, and actively promote construction of dense, high-end market rate developments in suburbs while ignoring the urgent need for better affordable units in our state's cities. Massachusetts will not succeed in meeting its educational, socio-cultural and financial goals if it continues to pointedly ignore its urban cores, which, at present, are being left to rot while financial support is routed towards accelerating highly profitable, market-rate growth with dismal contributions of reasonable affordable housing. The state's housing policies of the recent past have clearly failed and need to be improved.

By definition, a successful affordable housing plan should be consistent with community or regional needs for housing. Massachusetts, however, has chosen to promote an affordable housing plan, M.G.L. Chapter 40B, which has no foundation in planning principles or respect for diverse municipal needs. 40B epitomizes an "ends justifies the means" methodology that regularly ignores "smart growth" principles, the state's own rules for sustainable development and an otherwise obvious challenge, the need for more affordable housing.<sup>6</sup> Virtually everyone agrees that housing should be as affordable as possible and should meet certain standards for livability. Accordingly, residents understand why Massachusetts will be stronger when people are not turned away from places they deserve to live in but cannot afford due to failed affordable housing policies.

It is far less expensive, both financially and in terms of environmental impact, to achieve this goal by improving and redeveloping existing units than by building new ones. By pursuing a more cost-effective strategy for producing affordable housing, Massachusetts will create much needed housing for the diverse needs of our state's population. The state is also exacerbating negative impacts of growth by exempting 40B developments from the state's sustainable development guidelines. Massachusetts cannot afford nor should it allow for affordable housing production to be exempt from the Commonwealth's Sustainable Development Principles. The entire state will enjoy added benefits by producing affordable housing that complements the diverse needs of the state's population while respecting the environmental demands and limitations of the Commonwealth. The economic benefits of job growth in the sustainability industry and the marketability of the state as a high quality place to live are considerable and are just two of the positive examples of sustainable planning.

Considering the failures of Chapter 40B, immediate policy actions must be implemented to improve affordability in Massachusetts:

1) Prioritize redevelopment over new development. Notable advantages to prioritizing redevelopment over new development are the obvious benefits to the environment and the promotion of sustainable industry practices,

through which Massachusetts can become a leader. Yet current state policies mandated by the Department of Housing & Community Development (DHCD) clearly favor the new construction of 40B, and the lion's share of financial support has been allocated to new construction projects consisting of mostly market-rate units. The vast majority of these projects are built in the suburbs and semi-rural communities. Because the 40B statute and its supporting regulations continue to mandate these projects, cities such as Boston, Lawrence, Worcester, and New Bedford are denied significant funding sources to enhance their housing stock and have been hobbled in their ability to provide the number of affordable units that are needed in these anchor cities.

2) Implement and fund more cost-effective approaches to affordable housing production. The current system endorses the power for development corporations and their banks to making decisions for you and your community that are not only not in your best interest, but seem only to enhance the profitability of the new construction and lending industry. 40B forces already financially-strapped communities to make investments in and assume secondary costs for unwanted, unnecessary growth without receiving an increase in revenue. This pattern of putting the financial burden on struggling municipalities accentuates the ineffective method 40B uses to pursue affordable housing construction. An affordable housing strategy emphasizing improvement and redevelopment rather than "build out" is considerably more cost-effective. Many communities, particularly those with a shortage of "buildable" land, can provide an order of magnitude more units with a rehabilitation approach rather than with new construction. Given Massachusetts' stable or declining population, DHCD's annual allocation for subsidizing new construction should instead be applied to improving housing through refurbishment and redevelopment. Congruently, if MassHousing (the state's "affordable housing bank") provided loans for redevelopment instead of new development, then housing shortages and affordability problems in Massachusetts could be greatly ameliorated, in fact almost eliminated, in a matter of less than five years. By shifting the focus from new construction towards redevelopment, residents would experience immediate improvements in quality of life, particularly residents in metro areas. The current approach of mandating new construction and market-rate growth while ignoring environmental and capital costs have caused unnecessary negative pressure on municipal budgets and negatively impact the fabric of historic communities. These negative trends ensure that the quality of life for all Massachusetts residents is continually degraded. As an example, despite losing almost a quarter of a million people in population since 2000, Massachusetts constructed more than 32,000 new homes, forcing some communities to experience housing growth of upwards of 900%! This approach is illogical and is responsible for the deterioration of Massachusetts' quality of life.

3) Align the Affordable Housing Plan with the Commonwealth's Sustainable Development Principles. The Department of Housing and Development (DHCD) guidelines for development clearly dictate that the state's goal is to "undertake a comprehensive approach to housing and community investment in a way that respects landscape and natural resources. The administration believes that sustainable development can and should take place in all communities." To be successful, they support investments that "bring the housing market into equilibrium" and which enable the state to "attract new businesses while making strategic land use choices." However, the 40B statute, a law the director of DHCD has called "fantastic," ensures that local planning and zoning intended to meet those important state goals is impossible. Worse, the DHCD has promulgated guidelines for 40B projects that are in direct opposition to the state's sustainability goals. Proposed regulatory changes designed by the DHCD further endanger the economy and the livelihood of countless residents.

Rather than take its own recommended comprehensive approach to the provision of adequate and affordable housing, the DHCD emphasizes and continues to promote increasing new construction that degrades the environment, residents' quality of life and the state's economic vitality. In November, 2007, DHCD Director Tina Brooks confirmed that the agency's annual budget is over \$600 million dollars and that no money has been expended to support redevelopment projects involving buy-down strategies to make more affordable units available.



In its rush to accelerate new construction via the 40B statute<sup>7</sup> the DHCD routinely approves 40B applications that violate its own, and other agency's, guidelines. 40B construction, with its lack of long-term deed restrictions, minimal percentages of affordable units, excessively high densities, and lack of local control is an inherently unsustainable strategy. These concerns have been repeatedly ignored by the DHCD as it continues to promote increasing new construction over strategies that will improve affordable housing stock, local job creation and economic vitality.

4) Raise Massachusetts' Affordable Housing Strategies to the standards of other states. Massachusetts's failing record on affordable housing, in conjunction with the better practices pursued by every other state in the country, clearly dictates that a new approach is needed that does not require forced new construction that is not wanted, not needed, and which stands in the way of more effective, economical and more sustainable alternatives. The Comprehensive Permit Law, M.G.L. Chapter 40B, contains provisions that actively obstruct viable solutions for affordable housing and preclude effective local and regional planning for long term sustainable solutions. Combined with counterproductive and misguided regulations from within the DHCD, 40B has become the foundation for a strategy that emphasizes new construction at a staggering cost. The cost in direct subsidies, loans, tax credits, administration and local community burdens totals in excess of a billion dollars every year. This amount is great enough to produce 20,000 truly affordable units each and every year using redevelopment and buy-down strategies instead of new construction. More effective solutions have been proven to provide an order of magnitude more affordable housing for the same or less cost but without the deleterious effects of new construction and without overriding local zoning, conservation and planning. With the American Planning Association referring to 40B as the "most regressive planning legislation in the country," it is evident that until the obstructive provisions of the 40B statute are repealed, tax money will continue to contribute to deteriorating affordability conditions and the DHCD and MassHousing will continue to be corrupted by the construction industry lobby, which continues to promote its profits over people.

## A Pattern of Failure, a Time for Progress

- Challenges to 40B are grounded in legitimate and reasonable concerns
- Statutory and regulatory changes to 40B have accelerated abuse and failure
- The public lacks accurate information about 40B
- Perennial leaders in affordable housing production have never used 40B

Two underlying myths have generated decades of misinformation about the Comprehensive Permit Statute. The first myth is the notion promoted by developers that Chapter 40B grows more controversial in direct relation to its increased use. This myth is used to perpetuate the developer claim that the only people who oppose 40B are “not-in-my-backyard” types or “NIMBY.” It is inaccurate to claim that public debate over 40B and challenges to its methodology increase in direct proportion to its use. 40B has faced four major challenges in four decades, none of which occurred during heightened use of the statute, but rather due to public questions about its legitimacy and often during periods when 40B construction slowed. The law was first challenged when enacted, having passed the legislature by only one vote and during a struggle between urban and suburban legislators who were at odds over social policy disagreements. 40B was again challenged in the late 1980s when the statute was distorted by the addition of lucrative home-ownership units, which had previously been left out so that increased rental properties could be produced. In 1999, a third challenge was mounted in opposition to the decision to allow for a consortium of private banks to provide funding for 40B projects. The 40B statute mandates that monies should be from state or federal agencies but after intense lobbying by the developer industry and related special interest groups, private banking monies were routed through the Boston Federal Home Loan Bank as a legal loophole. This change fundamentally altered 40B projects by creating a “pigfest” of profiteering and opened the floodgates for large development conglomerates from out of state to enter Massachusetts to join the profit frenzy. This created the largest increase in 40B production in its history but did not increase the rate of affordable unit production. To the contrary, affordable unit production dropped to historic lows. In 2007, a diverse assembly of grass-roots groups, civic organizations and municipal leaders formed the “Coalition to Repeal 40B” in order to advocate for replacing the statute with alternative affordable housing programs. This effort was initiated at a time when 40B projects were being proposed at significantly slower rates.

The second myth relates to an exaggerated and misleading 40B record. Contrary to habitual claims in the media by pro-40B advocacy groups that 40B has produced 50,000 units of affordable housing; the law has only produced, at best, 26,000 units of affordable housing in four decades. The rest are simply market rate units that happen to be included in 40B projects. Furthermore, many of the affordable units are deed restricted only in the short term and will become market rate units. As noted, because 40B regulations require only very weak deed restrictions, starting in 2010, 53% of the state’s existing affordable housing stock will revert back to market rates because their deed restrictions will expire. While these additions are too few to tout as a success story, perhaps what is most important to note, and what is often misunderstood, is that 40B includes market-rate and other units in its affordable housing totals according to guidelines set forth in the Comprehensive Permit Statute. These regulations allow market-rate units to be counted as “affordable” and are used to exaggerate statistics that promote 40B. Data gathered for an official state report between 2002 and 2006 confirms that published amounts of 40B’s total “affordable housing” contributions were inflated by 63% by including units that are not actually affordable.<sup>8</sup> 40B data also disregards the annual contributions of affordable housing by municipalities since the statute is designed to only count units constructed using 40B subsidy standards. Far from a recipe for success, this pattern of development has obstructed the production of real affordable housing for the residents of Massachusetts.

Perennial leaders in the production of affordable housing, which include the state’s ten cities – Boston, among them – have never relied on 40B and have done an admirable job of producing better affordable housing with the limited funding available under 40B’s regulatory and funding schemes.<sup>9</sup> Local and regional agencies have a proven track record of success at preserving existing affordable housing and in producing more through

redevelopment programs and rehabilitation programs that maintain affordability without destroying the cultural fabric of neighborhoods and communities. It is an appropriate time for elected officials to confront the increasing affordability crisis facing Massachusetts families and to invest public resources in more successful affordable housing programs at the local and regional level to bring housing back within reach for those who need it. This investment will pay significant dividends in the Commonwealth's economic vitality, our educational system, family stability and for sound-land use and sustainability practices. The Commonwealth ought to take immediate action to ameliorate 40B's pernicious effects on affordability before the hardships of low income families are again obscured behind a façade of universal prosperity. With significant state budget deficits and ongoing municipal financial woes, the time is right to implement a new approach. Change is more likely to occur at a time such as this when the residents of Massachusetts are confronted with increased financial challenges. This obligates legislators and state leaders to think creatively and to not simply maintain the status quo.

Across the Commonwealth, housing affordability has moved out of reach for working families, recent graduates and senior citizens. Half of Massachusetts renter households are now risking financial stability by paying more than a third of their income for housing. Massachusetts home-owner costs are also increasing, with costs grown double the rate of increases in resident income.<sup>10</sup> For those looking to secure housing for the first time, housing affordability has plummeted 90% in less than ten years.<sup>11</sup>

Working families in Massachusetts, especially younger residents and recent graduates, are increasingly unable to afford even basic housing despite historically high vacancy rates because of the lack of appropriate kinds of housing. It was not, however, always this way. In the last forty years, affordability has grown worse for a number of reasons. While we cannot roll back the clock, we do have the opportunity to solve a major impediment to our housing troubles by re-evaluating how we provide affordable housing in Massachusetts. The state's forty year old Chapter 40B law has been unsuccessful when compared to alternative affordable housing programs in Massachusetts<sup>12</sup> and is an outright failure when compared to affordable housing plans other states. When housing becomes out of reach for the majority of working families, all residents pay the price. Low- and medium-cost housing is rapidly disappearing and more families are forced to move further away from jobs, friends and family. Others, with fixed incomes, are confronted with homelessness, debt and hunger.

Perhaps most concerning is the fact that during these period's of staggering losses in affordability, the state's so-called "affordable housing law," 40B, produced a record-high number of housing units with a record low percentage of affordable units, the vast majority of which targeted only those families making the upper-end of income eligibility.<sup>13</sup> Maintaining the practice of 40B overriding planning, zoning and conservation standards while forcing unnecessary market-rate growth has had a profoundly negative impact on Massachusetts across the board. Continuing to support 40B policies and regulations will damage the state's economic development and its ability to retain or attract a competitive workforce. Furthermore, continuing the practice of 40B's forced growth has harmful financial impacts on public safety, public health, public schools, environmental protection and traffic. The negative financial costs and impacts of forced growth are substantial, but the human costs continue to remain a primary reason why a complete overhaul to the state's affordable housing strategy is necessary. A diversity of housing gives the residents of Massachusetts the opportunity to build better lives. With national leaders in business, science and education, this state needs to support and promote opportunities for people to live, work and raise a family in Massachusetts. For our state to succeed, people need to be able to call it home.

The private market, bankers and for-profit developers have failed to provide affordable housing programs that help the state reach its potential. Instead, they have maintained a system of prioritizing profits over people, a practice this state can ill-afford to continue. Contrary to arguments that 40B will help housing affordability in Massachusetts and "maintain a strong economy," the opposite is quite true. State agencies and developers tout the market-based approach utilized by 40B as the best method for producing affordable housing but fail to explain why housing affordability did not improve when 40B production was increased dramatically. Further,



they fail to address the rather serious issue of how 40B fails completely in a slowing housing market. If 40B developments are considered “less profitable” for developers in a slumped housing market (they have a harder time selling the market rate units) and developers drastically slow or stop proposing 40B projects, how exactly does this law continue to address the need for affordable housing?

As it currently is designed, 40B costs hundreds of millions of dollars annually and has yielded consistent losses in housing affordability. With 2010 rapidly approaching, the state will be faced with a devastating loss of existing affordable housing stock as weak deed restrictions on affordable pricing are due to expire. In addition to not producing the variety and amount of affordable housing needed by the Commonwealth, 40B’s inadequate deed restriction standards now put the state at risk of losing 53% of existing affordable housing stock. Massachusetts is the only state that subsidizes market-rate growth with its affordable housing law and it currently ranks 49<sup>th</sup> in national housing affordability.<sup>14</sup> Quite honestly, continued use of 40B projects will simply accelerate worsening affordability, damage the fiscal stability of municipalities and destroy the character and history of Massachusetts across the state. Massachusetts cannot afford to continue 40B. Now, more than ever, the state must focus on redevelopment and rehabilitation programs while restoring funding to the successful affordable housing alternatives that exist so that Massachusetts can begin to make much-needed progress.

## The True 40B Record

- 40B has been insulated from reform by developer lobbying groups such as CHAPA
- The Department of Housing & Community Development has failed to maintain oversight and to stop fraud
- Private funding of 40B has contributed to worsening affordability
- State regulations impede financial transparency and promote abuse
- 40B fails to produce better quality and quantity affordable housing
- 40B regulations promote the inaccurate counting of affordable housing stock

Across the vast majority of Eastern Massachusetts, 40B has been the primary vehicle used by developers to create residential construction of any type. From its inception in 1969, 40B was used almost exclusively by local housing authorities, non-profit organizations and private developers who specialized in the construction and management of affordable rental housing. But the law was altered after heavy lobbying by the state's home builders association and developer advocacy groups such as the Citizen's Housing & Planning Agency (CHAPA). Contrary to its misleading name, CHAPA is managed by a board of directors whose majority is comprised of development corporations and banking institutions that provide nearly all of the organizations funding. Because of the direct involvement of these two organizations, 40B evolved from being a vehicle that allowed government subsidy programs, local initiatives and non-profit groups to work in more locations to becoming the primary zoning vehicle for multi-family housing, which is both unfortunate and unfaithful to the genesis of the law. Significant amounts of taxpayer funding are expended to make the 40B system function. For better or worse, and the statistics conclude worse, Massachusetts has come to rely on 40B to develop more new construction. It is important to note that 40B is a statute that was originally designed to be used as an exception when cities or towns were obstructing the production of affordable housing. It was never meant to be the law that developers looked to first to force construction in communities and remains a repeatedly abused aspect of the statute.

The Department of Housing & Community Development, the state agency charged with managing 40B, has failed to enforce its own mission of being responsible for programs and services that assist cities and towns in community development. This mission was designed to mandate an agency that offers programs, housing and funding to communities to serve those with low to moderate incomes. To the contrary, 40B is a statute whose draconian design allows it to ignore all local planning, zoning and conservation efforts and to be used as a production tool as an enabling mechanism for new market rate housing across much of the state.<sup>15</sup> As has been noted, the composition of housing produced by Chapter 40B has changed significantly since its inception. From its beginning in 1969 to 1999 when 40B began allowing funding through a consortium of private banks, 499 developments were built. After the funding changes commenced in 2000, another 480 construction projects were developed. Table 1 depicts the fundamental shift in 40B production.

**Table 1**

	1969-1999	2000-2006
<b>Total Developments</b>	<b>499</b>	<b>480</b>
<b>Total Units</b>	<b>26,264</b>	<b>28,109</b>
<b>Rental Developments</b>	<b>387</b>	<b>151</b>
<b>Rental Units</b>	<b>22,041</b>	<b>13,972</b>
<b>Ownership Developments</b>	<b>112</b>	<b>320**</b>
<b>Ownership Units</b>	<b>4,223</b>	<b>14,137</b>
<b>Total Affordable</b>	<b>19,279</b>	<b>8,337</b>
<b>Afford Rental Units</b>	<b>17,861</b>	<b>4,581</b>
<b>Afford Ownership Units</b>	<b>1,418</b>	<b>3,759</b>
<b>% Affordable</b>	<b>73.4%</b>	<b>29.7%</b>

\*\* 9 additional developments are mixed rental and ownership

Source: Update on 40B Housing Production, March 2007

Table 1 demonstrates that while the total number of development was just less than the number produced in the first 31 years, the number of actual units exceeds previous totals by almost 2,000 units. Additionally, after the inclusion of home-ownership units, which had never before been included in the 40B mandate, Table 1 illustrates that production of rental units shifted to focus on home ownership units, which yield much higher profits for developers.

Most importantly, however, Table 1 substantiates that because of the alternations made to Chapter 40B and its regulations, production of its “affordable” units plummeted more than 40 percent. This happened during the same time that 40B production hit historically high rates, developing record numbers of the upscale market-rate units that developers use to further boost profits on affordable units. The result is that 40B projects often build at densities that are at, or above, state guidelines and produce the minimum percentage of required affordable units. Disturbingly, developers have increasingly litigated or bullied communities into accepting less than the minimum percentage of affordable housing while building highly profitable market-rate units at increasingly high densities.

Since 2000, developers have continued to propose and gain permits for 40B in more communities, the vast majority of which have no previous experience with 40B and who lack the technical expertise to effectively evaluate projects. Many of these communities have been forced into situations that require them to process multiple 40B projects simultaneously as developers of market rate housing continue to use 40B to build additional market-rate growth where it is not needed or would otherwise be disallowed. This had led to multiple investigations by the Commonwealth’s Office of the Inspector General who has documented cases of 40B fraud. The pattern of actions by developers using 40B suggests that, because of regulations that allow for incomplete reporting and no effective oversight, developers inflate costs and understate profits. State regulations then permit developers to have their financial statements certified by the 40B lobbying group, Citizens Housing and Planning Association, which is paid by the developer to review its profits. Reports to state officials and the public will never be reliable nor meaningful if the government is negligent in performing oversight and if the only data provided is relayed from the developers via their own advocates.

Calling the cost certification and oversight of 40B “broken,” the Office of the Inspector General described a situation where municipalities have a “false sense of security” and where developers are taking advantage of weak or nonexistent oversight to “enrich themselves at the expense of the municipalities and their affordable housing initiatives.” The Inspector General concludes that “local initiatives to expand and create affordable housing...have been thwarted by the apparent manipulation by developers in a poorly-monitored oversight system.”<sup>16</sup> While the Inspector General has urged communities to carefully review financial information, two underlying problems exist. First, many communities lack the ability, resources or knowledge to question opaque developer financials and secondly, the Department of Housing & Community Development promulgated regulations that disallow municipalities from participating in the process in any effective manner. These regulations bar local leaders from reviewing financial data until after they make a decision regarding the project. Shockingly, the regulations even force local Board of Appeals members to sign 40B regulatory agreements that limit their legal rights to challenge projects and which allow the developer and its bank to determine the projects size, composition, character and profits.

Perhaps the most confusing element of 40B to laypersons unfamiliar with the statute and its regulations is the assumption that the statute simply produces “affordable housing.” The facts are much more complex and definitions of what is and is not affordable become very important. The truth is that 40B’s stipulations allow for housing developments that are 75% market-rate and thus, inherently non-affordable to those who need it most. In terms of the results it has produced, 40B is a mechanism for building non-affordable housing. The most recent data available by the state’s Subsidized Housing Inventory (SHI) indicates that almost 50 communities met the 40B-implemented threshold of having 10 percent of their housing as “affordable” after nearly forty years of 40B. That represents only 14% of the cities and towns in Massachusetts. The “10% threshold” was established by the Comprehensive Permit Statute to create an arbitrary number for communities to strive

towards to create a climate of affordability. The number, however, fails to reflect the diversity of needs found within Massachusetts and remains a troublingly subjective standard. Of the communities that attained the “10% threshold” since 2000, only half were accomplished using 40B. Other contributions to affordable housing came from alternatives affordable housing strategies.

One of the most significant flaws of 40B is how it “counts” affordable housing. Market-rate homes that have prices lower than 40B “affordable units” are not counted because the state did not build them with 40B subsidies. Additional, 40B counts units that are not actually affordable in establishing total contributions, leading to widespread misunderstandings about 40B’s contributions. In fact, the vast majority, approximately two-thirds, of additions to state’s affordable housing stock since 2001 have resulted from specific repair programs, counting units that serve clients of the Department of Mental Health and the Department of Mental Retardation as well as market rate units in rental developments.

This skewed method of counting affordable housing is illegitimate and continues to mislead the public about progress in affordable housing at a time when the state is suffering staggering losses of affordability.

Table 2 details how units produced by 40B are counted for the state’s “affordable housing stock.” The first column indicates the number of 40B affordable units produced each year and the second column specifies the number of market-rate units that were also constructed. The final column, titled “Total Units Claimed as “affordable” by 40B standards illustrates that additional non-affordable units are added to the list and make it appear 63% larger than it actually is.

**Table 2**

Year	Affordable Units	Market Rate Units	Total Units Claimed as "affordable" by 40B Standards
2003	1427	2496	1924
2004	1889	4270	3268
2005	1997	5166	3798
2006	2422	5014	4119
<b>Total</b>	<b>10243</b>	<b>16946</b>	<b>16777</b>

Source: Center for Urban & Regional Policy, Greater Boston Housing Report Card 2006-2007

Lastly, it is critical to note that the affordable units developed by 40B are not held to market standards, but rather to 40B’s own definition of what constitutes “affordable” housing. 40B regulations define “affordable” housing by such a limiting standard that a wide variety of deserving people are not helped. For example, in many metropolitan Boston communities, 40B builds “affordable” units that target families making approximately 80% of the area median income. In many areas of greater Boston, that percentage translates to incomes of around \$70,000 annually. Those making less than that cannot afford even “affordable” units developed by 40B and those making more than that are ineligible, but still cannot realistically afford homes in such an expensive housing market. Additional 40B standards also make deserving people ineligible for affordable housing by penalizing persons with personal or student loans or senior citizens who may have personal assets due to the death of a spouse.

Even 40B advocates have admitted that in addition to the hundreds of millions of dollars expended to support 40B, unless more money is allocated, it is exceedingly difficult for 40B developments to serve the neediest households. Because 40B home-owner units target households at the upper end of income eligibility, many people are left unassisted. Similarly, 40B “affordable” rental units require tenants to have equally stringent

income standards to be able to afford even one bedroom apartments. Many local housing authorities attempt to address these inadequacies by supplementing tenant income with tax-subsidized rent vouchers. Recent state assessments of 40B rental developments divulged that as many as 30% of tenants in 40B “affordable” units needed supplemental rent vouchers just to be able to afford to live there. Many of the vouchers supplemented as much as 20% of the monthly rental costs. Continuing this system as it is currently designed is an inefficient and improper use of tax money that could be better spent on more successful and cost-effective affordable housing plans.

In addition to the further demand for tax subsidies to financially assist tenants living in 40B “affordable” rental units, the ability of residents looking for affordable housing is deeply restricted in large part because of 40B’s highly restrictive affordability “window.” The majority of residents in Massachusetts understand that there are income limits imposed on families seeking 40B’s “affordable” units. What many do not realize, however, is that rigid standards govern eligibility and most families are left behind because of income minimum thresholds. By law, 40B limits families to a small range of incomes to qualify for an affordable unit. Families must earn no more than 80% of the average median income (AMI) as determined by the United States Department of Housing & Urban Development for cities and towns. However, families must also earn enough money to qualify for a mortgage. This minimum threshold imposed on working families is becoming increasingly more difficult in light of the mortgage and lending crisis currently underway across the nation.

Many families seeking affordable housing are ineligible for 40B units because they 1) may earn slightly more than 80% of AMI, lack an adequate down payment, maintain debt payments (such as student loans) or lack the income required to secure a mortgage. Support programs that assist working families with “soft second” mortgages and other funding sources are available in Massachusetts, but not surprisingly, because of the high cost of funding initiatives such as 40B, these programs lack the funding they need to adequately assist working families every year.

Recent successes in affordable housing production can be directly attributed to communities like Boston, Cambridge, Burlington, Danvers, and Woburn which took an active role in providing new affordable units by utilizing inclusionary zoning. Alternative affordable housing strategies remain a compelling option even with a regulatory environment that gives preferential support and funding to 40B. According to the most recent state housing data, by the beginning of 2006, larger numbers of communities were taking proactive steps to create incentive-based zoning and inclusionary zoning bylaws. Communities have also pursued “Smart Growth Zoning” districts that can be created using M.G.L. Chapter 40R. Municipal leaders have recognized the benefits of pursuing alternative strategies that produce better and more affordable housing and have recently improved their ability to produce 40R development in areas that are often stalked by 40B developers. This allows for communities to take the lead in not only producing more meaningful affordable housing contributions, but doing so in a manner that respects the culture of neighborhoods and communities.

Even after a cursory review of 40B’s production records of the past four decades, it is obvious that this “affordable housing” statute is being abused so that market-rate growth can be developed when it would, by any other reasonable standard, be disallowed. As has been discussed, the majority of both rental and home-owner units developed by 40B are upscale, market-rate units that increase the cost of all homes on the market due to the ongoing practice of 40B developers driving up the price of land by over-bidding on parcels and adding price premiums onto market-rate homes to yield additional profit. The increasing production of 40B developments is staggering. The average number of units built per year in the 1990s was slightly more than 500. In 2005, the average was more than 6,000. This high overall level of production, with a focus on building more market-rate homes, is what has triggered the drastic increases in land prices and thus the cost of all housing. Like every other state in the country, municipalities in the Commonwealth recognize that an affordable housing law that builds three market rate units for each affordable one is both counter-productive and inefficient.



Massachusetts has a stable or declining population while 40B forces ongoing development of new home construction. This has led to a stunning 68% rise in home vacancy rates, yet affordability continues to grow worse and more families are priced out of the market.<sup>17</sup> 40B has a well-deserved negative reputation as a statute that claims to promote affordable housing when all it really accomplishes is to produce the majority of the state's market-rate growth. At the end of 2006, the Massachusetts Association of Realtors reported that the oversupply of single family homes stood at a nearly eleven month supply. The market is considered balanced when it has between a seven and eight month supply.

The recent production record of 40B paints an accurate picture of its intent: 2,865 questionably affordable rental units were built since 2003, while also forcing the construction of 8,812 new, expensive apartments. Congruently, the 2,498 "affordable" home-ownership units built across the entire state pale in comparison to the 9,501 additional homes imposed on a state with limited resources and a stable population. The intent is clear. 40B is being used not to improve housing affordability, but rather to ensure that developers can avoid existing laws and reasonable land-use policies that would otherwise prohibit the new construction because it is unnecessary and has negative impacts on the state's environmental vitality and sustainability. 40B allows developers to build profitable and expensive new houses under the guise of improving affordability while producing precisely the opposite effect.

## A New Plan for Progress

- Massachusetts must fundamentally change the way it produces affordable housing
- Affordable housing plans should not be exempt from sustainability principles
- Regional planning should be utilized to address diverse affordable housing needs
- Redevelopment is more efficient than new development and mitigates the negative impacts of growth

While pursuing the mandates of the Comprehensive Permit Statute, Massachusetts has followed a “one step forward, two steps back approach” to building housing. By allowing 75% of new developments to be non-affordable, 40B has substantially contributed to the number of non-affordable housing units while making pathetic contributions to the number of affordable units. 40B allows developers to put three times more effort into the production of non-affordable housing than they put into the development of affordable housing. A strategy of providing quality affordable housing through redevelopment of existing structures, improvement of existing units, and buy-downs (purchase of deed restrictions to assure affordability) has several significant advantages over new construction. Redeveloped units are better integrated into the existing community, open space is preserved, and there is less upward pressure on land prices, making all housing more affordable.

Interestingly, the Commonwealth’s own standards of Sustainable Development Principles are violated by M.G.L. Chapter 40B. Effective January 1, 2006 under the Romney administration and endorsed by the Patrick administration in May, 2007, Massachusetts implemented a framework that established a “comprehensive approach to housing and community investment in a way that respects landscape and natural resources.” By launching these Sustainable Development Principles, the Commonwealth was creating a standard by which all future development would work to promote sustainability across the state. Unfortunately, it has chosen to exempt M.G.L. Chapter 40B, which the state uses as the primary vehicle for producing housing in Massachusetts.

According to the Sustainable Development plan, a housing or community development project must following one of two methods. Firstly, it should pursue a “Redevelop First” strategy. Such an approach appropriately supports the revitalization of town centers and neighborhoods and encourages the reuse and rehabilitation of existing infrastructure rather than the construction of new infrastructure. “Redevelop First” gives preference to redevelopment of brownfields (abandoned or underused industrial or commercial properties), preservation and reuse of historic structures and rehabilitation of existing housing and schools. By pursuing a strategy of producing affordable units by redeveloping existing units, existing neighborhoods are not destroyed and municipalities are not confronted with the considerable financial pressure and stress on local services (e.g. fire, water, sewer, traffic management, and schools) that new construction creates.

If the Redevelop First method is not utilized, a housing or community development project “must be consistent with at least 5 of the mandated Sustainable Development Principles,” and of which one must “enhance and restore the environment or concentrate development.”

Those principles are:

- 1) Restore and enhance the environment by respecting natural resources
- 2) Concentrate development to conserve land, foster a sense of place and create walkable districts
- 3) Be fair by promoting the equitable sharing of benefits and burdens of any development, by making the permitting and development processes clear, transparent, cost-effective and oriented to smart growth and regional equity
- 4) Conserve resources to increase the state’s supply of renewable energy, reduce waste, use clean power and use innovative conservation strategies when developing

- 5) Expand housing opportunities by supporting rehabilitation and construction of housing that meets the needs of all people, coordinate the provision of housing with jobs, transit and services and develop housing that is compatible with a community's character and vision
- 6) Provide transportation choices by increasing access to transportation options
- 7) Increase job opportunities by attracting businesses and expanding access to education and entrepreneurial opportunities
- 8) Foster sustainable businesses by strengthening sustainable natural-resource based businesses and agricultural opportunities
- 9) Plan regionally so as to support the implementation of local and regional planning that has broad public support and that is consistent with local and regional interests.<sup>18</sup>

Any professional or layperson familiar with the Comprehensive Permit Statute understands that the 40B statute specifically contradicts at least seven of these principles, and more likely all nine as they are described.

Perennial leaders in the production of affordable housing, which include the state's ten cities – Boston, among them – have never relied on 40B and have been successful at producing better affordable housing with the limited funding available under 40B's regulatory and funding schemes.<sup>19</sup> Local and regional agencies have a proven track record of success at preserving existing affordable housing and in producing more through redevelopment programs and rehabilitation programs that maintain affordability without destroying the cultural fabric of neighborhoods and communities. It is an appropriate time for elected officials to confront the increasing affordability crisis facing Massachusetts and to invest public resources, currently ill-spent supporting 40B, in more successful affordable housing alternatives at the local and regional level to bring housing back within reach for those who need it. This investment will pay significant dividends in the Commonwealth's economic vitality, our educational system, family stability and for sound land use and sustainability practices. The legislature should take immediate action to ameliorate 40B's harmful effects on affordability before the hardships of working families are once again obscured by the façade created by pro-40B developer lobbyists.

Table 3 demonstrates the success of affordable housing plans that are alternatives to 40B. These alternative plans have produced more than double that amount of affordable housing units, using a more generous and realistic definition of affordable housing that meets a wider variety of needs. The undeniable success of these alternative programs also puts to rest the notion promoted by Beacon Hill that 40B is the leading producer of affordable housing and that municipalities have somehow blocked the production of affordable housing. With highly successful alternatives to 40B available, it begs the question, why has Massachusetts elected to utilize such a blunt and confrontational tool as 40B?

**Table 3**

Year	Total Affordable Units by Other Programs	Total 40B Affordable Units
2003	2086	989
2004	2298	1185
2005	3095	1449
2006	3320	894
<b>Total</b>	<b>10,799</b>	<b>4,517</b>

Source: Greater Boston Housing Report Card 2006-2007, Table 5.1, Page 56

## Establishing a Regional Approach that Respects Diversity

- Massachusetts is too diverse to have a standardized affordable housing strategy
- Municipalities outpace 40B in the production of affordable housing even under current regulatory and funding schemes
- A regional approach encourages investment in urban centers and strengthens them as economic anchors in their region

Massachusetts has a rich history and distinctly diverse regions. A blanket policy that fails to acknowledge the diversity of this state's regions is bound to fail, as 40B has. A regional approach to providing affordable housing allows for improving and restoring our varied cities and towns without new construction that often destroys the fabric of neighborhoods and communities with sterile, one-size-fits-all developments. Municipal and regional officials who live and operate in their communities know how best to address affordability. They should not have to defer to generic templates designed by Beacon Hill with the wrong perspective and from another era.

Massachusetts has regions that require and deserve different approaches to affordable housing production. Since the Comprehensive Permit has a track record of precluding effective regional planning and fails to acknowledge the distinctions between different parts of the state, the best question to ask 40B proponents is "why continue to promote a statute that has a statistical record of abject failure when regional planning would make progress for working families?" A basic review of the costs of producing affordable housing demonstrate that redevelopment rehabilitation practices, (including "buying-down" the cost of homes and deed restricting them) provide many more affordable units per dollar invested than new construction.

To meet the housing needs of diverse Massachusetts communities, resources should be allocated to fund regionally-based strategies that support local needs. This allocation formula also adjusts to meet changing needs and can be easily adjusted for future trends. No such strategy is currently in place and, to the contrary, existing policies support a "build-out" mentality. Continuing forced construction that circumvents planning and sound land-use policies that are in place for the protection of quality of life, safety and the environment will have devastating consequences.

A regional approach to affordable housing that recognizes local needs is the most successful method for producing affordable housing that serves diverse needs. Contrary to claims by pro-40B lobbyists, municipalities are more successful at producing affordable housing utilizing other programs. These existing alternatives regularly outpace 40B despite the regulatory and funding preferences given to 40B. From 2003 to 2006, communities that utilized alternative affordable housing strategies such as "inclusionary zoning" produced 90% greater contributions of affordable housing that provided a variety of housing suitable for a wide range of lower-income residents. Municipal-led alternative affordable housing plans produced 4,300 more units of affordable housing than 40B in just four years.<sup>20</sup> These municipal success stories are also supported by recent data from the Massachusetts Municipal Association, which estimates that cities and towns produce upwards of 2,000 units of affordable housing each year. Recognizing that this is not enough to meet the demand for quality affordable housing, legislators, municipal leaders and community organizations have called for 40B's impediments to be removed so that these numbers can improve further. The University of Massachusetts Donohue Institute has also asserted that building permits by communities in Massachusetts exceeded national averages, further proving that, contrary to developer lobbying groups, communities are active supporters of producing much needed affordable housing solutions for their residents.

A regional plan for affordable housing can easily be established according to the Commonwealth's already distinct geography. Regional management might be established according to the following: The Berkshires, Central Massachusetts, Greater Worcester, North West, North Shore, Metro Boston, Southeastern

Massachusetts, South Shore, Cape Cod & the Islands. These nine regions have diverse needs and different anchor cities and thus warrant a specialized approach to producing the appropriate quality and quantity of affordable units to meet their needs.



## Alternative Strategies

- Re-allocating funding will improve affordable housing production and save money
- Deed restrict affordable units in perpetuity to staunch the loss of affordable housing stock
- Endorse and support Inclusionary Zoning
- Establish housing land trusts
- Implement pre-rated housing proposal process
- Realize tax savings by funding cost-effective alternatives
- Encourage competitive funding mechanisms

The Department of Housing & Community Development has a budget of at least \$500 million. The funding apparatus that supports affordable housing in Massachusetts is significant, with both state and federal money supporting housing production. 40B costs hundreds of millions of dollars annually and remains the favorite tool of the state to build new home construction projects. The cost of maintaining 40B surges even higher when one considers the additional municipal expenses that burden cities and towns when increased and unplanned development is forced. These costs include impacts on roads and traffic; schools; water and sewer; public safety and countless environmental and social services. Superior alternatives are available that would both produce real affordable housing contributions and help the state to begin to recover from the devastation of 40B's ruinous approach. These approaches would improve job growth and respect the economic balance needed to maintain sustainability.

The state should immediately commence a "Housing Opportunity" campaign to establish affordable housing for hardworking families that currently lack housing options. By re-allocating \$100 million in monies that are currently being used to construct new market-rate growth via 40B, the state could take important steps that would give local communities and regional housing authorities the tools to create better affordable housing options. This approach will be able to successfully fund diverse affordable housing needs and preserve the existing stock of affordable homes that Massachusetts has neglected by expending funds to support costly new development. With the financial benefits of improved housing affordability felt state-wide, this more cost-effective approach will also be able to fund an affordable housing trust fund that can be used to award annual grants through a competitive process that funds the best projects. By law, through this program, these affordable units must be deed restricted in perpetuity (so that ongoing losses of affordable housing will be effectively stopped) and must be produced in a manner that meets the standards of the Commonwealth's Sustainable Development Principles. Furthermore, a competitive proposal process will encourage and invite projects that have financial feasibility (unlike 40B projects, which can have unintended results), consistency with local and regional strategic affordable housing plans and will complement or enhance the important cultural and historic qualities that make Massachusetts a base for jobs, schools and tourism.

By repealing the 40B statute, Massachusetts can endorse inclusionary zoning, a successful alternative that has been obstructed by 40B's funding and regulatory schemes. This will grant more communities the opportunity to realize the success of the inclusionary zoning approach and will create the flexibility needed to create urban renewal funds. These funds will revitalize our state's urban cores by investing much needed resources into the many cities that are anchors for jobs, diversity, culture and public transportation options. The state should also authorize deed restrictions and affordability covenants by statute so that the dollars invested in affordable housing actually produce the intended progress that is required and needed. This will also prevent abuses, such as those created by the 40B statute, which encourage developers to exploit affordable housing funding to develop high-priced, market-rate housing.

In addition to supporting programs that actually work, pragmatic and simple changes can be implemented so that affordable housing is easier to produce for the working families of Massachusetts. Perhaps the single biggest challenge facing affordable housing production is the immediate issue of land cost. For decades, 40B has contributed to the escalating and prohibitive cost of land in the Commonwealth. To make immediate

progress in making housing more affordable, the state should establish housing land trusts that can be managed regionally or locally. By pursuing housing land trusts, the state can immediately remove the price of land from the affordable housing paradigm. Regional housing authorities or non-profit developers can hold land in perpetuity, keeping homes affordable indefinitely. The homes on this land can be bought and sold, but not the land. The homeowner can lease the land through long-term, renewable leases that would require that the home be sold either back to the housing land trust or to another low-income household at an affordable price.

An additional alternative strategy that is the exact opposite of the approach taken by 40B is to create pre-rated housing proposals. A pre-rated process establishes volunteer or elected positions of residents who scrutinize and evaluate proposals before they even are submitted to planning boards. Supportive arrangements can also be funded through nominal state expenditures to create effective proposals with local endorsements. This process rewards successful, reputable affordable housing developers (whether for-profit or non-profit), giving them a chance at expedited permitting. Successful examples of this process have been used in New Hampshire, proving that, contrary to 40B, faster permits can go hand in hand with smarter, better projects.

It is unlikely or unnecessary that new funding sources would be required for new or existing alternative affordable housing initiatives. Current funding is highly inefficient, spending hundreds of millions of dollars annually to produce actual losses in affordability. If Massachusetts invested instead in rehabilitation and buy-downs, which would provide an order of magnitude more housing than current practices, the state would witness immediate gains in affordability in addition to realizing savings. Should the state decide that a one-time or annual expenditure be made to support creative affordable housing strategies, such as a housing bond, to help Massachusetts recover more quickly from 40B, public funding could be secured through modest increases in document recording fees or by small allocations of gambling or lottery proceeds as has been done in countless other states.

## Conclusion

- Alternative affordable housing plans successfully produce greater affordable housing and must be supported
- 40B is responsible for inflating land and housing costs, contributing to worsening affordability
- Massachusetts would realize significant cost savings by funding redevelopment over new development
- State regulations impede financial transparency and promote abuse of 40B
- Affordable housing plans should not be exempt from sustainability principles
- Regional planning must be utilized to address diverse housing needs across Massachusetts
- Redevelopment is more efficient, mitigates the negative impacts of growth and yields better affordable housing

The documented growth imposed on Massachusetts communities by the Comprehensive Permit Statute (also known as 40B) has left municipalities permanently scarred by rapid growth that costs more than it generates in tax revenues. These 40B projects have produced embarrassingly inadequate “affordable” housing contributions while saddling communities with traffic saturation, increasingly unaffordable housing, a lost sense of community and a degraded environment. Most communities will never recover from the negative impact on quality of life that these projects have imposed.<sup>21</sup>

For municipalities that have been destroyed by growth, perhaps the most devastating consequence is the erosion of local leadership and planning. The vibrant “home rule” character of Massachusetts has been shattered as community vision and local control have been preempted by 40B’s forced zoning overrides.

For nearly four decades, 40B has relied on tired and worn innuendo in order to insulate the law and associated regulations from legitimate criticism. The fact is that the statute is incapable of standing up on its own merit. 40B has been and continues to be exploited by real estate developers and elite power brokers who have inappropriately prioritized profits over people. These special interests have long fed at the “pig fest” so aptly described by the Massachusetts Inspector General and they continue to insulate the law from “political pressure.”<sup>22</sup> Described by a leading environmental policy and planning professional, 40B is “punitive” and it “obliterates all local land use, fiscal and planning control, it ignores countless other critical issues facing cities and towns... and imposes a one size fits all policy that insults the distinctions” between the diverse regions of Massachusetts.<sup>23</sup>

Historical trends have been bolstered by recent housing statistics in concluding that the 40B statute has been successfully hijacked to forcefully impose market-rate, high-density projects in communities that lack the infrastructure to support such damaging growth. This has contributed to a mass migration of residents to neighboring states to seek out more affordable housing. 40B, according to the Commonwealth’s own sustainability principles, has no basis in sound land use planning standards, has no counterpart anywhere else in the United States and results in the blatant destruction of communities in the name of “affordable” housing, of which it lags behind alternative programs. It is an appropriate time for Massachusetts to adopt successful alternative affordable housing plans that create inclusionary zoning requirements, the collection of impact fees and development agreements that require developers to participate in the production of real affordable housing instead of just profiting from it.<sup>24</sup> By providing legislative and funding support for these programs, the Commonwealth will begin to witness immediate improvements in housing affordability and residents, from the working poor to the middle-class, will begin to experience relief from ongoing financial pressures.

Sustainability has been defined as pursuing policies that “meet the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>25</sup> The record of 40B in Massachusetts after almost four decades proves that it is a policy that contradicts and, in fact, obstructs sustainability. Developers have successfully used 40B to build more than 800 developments across the state that override local zoning rules for density, type of housing and conservation restrictions. The statute limits the definition of “affordable” so much that the people of Massachusetts who need help are not helped by the “affordable” units being produced. The statute created an appeals process that uses its own regulations to mandate more development, thus giving

communities no fair chance at pursuing legitimate concerns. The statute creates a system of development that is so profitable, 40B developers overbid on parcels of land, effectively driving up the price of land and making all housing more expensive. Because regulations also fail to impose reasonable profit limits and transparent financial reporting, 40B developers add additional price premiums on the market-rate units to further increase profits and that artificially drives up the prices of all housing further again. 40B has been the state's "affordable housing law" for four decades and housing affordability has grown increasingly worse, driving Massachusetts to the very bottom of national housing affordability rankings (49<sup>th</sup>).<sup>26</sup>

Research concludes that new growth, such as that imposed by 40B, costs Massachusetts municipalities at least \$30,000 more per new unit of housing than it generates in tax revenue. Three recent studies conclude that it costs equal or lesser amounts to invest in affordable housing that provides a "supporting" element within the economy than it would if the people impacted by the housing remained homeless or in need of additional services. New York City saves more than \$16,000 per year in associated costs for each unit of housing it creates. This roughly equals the investment cost needed to generate the affordable housing. In Colorado, Denver reduced more than \$15,000 in costs per person, per year by investing in such housing. In Denver's case, the savings exceeded the cost of the housing. In Portland, Oregon, the city realized a public cost savings of 36% in its first year for each person assisted by the housing.<sup>27</sup> By pursuing cost-effective alternatives that provide a better rate of return in the production of affordable housing through redevelopment, rehabilitation and buy-downs, the state will not only spend more efficiently, but save money in the long-term, allowing it to invest in other meaningful policy areas.

The timing is right to implement meaningful changes in policy in order to protect the state from a rapidly deteriorating quality of life and weakening economy. Genuine progress in Massachusetts is complex and near impossible when management of growth is undermined by significant subsidies for new development. Adopting new policies that reflect the needs of the Commonwealth and that stop the inappropriate sponsorship of constant, damaging growth is critical. Furthermore, increased accountability on Beacon Hill to establish appropriate oversight and management of development programs will also help minimize the damage of unrestrained development.

Possible policy alternatives available to the Commonwealth include halting 40B subsidies and requiring development impact fees to recover the actual costs for all types of infrastructure required when new development is built. Massachusetts should end costly and inefficient tax breaks for developers unless they can demonstrate that their contribution nets a public benefit. This issue might best be addressed by bolstering the Commonwealth's Sustainable Development Principles. Throughout these efforts, voters in Massachusetts must demand greater accountability on Beacon Hill and cost-certification methods must be corrected to address the egregious abuses documented by the state's Inspector General's findings. Poorly designed affordable housing statutes such as 40B are the most substantial contributors to unleashing unnecessary and devastating development whose financial impacts continue to take a toll on countless public services. The Commonwealth can not afford to continue to directly subsidize this form of new construction. Despite continued efforts by special interest lobbyists and the Home Builder's Association of Massachusetts to thwart such attempts, regulatory programs such as inclusionary zoning must be implemented to improve the state's stock of affordable housing and to protect the economy from most certain collapse.

In order to effectively facilitate progress in the way Massachusetts approaches affordable housing, balance must be restored to the land-use decision making process. In Massachusetts, the process has been distorted by stakeholders who have taken control away from the people who are directly impacted by the housing market. These stakeholders have direct financial interests in the continued forced growth of 40B and they are found in every agency that manages or implements 40B mandates. The Citizen's Housing & Planning Agency does not represent citizens. Rather, it is composed of nearly all development corporations and banks that fund this biased and bizarre quasi-state agency to ensure that 40B is protected from "political pressure." MassHousing, the state's affordable housing bank is governed by a board of directors that are all bankers whose institutions

yield significant profits from investing in 40B construction. Political clout and the deep-pockets of the developer lobby have even ensured that political leadership at the Department of Housing & Community Development continues to promulgate regulations that benefit developers and take control away from municipalities. Recent examples include the regulatory changes proposed by the DHCD in December 2007, which, among other things, will not count a city or towns contribution to affordable housing stock unless it meets the standards of the 40B statute. A simple and appropriate change that would encourage affordable housing that meets diverse needs is to refocus and re-charter local housing authorities to empower them as a key proactive player in securing, maintaining and producing local and regional affordable housing.

Inappropriate levels of developer influence continue to mar the state's affordable housing strategy and are directly responsible for 40B. Since there is ample evidence of 40B's failure to produce affordable housing, it is obvious that it is not being used for noble purposes. As has been noted, "Growth for the sake of growth is the ideology of the cancer cell."<sup>28</sup> Empowering local governments, affordable housing advocacy organizations and the state legislature to be free from narrow, developer-led special interests is not only consistent with good democracy, but is an important first step in bringing balance back to the affordable housing debate in the Commonwealth. The state government should be dedicated to serving the broader public interests of the community it serves. At present, public interest continues to be unfairly treated by worsening affordability and statutory and regulatory policies that give preference to developers. Massachusetts must take immediate action to repeal M.G.L. Chapter 40B in order to realize the full potential of more successful affordable housing alternatives and to better serve its residents.



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- <sup>1</sup> Massachusetts Association of Realtors, 2007
- <sup>2</sup> The Greater Boston Housing Report Card 2006-2007, Table 2.3, p. 23
- <sup>3</sup> General Appropriates Act, Commonwealth of Massachusetts, FY2008. Current as of 10/29/07
- <sup>4</sup> National Low Income Housing Coalition
- <sup>5</sup> The Greater Boston Housing Report Card 2006-2007, Table 5.1, p. 56
- <sup>6</sup> Witten, Jonathan. "The Cost of Developing Affordable Housing: At What Price?" *Boston College Environmental Affairs Law Review*, 2003.
- <sup>7</sup> The Greater Boston Housing Report Card 2006-2007, p.69
- <sup>8</sup> The Greater Boston Housing Report Card 2006-2007, Table 3.5, p. 33
- <sup>9</sup> 40B Update, March 2007, p. 5
- <sup>10</sup> U.S. Census, September 2007
- <sup>11</sup> Greater Boston Housing Report Card 2006-2007, Table 4.6, p. 47
- <sup>12</sup> The Greater Boston Housing Report Card 2006-2007, Table 5.1, p. 56
- <sup>13</sup> 40B Update, March 2007, p. 10
- <sup>14</sup> National Low Income Housing Coalition, 2007
- <sup>15</sup> 40B Update, March 2007, p. 8
- <sup>16</sup> Office of the Inspector General, Letter to MassHousing, September 13, 2006.
- <sup>17</sup> Greater Boston Housing Report Card 2006-2007, Table 4.6, p. 47
- <sup>18</sup> Department of Housing & Community Development, Guidelines for Project Consistency with the Commonwealth's Sustainable Development Principles, effective January 1, 2006.
- <sup>19</sup> 40B Update, March 2007, p. 5
- <sup>20</sup> Greater Boston Housing Report Card 2006-2007, p. 56
- <sup>21</sup> Foder, Eben. "Better Not Bigger: How to Take Control of Urban Growth and Improve Your Community," *New Society*, 1999. p. 18
- <sup>22</sup> Citizen's Housing & Planning Agency, Task Force on 40B, 2001.
- <sup>23</sup> Witten, John. "Inclusionary Zoning is answer to 40B." *Worcester Business Journal*. 2007
- <sup>24</sup> Ibid
- <sup>25</sup> Meadows, Donella et al. *Beyond The Limits*, Chelsea Green Publishing, 1992
- <sup>26</sup> National Low Income Housing Coalition
- <sup>27</sup> National Alliance to End Homelessness, "Supportive Housing is Cost Effective," 2007.
- <sup>28</sup> Abbey, Edward