

**MASSACHUSETTS’S CHAPTER 40R: A MODEL FOR
INCENTIVE-BASED LAND USE PLANNING AND
AFFORDABLE HOUSING DEVELOPMENT**

*Karla L. Chaffee**

TABLE OF CONTENTS

Introduction	182
I. Massachusetts’s Housing Crisis.....	184
II. Open Space Preservation and Affordable Housing are Conflicting Goals Under Chapter 40R’s Predecessor, 40B	185
A. The Comprehensive Permit: A Rebuttable Presumption Against the Environment.....	186
B. Market Driven Development Under Chapter 40B Encourages Sprawl	189
C. Chapter 40B’s Impact on Housing.....	191
III. Chapter 40R: The Basic Framework and the Incorporation of Land Planning Principles.....	192
IV. How Other States Have Approached Land Use and Affordable Housing Goals	197
A. Oregon.....	197
B. Vermont, Hawaii, & Connecticut.....	200
V. Responses to Chapter 40R Criticism.....	205
A. Chapter 40R Surrenders Local Control.....	205
B. Chapter 40R Will Strain School Budgets and Future Funding Is Not Secure.....	208
C. Repayment.....	210
Conclusion.....	211

* Karla L. Chaffee is a student at Vermont Law School and expects to graduate with a Juris Doctorate and a Masters of Studies in Environmental Law, May 2009. Thanks to Professor Reed Loder for comments on numerous drafts, and to my family and partner for their insight and support.

Is Chapter 40R “nothing but 40B with a check and a smiley face,”¹ or is it an innovative way to increase affordable housing and encourage compact development across Massachusetts?

INTRODUCTION

What do an abandoned rope mill complex, sixty acres that abut the Atlantic, and a commuter rail station have in common? In Plymouth, Massachusetts, this infrastructure allowed the local municipal government to apply for a substantial grant of state money.² In May 2006, Plymouth town meeting members voted to establish a Chapter 40R smart growth zoning district under Massachusetts’s new “Smart Growth Zoning and Housing Production” law.³ Plymouth’s new zoning district provides for 675 residential units and 600,000 square feet of commercial space “where the Plymouth Cordage Company manufactured rope between 1824 and 1964.”⁴ Cities and towns like Plymouth that qualify under Chapter 40R may be eligible to receive \$10,000 to \$600,000 from the new Massachusetts smart growth housing trust fund. They may also receive an additional \$3,000 for each new housing unit or substantially rehabilitated existing building unit constructed that makes use of similar, often neglected, resources.⁵ As of October 9, 2008, twenty-six cities and towns have approved Chapter 40R Smart Growth Zoning Districts (SGZD) and more than 9,589 units have been zoned within them.⁶

1. Michael E. Scott & Lee Hartmann, *Chapter 40R on the Rise: Plymouth’s Cordage Park is a case study in finding a smart approach to smart growth*, COMMONWEALTH, Spring 2007, at 1, available at http://www.massinc.org/fileadmin/CommonWealth/Spring_2007/chapter_40r.pdf.

2. *See id.* at 2 (discussing the Town of Plymouth’s \$50,000 grant from the Massachusetts Department of Housing and Community Development for the Cordage Park project).

3. MASS. GEN. LAWS ch. 40R §§ 1–14 (2006). Chapter 40R defines “smart growth” as:

A principle of land development that emphasizes mixing land uses, increases the availability of affordable housing by creating a range of housing opportunities in neighborhoods, takes advantage of compact design, fosters distinctive and attractive communities, preserves open space, farmland, natural beauty and critical environmental areas, strengthens existing communities, provides a variety of transportation choices, makes development decisions predictable, fair and cost effective and encourages community and stakeholder collaboration in development decisions.

Id.

4. Scott & Hartmann, *supra* note 1.

5. MASS. GEN. LAWS ch. 40R § 9 (2006); 760 MASS. CODE REGS. 59.06 (2008).

6. EXECUTIVE OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT, 40R DISTRICTS/ACTIVITY (2008), <http://www.mass.gov/Ehed/docs/dhed/cd/ch40r/40ractivitysummary.pdf>.

Providing affordable housing for the current generation and preserving open space and environmental quality for future generations are normative goals that are often considered in isolation of one another.⁷ Policies can be, and are being, designed to promote these dual goals. Legislation in a handful of states like Massachusetts addresses the intersection between the need for affordable housing and comprehensive land use planning that aim to protect open space and promote vibrant communities.⁸ This note assumes the desirability of encouraging affordable housing and environmental conservation in conjunction. Quality housing and quality environment are not exclusive of one another and states must provide incentives and guidance to help municipalities realize both goals.

Part I will briefly address how many Massachusetts residents are suffering from the lack of available, reasonably-priced homes, forcing many long-time residents to move out of the state. Next, Part II will explore how Chapter 40B, Massachusetts's primary vehicle for promoting affordable housing⁹ since 1969, has aggregated sprawling land-use consumption across the state. Part III sets out Chapter 40R's basic framework for encouraging both affordable housing and smart growth land planning. Part IV will examine state legislation enacted in Oregon, Vermont, Connecticut, and Hawaii that addresses the same dual goals. Finally, Part V will address concerns expressed by municipal leaders in Massachusetts who have viewed Chapter 40R with skepticism. I will evaluate and comment on these concerns and address how, or if, Chapter 40R should be modified to address these issues.

The purpose of this note is to show how states can use Chapter 40R as a model to promote partnerships between local and state governments that support housing production and environmental conservation. As Massachusetts's Chapter 40B experience has shown, housing mandates can stimulate undesirable consequences in terms of both land consumption and community opposition. Similarly, the command-and-control model of land planning in Oregon has done much to conserve land but has also spurred intense opposition, coming very close to jeopardizing the State's entire

Municipalities with approved districts are: Amesbury, Belmont, Boston, Bridgewater, Brockton, Chelsea, Dartmouth, Easton, Grafton, Haverhill, Holyoke, Kingston, Lakeville, Lawrence, Lowell, Lunenburg, Lynnfield, Natick, North Andover, North Reading, Northampton, Norwood, Plymouth, Pittsfield, Reading, and Westfield. *Id.*

7. See Tim Iglesias, *Our Pluralist Housing Ethic and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 569–83 (2007) (discussing five American housing ethics and how housing may be viewed as “one land use in a functional system”).

8. See *infra* text accompanying notes 99–155.

9. The term “affordable housing” instead of “work force housing” is used in this paper to reflect the language of the statutes discussed.

land-planning model.¹⁰ The success of top-down land use regulation in the United States is rare and wide-spread; future implementation of this model is unlikely.¹¹ Chapter 40R maintains a higher degree of local control than Chapter 40B or the Oregon model, but this control is also checked by the imposition of state-wide goals. The law's structure allows communities to envision their own vibrant communities while ensuring land is used wisely and adequate housing stocks are built.

I. MASSACHUSETTS'S HOUSING CRISIS

In 2003, the Massachusetts Institute for a New Commonwealth (MassINC) completed a report indicating that twenty-five percent of 1,000 Massachusetts residents surveyed "would move out of [the state] if they could," principally due to the state's high cost of living and housing.¹² Although the state lost 168,000 jobs between 2000 and 2003, housing prices doubled in the five years preceding 2003.¹³ During this period, "housing prices . . . escalated at rates double and triple the rate of underlying inflation."¹⁴ In the 1980s and 1990s, Massachusetts was riddled with soaring housing costs, a slowing economy, and land consumption at a rate seven times higher than population growth.¹⁵

With a relatively weak economy and population loss in Massachusetts since the 2000–2001 recession (Massachusetts has 100,000 fewer jobs now than before 2000), young families are struggling to stay in the state.¹⁶ Massachusetts is one of the most costly states to live in; the percentage of

10. See Werner Lohe, *Command and Control to Local Control: The Environmental Agenda and the Comprehensive Permit Law*, 22 W. NEW ENG. L. REV. 355, 357 (describing "command and control" as a model of centralized control over government regulations and enforcement, while also discussing the trend against the use of this model in recent years in the environmental and affordable housing sectors).

11. See BRUCE BABBITT, *CITIES IN THE WILDERNESS: A NEW VISION OF LAND USE IN AMERICA* 38 (2005) (discussing how attempts to establish urban growth boundaries in states other than California, Florida, and Oregon have failed).

12. EDWARD C. CARMAN, ET AL., CENTER FOR URBAN AND REGIONAL POLICY: NORTHEASTERN UNIVERSITY, *BUILDING OUR HERITAGE: A HOUSING STRATEGY FOR SMART GROWTH AND ECONOMIC DEVELOPMENT* 7 (2003), available at <http://www.curp.neu.edu/pdfs/housingexecsumm.pdf>.

13. *Id.*

14. *Id.* at 3.

15. MASSACHUSETTS SMART GROWTH ALLIANCE, *SHARED DESTINIES: A SMART GROWTH AGENDA FOR MASSACHUSETTS* 5 (2005).

16. BONNIE HEUDORFER & BARRY BLUESTONE, CTR. FOR URBAN AND REG'L POLICY: NORTHEASTERN UNIVERSITY, *THE GREATER BOSTON HOUSING REPORT CARD 2006–2007: AN ASSESSMENT OF PROGRESS ON HOUSING IN THE GREATER BOSTON AREA 5* (2007), available at <http://www.tbf.org/uploadedFiles/Housing Report Card 2006-2007.pdf>.

median income devoted to mortgage payments in the Boston Metropolitan Statistical Area is one of the highest in the nation (44.9%), second only to San Francisco (46.7%).¹⁷ In 2007, Boston was the tenth most expensive housing market in the nation.¹⁸ Furthermore, housing woes in Massachusetts and across the nation are only exasperated by rising foreclosure rates linked to the 2007 and 2008 subprime lending crisis.¹⁹

II. OPEN SPACE PRESERVATION AND AFFORDABLE HOUSING ARE CONFLICTING GOALS UNDER CHAPTER 40R'S PREDECESSOR, 40B²⁰

Within the spectrum of issues on both state and local political agendas, preservation of open space and promotion of affordable housing are usually both viewed as weighing on the “progressive” side of the scale.²¹ Advocates for each issue aim to improve living conditions, both aesthetically and socially, for individuals and communities. It seems logical that these two issues should be promoted and supported as at least compatible, if not interdependent, goals. As discussed below, the framework of Chapter 40B (Massachusetts's primary vehicle for promoting affordable housing) at the very least, blocks any synergy between both goals and, at most, sets environmental preservation and affordable housing production at odds.

Chapter 40B, also known as the “Comprehensive Permit Law” or the “Anti-Snob Zoning Act,” was implemented in 1969 by the liberal-

17. Mark Bobrowski, *Affordable Housing v. Open Space: A Proposal for Reconciliation*, 30 BC ENVTL. AFF. L. REV. 487, 490 (2003).

18. Keisha Lamothe, *Housing: Big-ticket vs. Big Value*, CNNMONEY.COM, Sept. 26, 2007, http://money.cnn.com/2007/09/25/real_estate/home_prices/index.htm.

19. See Binyamin Appelbaum, *Thousands in Mass. foreclosed on in '07*, BOSTON GLOBE, Jan. 19, 2008, http://www.boston.com/realestate/news/articles/2008/01/19/thousands_in_mass_forelosed_on_in_07/ (stating 7,563 homes were foreclosed on in Massachusetts in 2007).

20. Since this article was written, new regulations were issued for MASS. GEN. LAWS ch. 40B §§ 20–23. Through these regulations, the Massachusetts Department of Housing and Community Development “consolidated materials previously found in several different sets of regulations, and it has codified issues that have been decided by judicial or administrative decisions or are general practice as reflected in policy documents of the Department.” 760 MASS. CODE REGS. 56.01 (2008), available at <http://www.mass.gov> (search “760 mass code regs 56.01”) (last visited Nov. 19, 2008). The impact these regulations may have on the 40B process is outside of the scope of this Note.

21. Bobrowski, *supra* note 17, at 487; see also Iglesias, *supra* note 7, at 518 (concluding that “the ‘housing as a one land use in a functional system’ ethic currently provides the most promising single housing ethic to increase the production of affordable housing,” but also concluding that there are “strong and enduring tensions between affordability and some environmentalist versions of the ‘housing as one land use in a functional system’ ethic”).

dominated Massachusetts legislature.²² Revolutionary for its time, seven years before New Jersey's first *Mount Laurel* decision,²³ Chapter 40B provided a presumption that each municipality in Massachusetts is responsible for providing a portion of its housing stock for low or moderate-income housing. Chapter 40B serves an imperative and laudable purpose of providing housing for those earning below the area median income. Two major challenges, however, are presented by the application of Chapter 40B. First, since Chapter 40B's inception, municipalities have resisted it as an infringement on local control over their power to be in command of local zoning regulations.²⁴ Second, as discussed in the next two sections, it has become clear that Chapter 40B discounts local environmental concerns and contributes to sprawling land use patterns.²⁵

A. The Comprehensive Permit: A Rebuttable Presumption Against the Environment

Chapter 40B provides developers with an opportunity to streamline the permitting process by obtaining a comprehensive permit (CP) when, depending on the subsidy program involved, it includes twenty to twenty-five percent or more low or moderate income units within the total development.²⁶ A low or moderate-income unit is either defined by the statute or regulation governing the subsidizing agency, or is defined as a unit occupied by residents whose income is at or below eighty percent of

22. Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 B.C. ENVTL. AFF. L. REV. 437, 451 (2003); see Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 385–86 (2001) (discussing Massachusetts's liberally charged political climate during the passage of Chapter 40B).

23. See Mark S. Dennison, *New Jersey—Mount Laurel Doctrine*, 2 RATHKOPF'S L. ZONING & PLANNING § 22:17 (4th ed. 2007) (giving a concise overview of the Mount Laurel Doctrine).

24. As a matter of constitutional law, states grant municipalities various powers—commonly, the power to zone and raise revenue from land within the municipality. David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field From the Field*, 21 J. L. & POL. 261, 263 (2005), available at <http://www.student.virginia.edu/~jalopy/PDFs/21-2&3/261-291.PDF>. Massachusetts amended its Constitution in 1967 to include the Home Rule Amendment with the purpose to “reaffirm the customary and traditional liberties of the people with respect to . . . local government, and to grant and confirm to the people of every city and town the right of self-government in local matters.” *Id.* at 271; MASS. CONST. art. LXXXIX § 1.

25. Chapter 40B development, conceived in the absence of any local or statewide comprehensive plan, leads to development in areas that are the cheapest to develop, often in outlying suburban “greenfields.” Chapter 40B “is not coordinated with other policy objectives. As a result [it] tends to be shaped by existing patterns of sprawl.” Russell, *supra* note 22, at 482; see *infra* § II.B.

26. Russell, *supra* note 22, at 453 (citing MASS. CODE REGS. tit. 760, § 45.06(3) (2002)).

the area's median income.²⁷ The CP provides incentives for low or moderate income housing production by “streamlining and consolidation of the local permitting process . . . allow[ing] for appeals from local comprehensive permit decisions . . . [and] developers building more housing units per acre than that allowed by local regulations.”²⁸

When pursuing a CP, a developer must first apply to a local zoning board of appeals.²⁹ Each local board has authority to hear and decide whether to issue the CP.³⁰ However, if the local zoning board denies or approves the CP with uneconomic restrictions,³¹ the developer has the right to appeal to the Housing Appeals Committee (HAC).³² The only issue considered on appeal to HAC is whether the denial of a permit or the issuance of a permit with uneconomic restrictions was “reasonable and consistent with local needs.”³³

27. 760 MASS. CODE REGS. 59.02 (2008).

28. EDITH M. NETTER, MASSACHUSETTS HOUSING PARTNERSHIP, LOCAL 40B REVIEW AND DECISION GUIDELINES: A PRACTICAL GUIDE FOR ZONING BOARDS OF APPEAL REVIEWING APPLICATIONS FOR COMPREHENSIVE PERMITS PURSUANT TO MGL CHAPTER 40B 1 (2005) *available at* http://www.mhp.net/uploads/resources/local_40b_v3_low_res.pdf. In order to be eligible for a CP, a developer must meet three jurisdictional requirements, including the project's being funded by “a subsidizing agency under a low and moderate income housing subsidy program.” 760 MASS. CODE REGS. 56.04(b) (2008). A subsidizing agency is “any agency of state or federal government that provides a Subsidy for the construction or substantial rehabilitation of Low or Moderate Income Housing.” 760 MASS. CODE REGS. 56.02 (2008). If the subsidizing agency is not an agency of the state government, the Department of Housing and Community Development may appoint a state agency to administer some or all of the subsidizing agency's responsibilities. *Id.* The majority of Chapter 40B projects are funded by MassHousing, the Department of Housing and Community Development, the Massachusetts Housing Partnership, and MassDevelopment. NETTER, *supra* note 28, at 3–4. Since 1999, financing from the New England Fund of the Federal Home Loan Bank of Boston (NEF) is considered a subsidy, increasing the availability of comprehensive permits to developers. *Id.* at 2. As discussed *infra* Part II.B., NEF qualification has affected the pattern of 40B development, often leading to less housing development, yet substantial land consumption.

29. *See* 760 MASS. CODE REGS. 56.05 (2008) (detailing local hearing review).

30. 760 MASS. CODE REGS. 56.02 (2008) (citing MASS. GEN. LAWS ch. 40A § 14 (2006)).

31. “Uneconomic” is defined as:

Any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development or on the amount or nature of the subsidy or on the tenants, rentals and income permissible, and without substantially changing the rent levels and units sizes proposed by the public, nonprofit or limited dividend organizations.

MASS. GEN. LAWS ch. 40B § 20 (2006).

32. MASS. GEN. LAWS ch. 40B § 22 (2006).

33. *Id.* § 23. *See* 760 MASS. CODE REGS. 56.07(1)(b) (2008) (“In the case of the denial of a Comprehensive Permit, the issue shall be whether the decision of the Board was Consistent with Local Needs.”).

Local needs, however, are considered in light of “the regional need for low and moderate income housing.”³⁴ The regional need for housing will usually prevail on a HAC appeal unless the local zoning board can raise the affirmative defense that the municipality has satisfied one or more of the measures listed in Department of Housing in Community Development (DHCD) regulations.³⁵ The measures include providing ten percent of its housing stock for people with low or moderate incomes, or ensuring that low to moderate-income housing covers a general land area minimum.³⁶ A municipality may also avoid a HAC appeal if it has adopted an affordable housing plan, approved by the DHCD.³⁷ If one of the listed measures is not met, the local zoning board has the burden of showing “there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need.”³⁸

This burden is, to say the least, onerous. Between 1970 and 1999, only eighteen HAC cases upheld local zoning boards’ decisions, but local decisions were overruled in ninety-four cases.³⁹ More recently, a large number of cases were settled even before a HAC appeal.⁴⁰ According to a March 2007 update on Chapter 40B production, since 2000, eighty-eight percent of Chapter 40B projects have been approved at the local level.⁴¹ This is partially due to the fact that local zoning boards are fully aware that success at HAC is unlikely.⁴² Comparatively, one-third of all of the projects built under Chapter 40B’s first thirty years were only approved after a HAC appeal.⁴³ Under this framework, Chapter 40B established a “bright line test;” when a municipality does not have ten percent of its housing stock reserved for low or moderate incomes, a rebuttable presumption arises that “substantial regional housing need . . . outweighs local concern.”⁴⁴ Under

34. *Id.* § 20.

35. 760 MASS. CODE REGS. 56.07(b)(1) (2008).

36. *Id.* at 56.03(1)(a).

37. 760 MASS. CODE REGS. 56.03(b) (2008). “Sixty-four communities have received . . . approval of their Planned Production Plans, but only six are currently certified as the result of having made adequate progress during the past year.” BONNIE HEUDORFER, CITIZENS’ HOUSING AND PLANNING ASSOCIATION, UPDATE ON 40B HOUSING PRODUCTION 19 (2007), available at <http://www.chapa.org/pdf/40BUpdate2007.pdf>; see also NETTER, *supra* note 26, at 3 for details on the planned production program.

38. 760 MASS. CODE REGS. 56.07(2)(b)(2) (2008).

39. HEUDORFER, *supra* note 37, at 19.

40. Krefetz, *supra* note 22, at 397–98 n.81–82.

41. HEUDORFER, *supra* note 37, at 19.

42. *Id.*

43. *Id.*

44. Russell, *supra* note 22, at 452–54; MASS. GEN. LAWS ch. 40B § 20 (2006); 760 MASS. CODE REGS. 56.07(b)(2) (2008).

this presumption, affordable housing is elevated as a regional need, superior to environmental, health, or safety needs, which are treated as limited, local concerns.

*B. Market Driven Development Under Chapter 40B
Encourages Sprawl*

Besides creating a division between local environmental concerns and regional housing needs, Chapter 40B also perversely affects land use for two closely related reasons. First, developers and the market are the impetus behind Chapter 40B development, and “[e]conomics and existing practices favor housing that promotes sprawl.”⁴⁵ Second, the most commonly used subsidy program—local lender financing under NEF⁴⁶—encourages development with less housing, larger lots, and limited coordination as the most profitable scheme: “[N]early two-thirds of 40B homeownership developments were built at densities of five or fewer units per acre”⁴⁷ and most 40Bs are detached dwellings, home ownership units that promote sprawl.⁴⁸

When developers and the market are the drivers of development, economic conditions and common development practice often lead to greenfield, sprawling development because suburban fringe areas do not hold the same regulatory and political hurdles as centralized development. There are few objecting neighbors, zoning restrictions are often more lax, and development costs are usually lower—especially if a municipality imposes minimal or low impact fees for infrastructure expansion.⁴⁹ Some developers also find greenfield development more attractive than construction on previously developed land, or brownfield development, because of uncertainty about cleanup costs and continuing liability risks.⁵⁰

The subsidy programs behind Chapter 40B have changed substantially since its inception in 1969. Since the 1980s, federal funding for affordable housing production was drastically scaled back and by the early 1990s,

45. Russell, *supra* note 22, at 483.

46. HEUDORFER, *supra* note 37, at 5.

47. *Id.*

48. Russell, *supra* note 22, at 457.

49. *Id.* at 459.

50. This fear remains despite the passage of the Small Business Liability Relief and Brownfields Revitalization Act, which gave federal liability protection to brownfield developers and reduced the strict liability standard previously applied under CERCLA. Miral Alena Sigurani, *Brownfields: Converging Green, Community, and Investment Concerns*, 43 ARIZ. ATT'Y 38, 41 (2006) (citing Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 1071-118 (H.R. 2869)), available at <http://www.myazbar.org/AZAttorney/index.cfm?issue=76> (last visited Nov. 19, 2008).

most Massachusetts state funding was eliminated as well.⁵¹ Due to less federal and state funding, affordable housing construction went from being done almost entirely by local housing authorities and non-profit organizations to private developers who may not have previously managed affordable housing projects.⁵² In the 1990s, the Local Initiative Program (LIP) filled the role of the leading Chapter 40B subsidy program.⁵³ Under LIP, the subsidy requirement of Chapter 40B is fulfilled when the State provides services and technical assistance to municipalities “for creation, maintenance and preservation of [] Low and Moderate Income Housing.”⁵⁴ Without a monetary subsidy, developers must recover lost profits on the affordable units through a variety of measures—most of which lead to sprawling development. Primarily, developers have shifted the development pattern to single family homes, and ninety percent of projects approved under LIP have been single family only.⁵⁵ In the absence of federal or state funds, “the affordable units in 40B developments must be ‘carried’ by the market rate units, so size has become a function of the cost of internally subsidizing those units.”⁵⁶ Private developers have substantial control over the LIP process, and in a great majority of cases, they are not looking to serve low-income residents or protect the environment, but are looking to collect the greatest rate of return on their money invested.⁵⁷ Between 2002 and 2007 the prominence of the LIP program was surpassed by NEF financing.⁵⁸ Although NEF provides financing at lowered interest rates, market forces and the private sector remain the drivers behind Chapter 40B development,⁵⁹ with all of the aforementioned consequences.

51. HEUDORFER, *supra* note 37, at 7.

52. *Id.*

53. Russell, *supra* note 22, at 459 n.130.

54. *Id.*

55. Krefetz, *supra* note 22, at 410. LIP was initiated with the political backdrop of the Dukakis Administration’s push towards creating additional family home production for young families increasingly being priced out of Massachusetts. Although the Administration’s efforts did increase the housing stock, it remains questionable whether the new housing significantly helped anyone other than those “born and bred” in the suburbs. *Id.* at 405–06.

56. HEUDORFER, *supra* note 37, at 14.

57. Krefetz, *supra* note 22, at 412–13.

58. HEUDORFER, *supra* note 37, at 16. Between 2001 and 2006, the LIP program backed nineteen percent of home ownership projects and ten percent of rental projects.

59. *See* Stuborn Ltd. P’ship v. Barnstable Bd. of Appeals, No. 98-01, 1999 WL 34782799, at *28 (MA. HOUS. APP. COM.) (finding that “NEF relies on market forces, on expertise found in the private sector, and on local control to build better affordable housing.”).

C. Chapter 40B's Impact on Housing

In 2006, forty-eight out of Massachusetts's 351 municipalities have reached Chapter 40B's ten percent affordable housing goal.⁶⁰ Also, fifty-one percent of all affordable units developed in 2004 to 2005 were erected under Chapter 40B, and when compared to inclusionary zoning and traditional subsidies, Chapter 40B is the main driver behind affordable housing production in Massachusetts.⁶¹ When the Greater Boston Area is excluded from calculations, Chapter 40B development accounts for seventy-one to eighty-three percent of affordable units permitted. However, "the homeownership developments are targeted at the upper end of income eligibility, 70–80% of the area median income," and it is unrealistic to rely on Chapter 40B to produce housing for those most in need.⁶²

Although Chapter 40B has multiple flaws, it can and should be credited with increasing the stock of affordable housing across the state in the face of suburban communities that establish restrictive zoning for a variety of economic and social reasons—legitimate and illegitimate alike.⁶³ Chapter 40B also continues to promote affordable housing production in the absence of direct governmental subsidies. After evaluating some of Chapter 40B's most drastic flaws, however, Chapter 40R provides an environmentally and socially favorable alternative. It provides a streamline permitting process for developers who increase the affordable housing stock, but it also places significantly more control in the hands of municipalities⁶⁴ and encourages compact development.⁶⁵

60. HEUDORFER, *supra* note 37, at 19.

61. *Id.* at 5, 19–20.

62. *Id.* at 19.

63. See Russell, *supra* note 22, at 439–40 (discussing municipalities' quest to "cultivate the most robust tax base," causing zoning boards to place a considerable amount of land off limits for affordable housing development and how "saving the local environment may serve as code for exclusionary zoning and all it conceals.>").

64. It should be noted that local political pressure often encourages local decision makers to allow or invite unwise development in their town or city. Municipalities may hope to raise their tax base or increase the local job market while the environmental and social costs of development impact the entire region. Justin Shoemaker, Note, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 DUKE L.J. 891, 900 (1999). Complete federal or state control over land planning seems unimaginable. Since the Supreme Court upheld local zoning as a legitimate application of police power in *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 366 (1926), municipalities have made active use of zoning powers to shape their communities (traditionally, by segregating land uses viewed as incompatible). Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic Into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 110 (2002). State regulatory frameworks, however, are required to ensure that local politics do not dominate and lead to unwise development. Partnerships between state and local governments can "produce more sophisticated and strategic approaches to best protect

III. CHAPTER 40R: THE BASIC FRAMEWORK AND THE INCORPORATION OF LAND PLANNING PRINCIPLES

Chapter 40R, the “Smart Growth Zoning and Housing Production” law was enacted on July 1, 2004 and 40R regulations were issued on March 25, 2005.⁶⁶ The purpose of Chapter 40R is “to encourage smart growth and increased housing production in Massachusetts.”⁶⁷ After almost forty years under Chapter 40B, the rapid rate of land consumption and the deficiency of reasonably priced homes in Massachusetts, make the need for legislation with the twin goals of Chapter 40R obvious.

Chapter 40R was modeled after recommendations by the Commonwealth Housing Task Force (“the Task Force”) in 2003.⁶⁸ The two main recommendations were:

1. The state provide financial and other incentives to local communities that pass Smart Growth Overlay Zoning Districts that allow the building of single-family homes on smaller lots and the construction of apartments for families at all income levels.
2. The state increase its commitment to fund affordable housing for families of low and moderate income.⁶⁹

As evidenced by its purpose statement, Chapter 40R has adopted both of these recommendations. In contrast to the mandatory nature of Chapter

and preserve environmental concerns and resources under the guise of local land use regulation.” *Id.* at 148. Chapter 40R is an important step in building such partnerships in Massachusetts.

65. See HEUDORFER, *supra* note 37, at 20 (“Many of the communities . . . considering creating, ‘Smart Growth Zoning’ districts under the recently passed Chapter 40R have been motivated to do so because of the existence of 40B. In fact, several of the sites now targeted for 40R development were originally proposed as 40Bs. . . . In some cases, developers are pursuing both options, 40B and 40R, simultaneously.”).

66. Robert A. Fishman & Beth H. Mitchell, *Massachusetts’ Novel Approach to Encouraging Housing Production in Smart Growth Areas*, AM. C. OF REAL EST. LAW. NEWSL. (Am. C. of Real Est. Law., Rockville, MD), Sept. 2005, at 9, available at <http://www.acrel.org/documents/newsletters/Sept2005.pdf>.

67. MASS. GEN. LAWS ch. 40R § 1 (2006).

68. CARMAN, ET AL., *supra* note 12, at 2. The Task Force is an ad hoc group that was formed in 2001 to address Massachusetts’ housing crisis as described above. The Task Force’s members includes representatives of “housing organizations, the business community, organized labor, the Urban Land Institute, The Boston Foundations, Citizens Housing and Planning Association (CHAPA), academic institutions, elected and appointed officials, and many others.” *Id.*

69. *Id.*

40B, Chapter 40R provides an incentive-based, optional program for encouraging affordable housing and concentrated development.⁷⁰

Any Massachusetts municipality can take advantage of Chapter 40R incentives; but first, both DHCD and the municipal government's own approving authority must approve a SGZD.⁷¹ A SGZD, or overlay district, is a zoning district adopted by the municipality that satisfies the requirements discussed below. The new zoning district does not replace the existing zoning requirements.⁷² Rather, it allows developers to build residential and mixed use developments "as-of-right,"⁷³ at higher densities than normally permitted as long as the development meets municipality's Chapter 40R plan and design standards.⁷⁴

Four main steps must be taken by a municipality seeking overlay district approval under Chapter 40R. First, the chief executive of a municipality must give public notice and hold a hearing on whether the city or town should adopt the overlay district.⁷⁵ At this stage, comments from the community must be gathered and considered and the project site finalized.⁷⁶ Second, the municipality's application is submitted to and considered by DHCD for a preliminary determination of whether the application meets the approval requirements.⁷⁷

Two primary factors are considered in DHCD approval: the location and density of the SGZD, and the increase in affordable housing provided by each district. As for location, areas available for overlay designation are "eligible locations," which include: "(1) areas near transit stations . . . ; (2) areas of concentrated development . . . ; or (3) areas that by the virtue of their infrastructure, transportation access, existing underutilized facilities,

70. For a discussion on the interplay between Chapters 40R and 40B, see *infra* text accompanying note 167.

71. 760 MASS. CODE REGS. 59.01 (2008).

72. A municipality may also apply for the approval of a SGZD based on existing zoning guidelines. If the SGZD is approved, incentives for each housing unit of new construction under MASS. GEN. LAWS Ch. 40R § 9(b)—a \$3,000 payment dispersed upon proof of issuance of a building permit—is available to that municipality. The municipality is not eligible for the one time zoning incentive payments. See MASS. GEN. LAWS ch. 40R § 13 ("Upon approval, a city or town with an existing district shall become entitled to the one-time density bonus payments upon the construction of new units within the smart growth zoning district and preference of capital expenditure funds, as provided in section 9, from the date of approval, but shall not be eligible for zoning incentive payments.").

73. "A unit of housing is developable As-of-right if it may be developed under the Underlying Zoning or Smart Growth Zoning without recourse to a special permit, variance, zoning amendment, or other form of zoning relief." 760 MASS. CODE REGS. 59.02 (2008).

74. See 760 MASS. CODE REGS. 59.04(f) (2008) for grounds on which a project may be denied.

75. *Id.* at 59.05(1).

76. *Id.* at 59.05(1).

77. *Id.* at 59.05(2).

and/or location make highly suitable locations”⁷⁸ The SGZD may also include “adjacent areas” such as “areas that are served by existing infrastructure and utilities, and that have pedestrian access to at least one destination of frequent use, such as schools, civic facilities, places of commercial or business use, places of employment, recreation or transit stations.”⁷⁹ Of the twenty-six municipalities with approved Chapter 40R districts, eight were approved as areas near transit stations, fourteen as areas of a highly suitable location, and four as areas of concentrated development.⁸⁰

The density requirement of Chapter 40R mandates that housing densities in the overlay district should be, at minimum, twenty units per acre for multi-family housing, eight units per acre for single family homes, and twelve units per acre for two and three family buildings.⁸¹ The density requirements shall apply to all developable land within the zoning district, but need not apply to “substantially developed land.”⁸² This exemption may include areas designated as open space or future open space, land currently used for governmental functions, historic districts, and protected and contiguous land greater than one half acre.⁸³ In order to meet the second factor required for DHCD approval, the affordability requirements of a municipality’s smart growth zoning or community housing plan shall provide mechanisms to endure “that not less than twenty per[cent] of the residential units constructed in projects of more than twelve units shall be affordable . . . and shall contain mechanisms to ensure that not less than

78. MASS. GEN. LAWS ch. 40R § 2 (2006).

79. *Id.* § 3. These eligible locations and adjacent areas conform to the Smart Growth Network’s definition of smart growth as “development that serves the economy, community, and the environment and is most often characterized by ten principles of growth,” including mixed land uses, walkable neighborhoods, and a variety of housing opportunities. DANIELLE ARIGONI, SMART GROWTH NETWORK, AFFORDABLE HOUSING AND SMART GROWTH, MAKING THE CONNECTION, at 14 (2001), available at http://www.smartgrowthamerica.org/affordable_housing.pdf. Seven remaining smart growth principles include compact building design; distinctive and attractive communities with a strong sense of place; preservation of farmland, historic buildings, natural beauty, and critical environmental areas; reinvestment in existing communities; a variety of transportation choices; predictable, fair, and cost-effective development decisions; and strong stakeholder participation in development decisions. *Id.* The Smart Growth Network was co-founded by the Environmental Protection Agency (EPA) in 1996. It consists of over twenty-five organizations, including the American Planning Association, Fannie Mae, the National Trust for Historic Preservation, and the Natural Resources Defense Council, among others. The network is a resource for information, technical assistance, and research. *Id.* at 14 n.22.

80. EXECUTIVE OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT, 40R DISTRICTS/ACTIVITY, *supra* note 6.

81. MASS. GEN. LAWS ch. 40R § 6 (2006); 760 MASS. CODE REGS. 59.04(d) (2008).

82. 760 MASS. CODE REGS. 59.04(d) (2008).

83. *Id.* at 59.02.

twenty per[cent] of the total residential units constructed in each district shall be affordable.”⁸⁴

After preliminary approval by the DHCD, a municipality’s “[a]pproving authority”⁸⁵ may choose to adopt the overlay district in the same manner used to adopt any other zoning regulations.⁸⁶ At the final approval stage, the municipality does not need to identify specific projects for development. However, building must commence within three years of DHCD approval or the municipality will be required to pay back funds disbursed upon approval.⁸⁷ Faced with the risk of repayment and the requirement that application materials under Chapter 40R include a specific plan for infrastructure upgrades, a municipality may find it desirable to specify projects before they begin the Chapter 40R application process.⁸⁸

Finally, the DHCD may make final approval after the municipality has submitted proof of its adoption of the overlay district. Final approval is an informal, non-adjudicatory procedure, and the DHCD shall confirm or deny the application within thirty days.⁸⁹ After final DHCD approval, if a developer is denied a permit within a Chapter 40R district, he or she has twenty days as part of an expedient procedure to appeal the denial or grant with conditions of a development permit. The Land Court, Superior Court, or the Housing Court may hear this appeal and each are required to give Chapter 40R claims priority.⁹⁰ The plaintiff is also not required to serve regular notice but may serve process through certified mail and file an affidavit with the court that such notice was given.⁹¹

Within ten days of the DHCD final SGZD approval, the DHCD is required to pay the municipality a zoning incentive payment according to a scale presented in Section 9 of Chapter 40R. Payments are based on the total projected units of new construction in excess of what could have been built under the underlying zoning.⁹²

84. MASS. GEN. LAWS ch. 40R § 6(a)(4) (2006); 760 MASS. CODE REGS. 59.04(1) (2008).

85. An “[a]pproving authority” is defined as “a unit of municipal government designated by the city or town to review projects and issue approval under section eleven.” MASS. GEN. LAWS ch. 40R § 2 (2006).

86. 760 MASS. CODE REGS. 59.05(3) (2008).

87. MASS. GEN. LAWS ch. 40R § 14 (2006).

88. Aladdine D. Joroff, *Smart Growth*, in 2 MASS. ZONING MANUAL § 18.1 (Martin R. Healy ed., 2007).

89. 760 MASS. CODE REGS 59.05(4) (2008).

90. Joroff, *supra* note 88, at § 18.7.4.

91. MASS. GEN. LAWS ch. 40R § 11(f) (2006).

92. The definition of “[n]ew construction” includes “construction of new housing units, the substantial rehabilitation of existing buildings or the conversion to residential use of existing buildings to create additional housing units, to the extent those units could not have been constructed or converted under the underlying zoning.” MASS. GEN. LAWS ch. 40R § 2 (2006).

Projected new units	Payment
Up to 20	\$10,000
21–100	\$75,000
101–200	\$200,000
201–500	\$350,000
501 or more	\$600,000

As mentioned above, the municipality must commence building within three years of DHCD's approval. Site remediation, utility relocation, and pouring foundations count as the start of building in the district.⁹³ The three-year period may also be delayed if a needed infrastructure upgrade or project is currently subject to a legal challenge.⁹⁴

In addition to the zoning incentive payment, DHCD grants municipalities \$3,000 when proof of issuance of a building permit for a unit of new construction is submitted.⁹⁵ New units eligible for the bonus are only those units above those already allowed for in the underlying zoning.⁹⁶ Units developed within the smart growth district under a CP issued pursuant to Chapter 40B before the municipality's Chapter 40R smart growth district was submitted are not eligible for any incentive payments because the Chapter 40B units are treated as development allowable under the underlying zoning.⁹⁷ However, development allowable under the Chapter 40B CP that is granted after the Chapter 40R plan has been submitted to the DHCD does qualify for bonus payments.⁹⁸

93. 760 MASS. CODE REGS. 59.02 (2008).

94. *Id.* at 59.07(1)(f).

95. *Id.* at 59.06(2).

96. *Id.* at 59.02.

97. *See id.* at 59.02 (“Bonus Unit means any residential housing unit developed as part of a Project within a District under the Smart Growth Zoning, either through new construction, the substantial rehabilitation of an existing building, or the conversion to residential use of an existing building, in excess of the number of Existing Zoned Units for the same Project. *Units that are developed within a District under a Comprehensive Permit issued pursuant to M.G.L. c. 40B after the submission of an application to the Department under 760 CMR 59.05(2), in excess of the number of Existing Zoned Units for the same Project, shall be treated as Bonus Units.*”) (emphasis added).

98. *Id.*

IV. HOW OTHER STATES HAVE APPROACHED LAND USE AND AFFORDABLE HOUSING GOALS

Some commentators have examined different regulatory or incentive-based approaches currently used across the country to promote smart growth and land planning at the local and state level.⁹⁹ For example, upon the request of the Governor, California's Office of Planning and the Public Research Law Institute conducted a study of how different states have incorporated smart growth principles into statewide legislation, mandates, and policies.¹⁰⁰ Studies, such as those conducted in California, provide a comprehensive overview of how state policies work to either encourage or impede smart growth planning. There has not yet been equivalent work evaluating state programs that incorporate the dual goals of promoting environmentally conscious land planning and increasing affordable housing.¹⁰¹ Part IV of this note is not comprehensive, but does evaluate programs in Oregon, Vermont, Connecticut, and Hawaii, which, like Massachusetts, have attempted to coordinate smart growth principles with affordable housing policies.

A. Oregon

Oregon has been referred to as “the archetypal centralized planning state,”¹⁰² “[a] [l]eader in [s]mart [g]rowth,”¹⁰³ and the “gold standard”¹⁰⁴ in land use planning. Oregon was also the first state to enforce statewide mandatory and comprehensive planning.¹⁰⁵ The Oregon Land Use Planning Act of 1973 requires that municipalities adopt comprehensive land use plans.¹⁰⁶ The plans must conform to nineteen statewide goals and may

99. See Ed Bolen, et al., *Smart Growth: A Review of Programs State by State*, 8 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 145, 145 (2002) (discussing smart growth initiatives and planning strategies across the fifty states); see generally Patricia E. Salkin, *Squaring the Circle on Sprawl: What More Can We Do? Progress Toward Sustainable Land Use in the States*, 16 WID. L. J. 787 (2007) (discussing the smart growth movement in the United States).

100. Bolen, et al., *supra* note 99, at 145–46.

101. Although no study was found that evaluates states' smart growth and affordable housing programs, several publications recognize the relationship between these dual goals. See, e.g., ARIGONI, *supra* note 79 (discussing how smart growth and affordable housing can coexist) and KENDRA J. BRIECHLE, THE CONSERVATION FUND, CONSERVATION-BASED AFFORDABLE HOUSING TO PROTECT PLACE & PEOPLE (2006) (discussing conservation-based affordable housing).

102. Bolen, et al., *supra* note 99, at 206.

103. Salkin, *supra* note 99, at 813.

104. Russell, *supra* note 22, at 476.

105. Bolen, et al., *supra* note 99, at 207.

106. OR. REV. STAT. § 197.005 (2007).

follow implementation guidelines.¹⁰⁷ Perhaps the most important and infamous mandatory planning goal is the enforcement of urban growth boundaries (UGB). Portland probably has the most famous growth boundary in the world besides the Great Wall of China.¹⁰⁸ An urban growth boundary “directs development to designated zones while preserving open space outside fixed but periodically adjustable” boundaries.¹⁰⁹ Municipality UGBs are re-evaluated every five years to ensure they contain enough land for growth based on a twenty-year projection.¹¹⁰

Although the primary motivation behind the Land Use Planning Act is environmental protection and open-space preservation, Goal 10 requires that the twenty-year projection include enough buildable land to “accommodate estimated housing needs for 20 years.”¹¹¹ The definition of needed housing includes “housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels.”¹¹² The Oregon Legislature also explicitly stated:

The availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers, is a matter of statewide concern. . . . When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing, including housing for farmworkers, shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.¹¹³

Unlike Chapters 40R and 40B, the Oregon statute does not require a certain percentage of affordable units per development or provide specific affordable housing goals. It does, however, recognize the importance of affordable housing and prohibit exclusionary zoning practices.¹¹⁴ Oregon

107. Oregon Department of Land Conservation and Development, Statewide Planning Goals, <http://www.oregon.gov/LCD/goals.shtml> (last visited Nov. 21, 2008).

108. Daniel Brook, *Argument, How the West Was Lost, How Were the People of Portland, Oregon, Once the Country's Fiercest Anti-sprawl Crusaders, Convinced to Give up the Fight?*, LEGAL AFF., Mar.–Apr. 2005, at 44, 45 (citing interview with Gerritt Knaap, University of Maryland).

109. GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 912 (2005 5th ed.).

110. Brook, *supra* note 108, at 45.

111. OR REV. STAT. § 197.296(2) (2007). *See also* OR Admin. R. 660–015 0000(10) (2008).

112. *Id.* § 197.303 (2007).

113. *Id.* § 197.307 (1)–(3)(a) (2007).

114. *See* 1000 Friends of Oregon, Affordable Housing, <http://www.friends.org/issues/housing> (last visited Sept. 19, 2008) (“The planning laws forbid *exclusionary* housing policies—zoning that

Housing and Community Services (OHCS) is a driving force behind the production of affordable housing.¹¹⁵ Through its regional advisors, OHCS provides outreach and technical assistance to Oregon communities in projecting their housing needs and facilitating the use of government funds for affordable housing development.¹¹⁶

Oregon's land planning system has rightly been lauded as a success.¹¹⁷ However, this highly top-down approach became a divisive element of Oregon politics and, in 2004, led to a massive change in the implementation of the Land Use Planning Act. Measure 37 requires local governments to compensate private land owners for reduction in their property's fair market value if the reduction is caused by the property being zoned outside of the UGB.¹¹⁸ If the municipality cannot afford the reimbursement, they must waive the zoning requirement.¹¹⁹ Measure 37 is also a retroactive statute, meaning that "[i]f a property owner feels that any zoning change made during his tenure as owner has devalued his property, he can file a claim for compensation."¹²⁰

In a special election vote on November 6, 2007, Oregon voters drastically curtailed the impact of Measure 37 when they passed Measure 49, a provision that reduces the remedies available to land owners. Instead of local governments providing monetary compensation, land owners are given the right to build a limited number of homes.¹²¹ Measure 49 also prohibits subdivisions on "high-value farmlands, forestlands and ground water restricted lands."¹²² Although Measure 49 will help Oregon's land planning system recover from the blow dealt by Measure 37, this recent

prohibits apartment buildings or other multifamily housing, manufactured housing, or government assisted housing.") (emphasis added).

115.

Oregon Housing and Community Services, http://www.oregon.gov/OHCS/COM_OHCSProgramsOverview.shtml (last visited Oct. 30, 2008).

116. Oregon Housing and Community Services, Regional Advisors to the Department http://www.oregon.gov/OHCS/COM_OHCSProgramsOverview.shtml (last visited Sept. 2, 2008).

117. Between 1992 and 1997, land was developed in Oregon at an even one-to-one ratio of land consumption to population growth. When compared to the ratios in states with and without comprehensive planning, this achievement is outstanding: 1.3 to 1 in Washington; 3.2 to 1 in New Jersey; 8.5 to 1 in New York (excluding NY City); 9.5 to 1 in Pennsylvania. DAVID RUSK, THE ANNUAL ISADORE CANEUB MEMORIAL LECTURE IN PLANNING, SPRAWL, AND FAIR HOUSING: NEW JERSEY'S UNFINISHED AGENDA (Oct. 3, 2002) at 2-3, <http://www.gamaliel.org/DavidRusk/Rutgers%20talk%2010-31-02.pdf>.

118. OR REV. STAT. § 195.305(1) (2007).

119. Salkin, *supra* note 99, at 815.

120. Brook, *supra* note 108, at 45.

121. BALLOT MEASURE 37 (2004) & PROPOSED BALLOT MEASURE 49, QUESTIONS AND ANSWERS 1 (2007), http://www.oregon.gov/LCD/MEASURE37/docs/general/M37-M49_Q-A_101507.pdf.

122. *Id.* at 2.

political struggle is evidence of the weaknesses inherent in a purely command and control system. UGBs are extremely effective land-conservation tools, but they have produced a firestorm of opposition from property-rights groups, such as Oregonians in Action, and can lead to strong private opposition.¹²³ Unfortunately, even land-planning systems as successful and established as Oregon's are vulnerable to political attack.

If Oregonians have learned anything from the Measure 37 and 49 debate, it should be that any successful top-down regulation must maintain some element of flexibility and private control. The California study noted earlier recommends incentive-based growth management as one of the most effective ways to manage sprawl and meet desired state goals.¹²⁴ The study also notes that the best state land-planning systems are flexible and specific to local social and political realities.¹²⁵ Given Massachusetts's home-rule tradition, the incentive-based approach is most appropriate: the state retains the ability to set statewide goals by conditioning incentive payments on well delineated planning and affordable housing requirements, but local communities retain the choice of whether and where to adopt a SGZD. Extension of the Oregon-style land-planning model across the United States is unlikely.¹²⁶ A system modeled on Chapter 40R can provide incentives for land-planning and affordable housing production when mandatory limitations on development are infeasible politically. The alternatives presented by Vermont, Hawaii, and Connecticut provide state grants, loans, and technical assistance to promote local utilization of smart growth principles, including affordable housing production.

B. Vermont, Hawaii, & Connecticut

Vermont's land use system has been described as one that "defies easy categorization."¹²⁷ The state's primary land use and development law, Act 250, is based on a permitting system and does not require mandatory, comprehensive planning.¹²⁸ Act 250 provides a framework for large-scale development decisions made across the state, and creates an administrative

123. See Brook, *supra* note 108, at 46 (discussing how a farmer began clear cutting her seventy-three acre farm when she was denied residential zoning and her land was instead zoned as an important wildlife and agricultural area).

124. Bolen et al., *supra* note 99, at 230.

125. See *id.* at 230 ("Different states see the state's role differently, reflecting the diversity of state land use systems, state government structures, geography, politics, and demographics, and numerous other factors.").

126. See EDWARD CARMAN ET AL., *supra* note 12.

127. Bolen et al., *supra* note 99, at 220.

128. VT. STAT. ANN. tit. 10, §§ 6001–6093 (2006).

structure consisting of nine district environmental commissions, each composed of three governor-appointed members¹²⁹ and one, nine member, natural resources board.¹³⁰ Every proposed construction of improvements on tracts of land involving ten or more acres for commercial or industrial use, housing projects of ten or more units where each unit is located on fewer than ten acres, and developments above an elevation of 2,500 feet must seek a permit from the district commission.¹³¹ Decisions of a district commission may be appealed to the Environmental Board created by Act 250, and the Vermont Supreme Court may hear final appeals.¹³² Growth is not as restricted under Act 250 as it is in Oregon, but permit approval must be evaluated against certain land-management principles which include “conformance with any duly adopted local or regional plan or capital program.”¹³³

Several pieces of legislation and executive orders in Vermont have modified or supplemented Act 250 to promote smart growth and local land planning.¹³⁴ Vermont expanded an existing Downtown and Village Centers Program in 2006 through Act 183.¹³⁵ Under Act 183, municipalities can apply for downtown “growth center” designation.¹³⁶ Designated growth centers incorporate many elements of a traditional New England town center, and must comply with smart growth principles as defined by the act.¹³⁷ Once the growth center is recognized by the state, the municipality may use tax-increment financing for infrastructure improvements within the

129. *Id.* § 6026.

130. *Id.* § 6021.

131. *Id.* § 6001 (3); Shoemaker, *supra* note 64, at 903.

132. *Id.* § 6089; *Id.* § 8505.

133. Ten detailed criteria must be met by permit seekers, however a permit may not be denied based on Criteria 5, 6, or 7 alone. *Id.* § 6087(b). Permit review requires consideration of: (1) water or air pollution; (2) water availability; (3) possible burden on existing water supply; (4) soil erosion; (5) transportation congestion; (6) burden on educational services; (7) burden on municipal and governmental services; (8) effect on scenic or natural beauty, aesthetics, historic sites, or rare or irreplaceable natural areas; (9) compliance with the capability and development plan and land-use plan [a statewide land-use plan was never adopted]; and (10) conformance with any duly adopted local or regional plan or capital improvement. *Id.* § 6086 (a). The burden of proof for showing compliance with Criteria 1–4 and 9–10 rests with the applicant, while the burden of showing noncompliance with 5–8 rests on the party opposing permit approval. *Id.* § 6088. Any group with a particularized interest in the development protected by Act 250 that may be affected may petition for party status. *Id.* § 6085(c)(1)(E).

134. See Summary of Smart Growth Policies and Legislation, <http://www.smartgrowthvermont.org/help/policies/> (giving a brief outline of Vermont smart growth policies) (last visited Sept. 19, 2008).

135. VT. STAT. ANN. tit. 24, § 2790 (Supp. 2007).

136. VT. STAT. ANN. tit. 24, § 2793c (Supp. 2007).

137. VT. STAT. ANN. tit. 24, § 2791 (12)(B)(i) (Supp. 2007).

growth center and is given priority for state assistance and funding.¹³⁸ The act also provides technical planning assistance to municipalities that are contemplating growth center designation.¹³⁹

Vermont is also a leader in explicitly promoting smart growth and affordable housing in conjunction. In 2007, Vermont received the only state award given in EPA's "National Awards for Smart Growth Achievement."¹⁴⁰ The award was given in recognition of Vermont's Housing and Conservation Board (VHCB). The VHCB is a state-supported agency that provides "grants, loans and technical assistance to nonprofit organizations, municipalities and state agencies."¹⁴¹ Money distributed by VHCB is provided in part by a portion of the property-transfer tax.¹⁴² VHCB funds "eligible activities" that meet either or both of VHCB's dual goals of creating affordable housing and protecting Vermont's resources.¹⁴³ Specifically, eligible activities include:

(A) the preservation, rehabilitation or development of residential dwelling units which are affordable to lower income Vermonters; (B) the retention of agricultural land for agricultural use; (C) the protection of important wildlife habitat and important natural areas; (D) the preservation of historic properties or resources; (E) the protection of areas suited for outdoor public recreational activity; (F) the development of capacity on the part of an eligible applicant to engage in an eligible activity.¹⁴⁴

Between 2003 and 2006, ninety-four percent of all VHCB grants and loans supported development in smart growth projects.¹⁴⁵ These efforts conserved 14,172 acres of farmland through their conservation easement program and spent \$23,226,884 on sixty-eight affordable housing projects across the state.¹⁴⁶ VHCB has funded over 8,500 units of affordable

138. VT. STAT. ANN. tit. 24, § 2793c (i)(1) (Supp. 2007).

139. VT. STAT. ANN. tit. 24, § 2793c (a) (Supp. 2007).

140. Dave Ryan, *States and Cities Recognized for Smart Growth: Manhattan, NY; Seattle, WA; Portland, OR; Barnstable, MA; Vermont Praised for Environmentally Sensitive Development*, EPA: AGING INITIATIVE, Nov. 14, 2007, http://epa.gov/aging/press/epanews/2007/2007_1114_1.htm.

141. Vermont Housing and Conservation Board, <http://www.vhcb.org/index.htm> (last visited Oct. 30, 2008).

142. VERMONT SMART GROWTH COLLABORATIVE, STATE OF VERMONT: SMART GROWTH 2007 PROGRESS REPORT 10 (2007), available at http://www.vsmartgrowth.org/SMARTGROWTH_PROG_REPORT.pdf.

143. VT. STAT. ANN. tit. 10, § 303(3) (1998).

144. *Id.* § 303(3)(A)–(F).

145. VERMONT SMART GROWTH COLLABORATIVE, *supra* note 142, at 3.

146. *Id.* at 10.

housing across the state since its inception in 1987.¹⁴⁷ VHCB is one of Vermont's most effective tools in promoting smart growth, but it has faced some funding challenges in recent years. Under VHCB's enabling legislation, its trust fund is supposed to receive fifty percent of the property-transfer tax revenue.¹⁴⁸ The legislature has reduced this percentage, however, and VHCB's 2006 budget was one million dollars below the 2003 budget.¹⁴⁹

Despite these funding challenges, the VHCB program is a nationwide model for the collaboration of smart growth and affordable housing. In 2005, Hawaii's Governor signed the Legacy Lands Act, which designates funds for purchasing coastline and special areas and increases funds for natural area reserves and affordable housing.¹⁵⁰ Money assigned to the "Land Conservation Fund" and "Rental Housing Trust Fund" is provided by a graduated tax on the transfer of high-end real estate.¹⁵¹ Similarly, in 2005, the Connecticut Legislature passed "An Act Concerning Farmland Preservation, Open Space, Historic Preservation and Affordable Housing." Instead of imposing a transfer tax, Connecticut imposes a thirty-dollar fee for recording in land records, twenty-six dollars of which go towards promoting the goals of the act.¹⁵²

VHCB is also a model for a new federal program, the National Affordable Housing Trust Fund Act. The act, proposed by Vermont Congressman Peter Welch, ensures that every state will receive at least 0.5% of the 800 million to one billion dollars allocated for disbursement to local and state governments. The governments may then provide grants to organizations and agencies that have the ability to build and rehabilitate affordable housing.¹⁵³ Contributions by Fannie Mae and Freddie Mac provide the disbursement funds, and a proposed reform of the Federal Housing Administration may provide additional funds.¹⁵⁴

Although the programs in Vermont, Connecticut, and Hawaii provide financial incentives for affordable housing and land conservation, Chapter

147. Press Release, Office of Congressman Peter Welch, Landmark Affordable Housing Bill Passes with Small State Minimum, Adopts Vermont's Successful Model (Oct. 10, 2007), available at <http://www.vhcb.org/news.html#epa> (last visited Sept. 26, 2008).

148. VT. STAT. ANN. tit. 10, § 312 (1998).

149. VERMONT SMART GROWTH COLLABORATIVE, *supra* note 142, at 10.

150. Press Release, Conservation Council for Hawaii et al., Governor Signs Legacy Land Act, (June 23, 2005), <http://www.hi.sierraclub.org/press/releases04-05/2005/6.23.05LegacyLandsSign.pdf>.

151. *Id.*

152. Vermont Housing and Conservation Board, National Collaborations, <http://www.vhcb.org/coalitions.html> (last visited Oct. 30, 2008).

153. Office of Congressman Peter Welch, *supra* note 147.

154. *Id.*

40R provides some advantages over these programs. First, Chapter 40R sets out specific requirements for the amount of affordable housing SGZD must contain.¹⁵⁵ This requirement allows state officials to identify the state's total need for affordable housing and ensure that each community receiving funds plays a role in fulfilling that need. Without this provision, local planning boards have few incentives to promote affordable housing and are under much political pressure to avoid it.¹⁵⁶ Act 183 in Vermont requires only that affordable housing be considered as one of multiple uses in growth centers.¹⁵⁷ Similarly, VHCB and the program identified in Connecticut and Hawaii do not specifically designate a housing goal. Given the normative value of affordable housing for current generations, states should play an active role in ensuring each municipality carries their fair share.

Also, unlike VHCB and similar programs, Chapter 40R and Act 183 require municipalities to engage in formal land planning before they are eligible to receive state funds. Development not guided by an updated plan with well defined goals and design standards can lead to inconsistent development and market-driven externalities.¹⁵⁸ Both Act 183 and Chapter 40R require local planning within a framework of statewide policies. This model encourages the state and municipality to enter into a partnership that achieves regional goals otherwise unattainable when municipalities act alone.

155. SGZD must “contain mechanisms to ensure that not less than [twenty] percent of the total residential units constructed in each district shall be affordable.” MASS. GEN. LAWS. Ch. 40R § 6(a)(4) (2006).

156. See Russell, *supra* note 22, at 439–40 (discussing municipalities’ quest to “cultivate the most robust tax base,” causing zoning boards to place a considerable amount of land off-limits for affordable housing development and how “saving the local environment may serve as code for exclusionary zoning and all it conceals.”).

157. VT. STAT. ANN. tit 24, § 2791(12)(B)(i) (Supp. 2007). Incorporation of affordable housing into land planning is a basic principle of smart growth in general. Smart Growth Network, Principles of Smart Growth: Create Range of Housing Opportunities and Choices, <http://www.smartgrowth.org/about/principles/principles.asp?prin=3> (last visited Oct. 30, 2008).

158. Bobrowski, *supra* note 17, at 502; see also Shoemaker, *supra* note 64, at 900 (discussing how local political pressure encourages development with local economic benefits and regional environmental consequences).

V. RESPONSES TO CHAPTER 40R CRITICISM

A. Chapter 40R Surrenders Local Control

One of the most prevalent criticisms of Chapter 40B is that it surrenders local control over the traditionally decentralized zoning system in Massachusetts.¹⁵⁹ In the first year after Chapter 40R was passed, a similar criticism was extended to it as well.¹⁶⁰ For example, Framingham planning director Kathy Bartolini flatly rejected Chapter 40R and stated that her biggest objection was the loss of local control over developments within an approved smart growth district. She stated that within the zoning district, “[i]t’s either their way or the highway,” making it unlikely that “too many communities . . . will even contemplate [Chapter 40R].”¹⁶¹ Bartolini’s remarks represent a fairly typical local planner’s viewpoint.¹⁶² Comparing Chapter 40R to 40B however, it is clear that 40R places a substantial degree of control back in the hands of local communities.¹⁶³ As discussed below, criticisms like Bartolini’s can be dismissed.

This criticism stems from the fact that once the overlay district is approved, residential uses must be allowed as-of-right.¹⁶⁴ This fear should essentially be disregarded because after a municipality’s smart growth plan has been adopted, the municipality has the opportunity to review projects based on design standards specified in their smart growth zoning application. Such design standards may be adopted to maintain the

159. See Darcy Rollins, *An Overview of Chapter 40R and 40S: Massachusetts' Newest Housing Policies*, Mass. Magazine, (Feb. 2006), available at <http://www.bos.frb.org/economic/neppc/briefs/2006/briefs061.pdf>, at 2 (“40B has consistently met with local resistance.”).

160. Michael Jonas, *Priced Out*, BOSTON GLOBE, Jan. 8, 2006, available at http://www.boston.com/news/globe/ideas/articles/2006/01/08/priced_out.

161. *Id.*

162. See Rollins, *supra* note 159, at 4 (“local officials were ‘critical or completely opposed to giving the state a degree of control over their zoning decisions’ and felt that ‘the trade-off of giving up control to the state was not worth the money and possibly not worth any amount of money.’”).

163. See Martin Luttrell, *Building Consensus: Smart-growth Development Eyed as Possible Cure for Bay State's Housing Ills*, WORCESTER TELEGRAM AND GAZETTE, July 2, 2006, available at http://www.mhoc.info/Pages/telegram_gazette.htm (“One of the biggest advantages [of Chapter 40R] is that it gives control back to communities. That’s what people are frustrated about. Local boards are outside the loop (with 40B). It’s (40R) basically going back through the normal processes. It puts control back into town hands, where it belongs.”).

164. 760 MASS. CODE REGS. 59.02 (2008) (“[A] unit of housing is developable as-of-right if it may be developed under the Underlying Zoning or Smart Growth Zoning without recourse to a special permit, variance, zoning amendment, or other form of zoning relief.”).

“physical character” of the district.¹⁶⁵ Standards may include, but are not limited to,

the scale, proportions, and exterior appearance of buildings, the placement, alignment, width, and grade of streets and sidewalks, the type and location of infrastructure, the location of building and garage entrances, off-street parking, the protection of significant natural site features, the location and design of on-site open spaces, landscaping, exterior signs, and buffering in relation to adjacent properties.¹⁶⁶

Municipalities may also incorporate into their design standards “the Comprehensive Housing Plan,¹⁶⁷ an applicable master plan, area specific plan, or any other plan adopted by the Municipality.”¹⁶⁸ Although this range of options gives municipalities broad discretion in planning the appearance of a smart growth district, design standards are limited by section 10 of Chapter 40R which allows the DCHC to deny Chapter 40R approval if the standards “add unreasonable costs” to development.¹⁶⁹

Despite limitations that may be imposed by DCHC under section ten of Chapter 40R, the design standards and the community’s initial delineation of the smart growth district boundaries allow communities to retain a reasonable degree of local control. First, Chapter 40R allows communities to channel development into areas the communities themselves identify as desirable for new or rehabilitated infrastructure. Under Chapter 40B, the developer chooses the location for development most profitable to him or her, and the community is left with three somewhat unattractive alternatives: grant a CP without protest and face development on land that may have a more desirable alternative use; attempt to bargain with the developer; or deny the CP and face an appeal to HAC. The first alternative is clearly undesirable because the community may lose land needed for a new soccer field, community hiking trails, or open space. The second alternative is slightly better, but under Chapter 40B the developer retains significant bargaining power under threat of a HAC appeal. Regarding the

165. *Id.* at 59.04(f)(6).

166. *Id.* at 59.04(f)(6)(c)(iii).

167. *Id.* at 59.02.

168. *Id.* at 59.04(f)(6)(c)(ii).

169. MASS. GEN. LAWS ch. 40R § 10 (2006).

third option, as discussed previously, a HAC appeal places a heavy burden on local municipalities, and municipal success is unlikely.¹⁷⁰

One may argue that municipalities that adopt a smart growth zoning district are still subject Chapter 40B applications, thus the ability to channel development remains limited. Comments made by the current chairman of HAC, Werner Lohe, and thirty years of HAC decisions undermine this argument.¹⁷¹ Cases previously decided by HAC “indicate that if towns take control of their own planning processes in a meaningful way and put affordable housing on their agendas their local autonomy will be respected.”¹⁷² Chapter 40R not only provides an opportunity for municipalities to “take control of their own planning processes,” but also provides monetary incentives to do so. HAC is likely to respect Chapter 40R’s strong public policy of promoting local planning for affordable housing and to uphold local CP denials when inconsistent with a municipality’s Chapter 40R plan.

The second reason municipalities retain significant control under Chapter 40R is that the process of adopting a smart growth district encourages local deliberation and the incorporation of a wide variety of interests. The first step in DHCD approval requires the municipality to give public notice and hold a hearing on whether the overlay district should be adopted in the city or town.¹⁷³ Comments from the community are gathered and considered before the district site is finalized.¹⁷⁴ This process allows all interested persons to become involved in prospective planning for their community. In contrast, under this process to Chapter 40B, community members’ only recourse is to leverage political pressure on local officials to deny a CP. Even if these individuals successfully block a CP, they have done nothing to ensure favorable development in the future.

170. HEUDORFER, *supra* note 34, at 19.

171. Werner Lohe, *Command and Control to Local Control: The Environmental Agenda and the Comprehensive Permit Law*, 22 W. NEW ENG. L. REV. 355, 358 (2001) (discussing a series of HAC decisions that have “reinforced the importance of local control” and upheld denials of CPs when inconsistent with local planning). *See also*, *Stuborn Ltd. P’ship*, 1999 WL 34782799, at *6 (denying a CP for proposed development based on inconsistency with the Town of Barnstable’s comprehensive plan, which included a plan for increasing affordable housing). The Barnstable decision is consistent with the state policy set out in the “planned production” program, under which communities may develop their own plans to meet the ten percent threshold, so long as each year the municipality adds “affordable housing units equal to ¼ of one percent of the community’s housing stock” NETTER, *supra* note 28, at 3. If the municipality’s plan is approved by The Department of Housing and Community Development (DHCD), developer applications for HAC appeal are denied in the year after DHCD approval. *Id.*

172. Lohe *supra* note 171, at 359.

173. 760 MASS. CODE REGS. 59.05(1) (2008).

174. *Id.*

B. Chapter 40R Will Strain School Budgets and Future Funding Is Not Secure

A major source of resistance to new housing development in Massachusetts is the fear that school funding costs will rise faster than property tax revenue. As a town administrator from Marshfield stated, “local land-use policies ‘have become very anti-child,’” leading local zoning boards to favor “McMansion” over-sized development to cover additional education costs of new children in that school district.¹⁷⁵ This fear is particularly acute in Massachusetts, where 49.8% of public school funding comes from local tax revenues.¹⁷⁶ When compared with seventeen state “economic ‘competitors’ . . . Massachusetts relied more heavily on local funding [of] schools than 14 of the 17”¹⁷⁷

To address the school funding issue, Chapter 40S, a “smart growth school cost reimbursement” statute was approved in November 2005.¹⁷⁸ Starting in fiscal year 2008, eligible municipalities may receive reimbursements from the smart growth trust fund for additional costs associated with an increase in public school students living in smart growth zoning districts.¹⁷⁹ Reimbursement payments are calculated by subtracting from the total education costs of eligible students the sum of local revenue from the smart growth district plus additional Chapter 70 aid.¹⁸⁰ Chapter 40S is now only in its first fiscal year but, if it runs as intended, 40S should eliminate community apprehension over increased family housing production under Chapter 40R.

Some fear, however, that Chapter 40S does not do enough to encourage family housing, which is essential to the development of Massachusetts’s sluggish economy.¹⁸¹ As represented by a recent Chapter 40R development

175. Jonas, *supra* note 160.

176. *Id.*

177. *Id.*

178. See MASS. GEN. LAWS. ch. 40S § 2 (2006) (creating a program that grants smart growth school cost reimbursement for each fiscal year that “any city or town that . . . established [one] or more smart growth zoning districts.”).

179. 830 MASS. CODE REGS. 40S.1.1(1) (2008).

180. 830 MASS. CODE REGS. 40S.1.1(5) (2008). See generally, MASS. GEN. LAWS ch. 70 (discussing public school funding and state aid, which is needed “to assure fair and adequate minimum per student funding for public schools . . . by defining a foundation budget and a standard of local funding effort applicable to every city and town in the commonwealth.”).

181. See Editorial, *Family-Friendly Housing*, BOSTON GLOBE, Apr. 25, 2007, at A6, available at http://www.boston.com/news/globe/editorial_opinion/editorials/articles/2007/04/25/family_friendly_housing (citing that “[b]etween 2000 and 2004, Massachusetts lost [five] percent of the age group between 25 and 34, the prime age for starting families. By themselves, Chapters 40R and 40S are not enough to reverse the flight of young families.”). The Massachusetts Housing Task Force is looking into the

in Kingston, new units are often limited to one or two bedrooms.¹⁸² This problem should be remedied by amending the mandatory provisions of Chapter 40R to require that a certain percentage of new units be zoned for housing with two or more bedrooms.¹⁸³ Currently, Chapter 40R requires only that zoning must “permit a mix of housing.”¹⁸⁴ A stronger, mandatory requirement is not unreasonable, and with the addition of Chapter 40S, cannot be criticized as a much-loathed unfunded mandate. Young families are being priced out of Massachusetts and Chapter 40R should be strengthened to require family housing.

Of course, the discussion of Chapters 40S and 40R incentive payments begs the question of how to secure a stable source of funding for the smart growth trust fund. The trust fund was originally funded by the sale of surplus state land,¹⁸⁵ but by October of 2007 the fund was “already oversubscribed by \$2.23 million.”¹⁸⁶ To deal with the shortfall in funding, Governor Deval Patrick proposed that \$15 million be transferred into the trust fund from state revolving housing loan accounts.¹⁸⁷ This proposal was adopted in October 2007,¹⁸⁸ but in the meantime several communities were left anxiously waiting for their state payments.¹⁸⁹

possibility of an amendment to 40R and 40S that would prioritize zoning for family homes in SGZDs.
Id.

182. *Id.*

183. The Commonwealth Housing Task Force completed a 2003 report that estimated the addition of 33,000 new market rate and affordable housing units over the first ten years of Chapter 40R implementation. CARMAN ET AL., *supra* note 12, at 4. The Task Force also estimated that 11,000 units of the total would be single family homes. *Id.* at 22. Just as Chapter 40R requires that at least twenty percent of new units constructed in 40R districts be affordable, it should also require that at least one-third of the affordable units be zoned for family housing.

184. MASS. GEN. LAWS ch. 40R (6)(a)(2) (2006).

185. CITIZENS' HOUSING AND PLANNING ASS'N, AFFORDABLE HOUSING GUIDEBOOK FOR MASSACHUSETTS 14 (2008), http://www.chapa.org/files/f_1220966872HousingGuidebookJuly2008.pdf. See also MASS. GEN. LAWS ch. 10 § 35AA (LEXIS through 2008 Sess. Act 175) (“There shall be established and set up on the books of the commonwealth a separate fund to be known as the Smart Growth Housing Trust Fund to be used . . . by the department of housing and community development for the purpose of making payments to communities under *section 10 of chapter 40R.*”) (emphasis added).

186. Matthew G. Feher, *Ch. 40R Incentive Funding Runs Short*, MASS. MUN. ASS'N, Oct. 5, 2007, available at http://www.mma.org/index.php?option=com_content&task=view&id=2192&Itemid=88.

187. Robert Preer, *Housing Deal Gets Popular*, BOSTON GLOBE, Sept. 2, 2007, available at http://www.boston.com/news/local/articles/2007/09/02/housing_deal_gets_popular.

188. Matthew G. Feher, *Legislature OK's Funding For Ch. 40R Incentives*, MASS. MUN. ASS'N, Oct. 11, 2007, available at http://www.mma.org/index.php?Itemid=88&id=2214&option=com_content&task=view.

189. See Robert Preer, *State Reneges on Local Awards for Smart Developments*, BOSTON GLOBE, Aug. 16, 2007, at Global North 7 (citing comments by local officials who are waiting for 40R incentive payments).

To encourage wider participation in Chapter 40R, the state legislature must guarantee a stable funding source. As Representative Bradley Jones stated: “I think it’s a very dangerous message to send if you offer a financial incentive to cities and towns and then don’t follow through.”¹⁹⁰ As this paper attempts to show, there are many barriers to increasing affordable housing stocks and land conservation. Through Chapter 40R, Massachusetts has chosen an incentive-based system to promote these dual goals because this model is compatible with Massachusetts’s political and social climate. The model will fail, however, if municipalities do not believe the state will fulfill its partnership obligations.

Massachusetts must be creative in finding a stable funding source for the smart growth trust fund, and it should look to the programs in Vermont, Connecticut, and Hawaii as possible models. Both Vermont and Hawaii fund their conservation and housing programs through a statewide real-estate transfer tax. Connecticut imposes a thirty dollar recording fee, twenty-six dollars of which go to its farmland preservation, open space, historic preservation, and affordable housing fund.¹⁹¹ Increasing the recording fees in Massachusetts may be a more favorable option, so that the 40R program does not interfere with an existing Massachusetts program, the Community Preservation Act (CPA). Under the CPA, communities may elect to collect a surcharge on real estate, not more than three percent of the real estate tax, if they allocate these funds towards open space, historic preservation, or community housing.¹⁹² Although a statewide real estate transfer tax does not directly conflict with the CPA, it may make local adoption of the CPA program more difficult in heavily taxed communities. The success of Chapter 40R should not infringe upon that of another positive land preservation and housing program.

C. Repayment

Communities worried about loss of control and funding shortfalls may have additional apprehension over section fourteen of Chapter 40R, the repayment provision: “If no construction in the smart growth zoning district has taken place within three years of the date of the zoning incentive payment (see Section 9), the municipality must repay all monies paid under this chapter.”¹⁹³ Under Chapter 40R, zoning-incentive payments are made

190. *Id.*

191. See footnotes and accompanying text *supra* notes 144, 146–48.

192. Massachusetts Government, Community Preservation Act, <http://commpres.env.state.ma.us/content/cpa.asp> (last visited Mar. 13, 2008).

193. MASS. GEN. LAWS ch. 40R § 14 (2006).

to the municipality's general fund and may be spent in any way the community desires. For example, funds may be used to buy new police cars, pave outlying roads, or renovate the local elementary school. This money is likely to be spent before the three-year period expires. If the municipality is faced with section fourteen repayment, it will be forced to rapidly raise funds—possibly by cutting public programs or laying off public employees, potentially placing the municipality in perhaps, a worse position than before Chapter 40R approval.

The actual threat that section fourteen may pose is yet to be seen. There seems little reason to worry, however, that section fourteen presents a genuine obstacle to Chapter 40R communities. First, the definition of “start of construction” is fairly broad and includes very preliminary construction activity on a project or planned infrastructure upgrade.¹⁹⁴ The three-year period shall also be extended if the project is subject to appeal or challenge, if the proponent is actively pursuing other required permits, or if there is other good cause for failure to start construction.¹⁹⁵ Second, municipalities can and should negotiate with developers before the DHCD approves the smart growth zoning district. This will allow development to start soon after approval and will provide more tangible plans for community members to comment on during the first phase of the zoning overlay adoption. Finally, the Legislature should be receptive to amendments if experience proves three years is not long enough to initiate development. Section fourteen ensures that municipalities will uphold their obligation under Chapter 40R, but the Legislature and the DHCD must use caution in its application, or they risk discouraging other communities from adopting 40R and sharing in its potential.

CONCLUSION

Simply put, “[s]prawl is hard to control . . .”¹⁹⁶ and the country is suffering from a “well-documented and widening crisis in housing affordability.”¹⁹⁷ Although these societal challenges are formidable, they can be addressed at the local planning level so long as municipalities are given incentives to comply with statewide policies. Affordability is a common element of most smart growth definitions, but this element should be strengthened in state land planning laws with affordable housing

194. 760 MASS. CODE REGS. 59.02 (2008).

195. *Id.* at 59.07 (1)(f).

196. BABBITT, *supra* note 11, at 38.

197. Iglesias, *supra* note 7, at 513.

incentives. Chapter 40R takes on this task and has tremendous potential to increase Massachusetts's affordable housing stock while providing an alternative, maybe even a replacement, to Chapter 40B.¹⁹⁸ If well funded and properly managed, Chapter 40R provides a tool that encourages communities to envision their own futures, while helping to achieve two imperative goals.

198. Feher, *supra* note 186.

