

## Chapter 40B Should Buy the Farm

*“It’s really the last remaining large piece of land in the entire town. It would just be an enormous loss not just for Winchester but really for the whole state, and really for the country. It’s a property of national and even international significance. To see something like that disappear would just kill me because you can’t reproduce it. It won’t come back. It’s gone forever.”*<sup>1</sup>

### I. INTRODUCTION

Winchester, Massachusetts is a quaint New England town.<sup>2</sup> The town center, consisting of brick walkways and stone buildings, hosts small shops and boutiques with a limited number of commercial franchises bearing softened logos.<sup>3</sup> Large Victorian homes, a few buildings, churches, and other structures throughout the area surround the center of town.<sup>4</sup> Newer development located along the town lines has been limited to large, single-family dwellings.<sup>5</sup>

Although most of Winchester’s six square miles are covered by homes and other structures, Winchester maintains its character through historic structures and green space.<sup>6</sup> In addition, the changing landscape of hills and valleys offers views that seem to defy the dense development.<sup>7</sup> Indeed, the town retains an old New England atmosphere.<sup>8</sup> Behind a sign bearing the words “THE FARM,” one can catch a glimpse of green pastures, woods, and

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1. Videotape: Winchester’s Hamilton Farm (Alec Asten, Kim Daly, and Susan Youmans 2007) (on file with Winchester Hamilton Farm Interest Group) (presenting case for preservation of farm).

2. See Town of Winchester, <http://www.winchester.us> (last visited Oct. 30, 2008) (displaying photographs of old buildings) [hereinafter Town of Winchester]; WINCHESTER COMPREHENSIVE MASTER PLAN STEERING COMM., VISION, GOALS, AND POLICIES 2 (2007), available at <http://www.winchester.us/wcmp/wcmphome.htm> [hereinafter VISION] (describing community and history).

3. See Town of Winchester, *supra* note 2 (showcasing photographs of historic architecture).

4. See VISION, *supra* note 2, at 2 (describing Winchester structure).

5. See BONNIE HEUDORFER & BARRY BLUESTONE, THE GREATER BOSTON HOUSING REPORT CARD 2006-2007: AN ASSESSMENT OF PROGRESS ON HOUSING IN THE GREATER BOSTON AREA 78 (2007) (hereinafter HEUDORFER & BLUESTONE, REPORT CARD) (setting median price of single family home in Winchester in 2006 at \$700,000); WINCHESTER COMPREHENSIVE MASTER PLAN STEERING COMM., HOUSING AND NEIGHBORHOODS 2 (2007), available at <http://www.winchester.us/wcmp/wcmphome.htm> [hereinafter NEIGHBORHOODS] (finding Winchester consists of mostly single-family homes). The Winchester Steering Committee found that the community has replaced smaller homes with houses twice their size. See NEIGHBORHOODS, *supra*, at 2.

6. See NEIGHBORHOODS, *supra* note 5, at 13 (describing Winchester as in “nearly built-out conditions”). The Committee also reveals that some members of the community are concerned that new, larger homes built at the set-back minimum will replace the older homes. *Id.* at 16.

7. See WINCHESTER COMPREHENSIVE MASTER PLAN STEERING COMM., THE COMMUNITY SPEAKS: PUBLIC PARTICIPATION 3 (2007), available at <http://www.winchester.us/wcmp/wcmphome.htm> [hereinafter PUBLIC PARTICIPATION] (expressing community desire to preserve appearance of old New England community).

8. See *id.* (commenting on town character).

raspberry fields.<sup>9</sup>

Upon further examination, however, it becomes evident that this atmosphere has been consciously preserved.<sup>10</sup> Just down the street, at the bottom of a steep hill, an active intersection bears no traffic lights.<sup>11</sup> Sidewalks are scarce.<sup>12</sup> Removed from the center of town, there is no public transportation.<sup>13</sup>

It is thus unsurprising that residents disapproved when a large-scale development threatened to invade their neighborhood.<sup>14</sup> Residents were concerned that the developer would evade the local zoning laws by allocating a certain number of units to low-income housing on farmland of historical significance.<sup>15</sup> Additionally, the land, which contains wetlands, a pasture, and wooded areas, is of environmental significance.<sup>16</sup> Some residents also may have resisted the addition of low-income families to a community where most people belong to a country club.<sup>17</sup>

Massachusetts General Laws Chapter 40B (Chapter 40B) permits a developer to bypass local zoning laws by designating a number of units as low-or-moderate-income housing.<sup>18</sup> The Massachusetts legislature passed Chapter 40B in 1969 to counteract exclusionary zoning practices in suburban Massachusetts.<sup>19</sup> Exclusionary zoning restricts access to a community by

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9. See Town of Winchester, *supra* note 2 (displaying photographs of Hamilton Farm).

10. See PUBLIC PARTICIPATION, *supra* note 7, at 3 (quoting resident concerns).

11. See Map of Winchester, 1999 Guide and Directory (Winchester ed.), available at [http://www.winchestermass.org/maps/win\\_map.html](http://www.winchestermass.org/maps/win_map.html) (showing major roadways).

12. See *id.* (showing Ridge Street).

13. See Massachusetts Bay Transportation Authority: Schedules and Maps, available at [http://www.mbtta.com/schedules\\_and\\_maps/rail/lines/stations/?stopID=230](http://www.mbtta.com/schedules_and_maps/rail/lines/stations/?stopID=230) (describing Commuter Rail Line for Zone 1, Winchester Center).

14. See PUBLIC PARTICIPATION, *supra* note 7, at 3 (quoting resident asking to preserve “the little open space we have”); see also Anna Fiorentino, *Lawsuit Spurs Second Look at Subdivision*, BOSTON GLOBE, Mar. 9, 2008, at West 3 (discussing local opposition to Chapter 40B projects). Community resistance to Chapter 40B projects is not unique to Winchester, and, in fact, is quite common. Fiorentino, *supra*.

15. See MASS. GEN. LAWS ch. 40B, § 21 (2006) (establishing process for development proposal applications). In contrast to the usual building application process, which involves applying for permits from several local boards, the process under Chapter 40B allows developers willing to build low-or-moderate-income housing the option of applying to a state board of appeals for one comprehensive building permit. *Id.*; see also CMTY. OPPORTUNITIES GROUP, INC., HAMILTON FARM REPORT, PROTOTYPE DEVELOPMENT STUDY 1 (2006) [hereinafter FISCAL IMPACT REPORT] available at <http://www.winchester.us/downloads/TownManager/FiscalImpactReport.pdf> (classifying Hamilton Farm as local landmark); cf. PUBLIC PARTICIPATION, *supra* note 7, at 4 (depicting resident worried about “destruction of neighborhoods”).

16. See FISCAL IMPACT REPORT, *supra* note 15, at 1 (discussing open space in Hamilton Farm); cf. PUBLIC PARTICIPATION, *supra* note 7, at 4 (quoting resident worried about “loss of open space”).

17. See FISCAL IMPACT REPORT, *supra* note 15, at 1 (maintaining Winchester consists of “conventional single-family home development”); cf. PUBLIC PARTICIPATION, *supra* note 7, at 4 (quoting resident asking to preserve “social community cohesion”). But see PUBLIC PARTICIPATION, *supra* note 7, at 4 (noting resident worried about “decline of socioeconomic diversity”).

18. See MASS. GEN. LAWS ch. 40B, §§ 20-23 (allowing developers to skirt zoning laws to create affordable housing).

19. See *Mahoney v. Bd. of Appeals*, 316 N.E.2d 606, 609 (Mass. 1974) (addressing legislative intent in enacting Chapter 40B); Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 536 (1992) (articulating how exclusionary

instituting building standards that increase home prices.<sup>20</sup> Thus, exclusionary zoning incidentally bars low-or-moderate-income households and disproportionately restricts minorities.<sup>21</sup>

Zoning law implementation and enforcement has traditionally belonged to local, rather than state or federal government.<sup>22</sup> Chapter 40B, however, permits a state board to override local decisions prohibiting or restricting a proposed development that includes affordable housing.<sup>23</sup> Traditional zoning power returns to the locality only after 10 percent of the housing in a community meets the legislative definition of “affordable.”<sup>24</sup> Thereafter, so long as 10 percent of the community’s housing remains affordable, the locality need not grant permits to Chapter 40B developers.<sup>25</sup>

Winchester residents have been particularly cognizant of Chapter 40B since the former owners of the twenty-acre Hamilton Farm agreed to sell it to

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zoning contributes to housing crisis). Exclusionary zoning is a way to “keep out the poor.” Stockman, *supra*, at 537. Communities may use zoning to exclude those who will absorb more resources than they pay in taxes. *Id.* at 536. Planners may presume families with school-age children often occupy smaller homes and apartments that yield less tax revenue. *Id.* at 540. In the 1960s, policymakers began attempts to eliminate these discriminatory practices. *Id.* at 536.

20. See Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 *FORDHAM URB. L.J.* 877, 877-78 (2006) (explaining exclusionary zoning in suburbs continues to perpetuate concentration of poverty in urban areas).

21. See *id.* at 877 (describing isolation of poor to urban areas). Orfield asserts that “[t]he concentration of existing affordable housing in central cities and older suburbs perpetuates the isolation of low-income residents and people of color from life opportunities available to suburban residents.” *Id.* (footnote omitted). This concentration supports racial segregation. *Id.* In addition, Orfield points out the disadvantages to living in segregated communities. *Id.* at 881. Children living in such communities often face many obstacles to their later success because they live in an area where there is a lack of role models and connections to education and employment, cultural opposition, and general poverty-related problems. *Id.* at 883; see also Alice M. Burr, *The Problem of Sunnyvale, Texas, and Exclusionary Zoning Practices*, 11 *J. AFFORDABLE HOUSING & COMMUNITY DEV. L.* 203, 203 (2002) (elucidating town response to zoning laws). In the town of Sunnyvale, officials claimed zoning laws did not prevent minority access but rather maintained Sunnyvale’s rural character. Burr, *supra*. Sunnyvale’s lot-size requirement and ban on apartments precluded access to low-cost housing. *Id.*

22. See Jonathan Witten, *Adult Supervision Required: The Commonwealth of Massachusetts’ Reckless Adventures with Affordable Housing and the Anti-Shob Zoning Act*, 35 *B.C. ENVTL. AFF. L. REV.* 217, 218 (2008) [hereinafter Witten, *Adult Supervision Required*] (recognizing counties, cities, and towns as responsible for making zoning laws).

23. See *MASS. GEN. LAWS* ch. 40B, § 21 (2006) (establishing HAC ability to override local decisions).

24. See *id.* § 20 (defining need for affordable housing if less than 10 percent of community’s units affordable); Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 *W. NEW ENG. L. REV.* 323, 339 (2001) (explaining share of affordable housing determines whether town vulnerable to override). Thus, in Massachusetts, a locality is within the safe harbor provision when 10 percent of the locality’s housing stock is affordable as defined by Chapter 40B. See Stonefield, *supra*. But see *Boothroyd v. Zoning Bd. of Appeals*, 868 *N.E.2d* 83, 89 (Mass. 2007) (concluding local board of appeals may waive own zoning laws even after safe harbor achieved). As a result of *Boothroyd*, abutters cannot depend on the community’s attainment of threshold in predicting the community’s future. See Witten, *Adult Supervision Required*, *supra* note 22, at 239 (expressing abutter frustration).

25. See *supra* note 24 and accompanying text (discussing safe harbor provision under Chapter 40B). Note that the community still may issue comprehensive permits after they reach the 10 percent threshold. *Boothroyd*, 868 *N.E.2d* at 89.

developer AvalonBay.<sup>26</sup> With merely 1.8 percent of its total units considered affordable under Chapter 40B, Winchester could not reasonably deny AvalonBay zoning rights under Chapter 40B.<sup>27</sup> Instead, Winchester exercised its right of first refusal under Massachusetts General Laws Chapter 61A, buying the land under the same terms as the Hamiltons had agreed to sell to AvalonBay.<sup>28</sup> Winchester was able to fend off the developer both because the land was listed as agricultural, and because residents agreed to pay the nearly fourteen million-dollar price tag.<sup>29</sup>

This Note will use the Hamilton Farm incident in Winchester, Massachusetts, to discuss the effects and inefficacy of Chapter 40B.<sup>30</sup> Part II, sections A and B, will first explore the history, usage, and contours of Chapter 40B.<sup>31</sup> Part II, sections C and D, will then address the law as applied to Winchester, Massachusetts, including the motivations behind Winchester's resistance to the proposed development of Hamilton Farm and the scheme Winchester took to avoid the law.<sup>32</sup> Next, section D will introduce the Massachusetts General Laws Chapter 40R (Chapter 40R) Smart Growth Zoning and Housing Production law as an alternative to Chapter 40B.<sup>33</sup> Part III will argue that Chapter 40B was, indeed, successful in motivating Winchester

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26. See *Priority Issues for Residents*, NEWS FROM COMPREHENSIVE MASTER PLAN STEERING COMMITTEE (Winchester, MA), July 2007, at 2 [hereinafter *Priority Issues*] (describing community development plan for housing and open space in first newsletter). The Comprehensive Master Plan Steering Committee came into existence about the same time that Winchester purchased the farm. Winchester Comprehensive Master Plan, <http://www.winchester.us/wcmp/WCMPbottom.htm> (last visited Oct. 30, 2008) (advertising beginning of public meetings in March and April 2007).

27. See HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 84 (providing statistic of 1.8 percent for Winchester's affordable housing).

28. See MASS. GEN. LAWS ch. 61A, § 14 (2006) (giving community right of first refusal on land classified agricultural); Melissa Beecher, *Override Passes, Giving Town Control of Farmland: Development Plans on the Table*, BOSTON GLOBE, Mar. 18, 2007, at NorthWest 1 (reporting Winchester exercised right of first refusal to purchase farm).

29. MASS GEN. LAWS ch. 61A, § 14 (2006)(allowing municipality to purchase agricultural property); Melissa Beecher, *Crucial Votes Nearing on Farm's Fate: First Choice to Buy Goes to the Town*, BOSTON GLOBE, Feb. 22, 2007, at NorthWest 1 (explaining town's option to buy farm because of agricultural tax breaks).

30. See *infra* Part III and accompanying text (analyzing effects of Chapter 40B through Hamilton Farm incident); see also HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 57 (discussing Chapter 40B as controversial but motivating).

31. See *infra* Part II.A and accompanying text (expounding on Chapter 40B history and usage).

32. See *infra* Part II.C-D and accompanying text (explaining problems with Chapter 40B generally and with regard to Winchester); see also PUBLIC PARTICIPATION, *supra* note 7, at 3 (conveying concerns over lack of open space). The Committee also quoted one resident as worried about "lack of diversity". PUBLIC PARTICIPATION, *supra* note 7, at 4. From the Winchester Comprehensive Master Plan, one can glean a variety of competing interests. *Id.* For example, while some residents desire adding other classes of people to the community, others worry that the financial cost of lower-income residents will be great. *Id.*

33. See *infra* Part II.E and accompanying text (discussing alternatives to Chapter 40B); see also MASS. GEN. LAWS ch. 40R, § 1 (defining smart growth). Smart growth "emphasizes mixing land uses" to foster the production of affordable housing by planning development near existing infrastructure. MASS. GEN. LAWS ch. 40R, § 1; see *infra* Part II.E (providing additional details on Smart Growth law).

residents to implement more inclusive zoning laws, even though the law was not able to create affordable housing in this instance.<sup>34</sup> Finally, this Note will conclude that Chapter 40B is not the most efficient means to achieve Massachusetts's affordable housing goals despite the legislature's admirable intentions.<sup>35</sup>

## II. HISTORY

### A. Chapter 40B—An Overview

The Massachusetts Constitution confers to the legislature the power to “limit buildings according to their use or construction to specified districts of cities and towns.”<sup>36</sup> Subsequently, the legislature delegated this power to municipalities.<sup>37</sup> A legislative committee, however, found that municipalities abused this power by implementing restrictive zoning practices that frustrated the construction of low-income housing.<sup>38</sup> The committee noted that the number of low-or-moderate-income homes was insufficient to provide housing for families already living within those communities.<sup>39</sup> The committee was concerned, among other things, that Vietnam War veterans would not be able to return to their former communities.<sup>40</sup> Consequently, the legislature withdrew

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34. See *infra* Part III and accompanying text (analyzing Chapter 40B with reference to Hamilton Farm incident); see also VISION, *supra* note 2, at 1 (describing goal to plan town's physical development).

35. See *infra* Part IV and accompanying text (concluding Chapter 40B not best way to achieve affordable housing goals); see also HEUDORFER, *supra* note 5, at 57 (explaining local consensus Chapter 40B is not “preferred mechanism for developing affordable housing”). Many communities support local control over regional planning. HEUDORFER, *supra* note 5, at 57. Some believe local progress in the affordable housing arena without Chapter 40B is unrealistic. *Id.* Those communities threatened by unwanted development are then goaded into making affordable housing a priority. *Id.*

36. See MASS. CONST. ART. LX (stating amendment).

37. See 760 MASS. CODE REGS. 30.01(1) (2008) (providing legislative history behind Chapter 40B of the General Laws of Massachusetts).

38. See 760 MASS. CODE REGS. 30.01(2) (faulting restrictive zoning for housing unavailability); Stockman, *supra* note 19, at 540-41 (elucidating how zoning causes rise in housing costs). Zoning limitations raise housing costs in a number of ways. Stockman, *supra* note 19, at 541. Not only must buyers pay for more land, but also a lower supply of lots raises prices by increasing demand. *Id.* Additionally, lower density raises the cost by requiring longer streets, sewers, water lines, and sidewalks. *Id.*

39. See 760 MASS. CODE REGS. 30.01(2) (discussing reasons legislature enacted Chapter 40B) (quoting REPORT OF THE COMMITTEE OF URBAN AFFAIRS (1969)); see also Orfield, *supra* note 20, 881-84 (listing negatives of lack of affordable housing available). Orfield catalogues quite an argument in favor of low-income housing. Orfield, *supra* note 20. Mandatory busing probably would not have been necessary had the government not allowed segregated public housing. *Id.* at 881. Poor minorities must attend poor schools, while poor whites often attend middle-class schools. *Id.* at 882. Racial discrimination and isolation lead to gang violence. *Id.* at 882-83. Poorer neighborhoods have higher crime rates. *Id.* at 883. In addition, linguistic isolation poses a threat to gaining employment. *Id.* Orfield observes that affordable housing does not only benefit racial minorities, but also can benefit whites by providing “higher career aspirations,” diverse learning settings, and “the ability to participate in a pluralistic society.” *Id.* at 883-84.

40. See 760 MASS. CODE REGS. 30.01(2) (explaining legislative reasoning behind Chapter 40B) (quoting REPORT OF THE COMMITTEE OF URBAN AFFAIRS (1969)).

some of these powers formerly entrusted to cities and towns.<sup>41</sup>

The committee intended the resulting measure both to prevent unreasonable exclusion of low-income housing and to afford “the least interference with the power of the community to plan its own future.”<sup>42</sup> Accordingly, the Massachusetts legislature enacted Chapter 40B, which operates by incentive to encourage developers to construct affordable housing.<sup>43</sup> Under Chapter 40B, also known as the “Comprehensive Permit Law” and the “Anti-Snob Zoning Law,” developers may flout local zoning regulations by designating a number of units to aid low-or-moderate-income households in municipalities that have not attained the threshold of affordable housing.<sup>44</sup> For instance, Chapter 40B includes, but is not limited to, construction of multi-family structures in zones reserved for single-family dwellings.<sup>45</sup>

The Chapter 40B, section 20 threshold is met when 10 percent of the total housing units in a municipality consist of low-or-moderate income housing.<sup>46</sup> A regulation code defines “low-or-moderate-income households” as those

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41. See 760 MASS. CODE REGS. 30.01(1) (recounting history of law).

42. See 760 MASS. CODE REGS. 30.01(2) (quoting REPORT OF THE COMMITTEE OF URBAN AFFAIRS (1969)).

43. See MASS. GEN. LAWS ch. 40B, §§ 20-23 (2006) (supplying relevant law); Eric J. Gouvin, *Rural Low-Income Housing and Massachusetts Chapter 40B: A Perspective from the Zoning Board of Appeals*, 23 W. NEW ENG. L. REV. 3, 15 (2001) (presenting lawmakers’ desire to spread low-income households from cities to suburbs).

44. See MASS. GEN. LAWS ch. 40B, §§ 20-23 (allowing override of zoning laws); 760 MASS. CODE REGS. 4.02 (2008) (defining low-or-moderate-income household). A low-or-moderate-income household is one “with gross income at or less than 80% of area median household income as most recently determined by the U.S. Department of Housing and Urban Development (HUD) adjusted for household size.” 760 MASS. CODE REGS. 4.02. Additionally, Chapter 40B provides that the term “low-or-moderate-income housing” also includes “any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute.” MASS. GEN. LAWS ch. 40B, § 20; see also CHAPTER 40B TASK FORCE, FINDINGS AND RECOMMENDATIONS, REPORT TO GOVERNOR MITT ROMNEY 18 (2003), available at [http://www.mhp.net/uploads/resources/chapter\\_40b\\_task\\_force.pdf](http://www.mhp.net/uploads/resources/chapter_40b_task_force.pdf) (providing legislative history of Chapter 40B).

45. See *Zoning Bd. of Appeals v. Ardmore Apartments Ltd. P’ship*, 767 N.E.2d 584, 587 (2002) (stating Chapter 40B permits construction of multi-family dwellings in single-family zones); BONNIE HEUDORFER, CITIZENS’ HOUS. AND PLANNING ASS’N, THE RECORD ON 40B: THE EFFECTIVENESS OF THE MASSACHUSETTS AFFORDABLE HOUSING ZONING LAW 38 (2003) [hereinafter HEUDORFER, RECORD] (explaining factors surrounding Chapter 40B controversy). Heudorfer reiterated factors that impede the successful implementation of Chapter 40B including regulations requiring large lots, growth controls, excessive regulations, and inadequate and inappropriate zoning. See HEUDORFER, RECORD, supra, at 38. Inadequate and inappropriate zoning covers situations where municipalities make no allowances for higher density or multi-family housing. *Id.*

46. See MASS. GEN. LAWS ch. 40B, § 20 (defining low-or-moderate-income households); Christopher Baker, Note, *Housing in Crisis—A Call to Reform Massachusetts Affordable Housing Law*, 32 B.C. ENV’T L. AFF. L. REV. 165, 171 (2005) (explaining how communities can escape Chapter 40B’s grip). A municipality has met its minimum housing requirement where the community has reserved at least 10 percent of the town’s total housing for low-and-moderate-income households; or the town has classified at least 1.5 percent of residential, commercial, or industrial land for affordable housing use; or the community’s grant of the permit would effectuate construction, within a year, on either ten acres or 0.3 percent of the municipality’s total land area, whichever is larger. *Id.*

earning an amount equal to or less than 80 percent of the area's median household income.<sup>47</sup> Unless the municipality achieves this percentage or has made recent progress toward this goal, any applicable proposed developments are presumed "consistent with local needs."<sup>48</sup> Thus, any municipality that has not met its housing minimum may not deny such a comprehensive building permit without proving that the regional need for affordable housing is outweighed by other interests that may include "the protection of the safety and health of the town's residents, development of improved site and building design, and preservation of open space."<sup>49</sup>

A developer proposing to build under Chapter 40B may file for a comprehensive building permit with the local zoning board.<sup>50</sup> Additionally, the developer may appeal to the Housing Appeals Committee (HAC) if the local board subsequently declines the proposal or conditions approval on stipulations that would make the development "uneconomic."<sup>51</sup> HAC then determines whether the local zoning board's decision was "reasonable and consistent with local needs."<sup>52</sup> HAC may not order a municipality to issue the permit, however, if that municipality has met the 10 percent minimum.<sup>53</sup> Conversely,

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47. See 760 MASS. CODE REGS. 4.02 (defining low-or-moderate-income household).

48. MASS. GEN. LAWS ch. 40B, § 20 (describing compliance requirements); see 760 MASS. CODE REGS. 31.07(1)(d) (extending threshold concept). The regulation provides,

A decision by a Board to deny a comprehensive permit . . . shall be consistent with local needs if the municipality has made recent progress toward its housing unit minimum. Recent progress toward its housing unit minimum shall mean that the number of housing units that have been created during the twelve months prior to the date of the comprehensive permit application and that count toward the housing unit minimum described in 760 CMR 31.04(1) is equal to or greater than 2% of the municipality's total housing units. Such a denial shall not preclude re-filing of the application at a later date.

760 MASS. CODE REGS. 31.07(1)(d); see 114 Sylvan Street, L.L.C. v. Danvers Bd. of Appeals, No. 02-04, slip op. at 2 (Mass. Hous. Appeals Comm. Feb. 28, 2003) (characterizing sufficient progress as "affirmative defense").

49. See *Standerwick v. Zoning Bd. of Appeals*, 849 N.E.2d 197, 206 (Mass. 2006) (explaining developers cannot always override local zoning through Chapter 40B).

50. See MASS. GEN. LAWS ch. 40B, § 21 (2006) (providing local zoning board has same permit power as any other board or official); *Zoning Bd. of Appeals v. Hous. Appeals Comm.*, 433 N.E.2d 873, 876-77 (Mass. 1982) (explaining developer may file for one comprehensive permit).

51. See MASS. GEN. LAWS ch. 40B, §§ 20-23 (defining uneconomic and providing appeal); *Taylor v. Bd. of Appeals*, 863 N.E.2d 79, 81 (Mass. App. Ct. 2007) (describing developer appeal process); HEUDORFER, RECORD, *supra* note 45, at 40 (outlining comprehensive permit approval process). As of 2003, local boards approved about two-thirds of the total developments built via Chapter 40B. HEUDORFER, RECORD, *supra* note 45, at 40. HAC approved the rest. *Id.*

52. See MASS. GEN. LAWS ch. 40B, § 23 (describing appellate role); *Zoning Bd. of Appeals*, 433 N.E.2d at 877-78 (affirming HAC decision directing local board to issue permit). The court affirmed the HAC decision over objections that half of the units in the proposed development would be rented at market-rate, making the project's small impact on low-and-moderate-income housing in the community less valuable than the original planning goals. *Zoning Bd. of Appeals*, 433 N.E.2d at 878.

53. See MASS. GEN. LAWS ch. 40B, §§ 20, 23 (limiting HAC's appellate role to whether board decision consistent with local needs); 760 MASS. CODE REGS. 31.07(1)(d) (2008) (describing when decisions denying permits or granting permits with conditions consistent with local needs). A board decision to "deny a

HAC may overturn the locality's decision if it finds the local board's rejection of, or limitations to, the project are unjustified.<sup>54</sup> The superior court possesses the power to review HAC's decisions.<sup>55</sup>

Municipalities and individuals alike have expressed opposition to the use of Chapter 40B.<sup>56</sup> In the past, town boards have objected to and refused to grant permits to development owners' operations.<sup>57</sup> Landowners abutting these projects have also taken action by bringing suits as persons aggrieved by such permits.<sup>58</sup> Nevertheless, town and abutter resistance have not had great success.<sup>59</sup>

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comprehensive permit or grant permit with conditions shall be consistent with local needs if the municipality has made recent progress toward its housing unit minimum." 760 MASS. CODE REGS. 31.07(1)(d). The regulation defines recent progress as "the number of housing units that have been created during the twelve months prior to the date of the comprehensive permit application and that count toward the housing unit minimum described in 760 CMR 31.04(1) is equal to or greater than 2% of the municipality's total housing units." *Id.*; 760 MASS. CODE REGS. 31.07(1)(e) (stating failure to meet housing minima creates presumption housing need "outweighs local concerns"); see *Zoning Bd. of Appeals v. Ardmore Apartments Ltd. P'ship*, 767 N.E.2d 584, 588 (Mass. 2002) (footnote omitted) (refuting HAC authority to order permit in locality already meeting requirement); *Zoning Bd. of Appeals*, 433 N.E.2d at 877 (explaining HAC may not order municipality reached minimum to issue permit); *Bd. of Appeals v. Hous. Appeals Comm.*, 294 N.E.2d 393, 414 (Mass. 1973) (stating local zoning restrictions consistent with local needs once municipality satisfies housing minimum); *Lever Dev., L.L.C. v. West Boylston Zoning Bd. of Appeals*, No. 04-10, slip op. at 6 (Mass. Hous. Appeals Comm. Dec. 10, 2007) (declaring housing needs outweighed municipality concerns because housing minima not met).

54. See MASS. GEN. LAWS ch. 40B, § 23 (describing HAC's power to overturn local board decisions); *Lever Dev., L.L.C.*, slip op. at 40 (instructing board to grant comprehensive permit based on original application rather than board modified); see also HEUDORFER, RECORD, *supra* note 45, at 40 (describing HAC appeals process). As of June 2003, HAC issued rulings in 31 percent of cases. HEUDORFER, RECORD, *supra* note 45, at 40. In the remaining cases, the developers either settled with the local boards or abandoned the project. *Id.* at 40-41. HAC ruled in favor of the developer in the overwhelming majority of cases, permitting local denials only 16 percent of the time and thus favoring the developer in 84 percent of the cases. *Id.*

55. See MASS. GEN. LAWS ch. 40B, § 22 (providing for decision review in accordance with Chapter 30A of the General Laws of Massachusetts); *Zoning Bd. of Appeals*, 433 N.E.2d at 874-75 (detailing review of HAC decision). The SJC explained that HAC decisions supported by substantial evidence must be upheld. *Zoning Bd. of Appeals*, 433 N.E.2d at 877. The court defined substantial evidence as what a reasonable mind would consider satisfactory. *Id.* (citing Chapter 30A, Section 1(6) of the General Laws of Massachusetts).

56. See MASS. GEN. LAWS ch. 40B, § 21 (2006) (providing standing to seek judicial review); *Planning Bd. v. Hingham Campus, L.L.C.*, 780 N.E.2d 902, 905 (Mass. 2003) (concluding board lacked standing to challenge issuance of permit because not aggrieved person); *Taylor*, 863 N.E.2d at 85 (explaining only aggrieved parties entitled to day in court).

57. See, e.g., *Dennis Hous. Corp. v. Zoning Bd. of Appeals*, 785 N.E.2d 682, 690-91 (Mass. 2003) (allowing Chapter 40B to override historic committee); *Ardmore Apartments*, 767 N.E.2d at 594 (mandating housing as affordable as long as noncompliant with zoning); *Zoning Bd. of Appeals v. Hous. Appeals Comm.*, 433 N.E.2d 873, 876 (Mass. 1982) (upholding decision against town zoning board).

58. See MASS. GEN. LAWS ch. 40B, § 21 (providing "any person aggrieved by the issuance . . . may appeal"); MASS. GEN. LAWS ch. 40A, § 17 (granting judicial review to persons aggrieved by permit issuance decision); see also *Standerwick v. Zoning Bd. of Appeals*, 849 N.E.2d 197, 206 (Mass. 2006) (holding diminishing property values not basis for standing); *Bailey v. Bd. of Appeals*, 345 N.E.2d 367, 369 (Mass. 1976) (denying landowners right to hearing on comprehensive permit); *Mahoney v. Bd. of Appeals*, 316 N.E.2d 606, 607 (Mass. 1974) (describing aggrieved abutters' equity action to annul allowance of permit).

59. See, e.g., *Standerwick*, 849 N.E.2d at 206 (holding diminishing property values not basis for standing); *Hingham Campus, L.L.C.*, 780 N.E.2d at 905 (concluding board lacked standing to challenge permit

In *Zoning Board of Appeals of Wellesley v. Housing Appeals Committee*,<sup>60</sup> the Supreme Judicial Court (SJC) affirmed a HAC decision that directed the Town of Wellesley to issue a comprehensive building permit.<sup>61</sup> The Town of Wellesley alleged that the intended site was unequipped to provide facilities for the increased population and that the plan would endanger the future residents.<sup>62</sup> Ultimately, the town concluded that these considerations outweighed the need for a limited number of affordable units.<sup>63</sup> Even so, the HAC, as well as the SJC, held that the board's decision was not consistent with local needs, or otherwise reasonable, and thus ordered the board to issue a permit.<sup>64</sup>

The HAC also denied neighboring landowners' motion to intervene in *Enterprise Village, LLC v. Yarmouth Board of Appeals*.<sup>65</sup> The landowners raised such concerns as the safety of the population residing in a commercial zone, the quality of life for those residents, traffic concerns, and the impact on the surrounding commercial properties.<sup>66</sup> The HAC stated that anticipated adverse effects on future residents were "well outside the scope of permitted intervention."<sup>67</sup> Additionally, the committee classified the allegations affecting the neighbors directly as vague and therefore frivolous.<sup>68</sup>

The SJC also addressed claims of abutting landowners in *Standerwick v.*

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because it did not qualify as "person aggrieved"); *Bailey*, 345 N.E.2d at 369 (denying abutters right to hearing on comprehensive permit); *see also Zoning Bd. of Appeals*, 433 N.E.2d at 876 (explaining standard of review for HAC decisions). Courts must uphold HAC decisions if supported by substantial evidence. *Zoning Bd. of Appeals*, 433 N.E.2d at 876. Thus, the court may not overturn HAC's decision merely because the judge would have ruled differently. *Id.*

60. 433 N.E.2d 873 (Mass. 1982).

61. *Id.* at 874-75 (affirming decision to issue permit).

62. *See id.* at 875 (explaining rationale behind town's decision to deny permit).

63. *See id.* at 878 (arguing project's contribution to low-cost property would be low). The owner of the development would rent half of the units at market rates. *Id.*

64. *See Zoning Bd. of Appeals*, 433 N.E.2d at 876 (reporting HAC's decision and determining HAC decision supported by substantial evidence).

65. No. 05-07, slip op. at 6 (Mass. Hous. App. Comm. Oct. 14, 2005) (concluding landowners failed to meet intervention criteria). To meet the standards for intervention, the HAC requires the proposed interveners to show:

- 1) they will be substantially and specifically affected by the outcome of the proceedings before the Committee and specifically that their harm would be related to the granting of relief from local regulation as requested by the developer in this appeal; 2) their harm is not a common harm shared by all the residents of the town; and 3) the Board will not diligently represent those interests.

*Id.* at 4; *see also* 760 MASS CODE REGS. 30.04(2) (2008).

66. *Enterprise Village*, No. 05-07, slip op at 5 (listing resident concerns).

67. *Id.* (stating proposed interveners did not raise a basis for their intervention).

68. *Id.* (remarking other allegations could help landowners qualify as interveners). The neighboring landowners would have to introduce some evidence proving anticipated effects of project. *See id.* The HAC, however, is not easily persuaded. *See Page Place Apartments, L.L.C. v. Stoughton Zoning Bd. of Appeals*, No. 04-08, slip op. at 17 (Mass. Hous. App. Comm. Feb. 1, 2005) (concluding concentration of use of property not great concern). In response to an expert in civil engineering testifying regarding truck traffic, the committee stated, "There is nothing in his qualifications to indicate that he is an expert in acoustics, noise, or any related field." *Id.* at 16-17.

*Zoning Board of Appeals*.<sup>69</sup> The plaintiffs anticipated the planned development would adversely affect local lighting, noise, safety, infrastructure, privacy, and property values.<sup>70</sup> The plaintiffs further asserted that the site lacked public transportation and other services and was unsuitable for a large structure and that the development exposed the town to safety risks and posed sewage concerns.<sup>71</sup> The court held that diminution of real-estate values is not an issue addressed by Chapter 40B.<sup>72</sup> Additionally, the court noted that some of the concerns the plaintiffs had tendered are simply a consequence of any increase in population.<sup>73</sup>

Denial of comprehensive permits generally is limited to two circumstances deemed “consistent with local needs.”<sup>74</sup> The HAC may uphold a local decision based either on health and safety or planning concerns that outweigh the regional need for affordable housing.<sup>75</sup> Recently, the HAC seems to have become increasingly aware of these valid concerns.<sup>76</sup> For instance, in *Lexington Woods, LLC v. Waltham Zoning Board of Appeals*,<sup>77</sup> the committee admitted to having previously sanctioned steep, winding, narrow or single access roadways, but concluded that several of these elements can combine to create safety problems that outweigh the need for affordable housing.<sup>78</sup> After cataloging numerous problems on twenty-nine pages of text, the committee

69. 849 N.E.2d 197, 200 (Mass. 2006) (considering whether property value diminution provides basis for standing).

70. *See id.* at 201 (describing plaintiff’s claims).

71. *See id.* at 201 n.6 (specifying reasons plaintiffs alleged board exceeded authority).

72. *See id.* at 206 (denying property value preservation gives rise to standing). For plaintiffs to have standing, they must allege facts showing that “the proposed development would affect them in any way distinct from the manner in which all town residents would be affected.” *Id.* at 200 n.4.

73. *Standerwick v. Zoning Bd. of Appeals*, 849 N.E.2d 197, 210 (Mass. 2006) (noting potential consequences of population increase). The court observed that increases in population also promote likelihood of contagious disease, noise, traffic, and vandalism. *Id.* The court adds that the plaintiffs “have nothing more than unfounded speculation to support their claims of injury.” *Id.*

74. *See Forty Eight Co. v. Westfield Zoning Bd. of Appeals*, No. 75-06, slip op. at 14 (Mass. Hous. App. Comm. Aug. 23, 1976) (explaining circumstances under which HAC may uphold local board decision). The HAC asserted that “to uphold the Board’s decision, we must be able to find that the health, safety and planning factors outweigh the regional need for low and moderate income housing.” *Id.*; *see also* Katherine L. Melcher, *Changes in the 40B Landscape: Assessing the Need for Reform*, 38 NEW ENG. L. REV. 227, 239 (2003) (offering two categories of local interest consistent with local needs).

75. *See Forty Eight Co.*, No. 75-06, slip op. at 14 (describing heavy burden municipality must meet in order to overcome need for housing). In *Forty Eight Co.*, the HAC concluded that

the risks to health and safety which this project would create in the form of potential catastrophic propane gas explosion, traffic hazards and railroad noise, along with the overall unsuitability of the site for residential development . . . present incurably negative factors which collectively serve to outweigh regional housing need in the present case.

*Id.* at 14-15; *see* Melcher, *supra* note 74, at 239 (explaining health and safety circumstances where HAC would uphold permit denial).

76. *See Lexington Woods, L.L.C. v. Waltham Zoning Bd. of Appeals*, No. 02-36, slip op. at 20 (Mass. Hous. Appeals Comm. Feb. 1, 2005) (affirming Board’s denial of permit because of safety concerns).

77. *Id.*

78. *Id.* (defending town’s position in light of inconsistency).

affirmed the board's decision.<sup>79</sup>

In contrast, the HAC generally will not uphold decisions based on any anticipated repercussions the project will have on municipal services.<sup>80</sup> Massachusetts regulations allow a board to consider financial feasibility "where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly."<sup>81</sup>

Nevertheless, in *Georgetown Housing Authority v. Georgetown*,<sup>82</sup> the HAC declared that a municipality's duty to provide services is not an acceptable reason to deny a Chapter 40B permit.<sup>83</sup> Indeed, impact upon town services appears to be one of the chief reasons set forth by Winchester residents opposing the AvalonBay proposal.<sup>84</sup> The arrival of families with multiple children would place a particularly exacting strain on the public schools.<sup>85</sup>

Chapter 40B is currently the principal vehicle for creating affordable housing in the Commonwealth of Massachusetts.<sup>86</sup> In 2006, developers used the comprehensive permit to build almost three-quarters of the total number of affordable housing developments that year.<sup>87</sup> Nonetheless, reports indicate that communities are employing alternative tools to facilitate production.<sup>88</sup> Some, however, maintain that without Chapter 40B, progress in the affordable housing

79. *Id.* at 28 (affirming board's decision).

80. *See* Melcher, *supra* note 74, at 238 (suggesting HAC would not uphold decision based on effect on local services).

81. 760 MASS. CODE REGS. 31.06(8) (2008) (imposing on Board burden to prove services not feasible).

82. *See* No. 87-08, at 12, slip op. (Mass. Hous. App. Comm. June 15, 1988) (refuting idea cost of municipal services at issue).

83. *See* Northern Middlesex Hous. Assoc. v. Billerica Zoning Bd. of Appeals, No. 89-48, slip op. at 6 (Mass. Hous. Appeals Comm. Oct. 12, 1993) (tolerating developer's failure to provide information on project's economic impact); *Georgetown Housing Authority*, No. 87-08, at 12, slip op. (holding requirement to provide town services imposed by law).

84. *See* FISCAL IMPACT REPORT, *supra* note 15, at 3 (presenting expenses of variously sized and structured developments to Winchester households). Where the average taxpayer would pay \$70 to \$112 more in taxes per year indefinitely under the AvalonBay proposal, the same taxpayer would pay \$154 more per year for the next 20 years for the purchase of Hamilton Farm. *See* Melissa Beecher, *Crucial Votes Nearing on Farm's Fate*, BOSTON GLOBE, Feb. 22, 2007, NorthWest 1. The AvalonBay development would weigh down town infrastructure and services. *Id.*; *see* Calvin Hennick, *Welcome to Medfield—Especially if You Don't Have Children*, BOSTON GLOBE, July 31, 2008, at 1 (discussing how town discourages entrance of children to preserve funds).

85. *See* Hennick, *supra* note 84 (explaining ways in which towns seek to impede entrance of more children to preserve funds).

86. *See* HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 55 (highlighting Chapter 40B continues to significantly help affordable housing). Heudorfer also emphasizes that Chapter 40B has induced other localities "to seek alternative strategies to achieve the same goal." *Id.* at 57. *But see* Stonefield, *supra* note 24, at 350 (recommending gathering data before giving opinion of Chapter 40B's effectiveness). Professor Stonefield writes that the available data does support the statute's effectiveness in generating housing, but also its ineffectiveness in achieving social mobility for minorities. *Id.*

87. *See* HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 9 (reporting 40 percent of area's communities allowed some affordable housing in 2006). The report maintains that the comprehensive building permit brought affordable housing to fifty communities. *Id.*

88. *See id.* (speaking of other ways to produce affordable housing). While 40B fostered affordable housing in fifty communities, inclusionary or incentive zoning created such housing in thirteen communities. *Id.* Nine communities used traditional subsidies. *Id.*

arena is limited.<sup>89</sup> These observers suggest that fear of Chapter 40B development motivates communities to plan for growth.<sup>90</sup> In contrast, others concede that Chapter 40B has helped to create affordable housing, but still find Chapter 40B may be unconstitutional and therefore unacceptable.<sup>91</sup>

### B. Criticism of Chapter 40B

Critics of Chapter 40B dispute both the law's effects and its efficacy.<sup>92</sup> Typically, a Chapter 40B development leads to more housing units on less land than would have been normally allowed on a particular parcel.<sup>93</sup> Buildings are typically higher, sometimes overshadowing surrounding neighbors' homes, and closer to streets, reducing green space.<sup>94</sup> Accordingly, adverse effects include lower property values, higher costs, noise, traffic, and destruction of open space.<sup>95</sup>

Sizeable, unexpected growth imposes a significant burden on community services leading to many undesirable effects.<sup>96</sup> Some commentators suggest that the local call to manage growth is likely legitimate and not motivated by prejudice.<sup>97</sup> For example, a large influx of people may overstrain the locality's

89. See *id.* at 57 (raising argument against greater local control). Heudorfer contends that the Commonwealth's zoning "does not provide for compact, higher density, or multifamily development anywhere in the community." *Id.* Heudorfer argues that many of the communities employing other housing mechanisms "have been motivated to do so because of the existence of 40B." *Id.*

90. See *id.* (maintaining Chapter 40B serves as motivating factor).

91. See Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 540 (2003) [hereinafter Witten, *Cost*] (recognizing Chapter 40B success, but focusing debate on means rather than end). Witten writes, "[I]f the means sought to accomplish the end result are unconstitutional or violate public policy, then the ultimate results are irrelevant." *Id.*

92. See, e.g., D. Craig MacCormack, *Selectmen Back Anti-Chapter 40B Push*, METROWEST DAILY NEWS, Sept. 26, 2007, available at <http://www.metrowestdailynews.com/homepage/x231048690> (quoting town officials discussing flawed system); Christine McConville, *Builder's Profit Is New Battleground*, BOSTON GLOBE, Apr. 12, 2007, available at [http://www.boston.com/news/local/articles/2007/04/12/builders\\_profit\\_is\\_new\\_battleground](http://www.boston.com/news/local/articles/2007/04/12/builders_profit_is_new_battleground) (discussing failure of monitoring agents in ensuring limit on developer profits); Jonathan Witten, *Opinion 1: Inclusionary Zoning Is Answer to 40B*, WORCESTER BUS. J., Aug. 6, 2007, available at <http://www.wbjournal.com/news39905.html?Type=searchion> (opining Chapter 40B "results in destruction of neighborhoods"); see also HEUDORFER, RECORD, *supra* note 45, at 39 (discussing pressures on community that Chapter 40B may exacerbate). Chapter 40B "did not create the pressures that many high growth suburban communities are now feeling—fiscal stress, increased traffic congestion, changing community character, loss of open space—but there is concern that it may aggravate them if it allows development that runs counter to responsible and balanced planning." HEUDORFER, RECORD, *supra* note 45, at 39. Instead, Heudorfer attributes the pressure to "job creation, good schools, development of larger market rate family housing, and shifting demographics." *Id.*; see also Melcher, *supra* note 74, at 247 (pointing out Chapter 40B's failure to significantly increase amount of affordable housing). Criticisms of 40B include its "steamrolling effect," lack of local control, and comparative lack of success. Melcher, *supra* note 74, at 247.

93. See Witten, *Cost*, *supra* note 91, at 530 (lamenting power of developer to evade any and all restrictions). The developer need only provide 25 percent of the units in the development as affordable to waive several requirements. *Id.* For example, the municipality will no longer impose density limitations, subdivision rules, health regulations, and historic district limitations. *Id.*

94. See *id.* at 530 (demonstrating undesirable effects of 40B).

95. See Stockman, *supra* note 19, at 540 (describing justifications for exclusionary zoning).

96. See *id.* at 539-40 (listing common reasons residents oppose Chapter 40B); see also Melcher, *supra* note 74, at 245 (legitimizing limits on rate of growth). With all of the detriments associated with large development, "opposition to such sudden, unplanned growth should not be written off as mere snobbery." Melcher, *supra* note 74, at 245.

97. See Melcher, *supra* note 74, at 246 (contending desire for control over growth impact not proof of discriminatory motive). Melcher suggests localities have "carrying capacities." *Id.* at 245.

schools, sewers, and supply of drinking water.<sup>98</sup> The HAC's indifference toward these concerns understandably triggers local frustration with Chapter 40B.<sup>99</sup>

In addition, critics question the logic of inflicting blanket regulations on all municipalities within the Commonwealth.<sup>100</sup> They argue that Chapter 40B does not distinguish between different types of land.<sup>101</sup> The law treats septic system regulations equally whether the systems are located on bedrock or on sand and gravel.<sup>102</sup> Thus, critics argue Chapter 40B hijacks the town's power to plan and gives that power to greedy and exploitive developers.<sup>103</sup>

Commentators also doubt whether Chapter 40B has met its goals of generating as much affordable housing as possible and of integrating suburban communities.<sup>104</sup> Massachusetts, a leader in affordable housing programs, currently is the third least affordable rental market behind California and Hawaii.<sup>105</sup> Boston also ranks as the fifteenth most expensive home-buying market, having fallen from third most expensive in 2001.<sup>106</sup> Until recently,

98. See *id.* at 246-47 (suggesting discriminatory intent absent in cases where influx poses genuine concern).

99. See *id.* at 246 (blaming HAC's rigidity on drive to repeal Chapter 40B). Melcher notes that the addition of a large number of units can substantially impact a community. *Id.*

100. See Witten, *Cost*, *supra* note 91, at 531-32 (contending Chapter 40B imposes "one size fits all" standard for all 351 Massachusetts municipalities).

101. See *id.* (maintaining Chapter 40B fails to preserve building standards).

102. See *id.* at 532 (identifying septic system regulations as example of "one size fits all" approach). In addition to septic system standards, wetland regulations should be distinguished where site retains "extensive vernal pools and wildlife habitat." *Id.*

103. See Melcher, *supra* note 74, at 244 (assessing criticism of Chapter 40B).

104. See HEUDORFER, RECORD, *supra* note 45, at 11 (expounding on Chapter 40B legislative history). At the time of Chapter 40B's passage, urban areas contended with a racial imbalance law that made it illegal to have classrooms comprised of more than 50 percent nonwhite students. *Id.* Some lawmakers saw Chapter 40B as a vehicle to spread the burden of enforcing the law to the suburbs. *Id.*; see also Brian R. Lerman, Note, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENV'T'L. AFF. L. REV. 383, 402 (2006) (stating small number of affordable housing units generated by Chapter 40B). Chapter 40B "fails to encourage diverse and integrated affordable housing." Lerman, *supra*, at 403; see also Stockman, *supra* note 19, at 560 (evaluating Massachusetts law based on housing goals). Stockman explains that an affordable housing system should meet five goals. Stockman, *supra* note 19, at 560. First, the system should integrate the community "in a process that is both incremental and self-limiting to prevent overcorrection." *Id.* Second, the program should "create as much affordable housing as possible." *Id.* Third, it should not "give rise to counterproductive side effects." *Id.* Fourth, the system should "facilitate the consideration of legitimate local concerns." *Id.* Finally, the program should be "relatively easy and inexpensive to administer, minimizing delays and total development costs on local and state treasuries." *Id.* The Commonwealth is still in need of affordable housing, despite the existence of Chapter 40B. Melcher, *supra* note 74, at 262 (advocating for Chapter 40B changes because affordable housing shortage unremedied); see also John Belskis, *Chapter 40B: Overview of a Failed Policy*, [http://www.masschc.org/story\\_opin.php?id=61](http://www.masschc.org/story_opin.php?id=61) (last visited Oct. 31, 2008) (stating Chapter 40B has "not come close" to targets). Officials say Chapter 40B has created 30,000 units of affordable housing, which amounts to slightly over 1 percent of the total housing stock in the Commonwealth. Belskis, *supra*.

105. See HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 8 (discussing housing problem in Commonwealth); see also HEUDORFER, RECORD, *supra* note 45, at 19 (calling Massachusetts "a leader in low and moderate income housing production"); Melcher, *supra* note 74, at 248 (highlighting Chapter 40B's failure to make homes more affordable). In fact, "the American dream of home ownership has become less of a reality over the lifetime of the zoning override tool." Melcher, *supra* note 74, at 248.

106. See HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 8 (voicing home ownership affordability concerns).

many experts characterized Massachusetts's situation as a housing crisis.<sup>107</sup>

Proponents of Chapter 40B bear the high cost of building in the Commonwealth responsible for the lack of development.<sup>108</sup> Conversely, critics point out that the Chapter 40B system is entirely dependent on developers to facilitate housing growth.<sup>109</sup> In addition, critics argue that penalizing communities that lack low-or-moderate-income housing fails to produce sufficient affordable housing to make the process worth the cost.<sup>110</sup>

Commentators also suggest increasing the percentage of affordable housing units required to qualify for the comprehensive permit.<sup>111</sup> They argue that designating only 25 percent of the development's total units as affordable does little to increase the locality's total low-income housing supply.<sup>112</sup> Additionally, the remaining 75 percent of the development, comprised of market-rate homes, swells the locality's total housing base, devaluing the progress made toward the 10 percent affordable-housing minimum.<sup>113</sup>

Even those who praise Massachusetts's attempt to provide affordable housing find flaws in the system.<sup>114</sup> Many projects do not survive the arduous

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107. See Baker, *supra* note 46, at 173 (characterizing Massachusetts housing as least affordable in country). Focus on reforming Chapter 40B is needed to alleviate the housing crisis situation. *Id.* at 165; see also HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 11 (warning of danger in creating too much housing). An incremental population increase of 1/10 percent occurred in Massachusetts between July 2005 and June 2006, after the state had back-to-back years of population decline. HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 6. Foreign immigration continues to offset domestic relocation. *Id.* Additionally, median home price decreased in 2007. *Id.* at 8; cf. John Christoffersen, *Economist: Housing Slump May Exceed Depression*, BOSTON GLOBE, Apr. 22, 2008, available at [http://www.boston.com/news/local/connecticut/articles/2008/04/22/yale\\_economist\\_gives\\_talk\\_on\\_economy/](http://www.boston.com/news/local/connecticut/articles/2008/04/22/yale_economist_gives_talk_on_economy/) (predicting housing prices will drop more than 30 percent). Economist Robert Shiller claims that the biggest housing boom in the United States's history occurred from 1997 to 2006, in which home prices increased about 85 percent. Christoffersen, *supra*. Housing prices across the country have already fallen by 15 percent since 2006. *Id.*

108. See HEUDORFER, RECORD, *supra* note 45, at 38 (characterizing high costs of land and development as impediments to new housing construction). Restrictive zoning is an additional challenge. *Id.*; see also HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 33 (blaming fuel costs for rising prices). The report shows that Boston construction costs are higher than average. HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 33. Heudorfer cites "[r]ising construction costs, unexceptional job growth, waning consumer confidence, and an overhang of unsold inventory" as factors restraining large-scale housing production. *Id.*

109. See Lerman, *supra* note 104, at 401-02 (illustrating Chapter 40B procedural process requires developer initiation of low-income housing development).

110. See *id.* at 402 (stating "remedy in Massachusetts belongs exclusively to developers"); see also Witten, *Opinion*, *supra* note 92 (criticizing cost and inefficiency of Chapter 40B). Witten suggests borrowing techniques from California, Maryland, and Rhode Island, which collect impact fees and impose inclusionary zoning requirements. *Id.* These states build greater affordable housing than Massachusetts does through such methods. *Id.* Whereas impact fees, development agreements, and inclusionary zoning compel the developer to contribute affordable housing creation, Chapter 40B allows developers to profit without much in return. *Id.*

111. See Melcher, *supra* note 74, at 249 (criticizing ineffectiveness of the minimum percentage system). Once developers meet the minimum percentage, they may waive other local restrictions. *Id.*

112. See *id.* (noting required percentage arbitrary and insufficient); Belskis, *supra* note 104 (lamenting inherent flaws of Chapter 40B). Only 25 percent of the units in a development count toward the housing minimum. Belskis, *supra* note 104. The remaining 75 percent of the development actually expands the housing base, making it harder for the town to reach the 10% "safe harbor." *Id.*

113. See *id.* (highlighting law's failure to advance 10 percent goal). In other words, if a development consisted of one hundred units—with twenty-five affordable units and seventy-five market-rate units—seven and a half affordable units would be needed simply to negate the influx of more market-rate homes. See *id.*

114. See Stockman, *supra* note 19, at 577-78 (expressing both criticism and praise for Massachusetts system). Stockman concludes, "To praise the Massachusetts scheme for its progress, however, is not to suggest that it needs no improvement." *Id.*

journey from the developer's proposal through the appeals process, despite liberal HAC rulings that generally favor the developer.<sup>115</sup> Financing, delay, and market forces all contribute to the stagnation of accepted proposals.<sup>116</sup> According to a 2003 report, developers constructed only 62 percent of HAC-sanctioned projects.<sup>117</sup> Additionally, developers constructed only 56 percent of settled projects and only 35 percent of projects withdrawn or dismissed from HAC review.<sup>118</sup>

Analysts also fault Chapter 40B on its inability to integrate the suburbs fully.<sup>119</sup> The permit allows communities to build disproportionate amounts of elderly housing, as compared to family housing.<sup>120</sup> By restricting affordable housing to older residents, communities can avoid costs associated with accommodating families with children.<sup>121</sup> Recall that the legislature initially enacted Chapter 40B to end such cost-reducing practices.<sup>122</sup> This drawback, however, corresponds to Chapter 40B's balancing of important policy objectives.<sup>123</sup>

On the other hand, some contend Chapter 40B violates both procedural and substantive due process and constitutes an unconstitutional giving.<sup>124</sup> One expert calls the HAC process a "charade" that deceives the public by convincing them that the government is guarding their interest.<sup>125</sup> Furthermore, the author contends that Chapter 40B is unpredictable and thus produces unfair results.<sup>126</sup>

Additionally, some assert that Chapter 40B unconstitutionally gives density

115. See HEUDORFER, RECORD, *supra* note 45, at 41 (maintaining fewer than half of projects appealed to HAC are built).

116. See *id.* (determining reasons developers abandon approved projects).

117. See *id.* (evaluating developer-friendly outcomes of HAC decisions).

118. See *id.* (listing percentages of projects accomplished).

119. See Stockman, *supra* note 19, at 564 (contending Chapter 40B "system does not adequately distinguish between family and elderly housing"); see also Stonefield, *supra* note 24, at 353 (elaborating on difficulty of using affordable housing to achieve social mobility). Local restrictions keeping units affordable also inhibits the increase in equity in those units. Stonefield, *supra* note 24, at 353. Equity is a significant factor in wealth discrepancy among races. *Id.*

120. See Stockman, *supra* note 19, at 564 (arguing many communities "favor elderly housing over family housing").

121. See *id.* at 564 (claiming elderly demands on town treasury minimal). But see FISCAL IMPACT REPORT, *supra* note 15, at 17-18 (maintaining different developments place different demands on public departments). The report reasons that "a retirement community is more likely to place demands on senior citizen programs and emergency medical services." *Id.*

122. See Stockman, *supra* note 19, at 548 (explaining findings suburban communities' zoning practices edged out low-and-moderate-income housing). According to Stockman, communities impose exclusionary or restrictive zoning practices to keep taxes low. *Id.* at 540. Municipal planners assume that small, family-occupied homes do not generate as much revenue as they consume. *Id.* But see HEUDORFER, RECORD, *supra* note 45, at 28 (describing populations served by Chapter 40B). In this 2003 report, Heudorfer states that developers reserved about 57 percent of developments for families, 33 percent for the elderly, and 10 percent for people with special needs. *Id.*

123. See Stockman, *supra* note 19, at 560 (complimenting Chapter 40B's ability to balance policies).

124. See Witten, *Cost*, *supra* note 91, at 541-43 (maintaining constitutional violations of Chapter 40B); see also Jennifer Devitt, Note, *Illinois' Affordable Housing Planning and Appeal Act: An Indirect Step in the Right Direction—A Survey of Housing Appeals Statutes*, 18 WASH. U. J.L. & POL'Y 267, 287-88 (2005) (asserting Illinois act may be unfair for arbitrariness and failure to define material terms).

125. See Witten, *Cost*, *supra* note 91, at 538 (arguing HAC operates on false pretenses).

126. See *id.* at 543 (arguing Chapter 40B "fails to comport with procedural and substantive due process").

bonuses to the developer.<sup>127</sup> Regulatory giving is “an action by government that grants unearned or uncompensated benefits to the private sector.”<sup>128</sup> The costs of that gift include the various burdens imposed on the locality, the deprivation of open space, water, planning for growth, and the loss of public trust.<sup>129</sup>

Critics also emphasize the potential for abuse by an overseeing authority because of the locality’s limited control over its own development.<sup>130</sup> Some argue that the SJC and HAC take for granted that the subsidizing agency is competent, careful, and conscientious.<sup>131</sup> One author characterizes the SJC’s and HAC’s reliance on the agency as blind.<sup>132</sup> For example, MassHousing, the agency releasing most project-eligibility letters, denies any obligation to obey the rules and regulations of the Department of Housing and Community Development.<sup>133</sup> Moreover, the Chapter 40B applicant can appeal to the HAC for an almost certain win.<sup>134</sup>

More recently critics have focused on developer abuses of the comprehensive permit.<sup>135</sup> The statute requires developers to limit profits, typically to 20 percent of the total allowable development costs.<sup>136</sup> Chapter 40B also compels developers to submit a detailed financial statement of all project costs in order to certify compliance with the statute.<sup>137</sup> Developers then turn over any surplus gains, which are those above the limited percentage, to

127. See *id.* (contending Chapter 40B “gives unlimited density bonuses”).

128. See *id.* (defining “giving”).

129. See Witten, *Cost*, *supra* note 91, at 544-45 (listing expenses considered gifts to developers).

130. See Gouvin, *supra* note 43, at 31 (implying HAC process unfair); Witten, *Cost*, *supra* note 91, at 538 (denouncing reliance on subsidizing agency’s review). Professor Gouvin explains that towns have prevailed in “only a handful of occasions,” and expresses some disappointment that the decisions are so lopsided. Gouvin, *supra* note 43, at 31. This imbalance, Gouvin writes, makes towns doubt the impartiality of the HAC process. *Id.*

131. See Witten, *Cost*, *supra* note 91, at 538 (speaking of locality’s “extremely limited authority”).

132. See *id.* (saying “blind reliance” on the agency effectively makes development likely).

133. See *id.* (citing *Town of Duxbury v. Mass. Hous. Fin. Agency*, No. PLCV2002-00298 (Mass. Super. Ct. filed March 12, 2002)) (describing “illusory effect” of project eligibility process).

134. See Gouvin, *supra* note 43, at 31-32 (describing hopelessness of HAC granting town victory); Witten, *Cost*, *supra* note 91, at 539-40 (saying developer eligibility makes for likely application approval). Professor Gouvin expounds that the Zoning Board of Appeals (ZBA) of which he was a member “never seriously thought the town would ever get a fair hearing before the HAC.” Gouvin, *supra* note 43, at 32.

135. See Witten, *Opinion*, *supra* note 92 (faulting Chapter 40B on allowing developers to collect profits without creating affordable housing); see also McConville, *supra* note 92 (stating Billerica found developer profits exceeded lawful limit). Relatively recently, several municipalities have sued Chapter 40B developers to recover excess profits. McConville, *supra* note 92. In Billerica’s case, an audit committee found differences between costs the developer cited and costs stated on contractor agreements. *Id.* Audit committee members criticized both Chapter 40B and the state agency that supervises its operation. *Id.*

136. MASS GEN. LAWS ch. 40B, § 20 (2006) (limiting class of applicants to “public agencies, nonprofit organizations, and limited dividend organizations”); 760 MASS. CODE REGS. 45.04(9)(b) (2008) (limiting developer profit to 20 percent); see also *Larson v. Borden*, No. 010185, 2003 WL 22285323, \*9 (Mass. Super. July 15, 2003) (annulling permit because of failure to address fundamental requirements). The court classifies “affordability, dividend limitation and long-term monitoring” as fundamental requirements. *Id.*

137. 760 MASS. CODE REGS. 45.04(10) (describing cost certification requirement). The Code provides that “[f]ailure to submit a financial statement reliably setting out all such costs shall be a material default and shall disqualify the developer and project owner and their principals from further participation in any state-sponsored affordable housing programs.” *Id.*

the host community.<sup>138</sup> Critics have long suspected, however, that developers overstate costs to increase their own profits unlawfully.<sup>139</sup>

Indeed, Gregory W. Sullivan, the Commonwealth's Inspector General, cited "widespread and pervasive" abuse of Chapter 40B by developers in his 2006 Annual Report.<sup>140</sup> The Inspector General examined six projects completed by different developers.<sup>141</sup> Developers reported no excess profits and claimed to take an average of only 7.98 percent of development costs.<sup>142</sup> Upon further review, however, the Inspector General found profits well exceeded the maximum profit limit.<sup>143</sup> In fact, the average profit percentage was 29 percent with a range of 14.4 percent to 55.9 percent.<sup>144</sup> Consequently, developers should have remitted a total of three million dollars to their host communities.<sup>145</sup>

The Inspector General determined that developer exploitation of Chapter 40B is part of a pattern.<sup>146</sup> The investigation revealed that developers routinely understated profits, overstated costs, and provided discounted units to affiliated parties.<sup>147</sup> The report concluded, "It is apparent that developers across the state knew that the organizations assigned to monitor and enforce the system were failing."<sup>148</sup> Accordingly, in a report to the executive director of MassHousing, the Inspector General characterized the cost certification and monitoring process as broken.<sup>149</sup>

Finally, critics of Chapter 40B express concern for abutting landowners.<sup>150</sup> For most people, the family residence is the "largest single investment in their

138. See GREGORY W. SULLIVAN, OFFICE OF THE INSPECTOR GEN., COMMONWEALTH OF MASS., 2006 ANNUAL REPORT 3 (2007) [hereinafter INSPECTOR GEN., 2006 ANNUAL REPORT] (outlining cost certification process). The report explains that the developer must remit any profits in excess of the agreed upon percentage developer may receive. *Id.* Typically, a developer may receive 20 percent of the allowable costs in profits. *Id.*

139. See John Dyer, *Mixed Bag for 40B Builders*, BOSTON GLOBE, July 5, 2007, available at [http://www.boston.com/realstate/news/articles/2007/07/05/mixed\\_bag\\_for\\_40b\\_builders/](http://www.boston.com/realstate/news/articles/2007/07/05/mixed_bag_for_40b_builders/) (acknowledging concern developers increased profits illegally); INSPECTOR GEN., 2006 ANNUAL REPORT, *supra* note 138, at 3 (finding average developer profit percentage at 29 percent); see also *supra* note 135 (discussing Billerica's allegation developer exceeded limit on earnings).

140. See INSPECTOR GEN., 2006 ANNUAL REPORT, *supra* note 138, at 3 (mit). Chapter 12A of the General Laws of Massachusetts gives the Inspector General power "to prevent and detect fraud, waste and abuse in government." *Id.* at 1. The office reports findings to the Massachusetts Attorney General and the U.S. Attorney for the District of Massachusetts. *Id.* at 2.

141. See *id.* at 4 (describing review of projects). The Inspector General studied projects located in Acton, Berkley, Leominster, Reading, Wareham, and Wakefield. *Id.* Project sizes ranged from six units to fifty units. *Id.* Of the total 159 units, developers reserved forty-one units as affordable. *Id.*

142. See *id.* (detailing developer reports).

143. See *id.* at 4 (finding "accounting fictions").

144. See INSPECTOR GEN., 2006 ANNUAL REPORT, *supra* note 138, at 4 (finding of report).

146. See *id.* (explaining "abuses of the Chapter 40B program proved to be part of a pattern").

147. See *id.* (calling developer profits "routinely and substantially understated"). It thus appears that developers not only overstate expenses and minimize profits, but also lower revenues through selling units at a discount to related parties. *Id.* The report cites "flipping of market rate housing units at below market prices to developer-controlled entities in order to report lower revenues of the project." *Id.* Additionally, the report found costs "routinely inflated, especially through related party transactions." *Id.*

148. See INSPECTOR GEN., 2006 ANNUAL REPORT, *supra* note 138, at 4 (blaming overseers of 40B process).

149. See *id.* (responding to unlawful developer windfalls).

150. See Witten, *Cost*, *supra* note 91, at 535 (noting courts' lack of concern for due process rights).

lives.”<sup>151</sup> In *Vazza v. Board of Appeals of Brockton*, the SJC reasoned that “[i]t is important that such purchasers be able to determine with reasonable accuracy, before making that investment, just what the applicable zoning ordinances or by-laws are, and what uses they permit or prohibit.”<sup>152</sup> The court further stated that the “purchaser should not be subjected to the impossible task, and corresponding risk, of speculating [that] the land being purchased, or neighboring land [will be] used for purposes which zoning ordinances or by-laws existing at the time of purchase either do not expressly permit or which they expressly prohibit.”<sup>153</sup> Thus, critics insist Chapter 40B is directly contrary to the language in *Vazza*.<sup>154</sup>

### C. Winchester—A Profile

The Town of Winchester boasts beautiful homes, great schools, and close proximity to Boston.<sup>155</sup> This highly desirable community, however, is rather exclusive.<sup>156</sup> Home costs and household incomes are significantly above the state average.<sup>157</sup> With over 92 percent of the town’s population being Caucasian, Winchester also lacks diversity.<sup>158</sup>

For about \$700,000, the median price for residence in the town, one can enjoy all Winchester has to offer.<sup>159</sup> The town features a unique atmosphere derived from development in the late nineteenth century.<sup>160</sup> During this period, the affluent businessmen that poured into the town constructed sizable homes.<sup>161</sup> Residents today are uncommonly involved in the community and generally seek to preserve Winchester’s heritage.<sup>162</sup>

Some of Winchester’s schools are rated the best or among the best in the state.<sup>163</sup> Winchester students tend to outperform their peers in standardized

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151. See *Vazza v. Bd. of Appeals of Brockton*, 269 N.E.2d 270, 274 (Mass. 1971) (reasoning purchasers entitled to rely on zoning ordinances); Witten, *Cost*, *supra* note 91, at 534 (citing *Vazza* for inconsistent treatment of home-buyer due process).

152. *Vazza*, 269 N.E.2d at 274 (arguing purchaser should be able to predict use of neighboring land).

153. See *id.* at 274 (discussing purchaser rights).

154. See Witten, *Cost*, *supra* note 91, at 535 (noting SJC’s concern for purchasers in *Vazza* missing in Chapter 40B).

155. See Winchester, Massachusetts Real Estate, <http://www.winchestermarealestate.com> (last visited Nov. 1, 2008) (outlining town features).

156. See City-Data.com, Winchester, Massachusetts, <http://www.city-data.com/city/Winchester-Massachusetts.html> (last visited Oct. 31, 2008) (providing town information).

157. See *id.* (comparing Winchester statistics with state medians).

158. See *id.* (citing town demographics).

159. See *id.* (enumerating median house price in Winchester).

160. See Winchester, Massachusetts Real Estate, *supra* note 155 (outlining town history).

161. See *id.* (explaining influx of residents attracted to bucolic atmosphere).

162. See *id.* (illustrating cohesiveness of community in improving and preserving town’s quality of life).

163. See James Vaznis, *MCAS Test Scores Are Best in 3 Years, Grades 3 Through 8 Reverse Recent Decline*, BOSTON GLOBE, Oct. 7, 2007, at 1 (reporting Winchester elementary schools within top five schools in Massachusetts in math and English); see also SchoolDigger.com *Schools in Winchester, MA*, <http://www.schooldigger.com/go/MA/city/Winchester/search.aspx> (last visited Oct. 31, 2008) (ranking Winchester’s schools second out of 385 Massachusetts cities).

testing.<sup>164</sup> The community at large is also highly educated as the percentage of the Town's population holding a Bachelor's degree or higher is significantly above the state average.<sup>165</sup>

On the other hand, only 1.8 percent of Winchester's total housing qualifies as affordable.<sup>166</sup> In contrast, many communities surrounding Winchester have met their 10 percent minimum under Chapter 40B or even exceeded it.<sup>167</sup> Thus, Winchester is not sharing in the burden of affordable housing and must add a large number of affordable housing units to the community if it wishes to evade Chapter 40B proposals in the future.<sup>168</sup>

#### D. Chapter 61A and Hamilton Farm

Chapter 61A of the Massachusetts General Laws provides tax relief for land registered as actively agricultural or horticultural.<sup>169</sup> To qualify, the land must span at least five acres and generate at least five-hundred dollars per year in sales revenue.<sup>170</sup> Additionally, Chapter 61A, section 14, grants the municipality a right of first refusal on the land.<sup>171</sup> The owner cannot sell such land unless he gives the municipality notice of intent to sell or convert.<sup>172</sup> Thereafter, the municipality has 120 days to purchase the property if it wishes to do so.<sup>173</sup>

The Town of Winchester held such a right of first refusal to purchase the Wright-Locke-Hamilton Farm (Hamilton Farm).<sup>174</sup> Stretching over twenty

164. See Massachusetts Department of Elementary and Secondary Education, MCAS Tests of Spring 2008, Percent of Students at Each Performance Level for Winchester, available at [http://profiles.doe.mass.edu/mcas/performance\\_level.aspx?linkid=32&orgcode=03440000&orgtypecode=5&](http://profiles.doe.mass.edu/mcas/performance_level.aspx?linkid=32&orgcode=03440000&orgtypecode=5&) (indicating Winchester students in grades three through ten received higher MCAS scores than statewide average).

165. See City-Data, *supra*, note 156 (reporting number of Winchester residents holding a bachelor's degree or higher significantly above state average).

166. See *supra* note 27 and accompanying text (noting percentage of affordable units in Winchester).

167. See HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 75-84 (listing percentages of affordable housing in surrounding towns).

168. See *id.* at 12 (estimating Boston Area will need 18,000 units of housing per year to sustain growth); see also Danielle Ameden, *Milford Opposes Affordable Housing Development*, MILFORD DAILY NEWS, July 10, 2007, available at <http://www.milforddailynews.com/homepage/x808938284> (indicating surrounding towns make no effort to add affordable housing); *supra* notes 6-9 and accompanying text (discussing need to positively shape Winchester's future through Comprehensive Master Plan). Towns with less than 10 percent affordable housing are "vulnerable" to unwanted Chapter 40B developments. Ameden, *supra*.

169. See MASS. GEN. LAWS ch. 61A, § 6 (2006) (providing lower tax rate for agricultural land). Under this provision, the municipality must assess registered agricultural and horticultural land on the basis of its value as such, rather than according to its maximum potential. *Id.* §§ 1, 2; 4 ANDREW C. BAILEY & WALTER G. VAN DORN, *Taxation* § 20:7 (4th ed. 2007) (discussing agricultural land). One uses agricultural land to raise animals and horticultural land to grow crops. MASS GEN. LAWS ch. 61A, §§ 1, 2.

170. See MASS. GEN. LAWS ch. 61A, § 3 (detailing requirements for such land to qualify for tax reduction).

171. See *id.* § 14 (describing first refusal option as municipality's right to purchase at offeror's price).

172. See *id.* (detailing procedure to sell designated agricultural land).

173. See *id.* (setting timetable for town's option to purchase).

174. See Initial Position Statement on the Wright-Locke-Hamilton Farm from Matthew Bronski, Chair, Winchester Historical Comm'n, to Bd. of Selectmen, Town of Winchester 1 (Oct. 1, 2006), available at <http://www.winchester.us/Downloads/Selectmen/hsips.pdf> [hereinafter Initial Position Statement ] (explaining Winchester has right of first refusal).

acres of land, Hamilton Farm consists of a farmhouse, eight agricultural outbuildings, ponds, wetlands, and open fields.<sup>175</sup> The farm also borders two other significant tracts of conservation land adding to the unique expansiveness of the property.<sup>176</sup> Additionally, Hamilton Farm enjoys both national and international acknowledgment as an area of cultural significance, as recognized by the National Register of Historic Places and the Government of Canada.<sup>177</sup>

Hamilton Farm truly holds a rich history.<sup>178</sup> Only three families have owned the property since the seventeenth century.<sup>179</sup> One early owner of the farm, Philemen Wright, led sixty-three people from the farm to Canada by winter sleigh in approximately 1800.<sup>180</sup> Wright founded the first settlement in the region of Canada that would later become the national capital, Ottawa, Quebec.<sup>181</sup>

In addition, the Farm bears environmental importance.<sup>182</sup> The land contains fields, forests, and wetlands that contribute to the health and quality of life of community members.<sup>183</sup> The property is also a drainage basin that is critical to preserving freshwater biodiversity.<sup>184</sup>

For unknown reasons, in the summer of 2006, the last owners, Curtis and Bertha M. Hamilton, decided to sell the property.<sup>185</sup> The prospective buyers included a rental housing developer who clearly intended to circumvent local zoning laws through Chapter 40B.<sup>186</sup> The Hamiltons accepted an offer to

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175. See FISCAL IMPACT REPORT, *supra* note 15, at 1 (describing Hamilton property as historically, aesthetically, and culturally significant); Winchester Hamilton Farm Interest Group, *About Wright-Locke-Hamilton Farm* [hereinafter *About Farm*] <http://www.whfig.org/FarmHistory.html> (outlining farm's 300-year history and unique existence of historic structures).

176. See FISCAL IMPACT REPORT, *supra* note 15, at 1 (describing layout of Hamilton property as comprising a contiguous tract of land).

177. See Initial Position Statement, *supra* note 174, at 2 (describing rich historical significance of property); *About Farm*, *supra* note 175 (noting farm's historical importance). The Canadian government set up a plaque on the 400-year-old farm site in 1980. Natalie Bull, *Farm a Key Link Between US, Canada*, BOSTON GLOBE, Mar. 11, 2007, NorthWest 3.

178. See Initial Position Statement, *supra* note 174, at 2 (providing ownership history of property).

179. See *id.* (detailing history of farm).

180. See *id.* (describing Wright journey in 19th century).

181. See *id.* (explaining Hamilton Farm's Canadian significance).

182. See *About Farm*, *supra* note 175 (describing farm's environmental importance as sustaining watershed for two ponds and sustaining aquatic biodiversity).

183. See *id.* (illustrating farm's importance in sustaining habitat for local wildlife); see also Craig Anthony Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 503 (2007) (asserting land use restrictions protect character and "quality of life" for community). Professor Arnold explains, "both impervious cover from urban development and the development of wetlands harm the healthy functioning of watersheds, which in turn contributes to flooding, soil erosion, pollution of water supplies, and loss of recreational uses of polluted waters." Arnold, *supra*, at 517.

184. See *About Farm*, *supra* note 175 (describing farm's importance as watershed). A Massachusetts Division of Fish and Wildlife project called "Living Waters" named Hamilton Farm as a necessary watershed for two ponds. *Id.* Living Waters deemed those ponds as critical for supporting freshwater biodiversity. *Id.* In addition, the Mystic River Watershed Association selected Hamilton Farm as crucial to preserving both the watershed and open space. *Id.*

185. See Letter from Daniel J. Bailey III, Esq., of Rackemann, Sawyer & Brewster, to Winchester Bd. of Selectmen (Nov. 14, 2006) (on file with Town of Winchester) (notifying Town of Winchester of Hamilton's intent to sell to AvalonBay).

186. See FISCAL IMPACT REPORT, *supra* note 15, at 1 (describing development proposal to establish numerous rental units).

purchase from AvalonBay, a national developer, which planned to build 260 rental units.<sup>187</sup> The plan would undoubtedly transform the landscape of not only the Farm, but also the entire area.<sup>188</sup> Additionally, the development would consume significant town resources by burdening public safety, public works, and education services.<sup>189</sup>

In fact, a Fiscal Impact Report estimated costs associated with the AvalonBay project to be so high that acquiring the land would be the less expensive option for Winchester.<sup>190</sup> Real estate and personal property taxes in the town account for about 80 percent of the Town's operating expenses.<sup>191</sup> Additionally, Winchester obtains very little revenue through new growth.<sup>192</sup>

Fiscal concerns were only one consideration in the decision to purchase Hamilton Farm.<sup>193</sup> Some residents wanted to preserve the natural environment, while others wanted to protect the historic buildings and landscape.<sup>194</sup> Ultimately, the town voted to purchase the farm through a debt-exclusion override.<sup>195</sup> Currently, the Town is determining how best to develop the land.<sup>196</sup>

#### *E. Alternatives to Chapter 40B*

In 2007, about the same time that the town purchased Hamilton Farm, a group of Winchester residents created the Comprehensive Master Plan Steering Committee, an organization devoted to planning Winchester's future.<sup>197</sup> The committee aspires to preserve Winchester's character, green space, and historic landscape.<sup>198</sup> Additionally, the committee seeks to increase development of the business community and advocate housing expansion for people at various

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187. See Hamilton Farm Interest Group, *AvalonBay*, <http://www.whfig.org/FinancialsAvalonBay.html> (describing AvalonBay's proposal and fiscal impact).

188. Cf. Arnold, *supra* note 183, at 504 (discussing how land restrictions protect "quality of life" from developments).

189. See Melissa Beecher, *Crucial Votes*, BOSTON GLOBE, Feb. 22, 2007, available at [http://www.boston.com/news/local/articles/2007/02/22/crucial\\_votes\\_nearing\\_on\\_winchester\\_farms\\_fate?mode=PF](http://www.boston.com/news/local/articles/2007/02/22/crucial_votes_nearing_on_winchester_farms_fate?mode=PF) (explaining taxes would rise \$70 to \$112 each year indefinitely if AvalonBay constructs project); see also FISCAL IMPACT REPORT, *supra* note 15, at 22 (concluding that "Winchester would find it challenging to absorb a large rental development").

190. See FISCAL IMPACT REPORT, *supra* note 15, at 23 (asserting fiscal impact favors exercising Chapter 61A right).

191. See *id.* at 5 (explaining fiscal impact of project upon taxpayers).

192. See *id.* at 22 (asserting town growth occurs through increased taxation of older homes).

193. See Beecher, *supra* note 189 (describing reasons residents desired to purchase Hamilton Farm).

194. See *id.* (reporting resident interests in keeping farm); see also Arnold, *supra* note 183, at 465 (explaining community planners seek to make special places.) According to Arnold, "special" communities have "connectivity, drama and dignity, variety and whimsy, reflection of local values, sociable settings, and many choices and things to do." Arnold, *supra* note 183, at 465. Similarly, Arnold cites research supporting the idea that "human experience with natural environments is critical to human physical and mental well-being." *Id.* at 466.

195. See Hamilton Farm Interest Group, *What's Happened*, [http://www.whfig.org/WhatsHappened.html#The\\_Town\\_Votes\\_Overwhelmingly\\_to](http://www.whfig.org/WhatsHappened.html#The_Town_Votes_Overwhelmingly_to) (relating news that Town exercised Chapter 61A right of first refusal).

196. See *What's Happened*, *supra* note 195 (discussing Town's next steps after land purchase).

197. See VISION, *supra* note 2, at 4-5 (describing plan and goals for Winchester's future).

198. See *id.* at 4 (describing desire to preserve physical character and enhance neighborhood with trees).

stages in life.<sup>199</sup> The committee also aims to increase economic diversity.<sup>200</sup> Winchester is initiating plans for its growth and including statewide goals.<sup>201</sup>

Smart growth is one of the alternatives to Chapter 40B.<sup>202</sup> In 2004, the legislature added Chapter 40R to the Massachusetts General Laws, entitled Smart Growth Zoning and Housing Production.<sup>203</sup> Instead of focusing solely on one issue, smart growth addresses problems concerning housing, the environment, and transportation as a whole.<sup>204</sup> Under smart growth plans, all new developments could include affordable housing, rather than only those falling under Chapter 40B.<sup>205</sup> Additionally, a smart growth plan could consider other interests besides affordable housing, such as environmental conservation and historical preservation.<sup>206</sup>

In 2006, Chelsea, Haverhill, and Norwood approved the first affordable housing developments under Chapter 40R Smart Growth.<sup>207</sup> In contrast to Chapter 40B, under Chapter 40R, the municipality must take the initiative to create the affordable housing district.<sup>208</sup> In addition, the district must be placed at an “eligible location.”<sup>209</sup> This requires that transportation, infrastructure, businesses, and schools be available to the new development.<sup>210</sup> Like Chapter

199. *See id.* at 4-5 (aiming to attract new business and provide sufficient housing).

200. *See id.* at 5 (asserting desire for economic diversity and affordable housing).

201. *See supra* note 197 and accompanying text (discussing Comprehensive Master Plan). *But see* *Oceanside Village, L.L.C. v. Scituate Zoning Bd.* of Appeals, No. 05-03, slip op. at 5 (Mass. Hous. Appeals Comm. July 17, 2007) (finding evidence of affordable housing plan does not rebut presumption of housing need).

202. *See* MASS. GEN. LAWS ch. 40R, § 1 (2006) (defining Smart Growth).

Smart growth is 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.*; *see also* Christophe Courchesne, Note, *What Regional Agenda?: Reconciling Massachusetts's Affordable Housing Law and Environmental Protection*, 28 HARV. ENVTL. L. REV. 215, 240-41 (2004) (explaining Governor Romney's smart-growth policy).

203. *See* MASS. GEN. LAWS ch. 40R, § 1 (describing purpose of law); 28 ARTHUR L. ENO, JR. & WILLIAM V. HOVEY, *Real Estate Law* § 23.37 (4th ed. 2007) (explaining smart growth).

204. *See* Courchesne, *supra* note 202, at 241 (explaining Romney's reforms).

205. *See* Lerman, *supra* note 104, at 415 (suggesting communities should establish comprehensive plan).

206. *See supra* note 197 and accompanying text (discussing Comprehensive Master Plan for Winchester); *see also* Lerman, *supra* note 104, at 387 (discussing attempted disguising of exclusionary zoning practices including efforts to preserve character). Some believe that prejudice and fiscal concerns motivate the resistance to Chapter 40B, prompting them to call for mandatory inclusionary zoning. Lerman, *supra* note 104, at 387-415.

207. *See* HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 55 (noting various mechanisms available for affordable housing production).

208. *See* MASS. GEN. LAWS ch. 40R, § 3 (2006) (using language cities and towns may adopt). The statute explains that municipalities should adopt the smart-growth zoning district in the town's zoning ordinances or by-laws. *Id.*

209. *See id.* (prescribing standard for smart-growth districts).

210. *See id.* (describing eligible location).

[A] city or town may adopt a smart growth zoning district in an eligible location and may include adjacent areas that are served by existing infrastructure and utilities, and that have pedestrian access

40B, Chapter 40R may necessitate adjustments to existing zoning laws.<sup>211</sup> The municipality, however, has more power to protect its interests than it has under Chapter 40B.<sup>212</sup> For instance, the city or town may reserve certain areas for open space under Chapter 40R.<sup>213</sup>

On the other hand, some maintain that voluntary cooperation from suburbs is an unrealistic solution.<sup>214</sup> Recall, for example, that some credit Chapter 40B for facilitating local interest in creating affordable housing.<sup>215</sup> Commentators observe that the legal structure within which municipalities function actually promotes exclusionary zoning.<sup>216</sup> Cities and towns vie to collect higher taxes from those requiring fewer services.<sup>217</sup> Some suggest that governments should cease rewarding such practice because property taxes can be replaced with new revenue sources.<sup>218</sup>

Chapter 40R provides incentives to localities with an approved smart-growth zoning district even if the incentives are not as enticing as those mentioned above.<sup>219</sup> Under Chapter 40R, approved districts are eligible to receive a one-time density bonus payment.<sup>220</sup> Additionally, departments dispensing discretionary funds will give precedence to such localities.<sup>221</sup> Thus, the issue remains whether the Commonwealth still needs Chapter 40B to achieve affordable housing.<sup>222</sup>

Commentators have long advocated for a mandatory program that would

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to at least 1 destination of frequent use, such as schools, civic facilities, places of commercial or business use, places of employment, recreation or transit stations.

*Id.*

211. *See id.* § 6(b) (explaining community may alter district's underlying zoning); 17 DOUGLAS A. RANDALL & DOUGLAS E. FRANKLIN, *Municipal Law and Practice* § 17.34 (5th ed. 2007) (discussing ways town can modify zoning).

212. *See* MASS. GEN. LAWS ch. 40R, § 6(b) (providing "city or town may modify" standards).

213. *See id.* (stating municipality may employ conservation restrictions).

214. *See* Note, *Old Regionalism, New Regionalism, and Envision Utah: Making Regionalism Work*, 118 HARV. L. REV. 2291, 2292-93 (2005) [hereinafter *Old Regionalism*] (presenting both sides of New Regionalism debate).

215. *See* HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 57 (characterizing Chapter 40B as motivation behind smart growth initiatives).

216. *See* Stonefield, *supra* note 24, at 343 (suggesting states could indirectly increase affordable-housing production through financial incentives and disincentives); *Old Regionalism*, *supra* note 214, at 2309 (explaining government structure fosters sprawl). Sprawl refers to "prevailing land use patterns for rapid land consumption, congestion, air pollution, social and economic segregation, concentrated poverty, and inner-city decline." *Id.* at 2291.

217. *See Old Regionalism*, *supra* note 214, at 2309 (arguing system forces sprawl). The author explains that "standard property tax regimes encourage—if not force—localities to compete for revenue by zoning for low-service, high-property-value uses." *Id.*

218. *See id.* at 2310 (introducing legal changes intended to weaken incentives for sprawl).

219. *See* MASS. GEN. LAWS ch. 40R, § 9(b) (2006) (providing bonus payment to localities with smart-growth zoning district). *But see supra* note 218 and accompanying text (discussing incentives designed to curb sprawl).

220. *See* MASS. GEN. LAWS ch. 40R, § 9(b) (reserving \$3,000 for each housing unit created in district).

221. *See id.* § 9(c) (asserting that departments awarding discretionary funds will favor smart-growth municipalities).

222. *See supra* note 215 and accompanying text (finding Chapter 40B motivation behind local initiatives).

compel inclusionary zoning in every locality.<sup>223</sup> One suggestion is that the state legislature should compel mandatory inclusionary zoning.<sup>224</sup> On the other hand, one expert suggests that municipalities should exchange exactions for building permits.<sup>225</sup> Still, another author writes that the ideal approach is for the municipality to create a “municipal comprehensive plan.”<sup>226</sup> Under this rubric, the locality offers the plans to state or regional governments for acceptance.<sup>227</sup> A joint effort allows consideration of both affordable housing and other needs.<sup>228</sup> In this way, affordable housing does not need to take precedence over other concerns.<sup>229</sup>

Inclusionary zoning offers design advantages.<sup>230</sup> The program may mandate building low-to-moderate-income units with each new residential and commercial development.<sup>231</sup> These homes would then provide accommodations for employees that work in those new developments or growing localities.<sup>232</sup>

### III. ANALYSIS

#### A. Application of Chapter 40B to Hamilton Farm

Labeling Chapter 40B as the “Anti-Snob Zoning Act” perpetuates the myth that those opposed to the law are prejudiced, intolerant elitists.<sup>233</sup> This overarching depiction is simply inappropriate in most cases.<sup>234</sup> In fact, it is likely that the “anti-snob” label is partially responsible for prolonging Chapter 40B’s unpopular and scandal-ridden existence.<sup>235</sup>

A combination of factors likely caused Winchester to resist the Chapter 40B development on Hamilton Farm.<sup>236</sup> While residents will not admit that their

223. See Orfield, *supra* note 20, at 931 (calling Oregon’s standardized zoning authority “most effective” in terms of creating housing); see also Belskis, *supra* note 104 (arguing for mandatory inclusionary zoning).

224. See Lerman, *supra* note 104, at 409 (advocating localities create mandatory plans); see also Witten, *Cost*, *supra* note 91, at 548 (defining inclusionary zoning). “Inclusionary zoning—the method of exacting on- or off-site dwelling units or fees-in-lieu-of the exaction—in exchange for subdivision approval, approval of an adjudicative permit, or a variance, is a logical tool for increasing the stock of below-market rate housing within a particular development or the community at large.” *Id.*

225. See Witten, *Cost*, *supra* note 91, at 548 (noting inclusionary zoning as time-tested practice). Mandatory inclusionary zoning is not available in Massachusetts. *Id.* at 549. The Comprehensive Permit Statute would be unnecessary if inclusionary zoning were available in the Commonwealth. *Id.*

226. See Lerman, *supra* note 104, at 409 (arguing for mandatory inclusionary zoning).

227. See *id.* at 410 (arguing housing should be part of planning).

228. See *id.* at 410-11 (promoting organization across land-use plans).

229. See *id.* (reasoning affordable housing should be one part of total consideration for land use).

230. See Lerman, *supra* note 104, at 411 (supporting contention that new units should be built with every development).

231. See *id.* at 411 (exemplifying inclusionary housing strategy).

232. See *id.* (providing examples of implemented housing strategies).

233. See *supra* note 44 and text accompanying (identifying Chapter 40B as “Anti-Snob Zoning Law”).

234. See *supra* notes 97-98 and accompanying text (calling abrupt population increase legitimate concern).

235. See *supra* Part II.B (presenting various problems with Chapter 40B).

236. See *supra* Part II.D (discussing factors motivating residents to oppose Hamilton Farm development).

distaste for the project was grounded in racism, bias, or exclusivity, they raised other issues that perhaps they believed seemed more legitimate.<sup>237</sup> Specifically, some argued for environmental and historical preservation.<sup>238</sup> Others focused on fiscal issues, exposing themselves to understandable criticism.<sup>239</sup> One argument against such fiscal concerns is that no one wants to pay for low-income housing, but everyone wants low-income workers.<sup>240</sup> Nevertheless, many arguments against Chapter 40B are legitimate and make valuable points.<sup>241</sup>

The movement to preserve Hamilton Farm illustrates some of the shortcomings with the Massachusetts affordable housing process.<sup>242</sup> First, Winchester's low percentage of affordable housing shows that the Chapter 40B process has not been successful, at least in that community.<sup>243</sup> One cannot entirely blame town residents for imposing zoning restrictions that happen to exclude low-income persons.<sup>244</sup> This local system rewards such exclusionary practices with more revenue, an attractive incentive.<sup>245</sup> Thus, the root of the problem may not actually be racism, hate, and desire for exclusivity, although these factors certainly may contribute.<sup>246</sup> Rather, exclusionary zoning could simply be attributed to operative conditioning.<sup>247</sup>

Moreover, Chapter 40B makes no allowance for environmental and historic preservation.<sup>248</sup> The Hamilton Farm site is undeniably unique in its environmental and historical significance.<sup>249</sup> Accordingly, local effort to preserve the farm appears reasonable.<sup>250</sup> These factors alone, however, would not likely sway the HAC because Hamilton Farm's environmental and historical features do not generate health and safety or planning concerns that outweigh the region's need for affordable housing.<sup>251</sup>

The Hamilton Farm case also illustrates how localities can overcome

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237. See *supra* note 194 and accompanying text (offering historical and environmental reasons for saving farm).

238. See *supra* note 194 and accompanying text (stating rationale for saving farm).

239. See *supra* note 190 and accompanying text (citing fiscal impact to town services).

240. See Christie Smythe, *Cape Cod, Mass., Pushes Affordable Housing to Attract Labor*, CAPE COD TIMES, Apr. 7, 2006 (portraying difficulty of attracting workers to Cape Cod because of affordable housing shortage).

241. See *supra* note 98 and accompanying text (calling sudden population influx "genuine concern").

242. See *infra* notes 243-246 and accompanying text (citing reasons municipality may engage in exclusionary zoning).

243. See *supra* note 27 (providing Winchester affordable housing statistic).

244. See *supra* note 216 and accompanying text (suggesting municipalities should stop giving tax incentives to towns excluding lower income households).

245. See *supra* note 216 and accompanying text (describing process whereby system promotes exclusionary practices).

246. See *supra* note 216 and accompanying text (describing how tax system promotes exclusionary practices).

247. See *supra* note 217 and accompanying text (suggesting government should stop rewarding exclusionary practices).

248. See *supra* note 75 and accompanying text (identifying when locality concern is consistent with local needs).

249. See *supra* Part II.D (discussing importance of Hamilton Farm).

250. See *supra* Part II.D (outlining local value of farm).

251. See *supra* note 75 and accompanying text (reviewing meaning of "consistent with local needs").

Chapter 40B.<sup>252</sup> Winchester could, theoretically, never host another low or moderately priced unit as long as Chapter 40B developers cannot access Winchester's land.<sup>253</sup> In contrast, mandatory inclusionary zoning would leave developers of larger projects with no choice but to include some affordable housing units.<sup>254</sup>

### B. Chapter 40B Is Unsound Law

Chapter 40B is flawed beyond its specific application to Winchester's Hamilton Farm.<sup>255</sup> The combination of revenue-driven developers and governmental agencies indifferent to town needs and finances creates a formula for abuse at the expense of the locality.<sup>256</sup> The Inspector General's finding of persistent developer exploitation demonstrates that this is, in fact, the state of affairs.<sup>257</sup>

Moreover, neither the government agencies nor the developers have any motivation to consider local interests.<sup>258</sup> Instead, these groups can dismiss local interests with accusations of prejudice, racism, and snobbery.<sup>259</sup> Their indifference can be supported by the near-guarantee that the HAC will rule in the Chapter 40B developer's favor.<sup>260</sup>

Additionally, the increase of new units in a locality does not augment the affordable housing supply as much as one might expect.<sup>261</sup> The overall supply of market-rate homes increases with the affordable housing stock.<sup>262</sup> Consequently, meeting the 10 percent threshold through developments containing a small proportion of low-income housing is frustrating and difficult.<sup>263</sup>

Furthermore, Chapter 40B does not thoughtfully consider neighbor claims against large developments.<sup>264</sup> Homeowners facing the possibility of a ten-story building obstructing all of their natural light and other similar issues would get no sympathy from the HAC.<sup>265</sup> Ideally, new growth should not

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252. See *supra* Part II.D and accompanying text (describing Chapter 61A of the Massachusetts General Laws as enabling Winchester to purchase farm).

253. See Lerman, *supra* note 104, at 402 (emphasizing affordable housing process as developer-driven).

254. See *id.* at 409 (promoting mandatory inclusionary zoning).

255. See *supra* Part II.B (discussing various problems with statute).

256. See INSPECTOR GEN., 2006 ANNUAL REPORT, *supra* note 138, at 4 (finding developers exceeded profit limitation).

257. See *id.* (finding pervasive Chapter 40B abuses by developers).

258. See *supra* Part II.B (outlining local criticism of both HAC and developers).

259. See Burr, *supra* note 21, at 203 (noting case where zoning laws enacted with discriminatory intent).

260. See *supra* note 125 and accompanying text (discussing pretense of HAC process).

261. See Belskis, *supra* note 104 (explaining how 10 percent threshold remains elusive where developer adds more market-rate housing).

262. See *supra* note 112 and accompanying text (discussing how increase of market-rate homes also increases base).

263. See *supra* note 112 and accompanying text (explaining unreachable threshold).

264. See Witten, *Cost*, *supra* note 91, at 535 (highlighting neighbor claims).

265. See *Vazza v. Bd. of Appeals of Brockton*, 269 N.E.2d 270, 274 (Mass. 1971) (showing sympathy for home-buyers).

dramatically lower property values, but rather increase property values by lowering the availability of land.<sup>266</sup> The SJC sympathetically asserted that “[p]urchasers of real estate are entitled to rely on the applicable zoning ordinances” before spending their life savings.<sup>267</sup> Abutting landowners may have sacrificed their resources to obtain a view, open space, or rural atmosphere—all to be disrupted by a Chapter 40B project.<sup>268</sup>

### C. Chapter 40R Smart Growth and Mandatory Inclusionary Zoning

Chapter 40R seems to be a favorable alternative to Chapter 40B.<sup>269</sup> Under Chapter 40R, the local government has the option to make allowances for affordable housing as well as other land concerns.<sup>270</sup> In contrast to Chapter 40B, smart growth allows the locality to provide for historical, environmental, and other municipal concerns.<sup>271</sup>

But without the Chapter 40B prod, local governments are unlikely to adjust policies already in place.<sup>272</sup> Exclusionary zoning is far too rewarding to be eliminated without inducement.<sup>273</sup> The government needs to discontinue providing incentives for localities like Winchester, which engage in exclusionary zoning.<sup>274</sup> The state government could achieve this result by altering the property tax system in order to make exclusionary zoning less attractive.<sup>275</sup>

Perhaps the best solution is mandatory inclusionary zoning.<sup>276</sup> By requiring every new development to set aside a certain percentage for low-to-moderate-income homes, the state government can increase the number of affordable units.<sup>277</sup> Housing will also be more appropriately situated through mandatory inclusionary zoning principles than through Chapter 40B.<sup>278</sup>

266. *See id.* (considering neighbor concerns).

267. *See id.* (reasoning purchasers entitled to rely on zoning laws).

268. *See id.* (recognizing importance of housing purchase).

269. *See supra* notes 207-213 and accompanying text (providing overview of Chapter 40R).

270. *See* MASS. GEN. LAWS ch. 40R, § 3 (2006) (defining eligible location).

271. *See id.* § 6(b) (discussing conservation restrictions).

272. *See* HEUDORFER & BLUESTONE, REPORT CARD, *supra* note 5, at 57 (remarking Chapter 40B induces localities to invoke Chapter 40R).

273. *See supra* note 216 and accompanying text (explaining how exclusionary housing operates within legal structure).

274. *See supra* note 217 and accompanying text (arguing for renovation of legal structure to reverse incentives).

275. *See supra* note 218 (advocating new incentives to reduce sprawl); *see also* Stonefield, *supra* note 24, at 342-43 (providing examples in lieu of direct approach to affordable housing creation). States could stipulate that each community must provide a percentage of affordable housing on penalty of losing state funding for other programs. *Id.* at 343. Additionally, states could reward communities that met the program’s terms by providing bonus funds. *Id.*

276. *See* Lerman, *supra* note 104, at 409 (supporting mandatory inclusionary zoning).

277. *See* Witten, *Cost*, *supra* 91, at 548 (indicating Chapter 40B unnecessary if inclusionary zoning mandatory).

278. *See* Lerman, *supra* note 104, at 410 (suggesting housing as component of comprehensive land planning as preferable).

## VI. CONCLUSION

The case to preserve Hamilton Farm highlights many of Chapter 40B's shortcomings. The statute disregards various situations in which the locality may reasonably desire to reserve land for a purpose other than development. Moreover, in examining problems associated with Chapter 40B, one cannot ignore the other abuses of the statute, such as excessive developer profits and HAC indifference toward legitimate community interests.

Hamilton Farm also demonstrates how Massachusetts localities like Winchester can avoid construction of affordable housing. Winchester's low percentage of affordable housing proves that the statute has not been particularly effective. Additionally, through tools like Chapter 61A, municipalities can prevent developers from accessing land. Consequently, the matter of Hamilton Farm shows that Chapter 40B is futile in many instances.

Chapter 40B should be repealed. In the meantime, Winchester residents should adopt a Chapter 40R Smart Growth District. In this way, Winchester would be able to plan its own growth rather than leaving the planning to capital-driven developers. Furthermore, by adding more affordable housing to the community, Winchester may be able to delay future Chapter 40B projects. Through Chapter 40R or mandatory inclusionary zoning, Winchester may someday be able achieve the 10 percent affordable housing safe harbor.

*Kara L. Dardeno*