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# HOUSING IN CRISIS—A CALL TO REFORM MASSACHUSETTS’S AFFORDABLE HOUSING LAW

CHRISTOPHER BAKER\*

**Abstract:** The debate over how to properly foster and maintain affordable housing has remained a longstanding, contentious issue in Massachusetts government. For the past thirty years, this debate has crystallized and regularly centered on Chapter 40B, Massachusetts’s affordable housing law. Recent executive, legislative, and private proposals, coupled with extraordinary increases in housing costs, have resulted in growing concerns over the effectiveness of 40B and the correct method, if any, of fixing its deficiencies. This Note examines these proposals as well as affordable housing efforts in other parts of the country and argues that Massachusetts’s affordable housing crisis will only be solved if the State legislature replaces 40B’s arbitrary housing quotas with new initiatives that create enough housing to meet demand and new incentives that encourage municipalities and the private sector to join in its efforts.

## INTRODUCTION

As the Massachusetts Legislature entered the second year of the 2003–2004 session, among the hottest expected topics was the growing debate over proposed changes to Massachusetts General Laws chapter 40B (chapter 40B or 40B), the Commonwealth’s ever-controversial affordable housing law.<sup>1</sup> With both executive and legislative leaders pledging to create a system that will appease housing advocates and municipal leaders alike, the final outcome of any reform is too far from certain for even the most experienced of Beacon Hill watchdogs to predict.<sup>2</sup>

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<sup>1</sup> See MASS. GEN. LAWS ch. 40B, §§ 20–23 (2004); Chris Reidy, *Representative Frank M. Hynes, On Affordable-Housing Debate*, BOSTON GLOBE, NOV. 9, 2003, at H2.

<sup>2</sup> See Shaun Sutner, *Flourishing Towns Want Some Relief; Help from State Sought to Check Development*, TELEGRAM & GAZETTE (Worcester, Mass.), Oct. 26, 2003, at A1.

Massachusetts's experience with 40B has been marked with ugly tension between the state and municipal governments. On the one side are Beacon Hill policymakers eager to expand affordable housing options to residents throughout the Commonwealth.<sup>3</sup> On the other side are indignant local officials and residents perturbed by Beacon Hill's interference with home rule and fervent in their desire to preserve the face of their own communities.<sup>4</sup>

As this Note will discuss, reforms proposed by the Governor's Affordable Housing Task Force and the legislature's Joint Committee on Housing and Urban Development reflect this conflict and demonstrate a State government eager to reconcile such competing values.<sup>5</sup> These reforms also reflect, however, the apparent unwillingness of the political branches to think far enough outside the 40B box to meet the larger objective that compelled its passage some thirty-five years ago: the creation of a sufficient supply of affordable residential dwelling units so that all Massachusetts citizens can acquire housing for no more than thirty percent of their income.<sup>6</sup>

By most estimates, chapter 40B fostered the creation of at least 18,000 affordable residential units through the first thirty years of its existence.<sup>7</sup> It is further estimated that there is a current demand for upwards of 36,000 additional units.<sup>8</sup> These housing units must be constructed for the continued growth and stability of the Bay State economy.<sup>9</sup> The current 40B debate presents a unique opportunity to exam-

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<sup>3</sup> See *id.*

<sup>4</sup> See generally Rick Collins, 'Snowball's Chance in Hell' Waiver Will Go to Developer, PATRIOT LEDGER (Quincy, Mass.), Dec. 5, 2003, at 1 (demonstrating the amount of discord that proposed 40B developments often create in their local communities).

<sup>5</sup> See H.R. 4240, 183d Gen. Ct., Reg. Sess. (Mass. 2003); CHAPTER 40B TASK FORCE, FINDINGS AND RECOMMENDATIONS: REPORT TO GOVERNOR MITT ROMNEY 1 (May 30, 2003), <http://www.state.ma.us/dhcd/Ch40Btf/report/report.pdf>; Sutner, *supra* note 2, at A1.

<sup>6</sup> See CHARLES C. EUCHNER & ELIZABETH G. FRIEZE, GETTING HOME: OVERCOMING BARRIERS TO HOUSING IN GREATER BOSTON 41 (Jan. 2003), <http://www.ksg.harvard.edu/rappaport/downloads/gettinghome.pdf>; Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 513 (2003). The 10% target was an arbitrary number intended to stimulate a "reasonable supply" of affordable housing. See Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 394 (2001).

<sup>7</sup> See Krefetz, *supra* note 6, at 392. This number is as of October 1999. *Id.*

<sup>8</sup> A 2001 study by the Center for Urban and Regional Policy of Northeastern University estimated that 36,000 more affordable units were needed for the Greater Boston housing market over the coming five years alone. BARRY BLUESTONE ET AL., CTR. FOR URBAN & REG'L POLICY, A NEW PARADIGM FOR HOUSING IN GREATER BOSTON, at iii (2001).

<sup>9</sup> See EUCHNER & FRIEZE, *supra* note 6, at 3.

ine where the state affordable housing policy has succeeded in meeting this need and, perhaps more importantly, where it has failed. Chapter 40B has succeeded in empowering private developers with the legal and financial tools necessary to construct thousands of affordable units in over two hundred communities.<sup>10</sup> It has failed, however, to empower those same communities with the tools they need to proactively make way for the 36,000 additional units necessary to meet current housing demands.<sup>11</sup>

As proposed reforms indicate, State government continues to view affordable housing as a necessary evil that it must force municipalities to bear for the good of the entire Commonwealth.<sup>12</sup> Massachusetts does not have to continue down this path, however, but can instead take on its cities and towns as equal partners in the production of these units. While state leaders may believe 40B exists only as a result of municipalities' unwillingness to cooperate, the truth is that it also exists as a result of a State government that lacks the political stomach to commit the legal and financial resources necessary to recognize and address affordable housing as the statewide issue that it truly is.<sup>13</sup> Lacking this commitment from the State, municipal leaders are pitted against each other, and unable to harness the fiscal and po-

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<sup>10</sup> See CITIZENS' HOUS. & PLANNING ASS'N, THE RECORD ON 40B: THE EFFECTIVENESS OF THE MASSACHUSETTS AFFORDABLE HOUSING ZONING LAW 7 (June 2003), <http://www.chapa.org/TheRecordon40B.pdf>; Krefetz, *supra* note 6, at 386–87, 392.

<sup>11</sup> BLUESTONE ET AL., *supra* note 8, at iii.

<sup>12</sup> See H.R. 4240, 183d Gen. Ct., Reg. Sess. (Mass. 2003); CHAPTER 40B TASK FORCE, *supra* note 5, at 1. The Citizens' Housing and Planning Association has published a summary of no fewer than 73 additional 40B-related bills filed in the first two months of the 2003–2004 legislative session alone. CITIZENS' HOUS. & PLANNING ASS'N, CATEGORIES OF BILLS RELATIVE TO CHAPTER 40B (2003–2004) (Mar. 2003) [hereinafter CHAPA, 40B BILLS], at <http://www.chapa.org/40ball.pdf>. Affordable housing may be seen as an evil for bringing down property values and increasing congestion, crime, and taxes in surrounding communities. See EDWARD C. CARMAN ET AL., CTR. FOR URBAN & REG'L POLICY, BUILDING ON OUR HERITAGE: A HOUSING STRATEGY FOR SMART GROWTH AND ECONOMIC DEVELOPMENT 8–9 (Oct. 30, 2003), at <http://boston.uli.org/myimages/HousingReport.pdf>; CITIZENS' HOUS. & PLANNING ASS'N, THE TOP 10 MYTHS OF 40B, at 3 (June 2003) [hereinafter CHAPA, TOP 10 MYTHS] (assessing the impact of 40B on municipalities' affordable housing efforts), at <http://www.chapa.org/40BMyths.pdf>. It is necessary both to keep Massachusetts economically competitive and to meet the growing demand of families and individuals who wish to continue living in the communities where they grew up. See EUCHNER & FRIEZE, *supra* note 6, at 3; Jon Chesto, *If They Build It . . . State Eyes Zoning to Lower Costs for Homes*, BOSTON HERALD, May 11, 2003, at 33 (noting that parents who used to save for their children's college educations now must also save for their home down payments so they can afford to stay in Massachusetts).

<sup>13</sup> See generally CARMAN ET AL., *supra* note 12, at 9.

litical strength they need to take an active role in both planning for and promoting affordable housing construction.<sup>14</sup>

This Note will argue that Massachusetts will best meet its goal of creating sufficient affordable housing with an amended chapter 40B that calls on state and local governments to play more active roles in making way for such housing, and on the private sector to do more than simply turn a profit by overriding local zoning. The State must create a statewide housing plan with ample local incentives to commit itself and its municipalities to the production of these units. Municipalities, in turn, must accept the State as an active partner and work to create incentives, as opposed to barriers, to affordable housing construction both in their own backyards and throughout Massachusetts. Finally, the private sector must recognize that it will best serve its own interests and those of the Commonwealth by collaborating with government and adding its own resources to the 40B challenge.

Part I of this Note will examine the origin and impact of chapter 40B on Massachusetts's affordable housing stocks and communities as well as the reforms proposed by the Governor's Affordable Housing Task Force and the legislature's Joint Committee on Housing and Urban Development. Part II will look to housing programs in other parts of the United States and one proposed housing program under current Massachusetts law. Part III will suggest how new initiatives, including those from Part II, might complement or replace parts of chapter 40B. Finally, Part IV will conclude that the onus falls on State government to change chapter 40B from a law that applies in a single, largely inflexible way to some municipalities, to one that applies in a flexible way to all municipalities and offers them real options to meet their own housing needs.

## I. MASSACHUSETTS'S PREVIOUS AND ONGOING 40B EXPERIENCE

### A. 1969 to the Present

Chapter 40B, originally known as the "Anti-Snob Zoning Law" or "chapter 774," was enacted by the State legislature and signed into law by Governor Sargent<sup>15</sup> in 1969.<sup>16</sup> Massachusetts broke new ground

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<sup>14</sup> See Witten, *supra* note 6, at 516–17, 518.

<sup>15</sup> A Republican from the affluent town of Dover, Sargent signed the bill as a result of housing advocates and his young, liberal staff's lobbying efforts. Krefetz, *supra* note 6, at 386.

<sup>16</sup> *Id.* at 381–82, 386.

with the statute by recognizing and providing some legal recourse specifically aimed against exclusionary zoning practices.<sup>17</sup> Among the exclusionary practices targeted were large lot size requirements and bans on multi-family housing, which had been causing housing price increases to far outpace inflation and perpetuating patterns of racial and economic segregation.<sup>18</sup>

Recognizing that local zoning laws were often insurmountable obstacles to the construction and maintenance of affordable housing, the legislature created in 40B a uniform, streamlined system for developers to obtain the building permits necessary to begin construction.<sup>19</sup> Provided they set aside twenty-five percent of the proposed housing units as affordable (defined as housing that would cost no more than thirty percent of the income of someone making eighty percent of the median regional income), developers<sup>20</sup> may apply to

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<sup>17</sup> *Id.* at 382–83. Most notably, 40B was passed six years before the New Jersey Supreme Court found a constitutional right to affordable housing in *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

<sup>18</sup> Krefetz, *supra* note 6, at 383. The State legislature's intentions, however, were not entirely benevolent but also were borne out of a desire to punish suburban legislators and the communities they represented. *See id.* at 385–86. In 1965, suburban legislators had aided in the passage of the Racial Imbalance Act to mandate the correction of racial imbalance in public schools. *See* Racial Imbalance Act, MASS. GEN. LAWS ch. 71, § 37D (2004); Krefetz, *supra* note 6, at 385–86. Because this unpopular law affected only urban school districts like those of the house speaker and senate president, leadership settled the score with their suburban, “armchair liberal” colleagues by passing chapter 40B and subjecting their constituents' zoning laws to a new form of state control. *See* Krefetz, *supra* note 6, at 385–86. This brief history of 40B illustrates a political atmosphere that was rife with hostility toward many municipalities from the beginning, which would have caused a natural reaction on the part of many communities to view 40B as an intrusive device designed to undermine their autonomy. *See id.*

<sup>19</sup> Krefetz, *supra* note 6, at 386–87; *see* MASS. GEN. LAWS ch. 40B, §§ 21, 22. For the purposes of this statute, “developers” is defined to include any public agency or limited dividend or non-profit organization. MASS. GEN. LAWS ch. 40B, § 20.

<sup>20</sup> Developers also may receive funding from the Massachusetts Housing Finance Agency, which usually comes with the stipulation that developers set aside either 20% of housing as affordable to someone making no more than 50% of the regional median income, or 40% as affordable to someone making no more than 60% of the regional median income. Krefetz, *supra* note 6, at 390, 414 & n.146. Chapter 40B also requires that the housing be state-subsidized. *See* MASS. GEN. LAWS ch. 40B, § 20. A recent Housing Appeals Committee decision expanded the traditional definition of “subsidy,” however, by including private lenders who use state technical assistance in making their loans. Krefetz, *supra* note 6, at 397 n.81, 414 n.146 (citing *Stuborn Ltd. P'ship v. Barnstable Zoning Bd. of Appeals*, No. 98-01 (Mass. Hous. App. Comm. Mar. 5, 1999)). As of the end of March 2004, MassHousing is the only agency to administer the New England Fund monies. Phyllis A. Zinicola, MassHousing, Address to Boston Bar Association Hot Topics in Affordable Housing Continuing Legal Education Seminar (Mar. 25, 2004). The New England Fund is a program funded by the Federal Home Loan Bank of Boston (a cooperative owned by

the local Zoning Board of Appeals (ZBA) for a comprehensive permit.<sup>21</sup> The ZBA must grant the comprehensive permit and bypass all local zoning requirements unless it can show that its denial of a permit is “consistent with local needs.”<sup>22</sup> The ZBA also may grant the permit with conditions attached, provided that they do not make the project economically infeasible.<sup>23</sup>

Besides fast-tracking the permitting process, 40B secures developers access to a special appeals process that is both faster and more responsive to their objectives.<sup>24</sup> Chapter 40B created the Housing Appeals Committee (HAC), a five-member board empowered by statute to override ZBA permit conditions and outright denials.<sup>25</sup> Should a developer appeal an adverse local decision to the HAC, the burden falls on the municipality to show “a valid health, safety, environmental, design, open space, or other local concern . . . [that] outweighs the regional housing need.”<sup>26</sup> The HAC consistently has favored affordable housing proposals and met local restrictions with great skepticism, upholding local decisions in only 18 of 112 appeals.<sup>27</sup>

The HAC appeals process has proven a great asset to developers and a persistent thorn in the side of local decisionmakers.<sup>28</sup> By reducing legal and delay costs<sup>29</sup> and regularly overturning ZBA decisions, the

more than 470 New England financial institutions) that provides member institutions with advances to fund affordable homeownership and rental housing. Federal Home Loan Bank of Boston, About the Bank, at <http://www.fhlbboston.com/aboutus/thebank/index.jsp> (last visited Nov. 30, 2004); Federal Home Loan Bank of Boston, New England Fund: Overview, at <http://www.fhlbboston.com/communitydevelopment/fundingprograms/nef/index.jsp> (last visited Nov. 30, 2004). In determining whether to grant site approval, MassHousing considers overall density and size (generally preferring eight houses per acre). Zinicola, *supra*. The agency rarely sees proposals that contain more than the minimum required percentage of affordable units. *Id.*

<sup>21</sup> MASS. GEN. LAWS ch. 40B, § 21.

<sup>22</sup> *Id.* § 20; Krefetz, *supra* note 6, at 387.

<sup>23</sup> MASS. GEN. LAWS ch. 40B, § 23.

<sup>24</sup> See Krefetz, *supra* note 6, at 387.

<sup>25</sup> MASS. GEN. LAWS ch. 40B, § 22.

<sup>26</sup> MASS. REGS. CODE tit. 760, § 31.06(6)–(7) (1993).

<sup>27</sup> Krefetz, *supra* note 6, at 397–98.

<sup>28</sup> See EUCHNER & FRIEZE, *supra* note 6, at 40; Julie Mehegan, *Bill Falls Short of True Affordable-Housing Reform*, SUN (Lowell, Mass.), Oct. 17, 2003.

<sup>29</sup> While still an attractive forum, an HAC appeal has become a “slow and cumbersome review” process, with a present backlog of 45–55 proposals. Clark Ziegler, Chair, HAC Comm. for Changes, Address to Boston Bar Association Hot Topics in Affordable Housing Continuing Legal Education Seminar (Mar. 25, 2004). As part of the 40B Task Force, the HAC Committee was created to study and propose improvements to the HAC process. See discussion *infra* Part I.B. Proposed changes include allowing greater pre-trial discovery and disclosure; allowing more motions to dismiss and for summary judgment; strengthening mediation efforts; and possibly hearing abutter appeals simultaneously and providing municipalities with

HAC gives developers significant leverage in their negotiations with municipalities.<sup>30</sup> Chapter 40B only applies, however, to municipalities whose affordable housing stocks fall under minimum percentages as outlined in the statute.<sup>31</sup> A community has met the minimum requirements and evades the grasp of 40B if one of the following applies: (1) at least 10% of its housing consists of subsidized<sup>32</sup> low- and moderate-income housing; (2) at least 1.5% of land zoned for residential, commercial, and industrial use is used for such housing; or (3) a proposed development would, within one calendar year, result in the start of such housing on more than 0.3% of the town's land zoned for residential, commercial, or industrial use or on more than ten acres, whichever is larger.<sup>33</sup>

According to a study conducted by Sharon Krefetz, a widely cited expert on affordable housing in Massachusetts, municipalities also have grown increasingly willing to work with developers to devise projects that include local input and concessions on both sides of the table.<sup>34</sup> The Department of Housing and Community Development (DHCD) has fostered this cooperation through its Local Initiative

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greater guidance on the standards for rejecting 40B applications. HOUS. APPEALS ADVISORY COMM., REPORT OF THE HOUSING APPEALS ADVISORY COMMITTEE 8, 10, 11 (Nov. 2003) (reporting to Governor Mitt Romney and Director of the Department of Housing and Community Development Jane Gumble on improvements to the housing appeals process), <http://www.mass.gov/dhcd/Toolkit/HACrpt.pdf>.

<sup>30</sup> See Krefetz, *supra* note 6, at 386–87.

<sup>31</sup> MASS. GEN. LAWS ch. 40B, § 20 (2004).

<sup>32</sup> In 1999, the HAC ruled that monies provided by the New England Fund of the Federal Home Loan Bank of Boston were also public subsidies and thus qualified under 40B. *Stuborn Ltd. P'ship v. Barnstable Zoning Bd. of Appeals*, No. 98-01 (Mass. Hous. App. Comm. Mar. 5, 1999). The availability of additional loans and the hot real estate market starting in the late 1990s created a sizable increase in 40B applications to many municipalities. See MASS. DEP'T OF HOUS. & CMTY. DEV., GUIDELINES FOR HOUSING PROGRAMS IN WHICH FUNDING IS PROVIDED THROUGH A NON-GOVERNMENTAL ENTITY 2 (Feb. 14, 2003), at [http://www.fhlbboston.com/communitydevelopment/fundingprograms/nef/downloads/DHCD\\_guidelines\\_02\\_14\\_03.pdf](http://www.fhlbboston.com/communitydevelopment/fundingprograms/nef/downloads/DHCD_guidelines_02_14_03.pdf).

<sup>33</sup> MASS. GEN. LAWS ch. 40B, § 20.

<sup>34</sup> See Krefetz, *supra* note 6, at 403–04. From the 1970s to the 1990s, ZBA denials of comprehensive permit applications decreased from 40% to 20%. *Id.* Over the same time period, the percentage of cases appealed to the HAC which are then decided by compromise has increased from 13% to 38%. *Id.* These shifts have been in no small part the result of the HAC's strict enforcement and subsequent courts' upholding of 40B's constitutionality. *Id.* at 400–01, 403; see *Mahoney v. Zoning Bd. of Appeals*, 316 N.E.2d 606, 606 (Mass. 1974) (holding that developers being sole beneficiary of HAC process was not a denial of equal protection); *Bd. of Appeals v. Hous. Appeals Comm. in the Dep't of Cmty. Affairs*, 294 N.E.2d 393, 393 (Mass. 1973) (upholding constitutionality of 40B, including its abridgement of home rule and HAC's standards of review).

Program (LIP).<sup>35</sup> By permitting communities to bargain for developer contributions to on- and off-site public works projects and for developer commitments that up to seventy percent of resulting affordable units be reserved for local residents, LIP has better enabled local governments to use 40B to their own advantage.<sup>36</sup> Almost one-half (82 of 175) of comprehensive permits proposed in the 1990s were under a LIP project.<sup>37</sup> Some have argued, though, that LIP has not gone far enough in opening up the suburbs for lower-income city residents.<sup>38</sup> Because they require local consent and market-rate subsidies, LIP projects are often scaled down in size and allocate the minimum twenty-five percent of units as affordable, producing only six to eight of them per project.<sup>39</sup> In fact, ninety percent of all LIP units produced have been single-family homes, affordable only to the highest end of the allowable income range.<sup>40</sup>

Over the life of chapter 40B, the number of municipalities meeting the minimum affordable housing requirements has gone from three to thirty-three (out of 351 municipalities in the Commonwealth).<sup>41</sup> Between 1972 and 1997, 119 communities went from having no affordable housing to adding some units to their stocks; over sixty percent of these communities included such housing directly through the comprehensive permit process.<sup>42</sup> While commentators on all sides of the housing

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<sup>35</sup> See MASS. REGS. CODE tit. 760, § 45.00 (1993). LIP was created “to give cities and towns . . . more flexibility in their efforts to provide low and moderate income housing.” Krefetz, *supra* note 6, at 390 n.49. LIP allows developers without government subsidies to obtain comprehensive permits provided at least 25% of the housing is affordable and they obtain the approval of the municipality’s chief elected officials. See *id.* at 410. LIP offers incentives to municipalities that include allowing a local preference for up to 70% of the affordable units and permitting developers to contribute to off-site public projects. See *id.*

<sup>36</sup> See, e.g., Connie Paige, *Town Eyes Payback for Project: Developer of Affordable Units May Provide It with Amenities*, BOSTON GLOBE, Nov. 6, 2003, § Globe West, at 1 (detailing how the Town of Shrewsbury, Massachusetts is working with a developer under LIP to reserve 70% of affordable units for town residents and to secure the placement of a town park in exchange for its approval of the comprehensive permit).

<sup>37</sup> Krefetz, *supra* note 6, at 410.

<sup>38</sup> See *id.* at 410–11.

<sup>39</sup> See *id.*

<sup>40</sup> This fact, combined with local resident restrictions, has translated to 40B units that are hardly accessible to the poorer, inner-city dwellers that many critics argue the law was meant to serve. See *id.*

<sup>41</sup> Emily Shartin, *Officials Back Easing of Affordable-Housing Mandates: Proposed Slash Touted as Incentive*, BOSTON GLOBE, Oct. 30, 2003, § Globe West, at 1. Current legislation endorsed by the Joint Committee on Housing and Urban Development would increase this number automatically to 35 municipalities. See Krefetz, *supra* note 6, at 393; discussion *infra* Part I.B.

<sup>42</sup> Krefetz, *supra* note 6, at 394.

debate dispute the exact numbers, all agree that 40B has enabled the construction of thousands of affordable units that otherwise would not have been built in Massachusetts.<sup>43</sup> That being said, the facts that some 36,000 units are still needed and that Massachusetts housing is now the nation's least affordable demonstrate that the demand for increased affordable housing efforts remains incredibly strong.<sup>44</sup>

### B. Proposed Reforms—*The Buzz on Beacon Hill*

As part of his campaign for Governor of Massachusetts, Mitt Romney pledged to increase the effectiveness of chapter 40B.<sup>45</sup> Upon taking the corner office, Romney established an Affordable Housing Task Force (the Task Force), whose mission was to study 40B and propose reforms to create both more housing for prospective residents and a more politically palatable system for current residents.<sup>46</sup>

After several months of deliberations, the Task Force presented the Governor with its list of proposed reforms.<sup>47</sup> Among these were proposals to increase the number of units that would qualify when determining a municipality's ten percent threshold. One such method would be to accord double weighting to affordable homeownership development units, effectively counting them twice rather than once.<sup>48</sup> The Task Force also proposed studying the counting of mobile homes as well as allowing the DHCD to count already-approved comprehensive permit units that have remained unbuilt for more than one year, provided good cause is shown.<sup>49</sup>

The Task Force further recommended that Massachusetts ease 40B's burden on municipalities by limiting the number and size of comprehensive permit applications they had to consider in any calendar year.<sup>50</sup> The reforms also would provide greater technical assistance

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<sup>43</sup> Telephone Interview with Jonathan Witten, Adjunct Professor, Boston College Law School (Jan. 15, 2004); see EUCHNER & FRIEZE, *supra* note 6, at 39; CHAPA, TOP 10 MYTHS, *supra* note 12, at 3 (stating that a substantial portion of existing affordable housing is a result of 40B).

<sup>44</sup> See BLUESTONE ET AL., *supra* note 8, at iii; Press Release, Mass. Hous. P'ship, Massachusetts Is Least Affordable State; Residents Must Earn \$22.40 an Hour to Afford Rent (Sept. 8, 2003), at [http://www.mhlp.net/news\\_ideas/latest\\_news.php?function=show&ID=228](http://www.mhlp.net/news_ideas/latest_news.php?function=show&ID=228).

<sup>45</sup> Julie Mehegan, *Housing Crisis Bubbles to Surface as Campaign Issue*, SUN (Lowell, Mass.), Oct. 6, 2002.

<sup>46</sup> Editorial, *Making 40B Better: Task Force Lays Solid Groundwork for Housing Policy*, TELEGRAM & GAZETTE (Worcester, Mass.), June 12, 2003, at A16.

<sup>47</sup> See CHAPTER 40B TASK FORCE, *supra* note 5, at 4.

<sup>48</sup> *Id.* at 26–27.

<sup>49</sup> *Id.* at 27.

<sup>50</sup> *Id.* at 27–28.

for reviewing applications and community planning.<sup>51</sup> Additional proposals include incorporating smart growth policies<sup>52</sup> by creating a smart growth fund for municipalities and requiring subsidizing agencies to consider smart growth policies and consult affected municipalities when determining which projects to fund.<sup>53</sup> The Task Force proposed increases in state funding for local education costs associated with the new students that affordable housing brings.<sup>54</sup> Finally, it proposed the sharing of expenses and housing credits among municipalities and the creation of housing regions where contiguous communities could join to collectively meet the housing goals for a defined region.<sup>55</sup>

These recommendations were met with mixed reviews. Some commentators applauded the measures for preserving the spirit of 40B while allowing the law to be implemented more consistently and equitably.<sup>56</sup> Other critics, however, attacked the measures as either

<sup>51</sup> *Id.* at 28–29.

<sup>52</sup> The goal of smart growth is to create a broader range of housing and transportation options that balances the need for jobs and economic growth with the desire to save the natural environment. See Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 253 (2000). It seeks to encourage growth in ways that protect the environment, strengthen existing communities, and reduce the fiscal burden of providing services to support new growth. See *id.* Smart growth is an evolving concept for which there is no agreed-upon definition. See *id.* Its advocates have rejected the formulation of a single list of steps or techniques, recognizing that political, economic, cultural, and historic differences among states and localities call for different measures to address the challenge of growth. See *id.* Its proponents may agree, however, that smart growth's fundamental premise is that growth is not inherently harmful. See *id.*

Other proponents have defined smart growth as a movement to modernize land use policy with newly declared state and local interests that compels a balance between state and community business markets, natural resource protection, and the promotion of social welfare needs, including housing, that change with the growth and development of communities. See James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 435 (2001). Reflecting the confusion surrounding the definition of smart growth, an attorney from MassHousing, the quasi-governmental agency that administers New England Fund projects, recently requested that those attorneys at a Boston Bar Association seminar who knew what smart growth meant to please raise their hands so that they could tell her. See Zinicola, *supra* note 20. While she may have overstated her confusion, she did remark that the agency needed more DHCD guidance on what it considers smart growth, a factor DHCD requires MassHousing to consider when approving 40B financing. See *id.*

<sup>53</sup> CHAPTER 40B TASK FORCE, *supra* note 5, at 34, 35–36.

<sup>54</sup> *Id.* at 35.

<sup>55</sup> *Id.* at 38, 39.

<sup>56</sup> *Making 40B Better*, *supra* note 46, at A16. Some endorsed the Task Force measures that would remove 40B's "needless[] rigid[ity]" and permit smart growth principles, including cluster development and proximity to transportation, utilities, and services, as well

doing too little to ease the stress 40B had placed on municipalities or doing too little to advance 40B's original intent of facilitating the building of housing in Massachusetts.<sup>57</sup> Home rule advocates called for the counting of mobile home and non-subsidized units toward meeting affordable thresholds, and an increase in local environmental powers.<sup>58</sup> Suggestions to strengthen state efforts included re-vamping zoning laws, selling surplus state land for housing, tying local aid to affordable housing production, and better coordinating government policy on housing, transportation, and the environment.<sup>59</sup>

The State legislature has seized on the initiatives of the Governor and the Task Force by proposing over seventy pieces of legislation to amend 40B in the 2003–2004 legislative session alone.<sup>60</sup> Perhaps the most prominent among the proposed bills is one drafted, and reported favorably by, the legislature's Joint Committee on Housing and Urban Development (the Joint Committee): House bill 4240.<sup>61</sup> Viewed by many as an attempt to assuage suburban legislators who threatened revolt in the form of an outright repeal of 40B,<sup>62</sup> House bill 4240 would make it easier for municipalities to qualify as having ten percent of affordable housing.<sup>63</sup> By better enabling communities to evade the reach of 40B, the Joint Committee hopes that more of them will make efforts to reach the new, more attainable ten percent mark so that, while they will then be free to exclude further affordable housing proposals, addi-

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as those measures permitting inter-community collaboration and allocating additional state resources for local planning. *Id.* At the same time, these commentators cautioned against enabling 40B opponents to abuse the reforms by tying up housing indefinitely, particularly in the majority of municipalities that do not currently shoulder their fair amount of affordable units. *Id.*

<sup>57</sup> Rick Collins, *Changes Proposed to Housing Law Get Mixed Reviews*, PATRIOT LEDGER (Quincy, Mass.), June 13, 2003, at 1.

<sup>58</sup> See Tom Benner, *Affordable Housing Overhaul Bill Aired; Hearing on Law Changes Draws Friends and Foes*, PATRIOT LEDGER (Quincy, Mass.), June 25, 2003, at 13.

<sup>59</sup> Shaun Sutner, *Affordable Housing Stirs Fierce Debate; Tempers Flare over Changes*, TELEGRAM & GAZETTE (Worcester, Mass.), June 25, 2003, at A1.

<sup>60</sup> See CHAPA, 40B BILLS, *supra* note 12.

<sup>61</sup> See H.R. 4240, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

<sup>62</sup> Sutner, *supra* note 2, at A1.

<sup>63</sup> See *id.* Some of H.R. 4240's language simply codifies DHCD regulations, including placing temporary moratoria on 40B applications in communities which demonstrate good faith progress toward reaching 10%, allowing the HAC to consider municipalities' overall growth plans when ruling on a 40B appeal, and permitting Zoning Boards of Appeals to reject projects that are too big for their communities. See DEP'T OF HOUS. & CMTY. DEV., INDEX OF EFFECTIVE REGULATIONS, at <http://www.state.ma.us/dhcd/regulations/effect.htm> (last visited Sept. 24, 2004). For a thorough bill summary of H.R.4240, see <http://www.chapa.org/HUD40BSummary.pdf>.

tional housing will be constructed in the short term to help satisfy its growing demand.<sup>64</sup>

House bill 4240 echoes many of the ideas expressed in the Task Force report.<sup>65</sup> It too would allow municipalities to double-count homeownership units toward their affordable housing threshold, so long as at least twenty-five percent of a development's units were affordable.<sup>66</sup> Like the Task Force's suggestions, House bill 4240 would allow additional, non-traditional housing to count toward a community's ten percent mark.<sup>67</sup> The bill would go further, however, by enabling local zoning boards to reject 40B developments that are disproportionately large vis-à-vis the surrounding communities.<sup>68</sup> Altogether, these changes will push numerous communities closer to or over the required ten percent threshold without actually requiring them to build any additional housing.<sup>69</sup>

House bill 4240 also seizes the Task Force's momentum by introducing smart growth principles to chapter 40B.<sup>70</sup> It attempts to reward communities that create and implement affordable housing plans by granting them one- to two-year reprieves from the comprehensive permit process.<sup>71</sup> The bill would again provide technical assistance to communities to assist them in creating their plans and reviewing future permit applications.<sup>72</sup> Finally, House bill 4240 would require subsidizing agencies to consider a proposed development's impact on the density, environment, and infrastructure of its surroundings when making its eligibility determination.<sup>73</sup> Like the Task Force measures,

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<sup>64</sup> See Sutner, *supra* note 2, at A1.

<sup>65</sup> See Mass. H.R. 4240; CHAPTER 40B TASK FORCE, *supra* note 5.

<sup>66</sup> Mass. H.R. 4240 § 6; CHAPTER 40B TASK FORCE, *supra* note 5, at 26.

<sup>67</sup> See Mass. H.R. 4240 § 6; CHAPTER 40B TASK FORCE, *supra* note 5, at 27. While the Task Force suggests counting mobile homes, the House bill would instead count group homes for the mentally ill and retarded as well as accessory (commonly known as "in-law") apartments. Mass. H.R. 4240 § 6(c)(v); CHAPTER 40B TASK FORCE, *supra* note 5, at 27.

<sup>68</sup> See Mass. H.R. 4240 § 5. For example, a municipality with current housing stocks between 5000 and 7500 units could reject any proposal to build more than 250 units while a municipality with fewer than 2500 total units could reject any proposal of more than 150 units. *See id.*

<sup>69</sup> See Mass. H.R. 4240; *see also* Editorial, *2 x 1 Equals 4*, SUN (Lowell, Mass.), Oct. 17, 2003 (labeling the double-counting provision of the House bill "a crock" and noting that the two communities immediately standing to benefit by automatically reaching 10% would be the affluent towns of Lincoln and Andover).

<sup>70</sup> See Mass. H.R. 4240 § 5; CHAPTER 40B TASK FORCE, *supra* note 5, at 10.

<sup>71</sup> Mass. H.R. 4240 § 5.

<sup>72</sup> *Id.* § 8; CHAPTER 40B TASK FORCE, *supra* note 5, at 4, 28–29.

<sup>73</sup> See Mass. H.R. 4240 § 6.

House bill 4240 was met with both praise and criticism, evoking responses from all sides of the housing debate.<sup>74</sup>

As the preamble to House bill 4240 acknowledges, the Joint Committee drafted the legislation in response to the dozens of 40B-related bills referred to it during the legislative session.<sup>75</sup> While a full survey of these bills would not fit within the confines of this Note, it is useful to observe that the underlying motives and proposed methods contained in the 40B bills are as diverse as the varied constituent interests that they reflect.<sup>76</sup> The vast majority of the bills, however, aim to weaken 40B.<sup>77</sup> Their methods include permitting housing such as mobile homes,<sup>78</sup> federally subsidized units,<sup>79</sup> mental retardation and health units,<sup>80</sup> elderly units,<sup>81</sup> veterans' units,<sup>82</sup> and even college dormitories<sup>83</sup> to count toward communities' thresholds, and giving municipalities more flexible standards to reject housing, such as historical significance<sup>84</sup> or local density<sup>85</sup> requirements.<sup>86</sup>

There are a handful of bills, however, that seem genuinely intended to promote affordable housing by offering communities positive incentives to include more units within their borders. Examples of these initiatives include the allocation of state funding to help

<sup>74</sup> See Raphael Lewis, *Legislative Leaders Push Measure to Boost Suburban Home Building*, BOSTON GLOBE, Oct. 17, 2003, at B3; *2 x 1 Equals 4*, *supra* note 69.

<sup>75</sup> Mass. H.R. 4240 pmbl.

<sup>76</sup> See *id.* For example, Representative Frank Hynes and Senator Robert Hedlund, both of South Shore communities that have been deluged with 40B permit applications, have proposed legislation to impose moratoria on all 40B projects and enhance localities' power to reject projects. See H.R. 3160, 183d Gen. Ct., Reg. Sess. (Mass. 2003); S. 706, 183d Gen. Ct., Reg. Sess. (Mass. 2003). Meanwhile, legislators that historically might have been deemed suburban "armchair liberals," such as Representative Jay Kaufman of the Metro West region, have proposed measures that would keep intact and build upon 40B's social policies, such as requiring that 10% of all 40B units be handicap accessible. See H.R. 357, 183d Gen. Ct., Reg. Sess. (Mass. 2003); Krefetz, *supra* note 6, at 385. Finally, urban legislators, such as Dianne Wilkerson of Roxbury, have proposed legislation that would help keep the current version of 40B intact by codifying recent regulations promulgated by DHCD. See S. 741, 183d Gen. Ct., Reg. Sess. (Mass. 2003); CHAPA, 40B BILLS, *supra* note 12.

<sup>77</sup> See CHAPA, 40B BILLS, *supra* note 12.

<sup>78</sup> See S. 719, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

<sup>79</sup> See H.R. 1097, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

<sup>80</sup> See H.R. 910, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

<sup>81</sup> See H.R. 2243, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

<sup>82</sup> See *id.*

<sup>83</sup> See H.R. 908, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

<sup>84</sup> See H.R. 1501, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

<sup>85</sup> See S. 1152, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

<sup>86</sup> In addition, House bill 909 would simply repeal 40B outright. H.R. 909, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

communities draft affordable housing plans and shoulder the burden of added public education expenses.<sup>87</sup> Other bills would promote linkage development and inclusionary zoning<sup>88</sup> by changing state zoning laws and counting municipalities' linkage efforts toward their thresholds.<sup>89</sup> Finally, one Senate bill proposes an employer-assisted housing program whereby the Commonwealth would provide matching funds (on a 1:2 ratio) to employers who allocate money for affordable employee housing, including rent and mortgage payments.<sup>90</sup>

On a separate but related point, the State legislature is also considering the Land Use Reform Act, which calls for changes to chapter 40A, the Commonwealth's zoning statute.<sup>91</sup> Massachusetts's builders now contend with a tangled mess of state and local regulations that hamper their ability to construct even moderately priced housing for a profit.<sup>92</sup> The combination of exclusive zoning practices and tough regulations on the buildable parcels that developers do acquire has led to significant decreases in new building permits<sup>93</sup> and staggering increases in new home selling prices.<sup>94</sup>

Senate bill 1174 would make the building process more predictable by setting clearer standards for prior, nonconforming uses, site

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<sup>87</sup> See H.R. 3331, 183d Gen. Ct., Reg. Sess. (Mass. 2003); H.R. 1827, 183d Gen. Ct., Reg. Sess. (Mass. 2003); H.R. 1507, 183d Gen. Ct., Reg. Sess. (Mass. 2003); S. 739, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

<sup>88</sup> See discussion *infra* Part II.A (addressing linkage and inclusionary zoning efforts in other states).

<sup>89</sup> See H.R. 3658, 183d Gen. Ct., Reg. Sess. (Mass. 2003); H.R. 1669, 183d Gen. Ct., Reg. Sess. (Mass. 2003).

<sup>90</sup> See S. 698, 183d Gen. Ct., Reg. Sess. (Mass. 2003). The housing assistance could only go to employees whose household incomes do not exceed 120% of the regional median income with at least half of the money going to employees whose incomes do not exceed 80% of the regional median income. See *id.* While this legislation's likelihood of success in 2004 is very slim as a result of the current budget crunch, support for the initiative will likely persist and may eventually be acted on by the State legislature. Christopher T. Norris, Citizens' Hous. & Planning Ass'n, Address to Boston Bar Association Hot Topics in Affordable Housing Continuing Legal Education Seminar (Mar. 25, 2004).

<sup>91</sup> See S. 1174, 183d Gen. Ct., Reg. Sess. (Mass. 2003); Norris, *supra* note 90.

<sup>92</sup> See EUCHNER & FRIEZE, *supra* note 6, at 6.

<sup>93</sup> New building permits in Massachusetts, as a percentage of the national average, declined from 2.6% in 1987 to just under 1% by 2002. Chesto, *supra* note 12, at 33. Burdensome zoning and land use regulations have pushed the costs of home construction in Boston well past that of its peer cities. The increase in construction costs of buildings having at least five units between 1996 and 2001 was 172% in Boston and only 36% in Manhattan. EUCHNER & FRIEZE, *supra* note 6, at 7-8. By 2001, the construction cost per unit for such buildings in Boston had hit \$144,000, or \$80,500 more than Manhattan's cost of \$63,500 per unit. *Id.*

<sup>94</sup> See EUCHNER & FRIEZE, *supra* note 6, at 7-8; Chesto, *supra* note 12, at 33.

plan reviews, and special permits.<sup>95</sup> The bill requires bylaw consistency with communities' Master Plans<sup>96</sup> and offers mediation to municipalities and builders as an inexpensive alternative to litigation.<sup>97</sup> Finally, Senate bill 1174 would permit municipalities to impose development impact fees<sup>98</sup> while reducing or waiving them for affordable units, and to impose inclusionary zoning requirements for affordable housing in residential subdivision developments.<sup>99</sup> If enacted, the bill will smooth the homebuilding process for all developers and residents,<sup>100</sup> reducing transaction costs and making all housing more affordable.<sup>101</sup>

Their significant and varied efforts notwithstanding, most of these bills stand little chance of passing.<sup>102</sup> They do serve a valuable purpose, however, by demonstrating both the contentious debate over 40B that has contributed to the legislature's inability to enact a comprehensive reform package, as well as the diverse solutions proffered that may contribute to whatever solution is eventually devised.<sup>103</sup>

## II. THINKING OUTSIDE THE 40B BOX

### A. Affordable Housing Programs in Other States

There is not a single state in this country that has come close to providing sufficient affordable housing for all its citizens.<sup>104</sup> There are, however, dozens of statewide, regional, and local initiatives that have experimented with unique methods of housing reform and met varying levels of success in doing so.<sup>105</sup> A common trend that emerges

<sup>95</sup> Mass. S. 1174 §§ 6(b), 7, 11.

<sup>96</sup> Master Plans are statements designed to "provide a basis for decisionmaking regarding the long-term physical development of a municipality." MASS. GEN. LAWS ch. 41, § 81D (2004).

<sup>97</sup> Mass. S. 1174 §§ 5, 12.

<sup>98</sup> "Development impact fee" is defined as a contribution paid to a city or town by the person undertaking a development for the purpose of offsetting the impacts related to the development. *Id.* § 9.

<sup>99</sup> *Id.* §§ 9, 23.

<sup>100</sup> *See id.*

<sup>101</sup> *See* Witten, *supra* note 6, at 524.

<sup>102</sup> *See* Lewis, *supra* note 74, at B3. As H.R. 4240 indicates, many of the bills' initiatives have been incorporated into the HUD bill. *See* H.R. 4240, 183d Gen. Ct., Reg. Sess. pmb. (Mass. 2003).

<sup>103</sup> *See generally* Reidy, *supra* note 1, at H2.

<sup>104</sup> *See* CUSHING N. DOLBEARE, NAT'L LOW INCOME HOUS. COALITION, OUT OF REACH: THE GAP BETWEEN HOUSING COSTS AND INCOME OF POOR PEOPLE IN THE UNITED STATES (1999), at <http://www.nlihc.org/oor99>.

<sup>105</sup> *See* Jennifer M. Morgan, Comment, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L. J. 359, 372-73 (1995).

from these initiatives is that those programs that are unbending in holding municipalities accountable for the development and implementation of effective affordable housing plans, yet flexible in the manner in which those plans may take shape, are the most apt to succeed in creating quality affordable housing.<sup>106</sup>

## 1. Oregon

One regime that has recently been contrasted with 40B is the Oregon Land Use Planning Act (the Act).<sup>107</sup> This law requires that every municipality devise a comprehensive plan that incorporates smart growth and affordable housing initiatives.<sup>108</sup> Each plan must be approved by the state Land Conservation and Development Commission (LCDC) and is reviewed every four to ten years to ensure compliance with the state housing mandate.<sup>109</sup> Contained in Goals 10 and 14 of the Act, state housing initiatives include urban service boundaries and attempts to lower housing costs through higher density development.<sup>110</sup> Should the LCDC find a plan not in compliance, it is empowered to

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<sup>106</sup> See *id.* Oregon perhaps serves as the greatest example of such an effective program. Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 B.C. ENVTL. AFF. L. REV., 437, 476 (2003). There are also some success stories in California, although a lack of enforcement has permitted many communities to evade the state law's intent. Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 43 (1993).

<sup>107</sup> See Oregon Land Use Planning Act of 1973, OR. REV. STAT. § 197.295–.296 (1989); Russell, *supra* note 106, at 476.

<sup>108</sup> OR. REV. STAT. § 197.295–.296.

<sup>109</sup> See *id.* § 197.633(2); Morgan, *supra* note 105, at 374–75.

<sup>110</sup> Goals 10 and 14 of Oregon's growth management law address housing. See OR. REV. STAT. § 197.295–.296; OR. ADMIN. R. 660-015-0000(10), (14) (2002); Marc T. Smith & Ruth L. Steiner, *Affordable Housing as an Adequate Public Facility*, 36 VAL. U. L. REV. 443, 452 (2002). Goal 10 mandates that municipalities create

housing plans that inventory buildable land within the urban growth boundary, project future needs, and plan for and zone enough land to meet those needs. The housing plan must address a variety of housing types, and “encourage the availability of adequate numbers of needed housing units [including multifamily units and manufactured homes] at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households.” When a plan is amended, its urban growth boundaries must encompass enough buildable land to meet the estimated need for all types of housing, including affordable housing, for the twenty-year horizon.

Russell, *supra* note 106, at 478 (alteration in original) (citations omitted) (quoting Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 74 (2001)).

impose the Act's requirements by administrative order and withhold state grant funds until the municipality in question falls in line.<sup>111</sup>

Like every housing plan, Oregon's law has its fair share of critics.<sup>112</sup> For example, some assert that the state's permitting of affordable housing only within defined urban zones has raised housing prices and eliminated the added affordability of cluster development.<sup>113</sup> Its proponents, however, have hailed the plan for creating a uniform, consistently implemented system that has caused local polities to accept that affordable housing is needed in a diverse range of communities, including their own.<sup>114</sup>

The Oregon Legislature sent a clear message that it was an imperative state concern to implement effective growth management strategies that would create more housing and less sprawl.<sup>115</sup> The Act also has let communities fill in many of the details concerning how the housing will be created, which has caused less political angst and more willingness on their part to experiment with planned development strategies that better serve their constituents.<sup>116</sup> With its top-down reform mechanism, comprehensive goals that address housing in the larger context of local and regional planning and smart growth, and provision for a specialized government agency that directly enforces its mandate, the Oregon law challenges the conventional 40B wisdom about the manner in which state and local governments should together address affordable housing.<sup>117</sup>

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<sup>111</sup> OR. REV. STAT. § 197.633(4).

<sup>112</sup> See Russell, *supra* note 106, at 479.

<sup>113</sup> Data has refuted many of these attacks, however, and demonstrated that Oregon's focus on housing costs over exclusionary zoning has successfully positioned the state to better fill its housing needs. *Id.* at 478–79.

<sup>114</sup> *Id.* at 479–80. The Oregon Legislature made it a given that every community is responsible for permitting low- and moderate-income housing in cluster development formation. *Id.* at 480.

<sup>115</sup> See *id.* at 479–80.

<sup>116</sup> See *id.* at 479–80, 481.

<sup>117</sup> As Rusty Russell notes, it is unlikely that the Oregon law could ever be directly transplanted to Massachusetts because of the latter's stronger tradition of home rule, more balkanized electorates, and more evenly dispersed population. See Russell, *supra* note 106, at 481, 482. However, he does advocate for elements of the Oregon law to be incorporated into 40B, including its strong, state-initiated top-down element; its thoughtful, long-term planning and concern for environment and land use over merely affordable housing; and its direct enforcement by a specialized state agency. See *id.*

## 2. California

California has also adopted legislation, known as the “housing element statute,” that calls on municipalities to develop a plan<sup>118</sup> demonstrating that they can provide enough sites for future housing development to accommodate their share of the statewide demand.<sup>119</sup> A municipality’s housing need is calculated on a regional basis and takes into account employment trends, commute patterns, current housing demand, and site availability for residential development.<sup>120</sup> Local governments retain much discretion on how they will meet their fair share.<sup>121</sup> This discretion has enabled the proliferation of a diverse range of plans with varying amounts of public and private sector control and financial support.<sup>122</sup> Communities that have made good faith efforts to use their discretion have in turn been rewarded with high quality developments that bring value and diversity to their surroundings.<sup>123</sup>

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<sup>118</sup> Like the Oregon law, the housing element statute includes affordable housing as one of several components that the local plan, or “element,” must contain. See CAL. GOV’T CODE § 65,302 (1997); Brian Augusta, Comment, *Building Housing from the Ground Up: Strengthening California Law to Ensure Adequate Locations for Affordable Housing*, 39 SANTA CLARA L. REV. 503, 508, 509 (1999). California also requires that municipalities plan for land use, safety, circulation, conservation, noise, and open space. See CAL. GOV’T CODE § 65,302; Augusta, *supra*, at 509.

<sup>119</sup> See Augusta, *supra* note 118, at 508.

<sup>120</sup> *Id.* at 509–10.

<sup>121</sup> See CAL. GOV’T CODE § 65,580; Augusta, *supra* note 118, at 510–11.

<sup>122</sup> See Peter W. Salsich, Jr., *Affordable Housing: Can NIMBYism Be Transformed into OKIMBYism?*, 19 ST. LOUIS U. PUB. L. REV. 453, 464 (2000). Examples of these plans include those found in the Ladera Ranch development in southern Orange County and in The Bridges development in Rancho Santa Fe, San Diego County, which have established affordable housing foundations that use real estate transfer fees to create new housing and enhance community relations and social activities. *Id.* at 468. San Francisco, on the other hand, has imposed linkage fees which directly fund the creation of new affordable units. Robert Collin & Michael Lytton, *Linkage: An Evaluation and Exploration*, 21 URB. LAW. 413, 414–15 (1989). The City of Napa has imposed an inclusionary zoning ordinance whereby 10% of all new residential units must be affordable. Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 1001 (2002).

<sup>123</sup> See Kautz, *supra* note 122, at 1002. For example, Sacramento County’s housing program entails a combination of tax-exempt mortgage revenue bonds, inclusionary zoning laws, home repair programs, multifamily project financing, and direct development of large housing projects. STUART MECK ET AL., AM. PLANNING ASS’N, REGIONAL APPROACHES TO AFFORDABLE HOUSING 123, 125, 127–28 (2003). These efforts have successfully created 2298 units in just nine years. *Id.* Funding preference is given to locations close to transit services and in central city locales to increase downtown residential life. *Id.* Sacramento County considers the tax dollars spent on affordable housing a one-time infusion of development capital that creates jobs, generates wages, and ultimately produces tax revenues derived from a stimulated economy. *Id.*

Like 40B, the housing element statute<sup>124</sup> was passed in response to the State government's concern that municipalities' exclusionary land use policies were in large part driving escalating housing costs.<sup>125</sup> Despite its auspicious language,<sup>126</sup> the California Legislature has failed to produce a statute that meets the state's growing housing needs.<sup>127</sup> The main failure seems to be the lack of an effective enforcement mechanism against noncomplying communities.<sup>128</sup> Surveys have demonstrated that the majority of California communities have failed to comply with the state's housing law.<sup>129</sup> Those municipalities that do possess plans have found additional ways of evading the statute's stated intent, leaving the state Department of Housing and Community Development with little or no ability to enforce compliance.<sup>130</sup> As in Massachusetts, although some communities have made progressive efforts to include more affordable housing within their borders, political realities and the lack of a consistent, effective state enforcement mechanism have left much of the California law an empty mandate.<sup>131</sup>

### 3. Montgomery County, Maryland

In contrast, one regional housing program that has attained success is that of Montgomery County, Maryland.<sup>132</sup> In 1974, Montgomery County passed its Moderately Priced Development Unit (MPDU)

<sup>124</sup> See CAL. GOV'T CODE §§ 65,580 to 65,589.8.

<sup>125</sup> Augusta, *supra* note 118, at 506.

<sup>126</sup> The California Legislature has declared it the goal of the State of California to enable "the early attainment of decent housing and a suitable living environment for every California family." CAL. GOV'T CODE § 65,580.

<sup>127</sup> See Lori Weisberg, *Low-Paid Workers Just Can't Make the Rent, Study Reports*, SAN DIEGO UNION-TRIB., Sept. 28, 1997, at H1.

<sup>128</sup> See Field, *supra* note 106, at 68–69; Morgan, *supra* note 105, at 375–76.

<sup>129</sup> Field, *supra* note 106, at 44–45.

<sup>130</sup> While the California law attempts to attain accurate fair share numbers by having either a county or state agency calculate each community's figure, the figure is actually calculated from data supplied by the community itself, thus allowing for easy manipulation to decrease its housing burden. See CAL. GOV'T CODE § 65,585(f) (1997). In addition, if the State Department of Housing and Community Development determines a local plan is not in compliance with the statute, it is powerless to order the municipality to change its plan. See *id.*

<sup>131</sup> Municipalities in Napa and San Francisco Counties are examples of communities that have sought to include more housing within their borders. Kautz, *supra* note 122, at 995–96, 999. Statistics show that the California model has spurred the development of at least 25,000 units in its 30-year existence. Like 40B, this is a step in the right direction but falls far short of satisfying actual housing needs. See *id.* at 979.

<sup>132</sup> See Salsich, *supra* note 122, at 462–63.

ordinance.<sup>133</sup> The regional government enacted the ordinance in response to a rapid increase in population, an inadequate supply of moderately priced housing, long commutes to work, high land costs, and a strong private development sector.<sup>134</sup> The law imposes the inclusionary zoning requirement<sup>135</sup> that all subdivisions of fifty or more residential units ensure that up to fifteen percent of the units are affordable.<sup>136</sup> In exchange for these units, developers may increase the allowed zoning density by up to twenty-two percent.<sup>137</sup>

The Montgomery County ordinance also provides alternatives to the on-site construction of affordable units, such as having the builder erect more units elsewhere, donate land or money for their construction, or provide some combination thereof.<sup>138</sup> By requiring that covenants run with the land and purchasing 1500 of the affordable units itself, the county has managed to keep its MPDUs affordable with sale prices averaging in the mid-\$90,000 range.<sup>139</sup> Over the first twenty-five years of the ordinance's existence, more than 10,000 affordable units were created in scattered sites throughout the county.<sup>140</sup> The Maryland Legislature later endorsed the county's success<sup>141</sup> by specifically

<sup>133</sup> *Id.* at 462 n.31.

<sup>134</sup> *Id.* at 462.

<sup>135</sup> Inclusionary zoning is a method of exacting on- or off-site dwelling units, or fees in lieu thereof, in exchange for subdivision approval, an adjudicative permit, or a variance. Witten, *supra* note 6, at 548.

<sup>136</sup> MONTGOMERY COUNTY, MD., CODE § 25A-5(b)(3) (2004).

<sup>137</sup> *Id.* § 25A-5.

<sup>138</sup> Salsich, *supra* note 122, at 463 & nn.39–40. These alternatives are only available, however, in “exceptional cases” where locating the affordable units on the original site would make them effectively unaffordable because of added resident services and facilities, the alternative proposal would achieve significantly more MPDUs, and the public benefits of the alternative proposal would outweigh locating the units on the original site. *Id.*

<sup>139</sup> *Id.* at 464. This figure is as of the year 1999. *See id.*

<sup>140</sup> Salsich, *supra* note 122, at 463. As a frame of reference, 40B has spurred the creation of 18,000 units for a current population of over 6 million people while the California law has created 25,000 units for over 30 million people. *See* Kautz, *supra* note 122, at 979; Krefetz, *supra* note 6, at 392.

<sup>141</sup> Some policymakers have noted, however, that the program has become less effective in Montgomery County and other places where the land is essentially built out, thus causing little new construction. VICINO ET AL., UNIV. OF MD. AT BALT. COUNTY, AFFORDABLE HOUSING IN METROPOLITAN MARYLAND: A POLICY ANALYSIS 40 (2004). In their continuing efforts to maintain sufficient affordable housing stocks, built-up areas like Montgomery County can establish a loan program for first-time homebuyers. *Id.* at 49. An MPDU program can still be quite effective in less built-out, higher-growth areas. *See id.* MPDUs are distributed on a lottery system open to all residents lacking affordable housing who can afford a unit, thereby increasing the program's equity. *Id.* at 41.

authorizing all state counties to enact a similar law.<sup>142</sup> Massachusetts, however, will not remedy the ills of 40B by merely replacing it with Montgomery County's ordinance.<sup>143</sup> Nevertheless, the initiative does provide valuable insight into an alternative zoning approach that uses private initiative and simple, uniform zoning laws with some built-in flexibility to respond to specific site circumstances.<sup>144</sup> Municipalities benefit from keeping their general zoning powers and planning discretion, as well as from having affordable housing built that is completely funded by the private sector.<sup>145</sup> Both municipalities and developers benefit from a comprehensive law that takes out much of the uncertainty and the related administrative costs that 40B regularly imposes.<sup>146</sup>

### B. *Progress Outside the 40B Box—Overlay Zoning Districts*

While chapter 40B is the primary engine for affordable housing growth in the Commonwealth, it is not the only one. A recent proposal by the Center for Urban and Regional Policy (CURP)<sup>147</sup> at Northeastern University offers some observations that are particularly useful to this discussion.<sup>148</sup> The CURP report recognizes that for Massachusetts to solve its affordable housing crisis, the State government must take a more active role in encouraging denser local development policies and in giving communities the financial and technical

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<sup>142</sup> Salsich, *supra* note 122, at 464.

<sup>143</sup> To start with, permitting developers to exceed density requirements by only 22% will often be an insufficient incentive for them to turn a profit under Massachusetts's tough zoning laws. The Maryland ordinance also is based on the premise that there is land available for subdivisions of at least 50 units. While Massachusetts has retained a good deal of open space, the eastern areas of the Commonwealth that most need affordable housing are either unlikely to permit multi-family developments or will not have single plots large enough to accommodate 50 single-family units. See EUCHNER & FRIEZE, *supra* note 6, at 6. The Maryland ordinance is also aimed at a specific region with relatively homogeneous housing patterns and needs. See VICINO ET AL., *supra* note 141, at 114. This contrasts with 40B, or a program aimed to create a statewide housing plan that serves urban, suburban, and rural communities alike. See *Making 40B Better*, *supra* note 46, at A16.

<sup>144</sup> MONTGOMERY COUNTY, MD., CODE § 25A (2004).

<sup>145</sup> See Salsich, *supra* note 122, at 462–63.

<sup>146</sup> See HOUS. APPEALS ADVISORY COMM., *supra* note 29.

<sup>147</sup> The Center for Urban and Regional Policy at Northeastern University, founded in 1999, is a “think and do tank”—a place where faculty, staff, and students pool their expertise, resources, and commitment to address a wide range of issues facing cities, towns, and suburbs. Ctr. for Urban & Reg'l Policy, About CURP, at <http://www.curp.neu.edu/aboutus.htm> (last visited Sept. 24, 2004). It places a particular emphasis on the Greater Boston region. *Id.*

<sup>148</sup> See CARMAN ET AL., *supra* note 12.

support they need to create housing that serves both local and state-wide interests.<sup>149</sup>

With the median price of a home in Greater Boston more than doubling between 1998 and 2002,<sup>150</sup> and a recent survey revealing that twenty-five percent of local residents would move out of the area for cheaper housing if they could,<sup>151</sup> the CURP report challenges current state efforts to create affordable housing as inadequate to meet the great demand.<sup>152</sup> The report concludes that local zoning is the driving factor for escalating housing costs, which is in turn the result of the strong Bay State traditions of home rule and a tax structure that places the burden of public education on individual communities.<sup>153</sup> Chapter 40B acts as an unevenly implemented check on the first factor (home rule and restrictive zoning) and completely fails to address its fiscal counterpart.<sup>154</sup>

The CURP report would not create a whole new set of laws but would instead use a little-known provision of Massachusetts's current zoning laws:<sup>155</sup> overlay zoning districts (OZDs).<sup>156</sup> Already enacted in the cities of Boston and Malden and the town of Westford,<sup>157</sup> OZDs encourage higher density development in set locations, most particularly around public transportation hubs and historic mills or other vacant buildings set for redevelopment.<sup>158</sup> It is unlikely that many municipalities will follow suit, however, as a result of the drain such

<sup>149</sup> See *id.* at 14.

<sup>150</sup> *Id.* at 6, 35 n.4. By early 2002, the median price of a Boston home hit \$358,000. Julie G. Bandy, *Home Price Changes in Major U.S. Markets* (July 12, 2002), <http://www.bankrate.com/bnm/news/mtg/20020715a.asp>. Nationally, the highest one-year jump in home values occurred in the city of Worcester, Massachusetts, the state's second-most populous city, which saw a single-family home price increase of 25.2% from 2001 to 2002. See *id.*

<sup>151</sup> CARMAN ET AL., *supra* note 12, at 35 n.12; MASS. INST. FOR A NEW COMMONWEALTH, *THE ROAD AHEAD: EMERGING THREATS TO WORKERS, FAMILIES, AND THE MASSACHUSETTS ECONOMY* 99–100 (1998) [hereinafter MASSINC].

<sup>152</sup> See CARMAN ET AL., *supra* note 12, at 6.

<sup>153</sup> *Id.* at 8. The CURP report provides a solid overlay of common local budgeting issues and the potential impact that an affordable housing development would have on a tight budget. *Id.* at 8–9; see also Sutner, *supra* note 2, at A1 (detailing fiscal strain that new affordable development may place on local schools in the central Massachusetts town of Mendon).

<sup>154</sup> See MASS. GEN. LAWS ch. 40B, §§ 20–24 (2004).

<sup>155</sup> *Id.* ch. 40A.

<sup>156</sup> CARMAN ET AL., *supra* note 12, at 12.

<sup>157</sup> The cities of Boston and Malden have created OZDs to encourage higher density development around transit stations. *Id.* The suburban town of Westford, on the other hand, passed an OZD to spur redevelopment of mill buildings at three separate locations. *Id.*

<sup>158</sup> *Id.* The CURP report would also add town centers as viable options for OZDs. *Id.*

housing development usually imposes on municipal budgets.<sup>159</sup> The report advocates the removal of this barrier by allocating state monies that exceed local costs and offering a real incentive to municipalities willing to participate in the program.<sup>160</sup>

Overlay zoning districts may be adopted by communities on a voluntary basis.<sup>161</sup> Under current law, any municipality can create such a district and draft zoning ordinances specific to its own vision for the site.<sup>162</sup> If sufficient state funding were attached to OZD units so that they actually put more money into local government than they take out,<sup>163</sup> municipalities would be hard-pressed not to create OZDs, particularly those which need additional affordable units to reach 40B's ten percent threshold.<sup>164</sup>

The OZD proposal has raised some concerns among affordable housing advocates, however, because it only requires that the municipality zone parcels that "could be" used for such units,<sup>165</sup> as opposed to parcels where those units are actually built.<sup>166</sup> Notwithstanding its critics, there may be good news in store for the proposal as CURP continues to discuss the enactment of its OZD plan with state executive and legislative officials.<sup>167</sup>

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<sup>159</sup> *Id.* at 8.

<sup>160</sup> *Id.* at 14–15. The report calls on State government to fund 100% of the public school costs associated with children living in the OZD; density bonus payments for every unit that local government allows to be built; and priority for other capital investment funds for projects such as new school construction and water, sewer, and road repairs. *Id.*

<sup>161</sup> See MASS. GEN. LAWS ch. 40A, § 9 (2004).

<sup>162</sup> See *id.*

<sup>163</sup> According to the CURP report's projections, this would often be the result because the state allocation of 100% tuition funding per OZD pupil would be in addition to the money it already awards the municipality for each pupil. CARMAN ET AL., *supra* note 12, at 15. Because the excess funds are usually more than the other costs the unit would impose on local services (police, fire, sewer, etc.) and because they would be coupled with the initial density bonus, municipalities would be in a better position financially after the OZD than before it. *Id.*

<sup>164</sup> See MASS. GEN. LAWS ch. 40B, § 20; CARMAN ET AL., *supra* note 12, at 15. The report also projects that the initial 10-year state investment of over \$404 million would in part be returned through increased taxes and fees of \$295 million. CARMAN ET AL., *supra* note 12, at 22–23. If some policymakers' predictions are correct, a failure to act could actually cost Massachusetts far more through its accompanying economic downturn. See EUCHNER & FRIEZE, *supra* note 6, at 3.

<sup>165</sup> The proposal would require 8 houses per acre or 20 apartments per acre with at least 20% of units (in OZDs that consist of 12 or more units) built being affordable to persons making no more than 80% of the regional median income. CARMAN ET AL., *supra* note 12, at 13.

<sup>166</sup> Norris, *supra* note 90.

<sup>167</sup> *Id.*

### III. WHERE DO WE GO FROM HERE? SUGGESTED REFORMS FOR 40B

As this Note has stressed repeatedly, there is no one ideal model to create sufficient affordable housing to meet the diverse needs of a state, region, or even a single community.<sup>168</sup> History has shown that there are certain elements, however, that must be present in a state's housing plan for it to hope to achieve this kind of success.<sup>169</sup> These elements might be summed up in the following three words: accountability, focus, and leadership.<sup>170</sup>

#### A. Accountability

Chapter 40B has left social advocates dissatisfied for not going far enough in creating housing, and municipal leaders frustrated for going too far.<sup>171</sup> A chief reason for their shared angst is that the State legislature has yet to articulate the ultimate goal of the statute and how it intends for Massachusetts to reach that goal.<sup>172</sup> The Commonwealth must set the clear goal of creating enough affordable units to meet demand, and it must hold itself and its municipalities accountable to that goal.<sup>173</sup> If that goal is to convince Bay State residents that 40B is not a state-imposed burden but a well-devised plan that will benefit the majority of citizens,<sup>174</sup> then the law must actually include a well-devised plan instead of an arbitrary percentage requirement.<sup>175</sup>

The political will to bring about these changes is not readily apparent from the current Beacon Hill debate.<sup>176</sup> Noticeably absent from both the Task Force's recommendations and the Joint Committee's legislation is the proposed articulation of a statewide housing plan to meet the 36,000 additional-unit demand facing the Commonwealth.<sup>177</sup> Nor does either initiative establish or call upon preexisting regional authorities to develop such plans to create their own shares

<sup>168</sup> MECK ET AL., *supra* note 123, at 187.

<sup>169</sup> *See id.* at 189.

<sup>170</sup> *See id.* at 189–90, 191.

<sup>171</sup> Sutner, *supra* note 2, at A1.

<sup>172</sup> *See generally* Collins, *supra* note 4, at 1.

<sup>173</sup> *See generally* Russell, *supra* note 106, at 479–80.

<sup>174</sup> Among the ways it would benefit the majority is that it would lower housing costs—a major concern of many Bay State residents, particularly recent college graduates. CARMAN ET AL., *supra* note 12, at 7; *see also* MASSINC, *supra* note 151, at 99–100.

<sup>175</sup> *See* Krefetz, *supra* note 6, at 394.

<sup>176</sup> *See generally* H.R. 4240, 183d Gen. Ct., Reg. Sess. (Mass. 2003); CHAPTER 40B TASK FORCE, *supra* note 5.

<sup>177</sup> *See* Mass. H.R. 4240; CHAPTER 40B TASK FORCE, *supra* note 5; *see also* Witten, *supra* note 6, at 552.

of this needed housing.<sup>178</sup> Rather, the initiatives rely on the existing threshold mechanisms which over the past thirty-five years have failed to produce even one-third of the affordable units needed to fill the state's current demands.<sup>179</sup>

This Note does not attempt to devise a perfect statewide affordable housing plan, but there are some elements that Massachusetts should strongly consider including in its plan.<sup>180</sup> It is time to do away with the state's default plan that every municipality have at least ten percent affordable housing.<sup>181</sup> Instead, the State legislature must candidly articulate its goal of ensuring that sufficient housing stocks exist for low- and moderate-income residents to afford to live in their own neighborhoods.<sup>182</sup> As in California, it should articulate its desire to reach that goal by partnering with municipalities to create affordable units that fit cohesively into their surrounding locales.<sup>183</sup> A revised 40B should detail how it will create these partnerships and how the Commonwealth intends to monitor municipal actions and enforce its new mandate.<sup>184</sup>

Without a statewide housing plan,<sup>185</sup> it comes as little surprise that localities continue to view affordable housing as a burdensome charity for the poor rather than a smart economic and social investment for every citizen.<sup>186</sup> While some Bay State communities have

<sup>178</sup> See Mass. H.R. 4240; CHAPTER 40B TASK FORCE, *supra* note 5.

<sup>179</sup> See Mass. H.R. 4240 § 5; CHAPTER 40B TASK FORCE, *supra* note 5, at 26. See generally EUCHNER & FRIEZE, *supra* note 6, at 40; Witten, *supra* note 6, at 552. Both the Task Force and the Joint Committee proposals would create local grants for municipalities to incorporate smart growth principles into their Master Plans. See Mass. H.R. 4240 § 5; CHAPTER 40B TASK FORCE, *supra* note 5, at 10. None of these proposals, however, details how the Commonwealth will meet the current 36,000-unit need for affordable units. See Mass. H.R. 4240 § 5; CHAPTER 40B TASK FORCE, *supra* note 5, at 10.

<sup>180</sup> See MECK ET AL., *supra* note 123, at 191–92.

<sup>181</sup> See MASS. GEN. LAWS ch. 40B, § 20; Witten, *supra* note 6, at 552.

<sup>182</sup> See generally CITIZENS' HOUS. & PLANNING ASS'N, THE FACES OF 40B, at 6 (June 2003), <http://www.chapa.org/Facesof40B.pdf>. One issue that the State legislature may have to address is whether in articulating this goal it truly wishes to be held accountable to the public in the form of citizen suits. Even if the legislature opts to forego citizen suits, a clear articulation of its ultimate goal and plan to get there would hold it and the Department of Housing and Community Development more politically accountable. See generally Barton H. Thompson, *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 185.

<sup>183</sup> See CAL. GOV'T CODE § 65,580 (1997).

<sup>184</sup> As the Task Force and Joint Committee have recognized, State government should also encourage smart growth principles that place affordable housing close to transportation hubs and other central locations. See Mass. H.R. 4240 § 5; CHAPTER 40B TASK FORCE, *supra* note 5, at 7. These principles would also be incorporated into the statewide plan.

<sup>185</sup> See Witten, *supra* note 6, at 552.

<sup>186</sup> See MECK ET AL., *supra* note 123, at 190; Russell, *supra* note 106, at 480. As a recent survey from the American Planning Association emphasizes, the affordable housing issue

taken steps to create individual affordable housing plans,<sup>187</sup> they are the exception to the rule and may be more concerned with meeting the required ten percent threshold than actually creating their fair share of affordable units.<sup>188</sup>

Massachusetts must hold all 351 of its municipalities directly accountable for providing sufficient affordable units to meet their respective housing demands.<sup>189</sup> Instead of the ten percent threshold, however, the Commonwealth should impose fair share requirements similar to those found in California.<sup>190</sup> State government must cease treating municipalities as “homogenous blobs”<sup>191</sup> and instead conduct a thoughtful review of each community to determine the appropriate amount of housing it should provide to help fill Massachusetts’s housing needs.<sup>192</sup>

must be recast as one of housing for workers that is crucial to keep a region economically competitive with other regions that already provide such housing. MECK ET AL., *supra* note 123, at 190. The survey goes on to note that without affordable housing, enormous stress may be placed on a region’s employees, including local government employees, by limiting the available pool of workers within commuting distance. *Id.* Opinion leaders and elected officials thus must tie the need for affordable housing to quality of life issues such as traffic congestion, equal access to educational and employment opportunities, and patterns of development. *Id.*

<sup>187</sup> See Shamus McGillicuddy, *Housing Costs in Marshfield Skyrocketing; Almost Half of Families Qualify for Housing Subsidy*, PATRIOT LEDGER (Quincy, Mass.), Dec. 4, 2003, at 1.

<sup>188</sup> *See id.*

<sup>189</sup> See Russell, *supra* note 106, at 479–80.

<sup>190</sup> See Augusta, *supra* note 118, at 509–10. The California Attorney General has defined “housing element” (otherwise known as “fair share”) as the determination of a locality’s share of the regional housing needs, including the existing and projected housing needs of the locality. *See* 70 Op. Att’y Gen. Cal. 251 (1987). The availability of suitable housing sites must be considered based upon not only the existing zoning and land use restrictions of the locality, but also the potential for increased residential development under alternative zoning ordinances and land use restrictions. *See id.* The author of this Note acknowledges that changing the 10% requirement is, politically speaking, much easier said than done. It is possible that some communities that have reached or are close to reaching the current threshold will find themselves back in the affordable housing “red” while other communities that have not worked as hard at producing housing, particularly in parts of western Massachusetts with leaner housing demand, may find themselves having already met their fair share. However, if the legislature can demonstrate that this initiative is more rational and will in the end serve all residents by permitting them and their children to remain in their own communities, it may convince the public that the law is in everyone’s best interests. *See* CITIZENS’ HOUS. & PLANNING ASS’N, *supra* note 182, at 1. This change also could be more politically palatable to home rule advocates if the Commonwealth counts Section 8 and mobile home units towards municipalities’ fair share amounts. While housing advocates currently lobby against these units’ inclusion in the 40B calculus, their concerns may be assuaged with a new law that mandates sufficient affordable stocks over arbitrary thresholds. *See* Krefetz, *supra* note 6, at 394.

<sup>191</sup> *See* Witten, *supra* note 6, at 532.

<sup>192</sup> In California, state and regional authorities determine each local government’s fair share based on data that includes market demand for housing, employment opportunities,

In bringing some equity to fair share determinations, Massachusetts might consider the amount of otherwise developable land that municipalities are sheltering through exclusionary zoning.<sup>193</sup> It might also consider the amount of commerce and industry and the corresponding affordable housing demand that each municipality brings to the surrounding region.<sup>194</sup> By increasing fair share requirements for municipalities that adopt such zoning or seek lucrative commercial tax bases but exclude the workers that business will inevitably attract, Massachusetts will help ensure that those communities that would otherwise be the greatest exacerbators of its housing crisis are held directly accountable for their self-serving actions.<sup>195</sup>

The Commonwealth should require that every municipality develop its own affordable housing plan to meet its own fair share requirement.<sup>196</sup> Like in Oregon, each local plan should have to comply with the statewide housing plan established by 40B.<sup>197</sup> With a comprehensive yet flexible statewide plan, though, municipalities will still have options in how they incorporate affordable units into their communities.<sup>198</sup>

Massachusetts should also hold universities more accountable for the strain they place on surrounding housing markets.<sup>199</sup> For every ten

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the availability of suitable sites and public facilities, commuting patterns, the type and tenure of housing needs, the loss of units contained in assisted housing developments, and the housing needs of farm workers. CAL. GOV'T CODE § 65,584 (1997). The targeted regional distribution of affordable housing must avoid funneling additional affordable housing into localities with relatively high preexisting proportions of such units. *Id.*; 70 Op. Att'y Gen. Cal. 251 (1987).

<sup>193</sup> See EUCHNER & FRIEZE, *supra* note 6, at 6.

<sup>194</sup> Massachusetts would not be alone in adding this factor, as New Jersey and California have called for the inclusion of present and future employment opportunities as an important criterion for their fair shares. See CAL. GOV'T CODE § 65,584; S. Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390, 440 (N.J. 1983).

<sup>195</sup> See *Township of Mount Laurel*, 456 A.2d at 440. See generally Smith & Steiner, *supra* note 110, at 454–55, 456–57.

<sup>196</sup> See Witten, *supra* note 6, at 516–17, 552. This may best be included as part of the Master Plan that each municipality is currently required to produce. See Master Plan; Economic Development Supplement, MASS. GEN. LAWS ch. 41, § 81D (2004). The state law already requires that each Master Plan include a housing element to “identify policies and strategies to provide a balance of local housing opportunities for all citizens.” *Id.*

<sup>197</sup> See Oregon Land Use Planning Act of 1973, OR. REV. STAT. § 197.295–.296 (1989); Morgan, *supra* note 105, at 374–75; Russell, *supra* note 106, at 476. See generally Field, *supra* note 106, at 70–71.

<sup>198</sup> See Witten, *supra* note 6, at 553. As one Massachusetts municipal attorney has noted, for municipalities to have these options, the legislature should grant them additional enabling authority to add impact fees and inclusionary zoning into their plans. See *id.*

<sup>199</sup> Robert Reich, Robert Reich's Plan for Fixing Massachusetts' Housing Crisis (2002), at <http://robertreich.org/2002/facts051502.shtm> (last visited Sept. 24, 2004).

percent increase in student population living off-campus, rents increase an average of \$75 per month in the greater college-area community.<sup>200</sup> As part of his 2002 campaign for Massachusetts Governor, Robert Reich called for universities that failed to house all their students to be assessed affordable housing linkage fees for the construction of buildings other than dormitories.<sup>201</sup> The linkage fee would decrease in proportion to the increase in the number of students living on campus.<sup>202</sup> If Massachusetts either adopted such linkage fees directly or permitted municipalities to do so, it would internalize more housing costs and require schools to be held more accountable for the fiscal burdens they may otherwise place on neighborhood residents.<sup>203</sup>

The current chapter 40B requires no municipal role in affordable unit production unless a developer forces a community's hand through a comprehensive permit application.<sup>204</sup> The Commonwealth is failing to strive for greater standards when it neglects to set housing stock goals, such as the commonsense objective of crafting a state plan that creates sufficient affordable units for all residents who need them.<sup>205</sup> Without this accountability, there is less incentive to create these units and greater public opposition to a state law that is rightly

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<sup>200</sup> MASS. EXEC. OFFICE FOR ADMIN. & FIN., BRINGING DOWN THE BARRIERS: CHANGING HOUSING SUPPLY DYNAMICS, at v (2000). For example, universities bring more than 250,000 students to the Boston area but house only 110,000 of them. They have driven rents up by \$150 per month in the Allston-Brighton area and by \$225 per month on Mission Hill. Reich, *supra* note 199, at point VI.

<sup>201</sup> Reich, *supra* note 199, at point VI.

<sup>202</sup> *Id.* Reich also references the Davenport Commons housing constructed by Northeastern University, which created new student housing combined with affordable units for area residents. *Id.* Such projects demonstrate the positive impact schools may have on their surrounding communities and their ability to make their neighbors friendlier to their presence. *See id.*

<sup>203</sup> *See id.* Reich's plan would, of course, require further development to be realized. Linkage fees should not be automatic but rather assessed according to the estimated rent increases that off-campus students produce. Massachusetts also would have to create a system that permits communities that share the burden of a school's off-campus population (such as those in the vicinity of Boston College, which contributes renters to Boston's Allston and Brighton neighborhoods, the city of Newton, and the towns of Brookline and Watertown, to name a few) to share linkage fee proceeds. Finally, the Commonwealth would probably exempt public schools from this requirement in order to keep tuition prices at more affordable levels. The initiative may show some promise, however, and should be considered by Massachusetts's leaders. *See id.*

<sup>204</sup> MASS. GEN. LAWS ch. 40B, § 21 (2004).

<sup>205</sup> *See* Witten, *supra* note 6, at 512, 552.

perceived as obtuse and thoughtlessly imposing on home rule and private property rights.<sup>206</sup>

### B. Focus

Massachusetts State government must change its focus from making small, technical changes to chapter 40B to re-evaluating its ultimate goal of creating enough housing to meet demand<sup>207</sup> and determining the best methods inside and outside of 40B to get there.<sup>208</sup> Local governments, in turn, must change their focus from that of building the minimum amount of required housing in order to avoid 40B's brunt impact to that of devising plans that will make the housing a valued asset to their local communities.<sup>209</sup> Chapter 40B has successfully introduced the issue of affordable housing to city council and town meeting debates throughout Massachusetts.<sup>210</sup> The current law is incapable, however, of carrying the issue forward by changing the focus of this debate to consider a better role for affordable housing in the larger social and economic contexts of our society.<sup>211</sup>

Municipalities must look beyond the ominous hammer that 40B can bring down on them and consider the real costs and benefits that well-planned, mixed housing might bring to their respective communities.<sup>212</sup> A genuine weighing of the larger costs and benefits is politically infeasible, though, until State government actually creates a uniform zoning system and real incentives instead of the double negative of not being vulnerable to 40B attacks.<sup>213</sup> State action might be further divided into uniform, top-down reform that applies comprehensively to all municipalities<sup>214</sup> and individualized, community-controlled reform that provides municipalities with new, expanded, and more flexible options to meet their housing needs.<sup>215</sup>

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<sup>206</sup> See *id.* at 532, 543–44. See generally John Stilgoe, *To Solve Problems, Cities Must Try to Confront Change*, BOSTON GLOBE, Jan. 18, 2004, § Globe South, at 1.

<sup>207</sup> See Krefetz, *supra* note 6, at 394.

<sup>208</sup> See generally MECK ET AL., *supra* note 123, at 187–95; Witten, *supra* note 6, at 552.

<sup>209</sup> See CARMAN ET AL., *supra* note 12, at 5.

<sup>210</sup> See Krefetz, *supra* note 6, at 394.

<sup>211</sup> See Witten, *supra* note 6, at 551.

<sup>212</sup> See CARMAN ET AL., *supra* note 12, at 10. See generally Paige, *supra* note 36, at 1.

<sup>213</sup> See Witten, *supra* note 6, at 531–32, 551–52.

<sup>214</sup> See MECK ET AL., *supra* note 123, at 191, 192–93.

<sup>215</sup> See Witten, *supra* note 6, at 516–17.

## 1. Uniform, Top-Down Reform

While 40B was written to apply in like fashion to all municipalities where less than ten percent of all housing is affordable,<sup>216</sup> it has created scattered development, with some communities receiving numerous 40B applications and others having yet to grapple with the law.<sup>217</sup> State government must change its own role from a passive one that relies on builders' proposals to an active one that compels municipalities to create more housing in their own neighborhoods.<sup>218</sup>

Massachusetts should require each community to create and implement a master plan that allows construction of sufficient affordable housing to meet local and regional demands.<sup>219</sup> The Task Force and Joint Committee would encourage municipalities to incorporate affordable housing into their master plans through technical assistance grants and temporary reprieves from 40B.<sup>220</sup> These measures are a step in the right direction, but their voluntary nature will not create the same uniformity as a law requiring each community to create an affordable housing plan.<sup>221</sup> A review of California's affordable housing law also demonstrates that requiring each locality to devise an affordable housing plan may prove ineffective unless state government creates a statewide housing plan and empowers a state agency to compel local plans' compliance with their statewide counterpart.<sup>222</sup>

State government must align the interests of developers with those of municipalities.<sup>223</sup> Massachusetts's builders already must contend with a tangled mess of state and local regulations that hamper their ability to construct even moderately priced housing for a

<sup>216</sup> See *id.* at 531–32.

<sup>217</sup> See Krefetz, *supra* note 6, at 394.

<sup>218</sup> See MECK ET AL., *supra* note 123, at 191, 192–93.

<sup>219</sup> See Russell, *supra* note 106, at 476; Witten, *supra* note 6, at 531–32. Massachusetts also needs to calculate and publish local and regional housing demands instead of imposing a blunt quota system that treats all municipalities like “homogeneous blobs.” See Witten, *supra* note 6, at 512, 531, 551.

<sup>220</sup> See H.R. 4240, 183d Gen. Ct., Reg. Sess. § 8 (Mass. 2003); CHAPTER 40B TASK FORCE, *supra* note 5, at 4, 28–29.

<sup>221</sup> See Mass. H.R. 4240 § 8; CHAPTER 40B TASK FORCE, *supra* note 5, at 4, 28–29; Witten, *supra* note 6, at 513–14. While the current proposals do not go far enough, they should be included with the mandate for affordable housing plans to help ensure local compliance and well-drafted affordable housing plans.

<sup>222</sup> See discussion *supra* Part II.A.2; see also Witten, *supra* note 6, at 513.

<sup>223</sup> This may have been the goal of Governor Romney when naming his Task Force membership, which included Democrat and Republican members of the House of Representatives and Senate, state housing officials, municipal and regional officials, and stakeholders representing developer and environmental interests. See CHAPTER 40B TASK FORCE, *supra* note 5, at 17.

profit.<sup>224</sup> The combination of exclusive zoning practices and tough regulations on the buildable parcels that developers do acquire has led to significant decreases in new building permits<sup>225</sup> and spiraling increases in residential construction costs.<sup>226</sup>

State government must streamline the regulatory process that deters housing development in Massachusetts.<sup>227</sup> Duplicative regulatory codes, avenues of appeal, and enforcement mechanisms and practices by various state and local agencies often leave builders unable to profit on anything but the most expensive residential developments.<sup>228</sup> State agencies must work to create a simplified building code that facilitates predictable and coordinated building standards and review timelines.<sup>229</sup> State and local agencies must collaborate to eliminate overlap, promote consistent enforcement through local training, and permit local regulations only when municipalities can convince the applicable state agency that their rule serves a specified legitimate purpose through the method that is least restrictive to future development.<sup>230</sup>

Massachusetts also might consider reducing the regulatory barriers builders face when renovating existing residential buildings.<sup>231</sup> In 1979, Massachusetts adopted the Hazard Index, a rehabilitation code that required builders who were not making drastic changes to comply with a minimal set of safety requirements.<sup>232</sup> The code also provided compliance alternatives to maximize flexibility while still meeting safety goals.<sup>233</sup> The legislature has repeatedly amended the rehabilitation code, however, adding burdensome building requirements such as seismic standards and five-year occupation requirements, and removing categories such as residential use that many builders understand to require full compliance for housing projects.<sup>234</sup>

The Commonwealth should entice builders to redevelop potential affordable housing units by offering them clear, flexible economic

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<sup>224</sup> EUCHNER & FRIEZE, *supra* note 6, at 6.

<sup>225</sup> New building permits in Massachusetts, as a percentage of the national average, have declined from 2.6% in 1987 to just under 1% by 2002. Chesto, *supra* note 12, at 33.

<sup>226</sup> See EUCHNER & FRIEZE, *supra* note 6, at 7.

<sup>227</sup> Witten, *supra* note 6, at 524–25.

<sup>228</sup> See EUCHNER & FRIEZE, *supra* note 6, at vi.

<sup>229</sup> *Id.* at 45.

<sup>230</sup> See *id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 24.

<sup>233</sup> *Id.*

<sup>234</sup> EUCHNER & FRIEZE, *supra* note 6, at 24–25.

incentives.<sup>235</sup> In exchange for formulating an improved rehabilitation code, State government might require builders to set aside a certain percentage of their residential units as affordable. Massachusetts has seen recent success at stirring business renovation through its brownfields program.<sup>236</sup> It should build upon this success by amending the rehabilitation code and bringing quality housing back to the same, oftentimes urban, neighborhoods.<sup>237</sup> Massachusetts might also increase the incentives to bring old units back on the market by increasing state tax credits for de-leading apartments.<sup>238</sup>

While municipal governments undoubtedly will protest these restrictions on their home rule powers, their objections will be much less severe if sufficient rewards accompany these mandates.<sup>239</sup> The Commonwealth must provide regular capital to offset the drain that affordable housing can place on local budgets.<sup>240</sup> The Task Force recognized this drain and proposed a “growth fund” that would reimburse municipalities for every dollar they spend educating children from affordable units.<sup>241</sup> The Center for Urban and Regional Policy (CURP) at Northeastern University would go further, having the state

<sup>235</sup> *Id.* at 45.

<sup>236</sup> The brownfields program encourages commercial and industrial development on environmentally contaminated sites. In 1998, the Governor and legislature enacted the Brownfield Act, a law that creates financial incentives and liability relief for parties undertaking brownfields cleanup. Mass. Dep’t of Envtl. Prot., *Introduction to Brownfields*, at <http://www.mass.gov/dep/bwsc/brownfld.htm> (last visited Sept. 24, 2004). In the first four years of the program alone, 570 projects received funding approval and/or direct project assistance. MASS. DEP’T OF ENVTL. PROT., *THE BROWNFIELDS REPORT UPDATE 3-4* (Apr. 2002) [hereinafter *MASS. DEP. BROWNFIELDS UPDATE*], <http://www.mass.gov/dep/bwsc/files/brown/update02.pdf>.

<sup>237</sup> See MASS. DEP. BROWNFIELDS UPDATE, *supra* note 236, at A-29 to A-34 (listing communities that have received brownfield technical assistance); EUCHNER & FRIEZE, *supra* note 6, at 22. For a recent example of a building code initiative specifically designed to create affordable housing, see the Maryland Building Rehabilitation Code Program. MD. DEP’T OF HOUS. & CMTY. DEV., *MARYLAND BUILDING REHABILITATION CODE HANDBOOK* (Oct. 2001), [http://www.dhcd.state.md.us/assets/document/smartcodes\\_complete.pdf](http://www.dhcd.state.md.us/assets/document/smartcodes_complete.pdf). Effective June 1, 2001, the code is intended to streamline and harmonize code requirements to encourage private investment in existing buildings and communities. See *id.* It permits repairs, renovations, modifications, reconstructions, additions, and changes of occupancy that maintain or improve the health, safety, and welfare in existing buildings without requiring full compliance with the state Building, Plumbing, Mechanical, Fire Prevention, Electrical, Boiler, Energy, Elevator, or Accessibility Codes except for proportional, additional work. See *id.*

<sup>238</sup> Jim Matte, *Housing Affordability a Hot Topic*, BOSTON HERALD, May 10, 2002, at 44.

<sup>239</sup> MECK ET AL., *supra* note 123, at 193-94 (discussing increasing the municipal toolbox).

<sup>240</sup> See generally Sutner, *supra* note 2, at A1.

<sup>241</sup> CHAPTER 40B TASK FORCE, *supra* note 5, at 10.

pay all education costs as well as density bonuses while giving priority for capital improvement funds to municipalities that create real opportunities for such housing.<sup>242</sup>

The chief difference between these proposed expenditures is the impact they potentially could have on municipalities' focus on housing. One proposal might persuade localities to tolerate affordable developments, while the other, by providing localities with more funding than the units would cost them,<sup>243</sup> might actually compel them to actively seek such housing instead.<sup>244</sup> By changing municipalities' perception of affordable housing from a social drain to a fiscal bonus, CURP's proposal could go great lengths toward creating the state-local partnership that this Note advocates.<sup>245</sup>

## 2. Providing More Flexible Options for Municipalities to Create Sufficient Housing

In exchange for acquiring more local control, Massachusetts should reward municipalities with increased flexibility in the manner by which they create their share of affordable housing.<sup>246</sup> One option that Massachusetts might make more readily available is inclusionary zoning.<sup>247</sup> Under current state law, local boards may authorize increases in population density and intensity of use above that allowed by underlying zoning on the condition that the developer provide public amenities, such as affordable housing.<sup>248</sup> The law has had little success in expanding housing stocks, however, because it comes with no limit on the concessions municipalities may seek and no comprehensive state guidance on how to incorporate inclusionary zoning into their master plans.<sup>249</sup>

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<sup>242</sup> See CARMAN ET AL., *supra* note 12, at 14–15.

<sup>243</sup> *See id.*

<sup>244</sup> *See id.*

<sup>245</sup> *See id.*

<sup>246</sup> *See* Witten, *supra* note 6, at 551.

<sup>247</sup> *Id.* at 548–49, 550; *see also supra* Part II.A.3 (discussing Montgomery County, Maryland's inclusionary zoning).

<sup>248</sup> MASS. GEN. LAWS ch. 40A, § 9 (2004). In his critique of 40B, Professor Witten argues that few developers will seek a density variance through this special permit when they instead can seek a comprehensive permit that entails fewer concessions to local authorities and more friendly appellate review in the HAC. Witten, *supra* note 6, at 547 n.148.

<sup>249</sup> *See* MASS. GEN. LAWS ch. 40A, § 9; Witten, *supra* note 6, at 547 n.148. *See generally* William W. Merrill, III & Robert K. Lincoln, *The Missing Link: Legal Issues and Implementation Strategies for Affordable Housing Linkage Fees and Fair Share Regulations*, 22 STETSON L. REV. 469, 514–15 (1993).

Montgomery County, Maryland offers a good example of effective inclusionary zoning. There, any residential development of more than fifty units must set aside fifteen percent of the units as affordable in exchange for a density bonus of up to twenty-two percent.<sup>250</sup> A uniform, statewide requirement like Montgomery County's would likely be unworkable for the varied 351 communities that comprise Massachusetts.<sup>251</sup> Instead, the Commonwealth could devise a law that, similar to Montgomery County's, delineates the set-aside percentages developers must give, but provides a variety of set-asides that are more adaptable to Massachusetts's urban, suburban, and rural communities.<sup>252</sup>

Like in Montgomery County, the law in Massachusetts should permit the developer to erect more buildings elsewhere or to donate land or money to other housing projects in lieu of supplying on-site affordable units.<sup>253</sup> The Commonwealth should expand on Maryland's idea, however, by also permitting and delineating the methods and set-aside percentages that municipalities may impose on non-residential developments.<sup>254</sup> Set-aside fees are justifiable for residential developments because the construction of high-income homes drives up the price of land and surrounding houses.<sup>255</sup> Similarly, commercial and industrial development drives up the price of land and houses by

<sup>250</sup> See MONTGOMERY COUNTY, MD., CODE §§ 25A-2(5), -5(b)(3) (2004).

<sup>251</sup> See *id.*; Witten, *supra* note 6, at 531–32.

<sup>252</sup> See MONTGOMERY COUNTY, MD., CODE §§ 25A-2(5), -5(b)(3); Witten, *supra* note 6, at 549.

<sup>253</sup> Massachusetts should only permit off-site developments when they would significantly increase the number of units produced and would better serve both the affordable unit residents and the greater public interest. See discussion *supra* Part II.A.3. The DHCD should be responsible for making this determination. This program could be incorporated with the Task Force's housing region proposal, where certain bordering communities may share the costs of affordable housing and count units in one community toward another's total. As the Task Force suggests, this inter-municipal collaboration should be permitted only when each community has devised and is adhering to a housing plan. See CHAPTER 40B TASK FORCE, *supra* note 5, at 39. Some have argued that states should go further by requiring that no new residential or commercial development may proceed in a municipality that has not provided its fair share of housing, unless either the developer sets aside sufficient affordable units or the municipality uses other means to create the required housing. See Smith & Steiner, *supra* note 110, at 455, 456–57.

<sup>254</sup> See Witten, *supra* note 6, at 549. See generally Merrill & Lincoln, *supra* note 249, at 512–13. While current Massachusetts law does not prevent set-aside requirements on non-residential development, it also does not set out in more defined terms the limits of local impositions, which could better enable communities to implement them. See Merrill & Lincoln, *supra* note 249, at 515 (discussing development of a set-aside system that withstands legal scrutiny, something that Massachusetts has not done for its cities and towns); discussion *supra* Part II.A.3.

<sup>255</sup> See Merrill & Lincoln, *supra* note 249, at 541.

bringing new jobs and a greater demand for housing to a region.<sup>256</sup> One example of a successful commercial development linkage program can be found in Sacramento County, California.<sup>257</sup> The county uses a nexus analysis that ties nonresidential development to the new low-income workers it will attract to the area.<sup>258</sup> Fees are assessed in proportion to the number of prospective new residents and used to create housing near those places of employment.<sup>259</sup>

By imposing set-asides on non-residential development, Massachusetts may again broaden the focus of the 40B debate by recognizing that the dearth of affordable housing is in part a result of commercial growth and that more housing is needed to sustain such growth in the future.<sup>260</sup> Some industries already have shown a willingness to help create housing to meet the demand that they generate.<sup>261</sup> Their suggestions might provide a good starting point for methods municipalities may employ to create working partnerships with commercial developers that seek to build within their borders.<sup>262</sup>

Critics may argue that linkage fees will drive business out of Massachusetts to states that impose no such requirements.<sup>263</sup> They will be silenced, however, if the fees create an economy that is stronger and able to attract a more diverse workforce.<sup>264</sup> Combined with other initiatives, linkage fees would be one component of state and local affordable housing plans that in the end rein in housing price increases and the resultant wage increases necessary for companies to attract a

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<sup>256</sup> See *id.* at 544–45.

<sup>257</sup> See MECK ET AL., *supra* note 123, at 127–28, 129.

<sup>258</sup> See *id.* at 125. Examples of new commercial projects include offices, business parks, hotels, and shopping centers. *Id.*

<sup>259</sup> *Id.* The housing units to be created with the revenues generated must be located within reasonable commuting distance of the employment-generating development that funds them; this is defined as being within a seven-mile radius. *Id.*

<sup>260</sup> See Merrill & Lincoln, *supra* note 249, at 544–45.

<sup>261</sup> James L. Cunningham, *Affordable Housing in Resort Areas*, SJ007 ALI-ABA 21, 23 (Feb. 2002); see Michael Schindler, *The Challenge of Developing Resorts Hotels*, PROB. & PROP., Nov./Dec. 1989, at 11, 12.

<sup>262</sup> See Cunningham, *supra* note 261, at 25; Schindler, *supra* note 261, at 12. These articles refer to resort developers' willingness to build affordable housing to attract labor to remote areas. While such an approach may not be fully adopted on a large scale, it demonstrates that industry is willing to help meet housing demand when it contributes to its bottom line. See Cunningham, *supra* note 261, at 25; Schindler, *supra* note 261, at 12.

<sup>263</sup> See generally Mike McCoy, *Affordable Housing Fee in Question; SR Support Waning as Some Fear New Tax Would Discourage Business*, PRESS DEMOCRAT (Santa Rosa, Cal.), Aug. 24, 2003, at B1.

<sup>264</sup> See EUCHNER & FRIEZE, *supra* note 6, at 2–3.

talented workforce.<sup>265</sup> Linkage fees thus may create more long-term economic growth in the Bay State than any economic harm they might initially bring.<sup>266</sup>

The Commonwealth may further reward municipalities that impose set-aside requirements by forcing residential developers who apply for comprehensive permits under 40B to justify to the HAC why it would have been uneconomic for them to build under a set-aside program instead.<sup>267</sup> This would encourage municipalities to implement set-aside plans that would both suit their local character and provide sufficient economic incentives to justify their plans to the HAC.<sup>268</sup>

It is crucial for State government to take the lead in establishing the parameters of affordable housing set-asides both to prevent municipalities from seeking too much and thereby hindering such development,<sup>269</sup> and to prevent them from seeking too little for fear of legal action in the form of a takings claim.<sup>270</sup> Thus, because municipalities must have various types of set-asides at their disposal to meet their diverse needs, the Commonwealth should invest its resources to create methods that will likely withstand takings challenges and to defend such challenges should they arise.<sup>271</sup>

Massachusetts also should permit the creation of affordable housing endowments.<sup>272</sup> Under this system, municipalities may require developers to attach private restrictive covenants and servitudes prior to the sale of new homes.<sup>273</sup> The covenants would require that, every time home ownership is transferred, a small fee (such as 0.25% of the selling price) must be paid to a designated beneficiary whose purpose

<sup>265</sup> See Stilgoe, *supra* note 206, at 1.

<sup>266</sup> See EUCHNER & FRIEZE, *supra* note 6, at 2–3.

<sup>267</sup> See MASS. GEN. LAWS ch. 40B (2004).

<sup>268</sup> See *id.*; Bd. of Appeals v. Hous. Appeals Comm. in the Dep't of Cmty. Affairs, 294 N.E.2d 393, 393 (Mass. 1973).

<sup>269</sup> See Witten, *supra* note 6, at 547 n.148.

<sup>270</sup> See Merrill & Lincoln, *supra* note 249, at 515–16.

<sup>271</sup> See Witten, *supra* note 6, at 549–50; see also Kautz, *supra* note 122, at 1018 (providing an example of various set-aside methods that are likely to uphold takings challenges, including that of Montgomery County, Maryland.). Massachusetts also needs to give municipalities clear authorization to impose such fees to prevent the courts from finding that they have overstepped their home rule powers. See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2360 (2003) (citing Dacey v. Town of Barnstable, No. 00-53 (Barnstable Super. Ct. Oct. 23, 2000) (invalidating portion of ordinance that required developers to pay into housing trust fund to obtain right to build as overstepping municipal home rule powers)).

<sup>272</sup> See Salsich, *supra* note 122, at 467–68.

<sup>273</sup> *Id.*

is to build and maintain affordable housing.<sup>274</sup> The covenants would run with the land and be the joint liability of the seller and buyer.<sup>275</sup>

Local communities also might experiment with a split-rate tax system.<sup>276</sup> Under this approach, land and improvements on land (e.g., houses) are separated for tax purposes, with the land taxed intensively and the improvements taxed lightly.<sup>277</sup> Present tax systems assess land values according to their current, as opposed to their potential, use.<sup>278</sup> As a result, the cost of holding land remains low while the potential payoff for holding on to vacant land remains high; this causes many smart investors to keep developable land off the market, thus diminishing the supply and increasing the cost of available land.<sup>279</sup>

Small lots also are assessed at extremely low values because they are considered too small for development under municipalities' strict zoning laws.<sup>280</sup> Massachusetts might encourage local governments to amend their zoning and tax laws to create more readily available, developable land by counting affordable units created as a result of such actions towards their housing thresholds.<sup>281</sup>

Finally, State government must expand its conception of private sector actors beyond that of adversarial developers who flout local authorities and evade their zoning laws.<sup>282</sup> Massachusetts might look to its neighbor to the north for an example of how a more collaborative role may come about.<sup>283</sup> In Grafton and Coos Counties, New Hampshire, local banks participate in an affordable housing plan where citizens who have taken home-buying workshops receive a

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<sup>274</sup> *Id.* at 468. In one California subdivision alone, it was estimated that homes selling at an average price of \$400,000 with a 0.5% endowment fee attached would generate \$2.4 million for affordable housing over a sixty-year period. *Id.* The author of the proposal argues that, as long as the housing market is reasonably strong, the fee will not affect the marketability of the land but instead will be discounted entirely. *Id.* (citing F. Scott Jackson, *Affordable Housing Endowments*, 18 AM. C. REAL EST. LAW. 15 (1999)).

<sup>275</sup> Salsich, *supra* note 122, at 468.

<sup>276</sup> EUCHNER & FRIEZE, *supra* note 6, at 13–14.

<sup>277</sup> *Id.* at 14.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> See MASS. GEN. LAWS ch. 40B, § 20 (2004).

<sup>282</sup> See *id.* § 21. While municipalities have proven more willing to work with developers under LIP in recent years, this cooperation often has transpired under the imminent threat of the standard 40B approach and has not been a relationship that the municipalities have actively sought. See Krefetz, *supra* note 6, at 412.

<sup>283</sup> See MECK ET AL., *supra* note 123, at 179.

credit of up to \$500 on their mortgage at closing.<sup>284</sup> This rewards homebuyers with both education and perhaps half of one month's mortgage payment, while generating positive publicity and additional customers for participating banks.<sup>285</sup>

Massachusetts might seize on this initiative by encouraging banks and other private actors in the development industry to lend more positive, noncontroversial assistance to the development of affordable units.<sup>286</sup> For example, the DHCD might create a similar affordable housing education program and encourage industry to reward citizens who participate.<sup>287</sup> In addition to mortgage lenders, the Commonwealth should call on building material suppliers and perhaps even individual builders and surveyors to offer small yet significant discounts through its program.<sup>288</sup> This program would create a role for the private sector that defies the conventional builder-ramming-project-down-municipality's-throat stereotype while also helping to create better homebuyers and, presumably, better homes.<sup>289</sup> By creating this new role, Massachusetts might in turn foster better relations

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<sup>284</sup> *Id.* at 180. These banks participate in Affordable Housing, Education and Development, Inc. (AHEAD), a nonprofit housing organization that provides affordable housing services, including an education program that instructs low- to moderate-income residents on the dos and don'ts of purchasing a home. *Id.* at 275.

<sup>285</sup> *See id.* at 180.

<sup>286</sup> *See id.* The private sector's current role is limited to proposing affordable developments that are perceived as flouting home rule, local planning, and the zoning laws upon which all community residents have come to rely. *See generally* Collins, *supra* note 4, at 1. While these proposals may increase the state's supply of affordable housing, their local impact is sure to be controversial. *See generally id.* By increasing the private sector's role to one of assisting low- to moderate-income citizens in the home-buying process in ways that do not conflict with home rule, there will be less controversy and more opportunities for all those involved in the affordable housing debate to see the private sector as working with, and not just against, local communities. *See* MECK ET AL., *supra* note 123, at 180.

<sup>287</sup> AHEAD instructs participants on such matters as applying for a mortgage, selecting a home, negotiating a purchase price, closing, credit and budget management, and home maintenance and rehabilitation planning. MECK ET AL., *supra* note 123, at 180, 182. Through 2002, 350 people had participated in the seminar programs. *Id.*

<sup>288</sup> *See id.* Again, these private actors may be happy to participate because of the publicity and additional customers that their generosity could bring them. In the long run, their participation might also create repeat customers who remain grateful for their willingness to assist them as new homebuyers. *See id.*

<sup>289</sup> *See id.* They will be better homebuyers by being smarter homebuyers. They will understand their role and rights in the home-buying process as well as learn how best to spend their limited resources on the acquisition of sound, quality homes. *See id.* This program might also help fuel the Bay State economy by creating additional demand for building products and building and financial services. *See* CARMAN ET AL., *supra* note 12, at 23; MECK ET AL., *supra* note 123, at 129.

between developers and the municipal leaders who will have seen their constituents aided by such efforts.<sup>290</sup>

The Greater Boston Chamber of Commerce has proposed that companies assist employees in obtaining housing by providing matching contributions to housing funds or loaning money for down payments and rent deposits.<sup>291</sup> Massachusetts should lend its support to these programs through tax credits to participating companies.<sup>292</sup> By helping businesses attract employees and encourage real estate purchases, Massachusetts also may see a positive return on its investment through a stronger economy and increased tax revenues.<sup>293</sup>

Like Oregon, Massachusetts needs to change the statewide perception of affordable housing from a public charity to a market inefficiency that must be corrected for everyone's benefit.<sup>294</sup> By adding flexible options and helping communities assume the fiscal burdens that such development can bring, the Commonwealth might also change municipal perceptions of Chapter 40B from a necessary evil to a positive opportunity for well-planned new growth.<sup>295</sup> It will be only with these changes in focus that state and local government and the private sector may effectively join forces to work toward their desired goal of creating sufficient residential units to meet the pressing demand.<sup>296</sup>

### C. Leadership

For democracy means much more than popular government and majority rule, much more than a system of politi-

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<sup>290</sup> See MECK ET AL., *supra* note 123, at 129. See generally Collins, *supra* note 4, at 1.

<sup>291</sup> Diane E. Lewis, *Chamber Aims to Help Workers with Housing*, BOSTON GLOBE, Feb. 15, 2002, at F3.

<sup>292</sup> Reich, *supra* note 199, at point V. To ensure these tax benefits are not abused, the program should cater to low- and middle-income workers and families purchasing their primary residences. See *id.*

<sup>293</sup> See *id.* In the 1990s, some 220,000 Bay State residents left the state, due in part to high housing costs. MASSINC, *supra* note 151, at 99–100 (1998). David Drinkwater, president of the Massachusetts Association of Realtors, was quoted in the *Boston Herald* as stating that in 118 of the 127 communities in the Greater Boston area, median family income was insufficient to purchase a median-priced house. Jim Matte, *Housing Affordability a Hot Topic*, BOSTON HERALD, May 10, 2002, at 44. Drinkwater went on to remark that his “fear is that because we have such a shortage of housing stock, it could start choking the economic engine here in the commonwealth,” because although “one of the things that Massachusetts is known for is its skilled labor base,” if the current housing climate continues “they may go elsewhere and so will some of the companies.” *Id.*

<sup>294</sup> See MECK ET AL., *supra* note 123, at 190; Russell, *supra* note 106, at 479–80.

<sup>295</sup> See MECK ET AL., *supra* note 123, at 190; Russell, *supra* note 106, at 479–80.

<sup>296</sup> See MECK ET AL., *supra* note 123, at 190; Russell, *supra* note 106, at 479–80.

cal techniques to flatter or deceive powerful blocks of voters. A democracy that has . . . no monument of individual conscience in a sea of popular rule . . . is not worthy to bear the name. The true democracy, living and growing and inspiring, puts its faith in the people . . . that [they will] elect men who will exercise their conscientious judgment—faith that the people will not condemn those whose devotion to principle leads them to unpopular courses, but will reward courage, respect honor and ultimately recognize right.

....  
 To be courageous . . . requires no exceptional qualifications, no magic formula, no special combination of time, place and circumstance. It is an opportunity that sooner or later is presented to us all. . . . The stories of past courage can define that ingredient . . . . But they cannot supply courage itself. For this, each man must look into his own soul.<sup>297</sup>

Then-U.S. Senator John F. Kennedy penned these words in *Profiles in Courage*, a historical reflection on fellow senators who, in the face of daunting public opposition, sacrificed their own political ambitions for causes they considered greater than themselves.<sup>298</sup> As Kennedy noted, the call for courage is not confined to select periods in time but goes out to “every officeholder in our land, however humble or mighty, and to whomever he may be responsible.”<sup>299</sup>

That Massachusetts is facing a housing crisis is a fact established by the number of businesses and residents that flee the state for greater profits and cheaper living, and the number of residents who stay and are forced to spend much more income on housing than they really can afford.<sup>300</sup> That 40B and its ten-percent threshold have failed to solve this crisis is evidenced by the growing number of individuals and families who find themselves without adequate housing.<sup>301</sup> With a re-

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<sup>297</sup> JOHN F. KENNEDY, *PROFILES IN COURAGE* 253–54, 255 (Black Dog & Leventhal 1998) (1955).

<sup>298</sup> *Id.* Examples of these Senators include John Quincy Adams, who effectively ceded his Senate seat by placing nation over party and refusing to pacify Great Britain in the events leading to the War of 1812; Daniel Webster, Sam Houston, and Thomas Hart Benton, each of whom fought for compromise and to preserve the Union in the tumultuous 1850s; and Edmund Gibson Ross, whose single, much-reviled vote saved President Andrew Johnson from an impeachment conviction. *Id.* at 56, 58, 83–84, 108, 118–19, 152.

<sup>299</sup> *Id.* at 254–55.

<sup>300</sup> See CARMAN ET AL., *supra* note 12, at 7.

<sup>301</sup> See EUCHNER & FRIEZE, *supra* note 6, at 3.

cent national poll finding that citizens' concerns over affordable housing rose to an unprecedented third place on their list of voting concerns for the 2004 election season, the public call for government to take thoughtful, decisive action has never been more resounding.<sup>302</sup>

This Note is not so simplistic as to argue that the affordable housing debate provides easy solutions that will satisfy the entire electorate, for lower housing prices are usually good news to prospective buyers but bad news to sellers. Those residents who have worked hard to live in nice, safe communities have valid reasons to preserve their quality of life, and this Note does not imply that their values must be sacrificed for the greater good.<sup>303</sup> It does argue, however, that all sides of the debate deserve leaders ready to discuss the proper balance of priorities and to pass a better law that reflects and compels the agreed-upon balance. This will require elected leaders to summon their own courage in the face of constituent discord. Like Kennedy remarked, the call for courage also goes out for those to whom elected leaders are accountable. As voters, may we support our leaders and "reward [their] courage, respect [their] honor and ultimately recognize right."<sup>304</sup>

#### CONCLUSION

The chapter 40B road that Massachusetts has traveled has been a more than bumpy one. Credit must be given to the law for bringing the housing debate from think tanks to town halls and for compelling municipalities to consider affordable projects and their respective needs and impacts.

With Massachusetts housing recently named the least affordable in the country, however, there may be no more urgent a time for the State legislature to pass much-needed reform. The Commonwealth has suffered through thirty-five years of 40B, a statute that permits developers to override most local zoning laws, regardless of the negative impacts that projects may have on their surrounding communities. Chapter 40B

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<sup>302</sup> See Press Release, National Association of Realtors, *New Study Suggests Affordable Housing Will Be Election Issue* (May 24, 2004), <http://www.realtor.org/PublicAffairsWeb.nsf/Pages/04AffordableHousingStudy>. This April 2004 poll indicated that 81% of voters wanted to see their government place a higher priority on affordable housing for renters and homeowners alike. *Id.*

<sup>303</sup> These residents may still prefer a reformed 40B, however—particularly those who live in communities with less than 10% of affordable housing. Under a new 40B, they could participate in formulating a municipal housing plan that reflects their concerns instead of crossing their fingers in the hope that a large development is not placed next door or across the street. See Witten, *supra* note 6, at 542.

<sup>304</sup> See KENNEDY, *supra* note 297, at 254.

has not created sufficient affordable housing stocks, and it has often-times transferred the decisionmaking power of how a community will be shaped from local residents to enterprising builders.

The people of Massachusetts deserve a better law that empowers them to collectively create housing and at the same time preserve the character of their neighborhoods. Most citizens cannot take such steps because they lack sufficient direction and support from state officials to solve this resounding statewide problem. The duty thus falls to our Beacon Hill leaders to ensure the future growth and prosperity of Massachusetts and its people. This is their opportunity to be courageous, and it is this author's hope that their ultimate decision reflects just such a courage that befits their esteemed offices and this Commonwealth.