

Overcoming Restrictive Zoning for Affordable Housing in Five States: Observations for Massachusetts

Rachel G. Bratt
Department of Urban and Environmental Policy and Planning
Tufts University
Medford, Massachusetts 02155
617-627-3394
rachel.bratt@tufts.edu

With assistance from Abigail Vladeck

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I have done my best to avoid errors of omission and commission. However, in work like this, there can be misunderstandings and misinterpretations. I apologize for any such shortcomings and I accept responsibility for whatever failings are contained in this report. I very much hope that the work will prove useful.

Executive Summary

Chapter 1: Introduction

- 1) One of the key limits to affordable housing development is zoning and other land use restrictions that discourage the development of smaller or moderately sized market rate housing, thereby limiting overall affordability for lower income households. Often called “exclusionary zoning,” these practices greatly reduce the likelihood that households with a wide range of incomes will be able to live in certain locales, thereby contributing to social and racial segregation. The result is that non-white and lower income households are often disadvantaged in seeking desirable employment and educational opportunities.
- 2) Concerns about restrictive land use patterns have been articulated for at least four decades by government, academics, and professionals.
- 3) This study is aimed at better understanding the experiences in Massachusetts and other states that have programs targeted at overcoming the negative impacts associated with exclusionary zoning. A number of states have attempted to deal with the reality that many cities and towns across the country do not have any areas zoned for multifamily housing, or for homes that can be built on small lots. Many cities and towns in Massachusetts have zoning ordinances that restrict the construction of multifamily housing and single family homes on small lots.
- 4) In short, what can we learn about how five states have attempted to develop more affordable housing and a more balanced distribution of such housing among cities, suburbs and rural areas by intervening in local land use practices?
- 5) The point of reference for this inquiry is the Massachusetts Chapter 40B statute, which is aimed at encouraging the construction of housing units affordable to lower income people into areas where such housing was not being built (e.g., affluent suburbs).
- 6) This inquiry was launched with the hope that states both with statutes with goals similar to 40B and states without such laws would be able to reflect on the comparative strengths and weaknesses of the various approaches.

Key Questions

- 1) The central question is: What have been the experiences in Massachusetts and other states that have programs with similar goals to Chapter 40B-- to develop more affordable housing and a more balanced distribution of such housing among cities, suburbs and rural areas?
- 2) In addition, this study poses the following set of questions for each state:
 - What types of administrative/regulatory changes in the implementation of the program have occurred and how is the statute viewed by key stakeholders
 - How much affordable housing has been produced per year since the statute became operational?
 - What type of affordable housing has been produced (e.g., rental, homeownership, elderly, special needs)? Does the state monitor production activity under the statute through a state-wide database
 - Where has this housing been produced? To what extent have locales that had little or no affordable housing added to their stock?

- If the state assigns affordable production goals to municipalities, to what extent is compliance being attained?
 - Are there demographic differences between municipalities that have been producing affordable housing (in terms of race, income, and population density) and those that have not? Do demographic differences exist between municipalities that have attained production goals (in states where they exist) and those that have not?
 - To what extent was the overall amount of affordable housing produced correlated with demographic characteristics? Is race, income, or population density correlated with the amount of affordable housing produced?
 - What can be learned from the various initiatives that might assist Massachusetts, as well as other states in creating more optimum programs?
- 3) Our assumption was that production patterns in municipalities with higher percentages of white residents, higher incomes, and lower densities (in comparison to municipalities that do have production, or with fewer units) would be indicative of the program making inroads on exclusionary land use patterns. However, in an attempt to develop relatively simple ways of measuring exclusivity, our analyses may yield some ambiguous findings.

Selection of States for Study

- 1) To select the programs for study, we sought initiatives that would provide important contrasts with the Massachusetts approach. We determined the major types of strategies aimed at overriding local zoning and then developed a set of criteria for selecting the four states to be studied.
- 2) The major types of anti-exclusionary zoning strategies were sorted into these groups: general city/town goal with state zoning override; mandatory inclusionary zoning; fair share mandate; and mandated housing element as part of planning requirement
- 3) The selected states were chosen purposefully, with each providing information and examples of purportedly exemplary procedures and interventions. The following criteria were used for selecting the four states for study.
 - The group of states selected should, taken as a whole, offer a range of interventions.
 - The statute must differ significantly from Chapter 40B.
 - The statute must have a significant “track record,” defined as being operational for at least ten years.
 - Selected key informants, and the available literature, must cite the state as being an exemplary model of overcoming exclusionary zoning.
- 4) The state programs in Rhode Island, New Jersey and California were selected, along with the county-wide program in Montgomery County, Maryland. Rhode Island has created a program similar to Massachusetts Chapter 40B, but with some important differences. Montgomery County, Maryland, New Jersey and California were also selected, in large part because they are widely viewed as the pre-eminent examples of inclusionary zoning, fair share mandates, and housing elements as part of a planning requirement, respectively.

Methods

- 1) A qualitative and quantitative research design was followed. Differences in state data collection methods made it difficult to fully answer some of the research questions. In addition, California does not have a centralized method of recording affordable housing data across the state. For Rhode Island, Montgomery County, Maryland, and New Jersey, data was obtained from the relevant state agency in charge of that task, as such data was available (ideally, from the start of the program), up to the period of the study (about 2008). In general, there were three or four sources of data for each case study. Various descriptive and correlation analyses were performed. (See Appendices II for additional details on the qualitative and quantitative information that was collected for each case study, to the extent that it was available.)
- 2) The qualitative part of the study involved reviewing available literature and interviewing key informants. This mixed-methods approach enabled us to present a full picture of the context in which the programs developed, how they changed over time, and how key informants viewed the various strengths and weaknesses of the programs operating in their state.
- 3) The term “affordable housing” is used somewhat differently by each case study locale. Despite the variations, we use the terms, “affordable housing,” “moderate income housing,” and “low-moderate income housing,” as they are used in each of the states under study. No effort was made to standardize the definitions or to count as affordable units targeted to the same income level households, across all states. As a result, housing that is classified as affordable in one state, might not meet that threshold in another.
- 4) Two measures were used in the analysis. First, the Wilcoxon Rank-Sum test, which assesses whether or not differences between two groups of data are statistically significant, was used to measure whether or not there were statistically significant differences between municipalities with affordable housing and those without any. Second, the Spearman correlation was used to measure whether or not there is a correlation between demographic characteristics and the amount of affordable housing produced.
- 5) In presenting correlations, it is critical to keep in mind that these analyses do not reveal anything about causality. Therefore, no finding in this report may be interpreted to say, for example, that income levels, racial characteristics, or density of municipalities are the *cause* of either the use or lack of use of any given program. Correlation findings only demonstrate whether a given variable is related to another variable. This caveat is repeated a number of times throughout this report.
- 6) Census data is based on 2000 information, whereas production data goes through the most recent date for which such information was available, late in the decade of the 2000s. We also acknowledge that 2010 census data, not available when the study was carried out, might reveal somewhat different municipal-level characteristics.
- 7) Each of the states included in this analysis presented a unique set of challenges, in terms of data analysis.

Overall Structure of the Report

- 1) This study is aimed at providing useful insights for Massachusetts as it continues to address exclusionary land use practices and for other states interested in better understanding the role that they can play in creating more opportunities for diverse populations to find decent, affordable homes throughout their entire jurisdiction.
- 2) Each of the five case studies is presented in a separate chapter. The final chapter presents cross-cutting themes and recommendations.

Chapter 2: Massachusetts

Overview and Background

- 1) Chapter 40B, Section 20, of the General Laws of Massachusetts, was enacted in 1969 as a mechanism to address zoning barriers that made it difficult or impossible to build subsidized housing in many municipalities. In an effort to counter restrictive local land use ordinances that limited the production of single family homes on small lots and multifamily buildings, Chapter 40B created tools to make it easier to develop subsidized housing, especially in municipalities with a limited supply (less than 10% of year-round housing stock).
- 2) The statute authorizes a special approval process (the comprehensive permit process) that allows local boards of appeal to waive zoning and other land use restrictions if needed to make subsidized developments (including mixed income projects) feasible.
- 3) Under Chapter 40B, a for-profit or nonprofit developer, or a public agency can propose a development that may not conform to existing land use regulations, as long as at least 20-25% of the units are reserved for low and moderate income households (incomes of up to 80% of area median income-AMI) for at least 30 years at an affordable rent or sale price, using a state-approved subsidy program.
- 4) The developer applies for a comprehensive permit to the local Zoning Board of Appeals. The application must specify any waivers of zoning or land use regulations requested (e.g., to build housing at higher densities than those permitted under the local zoning law and/or to develop multifamily housing in a single family zone).
- 5) In municipalities with a subsidized housing stock below 10% of their year-round housing stock (or certain alternative thresholds), developers can appeal an adverse ZBA comprehensive permit decision (denial or the imposition of uneconomic conditions) to the state-created Housing Appeals Committee (HAC) and ask it to overturn or modify the local decision so that the development may proceed.
- 6) Such appeals may be made unless any one of six conditions is met. If none are met, and as long as the housing complies with various health and environmental regulations and does not pose serious health, safety, design, environmental or open space concerns that cannot be mitigated, the HAC has the right to overturn or modify the local decision and order the granting of a comprehensive permit. (In the case of appealed conditions, the HAC also must find that the conditions would make a project uneconomic.)
- 7) All developments built using a comprehensive permit under Chapter 40B must use a Department of Housing and Community Development (DHCD)-approved subsidy program and designate at least 25% of the units as affordable, meaning that they are

targeted to households earning 80% or less of AMI. Alternatively, 20% of the units may be targeted for households earning up to 50% of AMI.

- 8) All units built in subsidized rental developments count toward the municipality's 10% affordable housing goal, whether built with or without a comprehensive permit, as long as at least 20-25% of the units are affordable. In homeownership developments, only those units that are actually affordable are so counted. All affordability restrictions must last for at least 30 years (although most municipalities require affordability in perpetuity).
- 9) The vast majority of comprehensive permit applications is negotiated at the local level and eventually receives approval from the local ZBA. The majority of cases appealed to the HAC are resolved prior to a formal decision by the HAC. For those proposals that have been decided by the HAC, "reasonable" projects generally have been approved.

Recent Regulatory Changes

- 1) Over the years, there have been dozens of regulatory changes to the 40B program.
- 2) Many changes have been instituted in response to local concerns. Two of the most important modifications include: (a) a municipality that has not met the 10% goal has the ability to reject a comprehensive permit application, without the developer having recourse to the HAC, if it has been making a specified level progress toward meeting the affordable housing goal; and (b) a municipality that has been certified by DHCD as being in compliance with its housing production plan can become appeal-proof for a year or two years, depending on the level of production.
- 3) Other modifications have attempted to address various criticisms of the statute. Nevertheless, opponents have argued that abuses in the program have allowed developers to reap excessive profits, that the program is not based on consistency with planning principles, and that the ends don't justify the means.

Chapter 40B Survives Repeal Initiative

- 1) Opponents to Chapter 40B have made various efforts to weaken or repeal the statute. Toward the end of the 2000s, a new effort to repeal 40B emerged, using the slogan: "Affordable Housing Now: Support REAL Affordable Housing—Vote Yes to Repeal 40B."
- 2) Arguments supporting the repeal were countered by a vigorous and well-organized anti-repeal coalition, which called itself the Campaign to Protect *the* Affordable Housing Law, the campaign urged voters to Vote NO on 2 (the ballot initiative) to Protect *the* Affordable Housing Law for Seniors and Working Families. There are several reasons why supporters of Chapter 40B were successful.
- 3) Voters defeated the effort to repeal Chapter 40B with a 58% majority vote. However, opposition continues, with the most recent effort to weaken Chapter 40B occurring in late 2011.

Zoning and Planning Context

- 1) Massachusetts has 351 municipalities, with each having jurisdiction over its zoning.
- 2) Town meeting is the predominant form of local government. Municipalities have Home Rule (adopted in 1966), which gives the residents of every city and town the right of self-government in local matters. There are, however, limits to these powers as set forth in

state laws. Chapter 40B is an example of the state setting a standard of performance in an area of public concern that over-shadows local control.

- 3) There is a long history of political will, leadership, pro affordable housing legislation, many supportive private developers, and a vigorous advocacy community around housing issues.
- 4) Massachusetts is among the one-half of the states in the U.S. with a weak planning framework. Specifically, for example, the state does not mandate regional planning; enforce the requirement for local comprehensive planning (with a housing element); mandate that municipalities adopt growth management plans; or mandate that a certain amount of land in each jurisdiction be zoned for multifamily housing/high density single family; or require that local plans and zoning be consistent and there has been little (but growing) recognition of the importance of such consistency;
- 5) The various limitations and problems with Massachusetts' approach to planning and land use have been widely acknowledged. A pending legislative initiative, the Comprehensive Land Use Reform and Partnership Act, would address a number of the most problematic aspects of Massachusetts' land use statutes, including the promotion of master planning as a basis for consistent zoning and permitting.

Housing Context

- 1) Massachusetts has long been a leader in affordable housing development. It has created a number of innovative state-based programs and has been a pioneer in implementing many federal programs.
- 2) Since deep federal subsidies are no longer available, the current context of affordable housing development in Massachusetts, and elsewhere across the country, involves the layering of a number of public and private subsidy and financing sources.
- 3) It also has become more difficult to target units to the lowest income households, since supporting such households requires high levels of additional support, from a large number of funders and subsidy sources.
- 4) With the demise of deep federal subsidies and the rise in private sponsorship of affordable housing, market factors have played an ever increasing role in development.
- 5) Despite the strong public support for affordable housing in Massachusetts, there is very little direct state assistance for the production or acquisition of affordable homeownership units.

Sources of Data and Approach to Data Analysis

- 1) The Citizens' Housing and Planning Association (CHAPA) provided the data on housing production in each municipality using the Chapter 40B comprehensive permit process. Affordable housing in municipalities that have not attained the 10% goal is almost always produced with comprehensive permits. The CHAPA database includes information on all affordable housing in the Subsidized Housing Inventory developed without using a comprehensive permit. This study analyzed the subset of projects that used comprehensive permits, most of which are outside the largest cities.
- 2) The state's Subsidized Housing Inventory (SHI), which is maintained by the state DHCD, is the official count of each municipality's affordable housing inventory for the purpose of calculating whether it has reached the 10% goal. It includes all units developed under an approved subsidy program. Units do not have to have been developed using a

comprehensive permit to be included (e.g., state and federal public housing and developments built under other state and federal subsidy programs). SHI counts sometimes lag behind actual production because many communities only submit updates when requested by DHCD (once every two years), rather than as soon as units are eligible to be counted.

- 3) This analysis assumes that all affordable units tracked in the comprehensive permit database continue to be affordable.

Affordable Housing Production Using Comprehensive Permits

- 1) Comprehensive permits have been used to produce nearly 58,000 housing units. Of these, 70% are rental and 30% are for homeownership. Over one third (36%) of these units are targeted to special needs populations, including the elderly and disabled.
- 2) With the exception of the age-restricted units, over 90% of the special needs units are affordable to households at or below 80% of AMI. Overall, 53% of the units are affordable and most (84%) of these are rental.
- 3) The more white residents, the fewer elderly housing units the municipality built using a comprehensive permit.
- 4) Homeownership opportunities (primarily developed since the late 1990s) are associated with higher-income and higher growth areas, while rental opportunities (developed between 1970 and 2010) are associated with denser, less-white, slower-growth areas (i.e., cities and built-out suburbs).
- 5) 30,703 affordable units were built through the Chapter 40B comprehensive permit process. This production came both from the 53 municipalities that had reached the 10% goal as of April 1, 2010 (6,902 units) as well as from the 298 municipalities that had not (23,801 units).
- 6) In 1970 there were 1,836,198 year-round housing units in Massachusetts and by 2010 this number had grown to 2,692,186 units. The 30,703 affordable (income restricted) units created during that period using comprehensive permits accounted for 3.6% of the increase; all production through the comprehensive permit process (whether affordable or not) accounted for 6.8% of the increase.
- 7) Between 1972 and June 2011, the number of units in the SHI that count toward each municipalities' 10% goal rose from about 84,054 to about 247,042 -- a net increase of about 162,188 units. CHAPA estimates that the June 2011 SHI count includes about 15,750 group home beds and homeowner rehabilitation loan units. Excluding those units, the net increase in SHI units between 1972 and 2001 was about 146,438 units or just over 17% of the increase in the state's total number of year round housing units.
- 8) DHCD does not publish the number of affordable units. However, CHAPA has estimated, that affordable SHI units (reserved for households with incomes at 80% or less of AMI) rose by about 117,150 units between 1972 and 2011 (from about 84,054 to about 201,204 units). The 117,150 affordable units are equal to 13.7% of the net increase to the state's year-round housing unit count between 1970 and 2010.
- 9) The 30,703 affordable units were produced with comprehensive permits; this accounted for 26% of the total growth in the number of affordable units produced since 1972.
- 10) There was steady growth in the percent of the state's overall housing stock that is included in the SHI count, from 4.6% in 1972 to 9.2% in 2011.

- 11) For all municipalities, affordable housing produced through the Chapter 40B comprehensive permit process is more often produced in municipalities with greater densities and higher median incomes, while production is less often associated with municipalities with larger white populations. The growth in the municipality, as measured by the change in the size of the housing stock, is not significantly correlated with housing production using the 40B comprehensive permit process. The 35 municipalities with no affordable units in the SHI as of June 2011 were small and rural.
- 12) The percent of the housing stock that is affordable is positively correlated with comprehensive permit activity. This is a further indicator that 40B is a critical strategy in the state's overall affordable housing production efforts.
- 13) In view of the very low median density of municipalities that have not used comprehensive permits, the places that have used the Chapter 40B comprehensive permit process are more metropolitan (i.e., urban and suburban) than places with no development using a comprehensive permit; the latter tend to be rural or exurban municipalities. While our general assumption is that development in higher density locales is indicative of a program not being successful at breaking down exclusionary zoning barriers, in this case we are simply not sure, since the relatively higher density of municipalities where comprehensive permits have been used may mean that it is being used in exactly the kinds of locales to which the program is targeted.
- 14) Thus, while our level of analysis is not able to offer definitive conclusions, these findings suggest that the availability of the comprehensive permit process may be encouraging development in relatively denser (more suburban than rural) locales. Similarly, the relatively higher white populations in places where Chapter 40B has not been used may also be indicative of more rural, as opposed to suburban municipalities.
- 15) A total of 316 municipalities have at least some affordable housing, as recorded in the state's SHI. Over three quarters of these municipalities and 70% of all municipalities in Massachusetts, have produced affordable housing using the Chapter 40B comprehensive permit process.
- 16) Among the 316 municipalities with some affordable housing, where a greater share of the affordable housing was built using comprehensive permits, there are more white residents, higher median incomes, and they grew at a faster rate than municipalities that have lower percentages of affordable housing built with comprehensive permits. This provides a compelling piece of evidence that Chapter 40B is being used in a wide array of municipalities to produce affordable housing.

Progress toward 10% Goal

- 1) While the Chapter 40B comprehensive permit process is only partially responsible for municipalities approaching or attaining the 10% goal, it likely played some role for all but the few municipalities that had attained the goal before the statute went into effect.
- 2) In late 2010, based on year-round housing stock figures from the 2000 census, the number of municipalities that exceeded the 10% affordable housing goal had risen to 53 municipalities. Subsequently, with the release of 2010 census data which revealed an increase in the number of year-round housing units, the number of municipalities that exceeded the 10% goal declined to 39.
- 3) Although there was a net reduction in 14 municipalities at or above the 10% goal using the higher overall 2010 housing stock figures, the actual number of affordable housing

units recorded in each of these municipalities, whether above or below 10%, either did not change or went up slightly.

- 4) The number of municipalities that were at least half way to meeting the 10% goal stayed about the same between mid-2010 and the beginning of 2011, based on either the 2000 and 2010 housing stock census figures: 177 (50%) compared with 171 (49%), respectively.
- 5) There has been steady, albeit slow, movement of cities and towns adding affordable housing units and making strides toward this goal. Over the nearly four decades between 1972 and 2011, 35 additional municipalities crossed over to the 10% or above level. In addition, a declining number of municipalities had no units listed in the state's SHI. While 55% had no such housing in 1972, just 10% of municipalities were without any subsidized units as of 2011. In 1972, 96% of municipalities were less than half-way to reaching the 10% goal; as of 2011, this was true for only about one-half of the state's municipalities. Moreover, 22% were at 8% or better, compared with only 2% in 1972.
- 6) Another way of exploring the progress being made toward the 10% goal is by examining the extent to which the SHI is keeping pace with the overall increase in the stock of year-round housing units. Between 2000 and 2010 there was a 6.5% in the number of these units. However, the number of units listed as part of the SHI grew at about double that pace.
- 7) As of late 2010, 70% of Massachusetts' municipalities had developed housing through the Chapter 40B comprehensive permit process.
- 8) Among the municipalities that have attained the 10% goal, Concord, Lincoln, and Lexington, are in the top 15 most affluent municipalities in the state, located in the suburbs of Boston. This provides an important bit of evidence that affordable production is feasible even in some of the most exclusive areas.
- 9) Municipalities that had attained the 10% goal as of April 1, 2010 are denser, have smaller white populations and lower incomes than those that did not. The former municipalities also grew at a significantly slower rate between 1970 and 2000, suggesting that these are the more built out cities and towns and inner-ring suburbs. Not surprisingly, municipalities that attained the 10% goal exhibit more overall 40B activity than municipalities that had not, as demonstrated by the higher median number of comprehensive permits issued and the higher median number of units built with comprehensive permits.
- 10) Thus, our data suggest that many of the locales that have at least 10% of their housing stocks as affordable are the large cities, which have larger low-income populations. In contrast, municipalities that are working to attain the 10% goal and are using the 40B comprehensive permit process, tend to be more affluent.
- 11) There was more affordable housing production overall in municipalities that had attained the 10% threshold than those that had not. Consistent with this finding, the former municipalities also had more comprehensive permits issued, more housing built under comprehensive permits, and far more affordable units per 10,000 residents than municipalities that had not attained the threshold.
- 12) Making progress toward the 10% goal is positively (and strongly) correlated with population density, and negatively correlated with the percent of the population that is white and the percent change in the housing stock. Thus, municipalities that are denser

and have fewer white residents, and that grew more slowly between 1970 and 2000, are associated with being closer to meeting the 10% affordable housing goal.

- 13) Municipalities that had attained the 10% affordable housing goal as of April 1, 2010 with the use of comprehensive permits, have significantly higher median incomes and higher housing growth rates than municipalities that attained the 10% goal without using comprehensive permits. These are important findings: municipalities where Chapter 40B has been used to the extent that the 10% threshold was attained have characteristics that are associated with more exclusionary locales.

Overall Assessment

- 1) Chapter 40B has produced nearly 58,000 units, with 53% of these units affordable. Chapter 40B also has been enormously successful in stimulating the production of rental housing, with 84% of the affordable stock being for rent, as opposed to homeownership units. Chapter 40B is viewed by key informants across the country, as one of the best strategies for encouraging all municipalities to produce affordable housing.
- 2) The 10% affordable housing goal is easy to understand and there is a certain sense of equity in it being a statewide goal, applicable to all municipalities. It is also relatively easy to administer and the HAC is an effective, non-judicial forum, which allows developers a mechanism to appeal local zoning decisions with minimal cost. The HAC serves as an important threat that often stimulates a negotiated settlement between the developer and the municipality. Changes in Chapter 40B over the years have also created various incentives for municipalities to receive immunity from HAC overrides if they are making progress toward meeting affordable housing goals.
- 3) Opposition to 40B has been strong in some areas of the state, primarily on the part of municipal officials and residents in many suburban towns. In November 2010, voters had the opportunity to repeal Chapter 40B, through a ballot initiative. However, over 58% of the electorate voted to retain the statute and supporters were in the majority in 78% of the state's cities and towns.
- 4) The criticisms of Chapter 40B notwithstanding, opponents have not put forward any serious proposals about how the state's affordable housing agenda could be better served.
- 5) In the absence of such plans, 40B has been effective at countering exclusionary zoning practices and has served as an important stimulus for municipalities to develop affordable housing using other mechanisms. Nearly one-half of Massachusetts' municipalities are at least half-way to meeting the 10% goal.
- 6) Although the attainment of the 10% affordable housing goal can change with each decennial census as the year-round housing unit count is updated, the more than 40 year history of the program demonstrates slow and steady progress by municipalities.
- 7) There is evidence that Chapter 40B has had a positive impact on the supply of affordable housing in more affluent municipalities. On the one hand,
 - Out of all municipalities, those that have more Chapter 40B affordable housing production tend to have higher median incomes and the larger the percent of the housing stock that is affordable;
 - Among only the 316 municipalities that have some affordable housing, the greater the share of the affordable housing that was built using comprehensive permits, the higher the median incomes and the larger the white population. These

municipalities also grew at a faster rate than municipalities with lower percentages of affordable housing built with comprehensive permits.

- The Chapter 40B comprehensive permit process likely played some role in reaching the 10% goal for all but the few municipalities that had attained the goal before the statute went into effect.
- Municipalities that attained the 10% goal had more overall 40B activity than municipalities that did not,
- Municipalities that attained the 10% goal with the use of comprehensive permits, have significantly higher median incomes and higher housing growth rates than municipalities that attained the 10% goal without using comprehensive permits.
- The more white residents, the fewer elderly housing units the municipality built through the 40B process.

On the other hand,

- Out of all municipalities, those that have more affordable housing produced through the Chapter 40B comprehensive permit process are associated with greater density and smaller white populations. This can be partially explained by the fact that municipalities that do not have comprehensive permit projects tend to be the smaller, rural municipalities, which typically have larger white populations.
 - Municipalities that attained the 10% goal are associated with greater density, smaller white populations and lower incomes than those that did not. In part, this is because the municipalities that have reached the 10% goal include all of largest cities in the state which have larger populations of low income households.
 - Municipalities that are closer to meeting the 10% affordable housing goal are associated with greater density, fewer white residents, and growing more slowly between 1970 and 2000. This may be explained by the fact that most of the housing growth over the past many decades has occurred in the eastern half of the state, which has historically been more densely settled than western Massachusetts.
 - Homeownership opportunities developed with a comprehensive permit are associated with higher-income and higher growth areas, while rental opportunities are associated with denser, less-white, slower-growth areas (i.e., cities and more built-out suburbs).
- 8) Chapter 40B has been a major positive force behind the state's affordable housing production record. It is also likely a key reason behind the affordable housing production in numerous cities and towns that would not, on their own, have been likely to host such development. In other words, it has helped to significantly mitigate exclusionary zoning patterns in Massachusetts.

Chapter 3: Rhode Island

Overview and Background

- 1) The Rhode Island Low and Moderate Income Housing Act was enacted in 1991 and directed all municipalities to attain a 10% (of their overall housing stock) low and moderate income housing (LMIH) threshold. In addition, the original act recommended that each municipality include a housing element as part of its comprehensive plan that details how the state-mandate LMIH goals will be attained. All zoning decisions must be in accordance with the plan.
- 2) Nonprofit, for-profit or limited dividend developers were given permission to apply to a city or town for a single comprehensive permit for a rental housing development (in lieu of seeking permits from all the relevant boards separately), as long as at least 20% of the units were subsidized by a federal or state program.
- 3) Developers whose applications were turned down at the municipal level were provided an appeals process at the state level through the State Housing Appeals Board (SHAB), which was given the authority to override a local board's rejection of the comprehensive permit.
- 4) Throughout the Rhode Island case the phrase "low and moderate income housing" (LMIH) is used instead of the phrase used elsewhere in this report, "affordable housing," since this is the statutorily defined term used in Rhode Island.
- 5) A number of important questions are not yet resolved about the Rhode Island statute. What specific types of positive efforts toward attainment of the housing goal would be sufficient to protect a municipality from unwanted development under the statute and immune from a SHAB override? In what ways would a developer's proposal need to diverge from a municipality's comprehensive plan for the proposal to be deemed out of conformance and subject to an override by the SHAB? And, in view of the July 2011 Comprehensive Planning law concerning the need for zoning to be consistent with each municipality's comprehensive plan, will Rhode Island adopt clear guidelines to enforce the statute?

Modifications in the Low and Moderate Income Housing Act and Current Regulations

- 1) The act has been revised five times. In 1999 it was amended to provide an alternative for municipalities to receive an exemption from the 10% threshold, and to be considered immune from developer appeals to the SHAB. An urban city or town must have at least 5,000 occupied year-round rental units; these units must comprise 25% or more of the city or town's year-round housing units and the low and moderate income units must comprise 15% or more of the rental stock.
- 2) The municipality's review board may deny a request for a permit if: the municipality has an approved Affordable Housing Plan and is meeting housing needs, and the proposal is inconsistent with the local plan; or the proposal is not consistent with local needs; or the proposal is not in conformance with the comprehensive plan; or the community has met or has plans to meet the goal of 10% of the year-round units or, in the case of an urban town or city, 15% of the occupied rental housing units as being LMIH; or concerns for the environment and health and safety of current residents have not been adequately addressed.

- 3) If a municipality denies a comprehensive permit and if the SHAB finds that the proposed development is consistent with the municipality's plan, with consideration of the state's overall need for affordable housing, the SHAB may overrule the local decision and grant approval for the development
- 4) There are at least three critical differences between the Rhode Island statute and Massachusetts Chapter 40B. First, SHAB has a legislative mandate to consider conformance of the local decision with the local Affordable Housing Plan, while no such guideline is required of the Massachusetts Housing Appeals Committee. (However, as noted in Chapter 2, while there is no statutory mandate under 40B to consider affordable housing plans, under 40B regulations first adopted in 2002, Massachusetts allows communities that have produced a certain number of units in accordance with their plan to be appeal-proof for one or two years.) Second, in Rhode Island there is no attempt at regulating developer profits under the act. Nevertheless, the profit limits under 40B have been used as a guideline for how much profit a developer should be allowed to earn when demonstrating the kind of densities needed to keep the developer whole in implementing inclusionary zoning, for example. And, third, any aggrieved party, including abutters, may make a formal notice to intervene an approval or an approval with conditions regarding the issuance of a comprehensive permit with the SHAB. Massachusetts' HAC does, however, allow other parties to participate in the hearing on an appeal.

Implementation of the Housing Act

- 1) A number of state agencies have responsibility for implementing various components of the Housing Act.
- 2) The state typically does not reject plans; rather, it asks for revisions and there is an iterative process between the municipality and the state until the plan is approved.
- 3) Between 1991 and 2002 there were only 8 appeals to SHAB. In 2003, 8 additional appeals were heard. Thus, in the first 12 years that the statute was in effect, only 16 cases came before SHAB. From 2004-2011 an additional 20 appeals were filed with the SHAB, for a total of 36 cases, since 1991.
- 4) The appeals process, following a SHAB ruling, is time-consuming and provides for hearings at both the Superior and Supreme Court levels.

Approved Affordable Housing Plan and Protection from Developer Appeal

- 1) There are ongoing questions about whether having an approved housing plan and making "adequate progress" toward meeting a municipality's housing goals will exempt them from a SHAB override. State officials generally felt that only reaching the 10% goal provided immunity, although no case law has established this so far.
- 2) A related major concern is the extent to which a municipality's zoning must be consistent with its comprehensive plan. There has not yet been a case where a developer's proposal that is found to be out of conformance with a municipality's plan, has been overturned by the SHAB. A Superior Court ruling held that there is a clear need for the comprehensive plan to be a realistic document, in terms of the municipality's ability to produce the housing it has proposed, given its current land use regulations. Whether Rhode Island will create clear guidelines to enforce such consistency, however, is not yet known.

Sources of Data and Approach to Data Analysis

- 1) Rhode Island Housing provided a copy of their 2009 database on LMIH for all municipalities in the state, showing LMIH unit totals by municipality. They further provided information going back to the program's first year, in 1991.
- 2) To establish a total production number since the statute went into effect, the research team first subtracted the total number of units in each town in 1991 from the total number in 2009. However, the total number was reduced by the number of beds in group homes.
- 3) The number of LMIH units reflects the net change in units, rather than gross affordable housing production. This almost certainly resulted in an under-counting of actual construction of new LMIH units in many places.
- 4) Since Rhode Island Housing also administers the state's Low Income Housing Tax Credit program, their database includes all developments built under this program, even in municipalities already in compliance with the state affordable housing goal.

LMIH Production under the Act

- 1) When the housing act was passed in 1991, 5 cities or towns (out of 39) had met the 10% goal; one additional town, New Shoreham, has attained this goal.
- 2) As of June 30, 2009, in addition to the 6 municipalities exempt from the comprehensive permit rule because they had attained the 10% LMIH goal, another 5 became exempt (as of 1999) because of the size of their rental/LMIH stock.
- 3) The 10 municipalities in compliance goal as of 2009 (not including New Shoreham) were also the most urban areas. These areas had 75% of the total number of LMIH units in the state, while they occupy only 14% of the land.
- 4) New Shoreham's exceptional record was partly due to a change in how the denominator of the 10% calculation is derived (2004 amendments stipulated that only year-round housing units were to be counted when calculating the basis on which the 10% goal is assessed, thereby eliminating the many vacation units in that town) and because of the town's significant efforts to produce LMIH.
- 5) By mid-2010, 7 additional municipalities (18% of the total cities and towns in Rhode Island, including two municipalities that were exempt from the comprehensive permit rule because of the size of their rental/LMIH stocks) were close to the 10% LMIH goal, with at least 8.0% of their housing stock devoted to LMIH; an additional 11 municipalities (28%) had at least 5.0% LMIH.
- 6) There was a net increase of 5,301 LMIH units in Rhode Island between 1991 and 2009, or about 11% of the increase in total number of housing units during that period.
- 7) The level of production was nearly equal among the 10 municipalities that had not met one of the state's housing goals prior to 2009 and those that had. A total of 2,547 units were produced by the former and 2,754 were produced by the latter. In 19 out of Rhode Island's 39 municipalities, the total LMIH stock comprised less than 5% of total housing units.
- 8) Between 1991 and 2009, only 3 municipalities had no net gain in the number of LMIH housing units.
- 9) The municipalities that have met the state's housing goal are denser, have smaller white populations and lower median incomes, and grew at a slower rate in the 1990s than municipalities that have not met either housing goal. Generally, then, the municipalities

that have complied with the state's LMIH mandate are urban and inner-ring suburban communities, which are typically associated with LMIH production.

- 10) The difference in LMIH production was not statistically significant between municipalities that had attained one of the two housing goals and those that had not, although the median production numbers were much higher for municipalities that had not attained a state-mandated housing goal than for those that did. If the lack of a statistically significant difference is due simply to the small sample size, this may indicate that those areas that have not attained the LMIH goals are moving in the right direction, by at least keeping pace with, if not out-producing, those locales that have a track-record of LMIH production.
- 11) There is a positive correlation between new LMIH units produced and the percent of a municipality's overall housing stock that is LMIH. Thus, a higher net change in the amount of LMIH is associated with more of a municipality's housing stock that is affordable.
- 12) There is a positive correlation between the size of a municipality's white population and its LMIH production per 10,000 residents. This indicates that LMIH production was higher in municipalities where a larger share of the population was white. This finding suggests that the Rhode Island statute is associated with LMIH production in areas that have typically excluded such housing.
- 13) Municipalities with the highest populations and the greatest densities are among the 10 municipalities that have attained the thresholds set forth in the statute. There is a 100% overlap between the 10 densest municipalities, in terms of persons per square mile, and the original 10 municipalities that attained either the 10% goal or the alternative rental housing goal. New Shoreham is an outlier, being among the least dense municipalities in the state.
- 14) Housing for the elderly and for families represents 57% and 39%, respectively, of the LMIH units.
- 15) 52% of all LMIH units are located in the 5 original municipalities that reached the 10% goal. These municipalities contain only 30% of the housing units in the state.
- 16) 76% of all LMIH units are located in the 10 municipalities that were in compliance with the statute prior to 2009. These municipalities contain 60% of the housing units in the state.
- 17) Production by municipalities not in compliance with the statute generally has been slow.

Relationship between Goals Projected in Plans and Actual Production

- 1) Based on housing goals that municipalities had projected in plans submitted between 2005 and 2009, New Shoreham, was the only municipality that attained 100% of its goal; no other municipality attained more than 80% of its goal. Only 4 municipalities (14%) attained more than one-half their goals; 83% of municipalities attained less than 50% of their goals, with 5 municipalities building no LMIH units designated in their plans during that period.
- 2) There is a positive, fairly strong correlation between the extent to which a municipality built the LMIH units it planned for, and the amount of LMIH in the municipality overall.
- 3) The State's Strategic Housing Plan projects the need for some 13,000 new units of LMIH to meet the state goal that each municipality have at least 10% of the stock dedicated to LMIH. However, production levels are not keeping up with the state's target.

Overall Assessment

- 1) Adoption of ordinances implementing municipalities' plans has been slow.
- 2) The statute is playing an important role in educating the population about the importance of affordable housing. (For example, the Building Homes Rhode Island bond bill to support LMIH was approved by all 39 Rhode Island municipalities. Nevertheless, NIMBY issues are still a concern.)
- 3) Several interviewees noted that the Rhode Island statute does not have sharp enough "teeth" to produce the needed LMIH units.
- 4) In terms of the LMIH statute's record in encouraging municipalities that are typically associated with exclusionary land use patterns (lower density with more white and higher median income residents), the picture is mixed.
- 5) On the one hand, the difference in LMIH production was not statistically significant between municipalities that have attained one of the two housing goals and those that have not, although the median production numbers were much higher for municipalities that had not attained a state-mandated housing goal than for those that did. If the lack of statistically significant difference is due simply to the small sample size, this finding may suggest that those areas that have not attained the LMIH goals are moving in the right direction, by at least keeping pace with, if not out-producing, those locales that have a track-record of LMIH production. In addition, since LMIH production was higher in municipalities where a larger share of the population was white, we might be seeing evidence that the Rhode Island statute is encouraging LMIH production in areas that have typically excluded such housing.
- 6) On the other hand, the finding of no significant difference in the amount of LMIH produced between municipalities that have attained one of the two housing goals and those that have not could also mean that municipalities that have not yet attained one of the housing goals have not been more successful in building LMIH housing. In addition, municipalities that have met the state's housing goal are denser, have smaller white populations and lower median incomes, than municipalities that have not met either housing goal. This could be an indication of a continuation of exclusionary patterns. However, similar to Massachusetts, the municipalities that have reached the 10% goal include all of largest cities in the state which have large populations of low income households.

Key Observations for Massachusetts (and others)

Major Similarities between the Rhode Island Statute and Massachusetts 40B

- All municipalities have the same goal to attain a 10% (of their overall housing stock) LMIH threshold.
- Nonprofit, for-profit or limited dividend developers may apply to a city or town for a single comprehensive permit for a rental or owner-occupied housing development (in lieu of seeking permits from all the relevant boards separately), as long as at least 20% of the units are subsidized by a federal or state program.
- Both have statewide appeals entities, the HAC in Massachusetts and the SHAB in Rhode Island. Applications that are denied or granted by the local review board with conditions or requirements that would make the development infeasible, in terms of

either the construction or operation may be brought to the respective committee/board. Each has the authority to override a local board's rejection of the comprehensive permit.

- Under the original statute, a municipality was given immunity from HAC or SHAB appeals if at least 10% of its housing stock was aimed at the targeted below-market population.
- Each state has changed its program, either by statute or through regulatory modifications, which have provided immunity from statewide appeals based on additional ways of reaching compliance.

Massachusetts (and others) May Want to Consider These Lessons from Rhode Island

- Mandatory Community Comprehensive Plans are required and are an important component of Rhode Island's approach to dealing with exclusionary zoning.
- A housing element is included as part of the comprehensive plan to determine if the municipality has either met the 10% threshold or to demonstrate that it is dedicated to meeting this goal. The housing element must detail how the state-mandated LMIH housing goals will be attained and all zoning decisions must be consistent with the plan. Similar to the experiences in California, these first two lessons would seem to be important and highly valuable modifications in Massachusetts's overall approach. However, clear guidelines must be in place so that municipalities understand what, exactly, constitutes compliance with the plan and how progress toward attaining the statewide goal will be measured.
- SHAB has a legislative mandate to consider whether the proposal being discussed is in conformance with the local Affordable Housing Plan, while there is no such requirement imposed on the Massachusetts Housing Appeals Committee.

Chapter 4: Montgomery County, Maryland

Overview and Background

- 1) The MPDU program was created in 1974 and is widely viewed as the first mandatory inclusionary zoning/density bonus program in the U.S.
- 2) The power to plan and zone in Maryland is held by local governments, either counties or municipalities. However, Maryland has relatively few municipalities; zoning is predominantly carried out by the 23 county governments.
- 3) The program requires developments of a certain size to earmark a fixed percentage of the units as affordable to moderate-income households. To compensate developers for any loss in profits, a density bonus is provided.
- 4) To accommodate even lower income groups, the Housing Opportunities Commission (HOC), which is Montgomery County's Housing Authority, was given the right to purchase MPDU units, to be set aside for rental housing.
- 5) The MPDU program is aimed at developing moderately priced housing throughout the growth areas of the County, as well as retaining an inventory of low-income housing.

- 6) The MPDU program is responsible for the creation of some 13,133 units of affordable housing. However, due to time limits on affordability restrictions, the great majority of these units are no longer in the affordable housing stock.

Major Changes in the MPDU Program and Current Requirements

- 1) Several program requirements have been debated and changed throughout the years: the number of affordable units that should be set aside as affordable and the size of the developments that should fall under the statute; the length of time the units must be kept affordable; and whether developers should have the option to “buy-out” of including MPDU units on-site and, instead, donating money for moderate-priced units to be built elsewhere.
- 2) Currently, developments that are served by public water and sewer, and that have 20 or more units, must set aside between 12.5 and 15% of the units as affordable for moderate-income households. This requirement pertains to small lots of even one-half an acre or less.
- 3) At its inception, a long-term affordability restriction for the moderate-income units produced was absent. The earliest developments built under the program only required that units remain affordable for 5 years; after that, re-rental prices were set by the builder. MPDU owners could resell their units at a market sales price. These have been steadily lengthened through the years. At the present time, for-sale units must be kept affordable for a minimum of 30 years and rental units for 99 years, from the date of initial sale or rental.
- 4) Between 1989 and 2003, 19 developments were allowed to opt for a buy-out provision. In-lieu payments failed to produce as many units as would have been required by the MPDU program, without the buy-out provision.
- 5) Currently, buy-out provisions are allowed only under conditions that would make the on-site units unaffordable for MPDU residents or if the inclusion of the MPDU units would be economically infeasible due to environmental constraints.
- 6) In terms of eligibility to purchase or rent a MPDU, targeted households must have incomes of 65% or less of area median income for rental MPDUs, and 70% of median or less in order to purchase a MPDU.

Implementation of the MPDU Program

- 1) MPDU units are generally viewed as high quality and attractive. Although they are not always fully integrated with the overall development, they appear to fit in well.
- 2) Diversity has been enhanced due to the MPDU program.
- 3) The Housing Opportunities Commission, the County’s housing authority (as well as nonprofit housing groups) have been able to purchase over 1,700 MPDU units, contributing to the County’s permanent supply of low-income housing. These units represent about 25% of the latter’s housing stock. Nonprofits currently own some 231 units of housing that were built under the MPDU program.
- 4) One of the key characteristics of the MPDU program is its relative simplicity. However, here, too, day-to-day program requirements are quite complex for builders and program participants.
- 5) Currently, there are virtually no exceptions to the MPDU program, and it has operated without any significant public subsidy.

- 6) As with all inclusionary zoning programs, the MPDU Program is dependent on a robust private housing market. When the economy weakens and private housing development stalls, affordable units are not built.
- 7) The overall MPDU program was never aimed at assisting very low or low-income households. Nevertheless, while the maximum incomes are 65 and 70% of median income, in practice, the program reaches lower income people—households earning in the 55 to 60% of median income range.
- 8) Very low-income households are, however, assisted by the MPDU program since the HOC or other nonprofit organizations have the right to purchase up to 40% of the MPDU units in each development. However, due to insufficient funds, and other considerations, only between one-quarter and one-fifth of the total possible number of units that could have been set-aside in this way are under HOC or nonprofit ownership.

Sources of Data and Approach to Data Analysis

- 1) Housing production data was provided by the Montgomery County Planning Department in two different GIS shapefiles. In view of the overlap between the two databases and the total number of entries in each, we believe this analysis captures somewhere between 65% and 80% of all MPDUs ever built.
- 2) Most of Montgomery County is unincorporated, so simply matching housing production data to municipal demographic information was not an option. We chose to use census-designated places (CDPs) as our unit of demographic analysis. Various assumptions and adjustments had to be made in order to assign each MPDU to a CDP.
- 3) This analysis includes 8,210 MPDU units and 1,711 HOC (former MPDU) units.

MPDU Production

- 1) The major strength of the MPDU program is that it has produced a significant amount of housing —some 13,133 units through 2010. However, only about one-third of the units built under the MPDU program (including units that were subsequently purchased by the HOC) are still under affordability restrictions.
- 2) Placing the record of the MPDU program in the context of overall affordable housing production in the County, inclusionary zoning had accounted for one half of the affordable units produced since 1974.
- 3) In 1980 there were 211,126 housing units in the county and by 2010 this number grew to 376,023 units. Thus, MPDU production accounted for 7.6% of total production.
- 4) As of the end of 2007, a total of 12,520 MPDU units had been produced. Of these, 71% were for-sale units. These are the numbers used in the remainder of the analysis. During 2008-2010, an additional 613 MPDU units were added to the inventory, bringing the total to 13,133 MPDU units produced, since the start of the program.
- 5) In recent years there has been a marked shift toward rental housing production. Through 2007 only 29% of the MPDU housing stock was rental housing, whereas from 2008-2010, this housing represented 62% of MPDU production.
- 6) Although rental units accounted for less than one-third of the total MPDU inventory, they represent 38% of the units still being monitored for compliance under the MPDU program, based on the database used in this analysis.
- 7) Data were available, and included in this analysis, for a far higher percentage of the for-sale units than for the rental units. Also noteworthy is that, based on the data available for

this study, a far higher percentage of rental units built under the MPDU program are still price controlled and therefore affordable under the MPDU program's guidelines in comparison to homeownership units.

- 8) In addition, affordability has been preserved for all 1,711 rental units built under the MPDU program and recorded in the HOC database and which we were able to map and assign a location; 18% of the total number of MPDUs produced are still monitored for affordability within the MPDU program, and nearly 14% have their affordability permanently maintained by the HOC, for a total of 4,005 units or 32%.
- 9) Slightly more than one-half (27) of the 51 CDPs have had MPDUs at some point in time, thus resulting in a fairly low overall median number of MPDU units per locale (10).
- 10) CDPs with no MPDU or HOC units (through the MPDU program) have significantly higher percentages of white residents and residents with significantly higher median household incomes than CDPs that have MPDU units. It also shows that CDPs with no MPDU or HOC units grew more slowly than those with MPDUs. This suggests that MPDUs are more likely to be built in faster-growing areas than in slow-growing areas. Although there is some evidence that the MPDU program has increased diversity, the data indicate correlations of MPDU production in less diverse locales.
- 11) MPDU and HOC units are more often situated in CDPs with lower percentages of white residents, with higher percentages of lower-income households, and with higher rates of growth in the housing sector. These results suggest that when left up to the private sector, and where there is no government influence on where affordable units get built, wealthier locales, with higher percentages of white residents, are less likely to produce affordable units.
- 12) There is little correlation between the median race or income of a CDP and the amount of each type of unit produced there (whether homeownership or rental). However, the production of rental units occurs more often in denser areas. The number of homeownership units is slightly negatively correlated with the percent of the population that is white, indicating that the larger the white population in a CDP, the fewer MPDU homeownership units it generally has. There is a significant, positive correlation between housing growth and homeownership units, indicating that higher CDP growth rates between 1980 and 2000 are associated with more MPDU homeownership units.

Current Issues and Proposed Changes to the MPDU Program

- 1) As with much of the country, new housing construction in 2009 and 2010 was sluggish without much activity in the MPDU program. However, when there was a significant amount of development in the County, the program was used extensively.
- 2) While the MPDU program is not producing many units at the present time, the County's trust fund, the HIF, has become a critical source for financing affordable housing.
- 3) To the extent that the County is seeing any construction at the present time, most activity is in high-rise, high-end development. A key issue pertaining to high-rises relates to the difficulty of MPDU condo owners in high-end developments being able to afford the condo fees, as well as concerns on the part of developers about the cost of setting aside MPDU units in high priced developments.
- 4) DHCA has proposed a rule whereby the price of the MPDU units would not be related to the actual costs of constructing the units. Instead, MPDU sales prices would be based on the carrying costs of the unit, including the condo fees and priced in relation to what a

household earning 70% of AMI could afford. Developers are far from happy with this proposal.

- 5) Other proposed amendments to the MPDU program would remove language from the statute, which clearly indicates that developers are not expected to lose money by including MPDU units in their projects.

Overall Assessment

- 1) Inclusionary zoning has become a popular approach for producing housing that is affordable to low and moderate-income households. From the perspective of the public sector, this strategy is particularly attractive since it relies primarily on the private housing market, rather than public subsidies. But therein also lies one its key weaknesses: when there is little private market activity, the program stalls or shuts down.
- 2) While the MPDU program enjoyed quite a bit of support through its first several decades, in recent years it has become far more contentious. Private developers have become increasingly concerned about the ever more demanding requirements of the program, which, they fear, will threaten the viability and profitability of potential projects.
- 3) A popular provision of the MPDU program, which was aggressively used between 1989 and 2003, permitted developers to opt out of the program and, instead, to provide in-lieu payments, which were then used to produce affordable housing elsewhere. However, contributions under this rule did not produce as many units as would have been required by the MPDU program, without the buy-out provision. This experience suggests that buy-out provisions should be used very rarely. At the present time, the MPDU program allows buy-out provisions only under conditions that would make the on-site units unaffordable for MPDU residents or if the inclusion of the MPDU units would be economically infeasible due to environmental constraints.
- 4) In its more than 35 years, the MPDU program has produced some 13,133 units. However, due to time limits on the number of years units are required to remain affordable, only about one-third of this inventory is still either in the MPDU program, or has been purchased by the county-wide housing authority, the Housing Opportunities Commission. Linking affordable housing production to public housing authority purchases appears to be an important strategy.
- 5) A far higher percentage of MPDU rental units are still affordable, in comparison to MPDU homeownership units. This suggests that, in order to maintain a stock of permanently affordable housing, inclusionary housing programs should consider including requirements for the production of rental housing. Requiring affordable units to remain affordable in perpetuity, or as long as feasible, is critically important for inclusionary housing programs. In addition, opportunities, and even funding, should be made available to public housing authorities and/or nonprofits to purchase inclusionary units for long-term low and moderate-income occupancy.
- 6) Despite the loss of about two-thirds of the housing produced under the MPDU program, informants note that MPDU units tend to be more affordable than neighboring units, even after affordability restrictions have expired.
- 7) Slightly more than one-half of Montgomery County's 51 Census-Designated Places have produced MPDU units and/or HOC-owned (former MPDU) units. CDPs with no MPDU units and no HOC units have significantly more white residents and significantly higher median household incomes than CDPs that have MPDU and HOC units. This suggests

that when left up to the private sector, and where there is no government influence on where affordable units get built, wealthier locales, with higher percentages of white residents, are less likely to produce affordable units.

- 8) The above pattern may be the result of the County's historical development patterns; many of the denser areas were essentially built-out prior to the passage of the MPDU law in 1974. While density did not emerge as a factor significantly related to MPDU production, we did find that MPDU production was closely associated with higher growth locales (i.e., those that were less built out).
- 9) On the one hand, slightly more than one-half of Montgomery County's 51 Census-Designated Places have produced MPDU units and/or HOC-owned (former MPDU) units.
- 10) On the other hand, CDPs with no MPDU units and no HOC units have significantly more white residents and significantly higher median household incomes than CDPs that have MPDU and HOC units. This pattern may be the result of the County's historical development patterns: many areas were essentially built-out prior to the passage of the MPDU law in 1974. These would likely be the denser areas of the County. While density did not emerge as a factor significantly related to MPDU production, we did find that MPDU production was closely associated with higher growth locales (i.e., those that were less built out). In addition, the production of rental units occurs more often in denser areas; the number of homeownership units is slightly negatively correlated with the percent of the population that is white, indicating that the larger the white population in a CDP, the fewer MPDU homeownership units it generally has.

Key Observations for Massachusetts (and others)

Major Similarities between the MPDU Program and Massachusetts' Chapter 40B

- Both rely on private sector initiation of developments and on a robust housing market (although in Massachusetts nonprofit developments and those that are 100% subsidized also use Chapter 40B).
- Both are viewed as relatively simple to administer.
- The court systems have been infrequently used.

Massachusetts (and others) May Want to Consider These Lessons from Montgomery County

- When buy-out provisions have been allowed, financial payments have not been adequate to allow for a 1:1 construction of units that would have been required under the MPDU program.
- The Housing Opportunities Commission was able to purchase MPDUs, thereby promoting affordability in perpetuity. It might be desirable for housing authorities or municipalities in Massachusetts to make similar purchases of 40B units.
- A higher percentage of units built under the MPDU program have been for-sale than under the 40B program. However, a disproportionate share of the rental units in Montgomery County is still affordable. This suggests that promoting rental housing accompanied by long-term use restrictions or other mechanisms for assuring affordability is an important strategy.

Chapter 5: New Jersey

Overview and Background

- 1) New Jersey's statute, the Fair Housing Act (1985), emerged from the Mt. Laurel decisions, rendered by the state's Supreme Court, which determined that a municipality's land use regulations must provide opportunities for a range of housing options for all people who might want to live there.
- 2) There have been a number of changes in how the state has attempted to implement the various judicial and legislative mandates, including the creation of the Council on Affordable Housing (COAH), the administrative branch of government charged with enforcement of the statute.
- 3) A key aspect of the New Jersey strategy involves the builder's remedy, whereby a developer that demonstrates that a municipality's zoning is exclusionary and commits to a set-aside of low-moderate income units, would be able to seek permission from the courts to build more market-rate units than would be allowed under existing zoning, if the site and project meet certain planning and environmental standards. A municipality that does not produce adequate changes in its zoning could be subject to a court mandate including voiding its existing zoning, as well as other sanctions impacting development.
- 4) A municipality can be granted immunity from the builder's remedy by submitting a realistic plan to COAH for attaining its affordable housing allocation, and receiving certification for the duration of the cycle period. A realistic plan would have to include, for example, zoning to accommodate the new housing, the identification of suitable sites, and designation of financial resources.
- 5) COAH attempts to evaluate housing needs across the state and it strives to develop a rational "fair share" distribution. This statewide "fair share" plan is supposed to lead to more rational planning at the local level. Each locality, not just those below a certain threshold of affordable housing, is required to develop zoning appropriate for affordable housing development. However, filing of plans with COAH is voluntary.
- 6) The 1985 law created the Regional Contribution Agreement to assist municipalities meet their "fair share" housing allocations. Until mid-2008, when this strategy was eliminated, a given municipality could transfer up to one-half of this target to another municipality within its region, so long as the latter was able to provide a realistic opportunity for affordable housing production consistent with sound planning. The "sending" municipality was required to make payments to the "receiving" municipality. However, per unit payments were never enough to create an actual unit.

Early Implementation of the State Law

- 1) When COAH was launched in 1986, the agency set to work developing "fair share" goals to be attained over a 6-year cycle. The numerical formula for developing "fair share" allocations was complex, bureaucratic, and broadly criticized.
- 2) Many municipalities have granted developers density bonuses through re-zoning or in conjunction with inclusionary zoning.
- 3) The ability of municipalities to charge fees to developers has been a major area of controversy. One-half of the state's municipalities have established trust funds and, in the

aggregate, have collected over \$541 million in developer fees, with some \$265 million still available as of June 2010.

- 4) The first round of “fair share” housing goals covered 1987 to 1993 and the second from 1994-1999. However, not all of New Jersey’s 566 cities and towns were assigned a new construction obligation. Urban municipalities, which receive state aid to supplement their municipal budgets because of high poverty rates and low tax revenues, were generally viewed as already “doing their share” and were not assigned a new construction obligation.
- 5) By the end of the second 6-year cycle, which ended in 1999, new housing need figures for the third round still had not been published by COAH. .
- 6) Despite the controversies, there was a sense that the system was working.

The Emergence of Growth Share and Third Round Fair Share Plans

- 1) In the late 1990s “growth share,” gained popularity as an alternative to COAH’s arcane rules and methodology for calculating “fair share.” An affordable housing obligation was articulated that was connected to all kinds of growth—residential and non-residential.
- 2) The third round “fair share” numbers were supposed to be announced as the second round was coming to a close. However, the new “growth share” rules, which were to govern the operation of the third round of COAH’s activities, were not adopted until 2004. Controversy again followed the new rules, including several court cases.
- 3) New third round rules, promulgated in October 2008, took into account the court’s several areas of concern and a new “growth share” formula was developed. Overall, however, neither the formula nor its implementation is simple.
- 4) As of February 2009, 53% of New Jersey’s municipalities had either filed “fair share” plans with COAH, or had a case pending in the courts, or were expected to file with the courts. Counting the 53 municipalities that had received a one-year extension for complying with COAH, 38% of New Jersey’s municipalities had chosen not to submit “fair share” plans.
- 5) Municipalities that are fully built up, intensely urban, or far from a major urban center, often do not submit plans to COAH. Nevertheless, they may still have “fair share” obligations and a few have been sued by developers. In any case, municipalities only need to build affordable housing to the extent that they actually grow.
- 6) Since submission of plans to COAH is voluntary, there are two important reasons for doing so: a COAH-approved plan, enables a municipality to retain the developer fee funds; if not, these monies are contributed to the statewide trust fund. And, second, once a municipality’s plan has been certified by COAH, it is immune from builder’s remedy lawsuits for the duration of the COAH cycle. However, all plans submitted to COAH must create a realistic opportunity for the development of affordable housing.
- 7) In October 2010, the New Jersey Appellate Division threw out the revised third round rules in a decision currently awaiting review by the New Jersey Supreme Court. As of fall 2011, third Round plans were, for the most part, not being processed even for municipalities that had submitted plans.

Additional Key Issues

- 1) Legislation enacted in 2008 abolished RCAs. In its place, a new strategy was created that provides municipalities in certain parts of the state, that already have a regional planning body, the opportunity to undertake their affordable housing work through these entities. For a municipality that is covered by a regional planning body, 50% of its obligation can be met by coordinating affordable housing efforts with other cities and towns in a particular region. However, obligations cannot be transferred to certain high-poverty towns, making this new system very different from RCAs.
- 2) The 2008 legislation also mandated that 13% of the housing created through state action must be affordable at 30% AMI or less; and created an up-front statewide developer fee that goes toward affordable housing development.
- 3) Municipalities that had developer fees in place prior to 2008 were (for the most part) given permission to keep any money collected or committed up to July 2008.
- 4) While the developer fee controversy did not appear to be active as of fall 2011, there were ongoing legislative efforts on the part of municipalities that were looking for relief from affordable housing obligations.

Builder's Remedy Lawsuits and Other State Sanctions for Non-Compliance with "Fair Share" Obligations

- 1) Only if a town is neither under COAH or court jurisdiction does a developer have a chance of being successful in Mt. Laurel litigation which, in turn, could result in rezoning that would allow inclusionary development. COAH also has the authority to grant a builder's remedy—site-specific relief in the form of COAH-ordered rezoning. While this is not referred to as "overturning" the zoning, COAH is directing the municipality to rezone or change the zoning of the builder's property. However, this authority has been exercised exceedingly rarely.
- 2) The great majority of cases are never actually decided in the courts, with developers and municipalities typically reaching an agreement before trial. There have been only about 10 builder's remedy court decisions that have forced a change in local zoning. Nevertheless, the perception is that there have been far more such decisions and the builder's remedy continues to serve as an implicit threat from developers. This represents a very important part of the development dynamic in New Jersey.
- 3) Another "stick," although one that also has been used infrequently, allows a trial judge to replace the town's planning board with a court-appointed master who is charged with developing new zoning ordinances consistent with the municipality's "fair share" obligation.
- 4) The general downturn in the housing market and a governor who is strongly opposed to COAH, makes the future uncertain for New Jersey's affordable housing agenda.

Sources of Data and Approach to Data Analysis

- 1) COAH provided computerized information on affordable housing production since 1980. COAH's records only include municipalities that have filed plans with them or whose plans have been approved by the Superior Court; affordable housing production in other municipalities is typically not counted by COAH.

- 2) Our analysis also includes affordable housing production that is not part of COAH's database, especially the Low Income Housing Tax Credit developments that have been built in urban areas that do not have affordable housing goal obligations.
- 3) In developing the production figures presented here, only actual production is counted; the tallies do not include "credits" that the State of New Jersey allocates to municipalities based on various alternative strategies for compliance. Specifically, the state has developed several mechanisms that enable municipalities to meet the "letter" of their affordable housing obligation, if not the overriding intent of the Mt. Laurel decisions. In other words, municipalities may be in some degree of compliance with the state's affordable housing goals, without themselves producing the number of units that the state has designated as their affordable housing obligation.
- 4) Assuming the third round is allowed to proceed, it would cover from mid-1999 through 2018. All production through March 2009 is credited toward the prior round obligation. Therefore, with reference to the extent to which production targets specified in the prior round obligation were attained, this analysis gives the "benefit of the doubt" to the municipalities, since a significantly longer-than-anticipated time frame is being utilized. This presentation of the production record is necessitated by COAH's record-keeping method; all COAH production is aggregated and viewed as efforts toward compliance with the prior round obligation.

Housing Production

- 1) From 1980 to March 2009, affordable housing production in municipalities that had filed plans either with COAH or with Superior Court, plus completed LIHTC units, totaled 62,071 units. An additional 28,672 COAH units were either approved for construction or were in the pipeline and likely to be built.
- 2) 494 municipalities (87%) were assigned a prior round obligation; 72 municipalities did not have a prior round obligation because they were, for the most part, urban locales with a history of affordable housing production.
- 3) Proportionally more municipalities without a prior round obligation built affordable housing (69%) than those that were required to do so (59%). Although, in the aggregate, they produced more housing, municipalities with an obligation tend to have fewer new affordable units than municipalities without an obligation, both overall and per 10,000 residents.
- 4) The 43,161 new units completed by municipalities with prior round obligations fulfilled one-half of the statewide prior round obligation. These municipalities completed 70% of all new units produced, while municipalities without prior round obligations completed 30%. These 43,161 units were completed by 293 of the 494 municipalities with prior round obligations. Of these municipalities, 201 built no affordable housing. Proportionally more municipalities without a prior round obligation built affordable housing (69%) than those that were required to do so (59%). A total of 18,910 affordable units (COAH plus LIHTC) were produced by 50 out of the 72 municipalities without a prior round obligation. Counting all affordable units produced (COAH plus LIHTC), the total comes to 62,071, of which 30% were produced by municipalities without prior round obligations.
- 5) Adding together all the new units produced, as well as the approved units in all municipalities (with and without prior round obligations; N=90,743), New Jersey's

municipalities may be able to exceed the total prior round obligation, even though 23% of the total number of units would be provided by municipalities that did not have a prior round obligation.

- 6) In 1980 there were 2,691,313 housing units in New Jersey and by 2010 this number grew to 3,544,909 units. Thus, COAH units accounted for 6.1% of total production. Adding in the LIHTC units, the percentage equals 7.3% affordable units out of overall production.
- 7) Of the 18,910 units produced in municipalities without prior round obligations, 3,029 (16%) were produced through the now-defunct RCA program, which allowed municipalities to make cash contributions to “receiving” municipalities, which did not have prior round obligations.
- 8) Municipalities with new affordable units tend to have proportionally smaller white populations and higher median incomes, and that their housing stock grew at a faster rate between 1980 and 2000 than municipalities with no new affordable housing.
- 9) Among all municipalities with new affordable units, the median number of units built was 82 (or 69 per 10,000 residents).
- 10) More family units were built than any other type of housing, although the percentages of family units and elderly units were quite close: 49% and 43%, respectively, while only 8% were special needs units. Few municipalities that have built affordable housing focus on only one type.
- 11) The production of elderly housing is associated with municipalities that are denser and that have fewer white residents, while special needs housing is associated with higher-income, less-dense municipalities with higher percentages of white residents.

Compliance with State-Mandated Prior Round Obligations

- 1) Of the municipalities not in compliance, more than one-half (201) built no new affordable units whatsoever. Over 80% of municipalities with prior round obligations have not produced affordable housing within their own jurisdictions at the level specified in their prior round obligations. And 68% of municipalities with a prior round obligation attained 50% or less of their obligation.
- 2) At the other extreme, almost 20% of municipalities with a prior round obligation completely fulfilled their goal and close to 5% additional municipalities completed over 80% of their prior round obligation goals.
- 3) If the approved units are counted, the record looks significantly more positive; only about 28% of municipalities with prior round obligations are slated to contribute no new affordable housing units and nearly 37% could be in full compliance, attaining 100% of their goal. Nevertheless, over 60% of municipalities will not have fulfilled their prior round obligation goals, even under the generous assumption that all approved units will actually get built.
- 4) Including both the municipalities that have produced a significant amount of affordable housing, either by reaching the state-mandate goal or because they did not have a prior round obligation due to their already substantial affordable housing stocks, a total of 148 municipalities (26%) appear to be fulfilling the state’s expectations concerning affordable housing production.
- 5) In municipalities with no prior round obligation, population density is much greater while growth in housing stock is lower than in municipalities with prior round obligations.

Residents in municipalities with no prior round obligations have lower median incomes and are more likely to be non-white than in municipalities with prior round obligations.

- 6) Municipalities that met their prior round obligations were denser and had somewhat fewer white residents, compared with municipalities that did not meet their prior round obligations. They also had lower obligations.
- 7) Among municipalities with a prior round obligation, there was a negative correlation between the extent to which that obligation was met, and the percent of that municipality's population identifying as white. Thus, the larger the share of a municipality's population that is white, the less likely it was to build affordable housing. Median income, change in housing stock, and ratio of new affordable units to all new units are positively associated with the percent of obligation met, while the percent of the population that is white is negatively associated with the extent to which the obligation was attained. Thus, municipalities with smaller white populations and higher incomes are associated with greater success meeting their prior round obligations. This finding presents a mixed picture concerning the hypothesis that higher income areas with more white residents will be less likely to produce affordable housing.

Third Round Obligations

- 1) The state's third round "fair share" numbers indicate that there is a statewide need for 115,566 new affordable units to be added from between 1999 and 2018. Plans submitted by municipalities as part of the third round indicate anticipated production of 39,189 units. Plans that were still in the process of being developed (when the data were collected) would add another 7,243 units for a total of 46,432 homes. This is obviously far short (only about 40%) of the total statewide need for affordable housing and the "fair share" obligations that are designated to most of the state's 566 municipalities.
- 2) Since the Appellate Court has invalidated the third round rules, the process has stalled. If the Supreme Court upholds the decision, new rules will have to be promulgated.

Overall Assessment

- 1) The climate for affordable housing production in New Jersey does not appear to have improved over the past decade.
- 2) Zoning has actually gotten more restrictive and exclusionary in many areas as suburban and rural towns have increased minimum lot sizes to as much as 10 acres.
- 3) The builder's remedy has been more of a threat than a reality; there have only been about 10 cases where the state has over-ruled local zoning to provide the permits to developers to build housing against the desires of the municipality. Many more have reached settlements, often with the encouragement of the courts. This is an important contribution of the builder's remedy; it has provided a point of leverage for reaching an agreement that is satisfactory to all parties.
- 4) Production certainly has not occurred easily. Implementation is extremely complex—from how "fair share" or "growth share" figures have been calculated to how the state has provided bonuses and credits to municipalities, beyond the actual production of units.
- 5) Numerous court cases have stalled the affordable housing process in New Jersey.
- 6) The New Jersey experience in implementing the Mount Laurel decisions and, later, its Fair Housing Act, presents a mixed record. On the one hand, tens of thousands of units

have been produced; municipalities with new affordable units have higher median incomes; and municipalities with higher income residents are associated with higher levels of affordable housing production and greater success at meeting their prior round obligations.

- 7) On the other hand, over 80% of the municipalities with prior round obligations have not produced affordable housing within their own jurisdictions at the level specified in their goals; municipalities with new affordable units are associated with proportionally smaller white populations; municipalities that met their prior round obligation are associated with higher densities and somewhat fewer white residents, compared with municipalities that did not meet their obligations; (similar to Massachusetts, development in higher density areas could also mean that suburban development is, indeed, occurring); municipalities that built no housing have higher percentages of white residents and lower median income residents compared with municipalities that built at least some housing; and municipalities with smaller white populations are associated with greater success at meeting their prior round obligations. Thus, municipalities with larger white populations are associated with building less affordable housing.

Key Observations for Massachusetts (and others)

- Both states have created affordable housing production goals that municipalities are encouraged to meet.
- In both states there is a statewide authority that can overturn local zoning. However, in Massachusetts it has been used more frequently.
- Neither state has the power to enforce the “fair-share” requirements proactively. In New Jersey, COAH or the courts may only act on the request of a locality, a developer, or a fair housing organization or other non-profit. In Massachusetts, the developer initiates a 40B application.

Massachusetts (and others) May Want to Consider These Lessons from New Jersey

- The attempt to create specific goals for individual municipalities has been extremely difficult to implement and has resulted in numerous court cases. Massachusetts’ 10% across-the-board goal appears preferable to the New Jersey strategy and Massachusetts should not, therefore, consider creating municipality-specific affordable housing goals. In fact, legislation was passed by both houses of the New Jersey legislature but vetoed by the Governor that would have instituted a similar across the board 10% goal as in Massachusetts.
- In New Jersey, immunity from the builder’s remedy is provided to municipalities that have submitted plans, while in Massachusetts immunity also may be granted to municipalities that have not yet met the 10% statewide affordable housing target but that have either made significant progress toward meeting the goal and/or that have met the goals stated in their housing production plans. Massachusetts should continue to follow its seemingly stronger guidelines.
- When payments were allowed through RCAs, the funds were not sufficient to cover a unit of housing. Therefore, any such arrangements, including in-lieu options for inclusionary housing, should require adequate contributions to enable a unit of

housing to be constructed, in the same municipality, consistent with the intent of the guidelines.

- The option for municipalities to charge developers a fee, which is then earmarked for affordable housing development, appears to be a good strategy for creating a dedicated source of revenue.
- In addition, Massachusetts may want to consider adopting a statewide mandatory developer fee that is earmarked to an affordable housing fund and that would be available for appropriate development, particularly in municipalities that have had weak affordable housing production records. Massachusetts should monitor New Jersey's new regional planning approach that attempts to coordinate affordable housing production among several municipalities.

Chapter 6: California

Overview and Background

- 1) Since 1969, California law has required all cities and counties to complete a housing element, as one of the components of their general plan.
- 2) The overriding purpose of the housing element is to encourage each local government in the state to do its part to facilitate the development of adequate housing to meet the needs of all economic groups. It also must indicate how, exactly, these needs will be met.
- 3) The state holds local jurisdictions accountable for what they can control—land use regulations that allow for affordable housing—rather than housing production.
- 4) Although infrequently used, the major sanction for non-compliance comes through the judicial system.
- 5) The original housing element statute was only a few paragraphs long; today it spans over 60 pages and is enormously complex, covering the state's sophisticated housing need allocation procedures and standards for compliance.

Implementation of the Housing Element

- 1) The housing element is one of seven required components of a city or county's general plan.
- 2) In addition to the locality providing an inventory of possible sites for development, it must provide an indication that the zoning, as well as the infrastructure, is appropriate and adequate to meet the community's need for housing during the upcoming planning period. Further, where appropriate and legally possible, the housing element must state how the locality will address the ways in which governmental constraints to housing development will be removed, taking into consideration the needs of persons with disabilities.
- 3) The housing element law uses a "fair share" type of allocation process. For each planning period, the DHCD assigns a share of the statewide regional housing need to one of the state's Council of Governments (COGs), broken down for four income categories. This is known as the Regional Housing Needs Assessment (RHNA). Each local government is then assigned a share of the regional housing need by their regional COG.

- 4) No local government is exempt from being assigned a housing need, even those areas that already have a significant amount of affordable housing.
- 5) The housing element submitted by each local government must demonstrate that it has a concrete plan for satisfying the various needs that it has been assigned to meet. Communities are directed not to allow exclusionary zoning provisions and the housing element must include a mechanism for removing local government rules or ordinances that constrain the development of affordable housing. Adequate local zoning must be in place if there is not enough available land to meet the needs, the housing element must include a plan to rezone the land, as appropriate. The local government's housing element also must specifically list all the sites available to accommodate the needed housing.
- 6) DHCD is responsible for reviewing each municipality's plan to assess whether it will likely accommodate the targeted number of housing units. The state can either certify the local government's housing element or it can request modifications. If the housing element is adopted by the locality, but does not satisfy the DHCD's requirements or if the housing element is not updated according to schedule, the local government is deemed to be out of compliance.
- 7) Local governments typically view compliance as a distinct advantage, since DHCD certification means that, in any legal dispute, California law directs judges to presume the legality of a certified housing element. More specifically, noncompliant communities are not eligible or would be less competitive for various federal and state loans and grants that are administered through DHCD and they are more vulnerable to lawsuits on development issues.
- 8) Each locality must determine for each site in the inventory whether it can accommodate some portion of the jurisdiction's share of the RHNA, by income category, during the planning period. If the inventory reveals insufficient sites to accommodate the RHNA-specified needs for all income levels, the housing element must state how it is going to create developable "by right" parcels, including those that would be suitable for multifamily housing.

Criticisms of the Housing Element

- 1) Key criticisms include: the way in which the state assigns housing need figures to the COGs and that they, in turn, assign specific housing goals to local governments; meeting housing needs should be a minimum threshold for what is needed, not a cap, and should not be grounds for rejecting an otherwise suitable development that would bolster the affordable housing stock; a lack of a requirement to explicitly zone for affordable housing (i.e., the state uses density as a proxy for affordability); lack of state funding to help COGs assign local needs numbers and to help local governments develop their plans; growth is assumed to be occurring, although this may not be happening in all locales; how or whether the rehabilitation or subsidization of existing units should count toward meeting local housing element goals; and whether or how compliance should be tightened.

The Compliance Issue

- 1) Local government compliance with the housing element requirement is widely viewed as the weakest aspect of the law.
- 2) A 2003 study on the relationship between the housing element requirement and housing production found that compliant communities were not more likely to build more housing overall, but of the housing they built, they were more likely to build multifamily units. However, state officials and others have been critical of the methodology used in the study.
- 3) In the 1990s, a maximum of only about one-half of the local governments were in compliance. As of 2004 about two-thirds of municipalities and three-quarters of the counties were in compliance. In December 2007, the state boasted that 80% of California's local governments had adopted a compliant housing element—the highest compliance rate ever attained.
- 4) Each jurisdiction in the state is required to submit its housing element based on its location—the COG area it falls within. At the beginning of each cycle, one would expect a high level of noncompliance, since many submissions are late or the jurisdiction has not identified a sufficient number of sites to attain the housing goals. As time goes on, the compliance rate should go up. Thus compliance levels appear to be a “moving target,” with fairly large variations based on when the tallies are compiled, in relation to when each local government is required to submit its plan.
- 5) In an effort to get an indication of aggregate compliance levels among California's 535 local governments, hand calculations were performed at two points in time, just over one year apart. In July 2010, only about 42% of California's local governments were in compliance with the housing element requirement; this number grew to 67% thirteen months later. Local governments whose housing elements were either out of compliance or due, fell from a combined nearly 42%, to just under 30%, from 2010 to 2011.
- 6) Whether due to funding shortages or other reasons, compliance with the housing element is not universal. Nevertheless, as of August 2011, one-third of California's local governments were not in compliance. The level of compliance continues to be a concern for state officials.
- 7) There are two key ways that the state attempts to put “teeth” into the housing element requirement--administrative incentives and the judicial threat. Concerning the first, if a local government is not in compliance, it may not qualify for certain categories of state and federal housing assistance, including state-administered CDBG and HOME grants to non-entitlement communities. Several of those interviewed felt that if the state were really serious about using the sanction of a possible loss in funding, they would tie funds to non-DHCD transportation and parks/recreation programs that local governments typically care about.
- 8) The judicial remedy may be pursued under two circumstances: if a particular project has been denied or if the adequacy of a housing element is challenged. Concerning the first, the remedy is a court order requiring the city or county to approve the project or come up with legal reasons for denial. Concerning the second, a building moratorium is a potential remedy.
- 9) Despite the existence of a housing element that fulfills all the requirements mandated by the state, projects can still be denied at the local level. When this occurs, there is no statewide recourse to argue the denial, other than by a citizen bringing a lawsuit through

the court system. However, this process is seldom used (30-40 cases since 1983) because of the costs involved and the adversarial nature of the judicial system.

- 10) Despite the infrequency of its use, the judicial threat is compelling: a local government that is not in compliance with the housing element requirement could lose all permitting authority for any type of project, even the ability to issue a building permit for a modest home renovation. Of those cases that have gone to court, the court remedy (of suspending development) probably has occurred no more than 10 times. Even those cases that do not get decided in the courts, the process of litigation is typically a sufficient prod to encourage a local government to create a compliant housing element.
- 11) Although, California's housing element law has been criticized for its weak enforcement, there is evidence, often anecdotal, that developers are producing housing as a result of the opportunities provided by the housing element statute.

The Housing Element Requirement and Housing Production

- 1) As of mid-2010, there was no centralized database that tracks affordable housing production by municipality. Regardless of how much production that one might be able to document, it was not possible to compare that to what the housing element outlined. In other words, communities can promise to produce "x" units, but it was not possible to determine if that had been fulfilled. At best, we could have simply learned that "y" units were built.
- 2) As a result, in view of the resources available to carry out this study, there was no way to determine the effectiveness of housing elements in producing the housing that is delineated in the plan, without analyzing each locality's housing element and then gathering the needed data to determine actual production.
- 3) Thus, the question of how the housing element impacts affordable housing production could not be answered through this study. This finding, itself, is important. Given that California is frequently cited as a model for a statewide intervention that is effective at producing affordable housing, the question is: "Based on what is this assertion made?" Recent efforts by the state may improve the data collection process.

Current Issues and Proposed Changes

- 1) Several issues concerning the housing element recently have attracted the attention of housing advocates and public officials: whether the 8-year cycle of state approvals of the housing element is appropriate; various issues related to local inclusionary zoning ordinances; the connection between the housing element and the availability of subsidies; and the length of time interested citizens have to protest an inadequate housing element.

Overall Assessment

- 1) The story of California's housing element is one of pluses and minuses and there are two possible summations to the California housing element story. On the one hand, local governments are held accountable for land use decisions—an activity that is uniquely within their domain. They are required to create appropriate plans and regulatory frameworks that are conducive to attaining their housing goals. This view stresses that the California model is one of the best efforts to counter exclusionary zoning, within a strong comprehensive planning framework.

- 2) On the other hand, while local governments are required to create plans that would enable them to attain their housing goals, they are not, required to produce the needed housing. In this view, the housing element is certainly a positive step and a critical planning tool and it creates an overall policy direction and awareness of the need for housing across all regions of the state. But it does not, in itself, create the housing and the sanctions for either not submitting a housing element or producing one that does not follow the state's guidelines are not sufficient to result in anything approaching full compliance across the state's local jurisdictions.
- 3) Based on the analyses done for this report, no more than two-thirds of California's local governments were in compliance over a period of just over one year. Therefore, it is arguable whether one could call the California law "mandatory."
- 4) While there are strong penalties for non-compliance, these penalties can only be imposed through the court system, which is costly, cumbersome, and time-consuming to utilize.
- 5) Zoning is just one piece of the story; cities can do the zoning and still frustrate developers when they come forward with a proposal. A number of interviewees noted that: "If we had the builder's remedy, we'd have the whole package, so that people would not have to sue in the state."
- 6) The lack of deep federal subsidies for affordable housing, combined with the ongoing financial crisis in California, has underscored the need for additional state funding.

Key Observations for Massachusetts (and others)

Major Similarities between the California Housing Element and Massachusetts' Chapter 40B

- A level higher than the municipality (in California it is the courts and in Massachusetts it is the Housing Appeals Committee) has the power to invalidate local land use decisions.
- In both states, contesting a local land use decision regarding an affordable housing development is dependent on an individual filing a complaint, which is time consuming and can result in increased costs.
- The extent to which local jurisdictions within each state are able to meet the statewide goals keeps shifting. In California, whether or not a local government is in compliance with the state-mandated submission of a housing element is due, in part, to when in the submission cycle the analysis done. Similarly, the number of Massachusetts' municipalities that have reached the 10% goal under Chapter 40B is affected in part by how close to the most recent decennial census the analysis is performed—the more years since the last census, the higher the number of municipalities that have reached the 10% goal is likely to be (the number of year-round housing units in each municipality is adjusted only ever ten years, while the number of affordable housing units may increase through the decade).

Massachusetts (and others) May Want to Consider These Lessons from California

- California represents one of the best models in the country of state-mandated comprehensive planning, with an explicit emphasis on how localities will meet the housing needs of residents at all income levels. Massachusetts should carefully study this approach and assess how it could be adapted.

- Similar to New Jersey, California’s attempts to assign “fair share” numbers to each municipality has resulted in a complex system that has provoked a great deal of controversy. This does not seem advantageous in comparison to Massachusetts’s 10% affordable housing goal, which is applicable to all municipalities.
- Requiring municipalities to inventory available sites for the production of affordable housing and requiring that zoning be supportive of meeting the various housing needs “by right” are critical approaches that could be required of Massachusetts municipalities.
- Another noteworthy strategy developed in California allows the courts to remove the right of municipalities to grant any type of building permit if a municipality is not in compliance with the housing element law.
- The lack of an administrative enforcement mechanism, with extensive reliance on the courts to implement the housing element, has proven to be problematic. This underscores the importance of the Massachusetts Housing Appeals Committee.
- Municipalities that do not have a certified housing element are either ineligible or in a less good position to compete for various federal and state loans and grants that are administered through DHCD. This could be a useful “stick” in Massachusetts.
- Although never implemented in California, a number of informants suggested that the state could make funding of non-DHCD transportation and parks/recreation programs contingent on having an approved housing element. This is another strong strategy that could be explored in Massachusetts.

Chapter 7: Cross-State Comparisons and Recommendations

Overview

- 1) Each of the programs discussed in this report represents a strong statewide or, in the case of Montgomery County, a strong county-wide commitment, within the state’s context and history, for developing affordable housing in locales that would otherwise be unlikely to produce such housing.
- 2) Each program has evolved over many years, making many modifications since its inception, to make it more responsive to articulated concerns. However, the many programmatic changes have resulted in increasing levels of complexity.
- 3) Interviewees repeatedly noted the extent to which locales are borrowing or copying details of other programs, learning from each other, and using the experiences from other states to inform and, in some cases, to modify their own initiatives.
- 4) Different methods of collecting data, missing data, and other methodological challenges have made the quantitative analyses difficult to carry out and also difficult to compare the experiences in the several states studied.
- 5) Another important consideration is the extent to which variations in market conditions create unique challenges in the various locales.
- 6) There is no such thing as simplicity or the proverbial “magic bullet” when it comes to devising a state (or county-level) strategy for overcoming local land use patterns that limit the opportunities for lower income households to find decent, affordable homes in a wide array of locales across the region.

Key Qualitative Comparative Observations

- 1) There is, perhaps, a trade-off between how well-targeted a program is to each municipality, and how easy it is to administer.
- 2) Informants from several locales commented that Massachusetts Chapter 40B is an exemplary key model of a state-based effort to overcome local exclusionary zoning.
- 3) A key reason why the Massachusetts approach has been praised is The Housing Appeals Committee, which is viewed as a highly effective tool for the state to implement its affordable housing goals. Rhode Island's State Housing Appeals Board has similar functions to Massachusetts's HAC.
- 4) In those states that rely on the courts, rather than an administrative agency such as HAC or SHAB, to implement the statewide statute (New Jersey and California), the process has often gotten bogged down in legal proceedings.
- 5) In Massachusetts, Rhode Island, New Jersey, and California, the state does not have the power to enforce its mandate proactively; a complaint or court case must be filed by an individual or entity with "standing" to protest a specific action by the local jurisdiction, which is time consuming and costly.
- 6) In the locale that experimented with local governments being given the option to make "in lieu" payments to other municipalities, (New Jersey) rather than building the housing in their own jurisdictions, the result has been fewer units being produced than what would have been required by the statute.
- 7) Similarly, in Montgomery County, when developers were given the option to opt out of developing units on-site and, instead, could make a donation to a fund to be used elsewhere, the per unit contributions were inadequate to provide an actual housing unit, as would have been required under the MPDU program.
- 8) An inclusionary zoning program (as in Montgomery County), or other affordable housing built through other statewide initiatives, working in conjunction with a local housing authority, can be an effective way to create a stock of long-term affordable units. However, the ability to do this is dependent on sufficient funding being able for the housing authority to purchase the housing units from developers.
- 9) A higher percentage of units built under the MPDU program have been for-sale, as opposed to rental units. However, a disproportionate share of the rental units in Montgomery County is still affordable. This suggests that promoting rental housing is an important strategy for creating a long-term stock of affordable housing.
- 10) Assessments of the progress municipalities are making toward meeting a given statewide goal may vary depending on when the analyses are done.
- 11) The various strategies to encourage the attainment of statewide goals primarily serve as threats, albeit important ones; very few cases actually come before the state's administrative or judicial bodies. The various appeals mechanisms encourage developers and local jurisdictions to come to a resolution through negotiation.
- 12) All the locales studied, with the exception of Montgomery County, have state-mandated goals that local jurisdictions are expected to meet. However, in all cases, attainment of the goals lags behind the state mandates.
- 13) Mandated comprehensive planning, with a housing element that requires localities to detail how they will meet the housing needs of residents at all income levels, is a powerful tool, particularly when coupled with the threat of negating local zoning (as in California). Massachusetts, New Jersey and Rhode Island have linked progress toward

attaining affordable housing goals with immunity from a state over-ride of the proposal in question.

- 14) In Rhode Island, it is not yet clear whether immunity will actually be granted for locales that are making “adequate progress” toward meeting their state-mandated affordable housing goals.
- 15) In the case of California, perceptions concerning the effectiveness of the statute must be tempered by the lack of a centralized database on housing production. Such a database would allow, for each jurisdiction, comparisons of housing needs as specified in the housing elements, with housing production outcomes.

Key Quantitative Comparative Observations

- 1) While each program appears to have stimulated the production of housing affordable to lower income households, there are mixed findings on the extent to which the new units are being located in higher income areas with higher percentages of white residents, and that have lower densities.
- 2) In locales where local jurisdictions may be exempt from the state statute, primarily because they already provide a significant amount of affordable housing, affordable units have continued to be produced.
- 3) Massachusetts had the best record of affordable housing production as a percentage of the growth in the state-wide (or county-wide for Maryland) housing stock from the start of the program. Rhode Island had the second best record.
- 4) In the one locale where long term-affordability restrictions did not accompany the program from the outset (Montgomery County), only about 32-34% of the total number of units produced through the program are still affordable, due to short-term restrictions on affordability in the early years of the program.
- 5) While the Montgomery County MPDU program had the highest affordable housing production record per 10,000 residents, in comparison to the other states’ programs, only 45 units produced through the MPDU program per 10,000 residents are still affordable.
- 6) Counting only the affordable units produced through the program, per 10,000 residents, the Massachusetts record was slightly lower than two of the other three states, and slightly higher than Montgomery County, Maryland’s still-affordable stock. However, adding all affordable housing production (whether or not through the program), Massachusetts’s production per 10,000 residents was second to Montgomery County, Maryland’s, with New Jersey and Rhode Island substantially lower.
- 7) Aside from the loss of affordable units in Montgomery County, the mandatory inclusionary zoning mechanism resulted in a very high rate of production.
- 8) Massachusetts had, by far, the highest total production and annual production of affordable units (including both program and other units). Montgomery County, Maryland had the highest annual affordable housing production per 10,000 residents, followed by Massachusetts.
- 9) Rhode Island had the highest percentage of municipalities producing and/or experiencing a net increase in affordable housing and Massachusetts had the second best rate.
- 10) Only limited data was available on the types of housing produced. Based on available information, there was substantial production for both families and elderly households.
- 11) Massachusetts produced considerably more affordable rental housing units than homeownership units, while in Montgomery County, the reverse was true.

- 12) New Jersey and Rhode Island had the best records in terms of the percentage of municipalities that attained the statewide goal overall, whether or not through the program. New Jersey also had the best record in terms of the percentage of municipalities that attained the goal through the program; Massachusetts had the second best record.
- 13) Massachusetts had the best record in terms of municipalities' attaining 50% of program goals. Massachusetts and New Jersey had the same percentage of municipalities attaining 80% of program goals.
- 14) In both Massachusetts and Rhode Island, municipalities that attained their statewide goals are denser, have smaller white populations, have lower median incomes and grew at a slower rate, than municipalities that have not met their housing goals.
- 15) In Rhode Island there is a significant positive correlation between LMIH production per 10,000 residents and the percent of white residents.
- 16) In both Massachusetts and New Jersey, affordable housing production is positively correlated with higher median incomes. This suggests that affordable housing production can be produced in high income areas, as well as lower income areas. However, our analyses did not explore the extent to which some higher income areas also have certain characteristics that would make them more likely to produce housing, such as available land.
- 17) Yet, municipalities that attained the statewide goal tended to have some combination of lower incomes, fewer white residents and higher densities, than municipalities that had not reached the state goal. This was the case in Massachusetts and Rhode Island, where all three relationships prevailed; in New Jersey municipalities that had met their prior round obligations tended to be denser and to have lower percentages of white residents, . In Montgomery County, MPDU units tended to be built in locales where there were fewer white residents and with lower median incomes.
- 18) Thus, municipalities that are working toward attaining the statewide goal are showing some promising signs that exclusionary patterns are changing. But, for the most part, the municipalities that have attained their state goals or obligations are those that historically are associated with producing more affordable housing.

Recommendations

- 1) In order to produce high quality housing that is affordable to low-income households generous funding from the public sector is needed. Without adequate federal and state subsidies, the ability of municipalities to attain affordable housing goals is likely problematic. Although resources for rental housing are a major priority, subsidies to enable qualified low-income people to become homeowners are also essential.
- 2) A single state-wide affordable housing goal is likely preferable to individual "fair share" mandates
- 3) Long-term affordability restrictions are critical.
- 4) Set-aside appropriations for rental units to be purchased by public housing authorities or nonprofits could contribute to a stock of long-term affordable housing.
- 5) Inclusionary housing programs need additional incentives or sanctions to encourage state-wide development of affordable housing.
- 6) The development of affordable rental housing should be encouraged.

- 7) In-lieu payments and other arrangements for off-site housing should, in general, be discouraged.
- 8) The potential of instituting a statewide developer fee applicable in strong market areas should be explored.
- 9) The record of state-based incentive programs for stimulating the production of affordable housing should be assessed.
- 10) Consistent and comparable forms of record-keeping on affordable housing production should be developed.
- 11) Data should be compiled on impacts of affordable housing, in general, and multifamily housing, in particular, on municipal costs, traffic, and property values.
- 12) State aid should be more closely linked to attainment of housing goals; significant sanctions for non-attainment of goals should be instituted.
- 13) Progress toward meeting housing goals should render a municipality exempt from sanctions for non-attainment of the goal.
- 14) It would be desirable to explore whether other interested parties should be allowed to proactively initiate a claim if a municipality has not attained the state's goal.
- 15) The state should require municipalities to develop and submit comprehensive plans, including detailed housing goals for addressing a full range of housing needs. As part of this, comprehensive plans for housing must be consistent with local zoning. The state should hold municipalities responsible for meeting housing goals.
- 16) Zoning should allow for multifamily housing development.
- 17) Requiring an inventory of available land is a desirable part of a planning effort.

Future Research Suggestions and Opportunities

- 1) Given the time and resources available for this project, various questions could not be addressed.
- 2) Future research efforts may want to consider other ways to quantify the differences between the urban areas that have traditionally been the main providers of affordable housing, and the suburbs that have typically avoided such housing
- 3) It would also be desirable to attempt to quantify a community's exclusivity before and after a policy's enactment. Particular attention should be paid to what population density means, either in an urban or more suburban context.
- 4) Including one or more "baseline" states could be a valuable addition to future studies
- 5) Other statistical tests may be useful in analyzing the type of data used in this study.
- 6) Further research examining affordable housing production would benefit from analyses using Geographic Information Systems.
- 7) Other measures might be able to provide additional information needed to assess and compare states' accomplishments.
- 8) It could be fruitful to explore the extent to which various types of incentive programs are encouraging locales to produce affordable housing.
- 9) It would be desirable to better understand how some communities, particularly those that may be viewed as "exclusionary," have managed to meet state affordable housing goals
- 10) A related question would be to focus specifically on how infrastructure constraints have been overcome.

Final Note

- 1) Each of the five programs explored in this report deserves praise. In all five cases, the problems created by exclusionary zoning were acknowledged and a bold set of strategies were developed, often over several decades. Also, in each locale, a significant amount of affordable housing was produced in areas that likely would not have experienced this growth if the statute had not been in force.
- 2) If enacted, the Comprehensive Land Use Reform and Partnership Act in Massachusetts would help to improve current shortcomings in the land use landscape.
- 3) Hopefully the material presented in this study will serve to further the debate and discussion about how the housing needs of all residents in Massachusetts and other states can be met through a joint effort between state and local governments, and with the support of nonprofit and philanthropic organizations, as well the for-profit development community.

Interviews and Contacts

1 – Massachusetts

Aaron Gornstein, former Executive Director, Citizens' Housing and Planning Association (currently Undersecretary of Housing and Community Development, Commonwealth of Massachusetts)

Keri-Nicole Dillman, Senior Researcher, Mathematica Policy Research (formerly at NYU and MIT)

Lynn Fisher, Associate Professor, MIT

Philip Herr, Principal, Philip B. Herr & Associates

Sharon Krefetz, Professor, Clark University

Peter Lowitt, Land Use Administrator/Director, Devens Enterprise Commission

Jennifer Raitt, Chief Housing Planner, Metropolitan Area Council

Karen Wiener, Interim Executive Director, Citizens' Housing and Planning Association

Ann Verrilli, Director of Research, Citizens' Housing and Planning Association

Clark Ziegler, Executive Director, Massachusetts Housing Partnership

2 – Rhode Island

Annette Bourne, Assistant Director of Policy at Rhode Island Housing

Brenda Clement, Director of the Statewide Housing Action Coalition

Colin Kane, partner, Rumford, RI Peregrine Group, LLC

Tom Kravitz, Director of Planning and Economic Development, Burrillville

Katherine Maxwell, Planner, Rhode Island Housing

Steve Ostiguy Church Community Housing Corporation,
Executive Director and State Housing Appeals Board, member

Amy Rainone, Director of Policy, Rhode Island Housing

Jonathan J. Reiner, Director of Planning and Development for the Town of North Kingstown

Noreen Shawcross, Chief of the Office of Housing and Community Development
and Executive Director of the Rhode Island Housing Resources Commission (retired May
2010)

3 – Montgomery County, Maryland

Christopher Anderson, Manager of Single Family Housing Programs (administers MPDU program),

Montgomery County Department of Housing and Community Affairs

Ralph Bennett, Prof. Emeritus, University of Maryland, former Commissioner and Chair, Housing Opportunities Commission

Jim Cohen, Lecturer, University of Maryland

David Flanagan, President. Elm Street Development, Inc., McClean, Virginia

Richard Y. Nelson, Jr. Director, Montgomery County Department of Housing and Community Affairs

Tedi Osias, Director, Legislative and Public Affairs, Housing Opportunities Commission

Sally Roman, Housing Opportunities Commission Commissioner; former Master Planner, Montgomery County Planning Department

Sharon Suarez, Coordinator for Housing Research & Policy, Montgomery County Planning Department

4 – New Jersey

Adam Gordon, Staff Attorney, Fair Share Housing Center

Larissa DeGraw, Technical Assistant, Council on Affordable Housing

Robert A Huether, Assistant Director, Program Development, New Jersey Housing and Mortgage Finance Agency

Kathleen McGlinchy Manager, Monitoring Unit, Division of Plan Administration, Council on Affordable Housing

David N. Kinsey, Partner, Kinsey & Hand; Principal, Realty Innovations, LLC;
Visiting Lecturer in Public and International Affairs, Princeton University

Alan Mallach, senior fellow, National Housing Institute

Diane Sterner, Executive Director, Housing and Community Development Network of New Jersey

Lucy Vandenberg, Executive Director, Council on Affordable Housing (resigned February 2010).

Kevin Walsh, Associate Director, Fair Share Housing Center

5 – California

Victoria Basolo, Professor, University of California, Irvine

Nico Calavita, Professor, San Diego State University

Cathy Creswell, Acting Director, California Department of Housing and Community Development; Deputy Director at the time of the interview

Peter Dreier, Professor, Occidental College

Bill Higgins, California League of Cities

Dowell Myers, Professor, University of Southern California

Ilene J. Jacobs, Director of Litigation, Advocacy & Training, California Rural Legal Assistance, Inc.

William J. Pavão, Executive Director, California Tax Credit Allocation Committee

Randy Quezada, Housing Preservation Specialist, California Housing Partnership Corporation

Darrel Ramsey-Musolf, Doctoral Student, Special Committee Degree in Housing and Policy Analysis, University of Wisconsin, Madison

Geeta Rao, Program Manager, Citizens' Housing and Planning Association

Michael Rawson, Co-Director, The Public Interest Law Project and Director, California Affordable Housing Law Project

Diane Richardson, California Housing Finance Agency

Matt Schwartz, President, California Housing Partnership

Dianne J. Spaulding, Executive Director, Non-Profit Housing Association of Northern California

Sean L. Spear, Executive Director, California Debt Limit Allocation Committee

L. Steven Spears, Acting Executive Director, California Housing Finance Agency

Evelyn Stivers, Field Director, Non-Profit Housing Association of Northern California

Mark Stivers, Consultant to Senate Transportation and Housing Committee (staff position)

Lindy Suggs, Policy Analyst, Division of Housing Policy, Department of Housing & Community Development

Rob Wiener, Executive Director, California Coalition for Rural Housing