

**Economic Development Subcommittee Steering Committee Meeting
Agenda & Meeting Packet**
December 14, 2022

Meeting will be held at the **Municipal Building**
2nd floor, Council Chambers
355 East Central Street
5:45 PM

A NOTE TO RESIDENTS: All citizens are welcome to attend public board and committee meetings in person. Additionally, in an effort to maximize citizen engagement opportunities, citizens will be able to continue to participate remotely via phone OR Zoom. The meetings will also be [live-streamed by Franklin TV](#) and shown on Comcast Channel 11 and Verizon Channel 29.

- **Link to access meeting:** December 14, 2022 EDC + Steering Committee Meeting Link [HERE](#) -- Then click "Open Zoom"
 - Or copy and paste this URL into your browser: <https://us02web.zoom.us/j/87133671757>
 - **Call-In Phone Number:** Call **1-929-205-6099** & enter Meeting ID: **871 3367 1757** then press #

Agenda:

1. Presentation: Mark Bobrowski
 - a. Chapter 40R - Smart Growth Zoning & Housing Production
 - i. 40R Article
 - ii. 40R Powerpoint

This is a meeting of the Franklin Town Council Sub-Committee; under the Open Meeting Law, this subcommittee is a separate "public body" from the Town Council. Therefore, unless the Town Council has separately notified and posted its own meeting, Councilors who are not members of this subcommittee will not be permitted to speak or otherwise actively participate @ this meeting, although they may attend and observe. This prohibition is necessary to avoid the potential for an Open Meeting Law Violation

THE MASSACHUSETTS "SMART GROWTH" EXPERIMENT: CHAPTER 40R

by Mark Bobrowski*



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INTRODUCTION

Massachusetts has faced an affordable housing shortage in recent years. To alleviate that shortage, the Massachusetts legislature in 2004 established, as part of the fiscal 2005 state budget,¹ a new housing production tool to promote "smart growth."² This measure, now codified as chapter 40R of the Massachusetts General Laws, constitutes a novel experiment in urban planning and housing production. Chapter 40R takes an "opt in" approach: municipalities may elect to adopt a zoning overlay district for the development of housing in an area of existing concentrated development or near

an existing transit station.³ Taking the bait makes a municipality eligible to receive various financial incentives.⁴ Chapter 40R also has rewards for the development community. When a municipality rezones in partnership with a particular developer, the contemplated project may proceed "as-of-right" to receive building permits.⁵ The statute prohibits special permit or discretionary decision-making.⁶

Chapter 40R has a most unusual legislative history. In 2003, a policy paper was published by the Commonwealth Housing Task Force ("Task Force") convened by The Boston Foundation, a coalition of representatives from business, labor, higher education, local government, housing advocacy and environmental groups, real estate developers and several elected and appointed officials.⁷ The report, entitled *Building on Our Heritage: A Housing Strategy for Smart Growth and Economic Development*,⁸ recommended that "the state provide financial and other incentives to local communities that pass smart growth overlay zoning districts (hereinafter "SGOD") that allow the building of single-family homes on smaller lots and the construction of apartments for families of all income levels."⁹ The 2003 Task Force report estimated that implementing such a strategy would likely produce over 30,000 new housing units over the next decade.¹⁰

The Task Force emphasized the need for such housing because, it alleged, "[h]ousing in Greater Boston is characterized by rapidly escalating prices and increasing rents."¹¹ The Task Force's conclusions have been annually echoed in *The Greater Boston Housing Report Card: An Assessment of Progress on Housing in the Greater Boston Area*.¹² For example, the 2006-2007 *Report Card* indicated that in only 30 of 161 study area cities and towns would the median single-

* Professor Bobrowski is indebted to his research assistant, Matthew G. Feher, for his invaluable contributions in the preparation of this article.

1. St.2004, c. 149, § 92, eff. July 1, 2004. References to the statute, MASS. GEN. LAWS ch. 40R, §§1 - 14 (2006), and its accompanying regulations, promulgated at 760 C.M.R. 59.00-59.08 (2005), will appear throughout this article.

2. The statute, at section 1, defines "smart growth" as

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

MASS. GEN. LAWS ch. 40R, § 1 (2006).

3. MASS GEN. LAWS ch. 40R, §2 (2006)(definition of "eligible locations").

4. Indeed, in 2005, the legislature sweetened the chapter 40R "pot" by adopting chapter 40S, St.2005, c. 141, eff. Nov. 22, 2005, which addresses the cost of educating the children of a 40R project. MASS. GEN. LAWS ch. 40S, §§1-4 (2006). See the discussion of chapter 40S in Part I (B) *infra*.

5. MASS. GEN. LAWS ch. 40R, §11 (e)(2006).

6. *See id.* § 3.

7. According to its website, The Boston Foundation is one of the oldest and largest community foundations in the nation, with assets of almost \$900 million. In 2007, the Foundation and its

donors made more than \$92 million in grants to nonprofit organizations and received gifts of \$90 million. The Foundation is made up of some 900 separate charitable funds established by donors either for the general benefit of the community or for special purposes.

The Boston Foundation, Financial Information, <http://www.tbf.org/AboutTBF/AboutTBFDetail.aspx?id=102> (last visited Dec. 8, 2008).

8. BARRY BLUESTONE, EDWARD C. CARMAN, AND ELEANOR WHITE, BUILDING ON OUR HERITAGE: A HOUSING STRATEGY FOR SMART GROWTH AND ECONOMIC DEVELOPMENT (The Boston Foundation) (Oct. 30, 2003) (hereinafter "2003 Task Force Report"). Mr. Bluestone is the Stearns Trustee Professor of Political Economy, Director of the Center for Urban and Regional Policy, and Dean of the School of Social Science, Urban Affairs, and Public Policy at Northeastern University in Boston. Mr. Carman is the president of Concord Square Planning & Development Company, Inc., a Boston-based real estate development and consulting company. Ms. White is co-founder and president of Housing Partners, Inc., a Watertown-based, full-service national affordable housing consulting firm that serves both the public and private sectors.

9. 2003 Task Force Report 2.

10. The Task Force assumed that in order to develop that many new affordable and market-rate housing units, zoning for 50,000 units must be in place. 2003 Task Force Report 4.

11. 2003 Task Force Report 7.

12. *See, e.g.*, BARRY BLUESTONE AND BONNIE HEUDORFER, THE GREATER BOSTON HOUSING REPORT CARD 2006-2007: AN ASSESSMENT OF PROGRESS ON HOUSING IN THE GREATER BOSTON AREA (Center for Urban and Regional Policy at Northeastern University) (Oct. 2007) (hereinafter "Report Card").

family home be affordable to a family earning the median household income of that community.¹³ For first-time home buyers, there were no such communities.¹⁴ In 2001, Boston had been the third most expensive home buying market in the nation; by 2007, it had slipped (or improved) to the fifteenth most expensive.¹⁵

The Task Force blamed much of the affordability problem on a lack of production.¹⁶ After sifting through several possible causes for this shortfall, the Task Force focused on overzealous local regulation:

The predominant reasons [for a lack of production] [are] the lack of zoning for building single-family homes on small lots and the construction of apartments. One can travel throughout Massachusetts and find few places where such zoning exists as of right. The result is that the process of obtaining local zoning approvals is a time consuming and expensive task that carries significant risk. The barriers to entry from zoning are so substantial that the housing markets in the greater Boston area are unable to clear (that is, to come into balance) without excessive price increases.¹⁷

Why have the commonwealth's communities acted so aggressively to prevent new residential growth? The Task Force blamed the Massachusetts tradition of home rule.¹⁸ Housing brings with it school-aged children. Municipalities rely on the property tax to fund education.

Census data and other surveys show that a typical four bedroom single family home will have at least one

school-aged child per house. Often there will be several in each home. It costs, on average, nearly \$8,000 per year to provide public-school education for each child. The property taxes on single-family homes, particularly those that are less expensive, often are not sufficient to cover the school costs for the children from that home, especially when the costs of other town services are provided.¹⁹

According to the Task Force, municipalities have reacted by using the home rule power to make the construction of new residential units very difficult.²⁰ Apartment development is generally subject to the requirement of a special permit (or not allowed at all).²¹ Large lot zoning discourages the development of affordable single family homes.²²

With these problems getting extensive media discussion,²³ then Senate President Robert Travaglini incorporated the Task Force's proposed new housing production tool into the Senate's version of the fiscal 2005 state budget.²⁴ The Senate Ways and Means Committee budget proposal released in May 2004²⁵ included language establishing the smart growth program, and the full Senate subsequently voted after lengthy debate to endorse it as part of its budget blueprint.²⁶ While the House of Representatives did not include the program in its competing version of the budget, then House Speaker Thomas Finneran agreed to include the chapter 40R framework during conference committee deliberations.²⁷ The full legislature endorsed the conference committee report, and Governor Mitt

13. Report Card 7 (2006 data).

14. *Id.* at 7-8 (2006 data).

15. *Id.*

16. The Task Force cited a 2002 study from the Center for Urban and Regional Policy at Northeastern University to the effect that the amount of production in the 1990s "lagged the increase in households by 41%." 2003 Task Force Report 8.

17. *Id.*

18. The 1966 adoption of the Home Rule Amendment, MASS. CONST., art. LXXXIX "effected substantial changes in the legislative powers of the General Court and the cities and towns." Opinion of the Justices, 356 Mass. 775, 787 (1969). Section 6 of article 89 delineates the powers of a municipality:

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has the power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city to town by its charter.

MASS. CONST. art. LXXXIX, § 6. Section 7 of article 89, MASS CONST. art. LXXXIX, § 7, specifies certain exceptions to this grant of authority. "Taken together, these two sections repudiate the conception that all powers lie in the State except those expressly delegated to cities and towns." Bd. of Appeals of Hanover v. Hous. Appeals Comm., 363 Mass. 339, 358 (1973). In short,

[m]unicipalities are now free to exercise any power or function, excepting those denied to them by their own charters or reserved to the State by §7, which the Legislature has the power to confer on them, as long as the exercise of these powers is not inconsistent with the Constitution or laws enacted by the Legislature in accordance with §8.

Id. Where the legislature has not occupied the field, or where existing statutes grant broad powers to municipalities to regulate a specific subject, the Home Rule Amendment adds another independent source of police power for municipal action. *Cherkes v. Town of Westport*, 393 Mass. 9, 11 (1984); *Sturges v. Town of Chilmark*, 380 Mass. 246, 253 n.11 (1980). The Zoning Act (MASS. GEN. LAWS ch. 40A, §§1-17 (2006 & Supps. 2007 & 2008) most notably, may

be used in conjunction with the Home Rule Amendment to fashion innovative land use regulation. *Rayco Inv. Corp. v. Bd. of Selectmen of Raynham*, 368 Mass. 385, 392 (1975).

19. 2003 Task Force Report 8-9.

20. The *Report Card* also laments that some municipalities have used Home Rule powers to impede or prevent the development of market rate and affordable housing. Report Card 7. The Rappaport Institute concurs. See EDWARD L. GLAESER, JENNY SCHUETZ, AND BRYCE WARD, REGULATION AND THE RISE OF HOUSING PRICES IN GREATER BOSTON (Rappaport Institute for Greater Boston) (Jan. 5, 2006) 6-9. Edward Glaeser, Professor of Economics at Harvard University, estimates that the cost of permitting housing in Massachusetts is the highest in the country. *Id.* at 31-35.

21. "Over the years, most communities have found ways to eliminate from their zoning maps any areas that allow apartment construction as-of-right." 2003 Task Force Report 9.

22. As the Task Force noted, "[t]he larger the lot size, the more expensive the land per house." *Id.*

23. E.g., Brenda Buote, *Restrictive zoning faulted for home costs*, BOSTON GLOBE, GLOBE NORTH, Jan. 15, 2006, at S1; Edward Glaeser, *Balancing housing options*, BOSTON GLOBE, Sept. 3, 2006, at D9; Edward Glaeser, *Housing changes key to city's future*, BOSTON GLOBE, June 10, 2007, at D3; Scott S. Greenberger, *Housing slowdown blamed on local rules*, BOSTON GLOBE, Jan. 1, 2006, at A1; Editorial, *Where's the Housing?*, BOSTON GLOBE, May 24, 2006, at A10.

24. See Senate Bill 2401 (2004).

25. Section 103 of Senate Bill 2400 (2004).

26. There was no hearing, however, as is customary, with regard to chapter 40R. This is because chapter 40R was proposed in what is known as an "outside section" of the budget bill. These "outside sections" are typically statutory amendments, or new legislative proposals, merely added at the end of the budget bill without much debate or public process. See Senate Bill 2401 (2004). Because the bill was simply redrafted by the Senate Committee on Ways and Means to include such, no public hearing was afforded to chapter 40R. Since 2004, the number of "outside sections" to budget bills has decreased sharply, affording a more open, public legislative process.

27. See House Bill 4850 (2004).

Romney signed the budget plan, including chapter 40R, on June 25, 2004.²⁸

According to the most recent Task Force information for March 2008,²⁹ 7,324 units of affordable and market-rate housing in 21 cities and towns have been zoned and approved under chapter 40R.³⁰ The largest approved 40R development is located in Brockton and could provide as many as 1,100 new affordable and market-rate units.³¹ Another three communities have filed chapter 40R applications with the commonwealth's Department of Housing and Community Development ("DHCD")³² with the potential to create around 1,800 additional units of housing. Ten additional communities have applied for, or received, "Priority Development Fund" planning grants for chapter 40R activity which may develop anywhere between 1,800 and 2,250 units. Thus, since its adoption in 2004, over 11,000 units of affordable and market-rate housing are in the pipeline — 65 percent of which have already been approved, with the balance in various stages of the approval process.³³

28. See St. 2004, c.149, §92.

29. CONCORD SQUARE PLANNING & DEV. CO., INC., INVOLVEMENT OF MASSACHUSETTS MUNICIPALITIES' IN CHAPTER 40R: SMART GROWTH ZONING AND HOUSING PRODUCTION (Mar. 2008).

30. The cities and towns include Amesbury, Belmont, Boston, Bridgewater, Brockton, Chelsea, Dartmouth, Grafton, Haverhill, Kingston, Lakeville, Lunenburg, Lynnfield, Natick, Northampton, North Andover, Norwood, Plymouth, Reading and Westfield. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

31. According to the City of Brockton's 2007 awards application to the American Planning Association, Massachusetts Chapter, this major downtown redevelopment project is "one of the first large-scale, multi-nodal 40R Districts" demonstrating "the potential of 40R to promote adaptive reuse and new infill development within an urban core." The zoning densities within the Brockton district offer "densities between 8 units/acre to 80 units/acre, as well as mixed-use and adaptive reuse."

32. DHCD oversees the chapter 40R program and must approve projects as "eligible." See 760 C.M.R. 59.05(2) (2005).

33. Telephone conference with Ted Carman, President of Concord Square Planning & Dev. Co., Inc., in Boston, Mass. (Mar. 12, 2008). These results put chapter 40R production on pace to eventually eclipse the rate of affordable and market-rate housing production under the state's affordable housing statute, chapter 40B of the General Laws, which has produced 48,289 total units (54 percent of which are affordable) in 884 developments since its inception nearly 40 years ago. BONNIE HEUDORFER, UPDATE ON 40B HOUSING PRODUCTION, (Citizens Hous. & Planning Assoc.) (Mar. 2007). See the discussion of chapter 40B in *infra* Part II A.

34. Report Card 65, noted that "[t]he first generation of 40R districts obtained the necessary zoning approvals in relatively short order, cutting months off the time typically required for approval, and to date no community has turned down a district when it came to a town meeting (or city council) vote." Since that observation, only the Town of Hingham has rejected a proposed 40R district.

35. In fact, the timing of this article was delayed (and the article potentially rendered moot) by the commonwealth's lack of funding for chapter 40R, which persisted for nearly two years. Prior to the enactment of the final fiscal 2007 supplemental appropriations act, St. 2007 c. 140 (the so-called "2007 close-out budget"), the Smart Growth Housing Trust Fund (the so-called "40R Trust") was oversubscribed by over \$4 million, according to the DHCD. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008). But the 2007 close-out budget authorized the transfer of \$15 million to be targeted mostly to the 40R Trust fund to ensure that communities that have adopted chapter 40R will receive promised incentive payments. St. 2007 c.140, § 16. The act also dedicates up to \$10 million to the 40R Trust from the Bay State Competitiveness Investment Fund. St. 2007 c.140, § 58. The \$15 million transfer is from MassHousing (derived from repaid State Housing Assistance for Rental Production, or SHARP, loans) to the DHCD to fund 40R incentive payments, planning, technical assistance and an employer-assisted housing program. St. 2007 c.140, § 16. The act also calls

The Boston Foundation has trumpeted these accomplishments of chapter 40R.³⁴ Indeed, chapter 40R has produced some notable success stories. It is time³⁵ to assess the chapter 40R experiment and to fine tune its opportunities. This article will accept that challenge.³⁶

I. OVERVIEW OF CHAPTER 40R'S KEY PROVISIONS

A. Basic Requirements

The chapter 40R system is based on a series of required zoning amendments and attendant rewards.³⁷ If a municipality opts into the program, the statute requires the community to allow for the development of housing as-of-right at a fixed density.³⁸ The municipality retains only a limited power to conduct "plan review"³⁹ and to impose design standards.⁴⁰ The statute prescribes the following minimum housing density requirements with respect to a SGOD:

- at least 20 units/acre for multifamily dwellings of four or more dwelling units;⁴¹

for a transfer of SHARP loan repayments for these purposes on an annual basis. *Id.* Furthermore, the state legislature's Joint Committee on Housing favorably reported legislation in the 2007 session that would create an automatic funding mechanism, not subject to appropriation, for the 40R Trust to fund the various incentive cities and towns are in line to receive if they adopt a SGOD. H.R. 160, § 1, 2007 Leg., 185th Sess. (Mass. 2007). Specifically, the legislation would direct income taxes collected from residents within the SGOD to the 40R Trust. *Id.* § 5. The legislation has been reintroduced in the current legislative session. See H.R. 197, 2009 Leg., 186th Sess. (Mass. 2009) and S. 86, 2009 Leg., 186th Sess. (Mass. 2009). See *infra* Part III.

36. The author has worked on several of the 21 enacted 40R districts. In 2005, Norwood's St. George Smart Growth Overlay District became the first to be approved by DHCD and adopted by town meeting. The author represented the Karsten Company of Weymouth, the proponent of the zoning change. On the development side, the author has also represented Fisherville Redevelopment LLC, the proponent of the Grafton smart growth district. On the municipal side, the author has represented Dartmouth, Haverhill, Easton, Northampton, Hingham, Pittsfield, and Gardner, and consulted with a few other cities and towns.

37. This overview is not intended to be a detailed description of the statute or the regulatory scheme in support. For a more comprehensive explanation of chapter 40R's internal workings, see Jay Wickersham, *Understanding Chapter 40R: The New Smart Growth Zoning Overlay District Program*, Apr. 2005, <http://thevillageatlincolnpark.com/understandingChapter40R.pdf> (last visited Dec. 8, 2008). Attorney Wickersham, of Noble & Wickersham LLP, Cambridge, Mass., was the consultant engaged by DHCD to prepare the chapter 40R regulations.

38. MASS. GEN. LAWS ch. 40R, §6(a)3 (2006).

39. "Plan review" is conducted by the "Approving Authority" pursuant to 760 C.M.R. 59.04(1)(f) (2005). The Approving Authority may be any "unit of municipal government designated...to review projects." Many towns have designated the planning board to serve in this capacity. Haverhill has designated its city council. Dartmouth has created a new entity, the "Plan Approval Authority," composed of one member each of the board of selectmen, zoning board of appeals, and planning board.

40. In this regard, chapter 40R's decision-making process mirrors the "site plan approval" process common in zoning by-laws and ordinances. In *Y.D. Dugout Inc. v. Bd. of Appeals of Canton*, 357 Mass. 25 (1970), the Supreme Judicial Court ("SJC") defined its understanding of site plan review as "regulation of a use rather than its prohibition...guid[ing] us in interpreting the [by-law]...as contemplating primarily the imposition, for the public protection, of reasonable terms and conditions...." *Id.* at 31. The Appeals Court has focused on this pronouncement to distinguish site plan review from the special permit process. See *Prudential Ins. Co. v. Bd. of Appeals of Westwood*, 23 Mass. App. Ct. 278, 283-84 n.9 (1986); *Auburn v. Planning Bd. of Dover*, 12 Mass. App. Ct. 998, 1000 (1981). Site plan review can only be used to shape a project. On the other hand, in the special permit process, the full range of discretion is available to the granting authority.

41. MASS. GEN. LAWS ch. 40R, §6(a)3 (2006).

- at least 12 units/acre for dwellings with two or three dwelling units;⁴² or
- at least 8 units/acre for single-family dwelling units.⁴³

These density requirements are virtually nonnegotiable.⁴⁴ The district must be situated in an “eligible location.” An “eligible location” is defined as an area near a rapid transit or commuter rail station,⁴⁵ an area of concentrated development,⁴⁶ or a “highly suitable” location otherwise acceptable to DHCD.⁴⁷ This requirement is discussed in greater detail below.

Of course, chapter 40R’s chief goal is the production of housing, particularly affordable housing. While commercial and industrial uses are permissible,⁴⁸ the local zoning ordinance or by-law must

provide for residential uses that cater to families, individuals, persons with special needs or the elderly.⁴⁹ The statute requires that not less than 20 percent of the residential units constructed in projects of more than 12 units be affordable.⁵⁰ The proposed SGOD may not exceed 15 percent of the total land area in the city or town unless an exception is approved by DHCD.⁵¹ Furthermore, the total land area of all approved SGODs may not exceed 25 percent of the total land area in the municipality.⁵²

The procedures to adopt a chapter 40R district borrow from the Zoning Act. Before submitting an application for a SGOD, the chief executive official of the municipality must hold a public hearing.⁵³ Upon submission of the application,⁵⁴ DHCD has 60 days to make a

42. One of the great mysteries of the statute is the “townhouse” limitation to two- or three-dwelling units per dwelling. This limitation forces a typical townhouse of four dwelling units to meet the higher multifamily standard of 20 units per acre, often causing significant design problems. Placing five fourplex structures on a developable acre is a tight fit. The legislature should consider amending this provision to allow for townhouses of two to four dwelling units at the 12 per acre density requirement.

43. See MASS. GEN. LAWS ch. 40R, § 6(a)(3) (2006), and 760 C.M.R. 59.04(1)(d) (2005).

44. Any municipality of less than 10,000 in population, for hardship shown, may be approved with lower densities than provided in the statute. See MASS. GEN. LAWS ch. 40R, § 6(f) (2006), and 760 C.M.R. 59.04(3) (2005). Further, the regulations allow a reduction in the density requirements if a municipality demonstrates that hardship occurs because of poor soils, lack of water or the project is highly inconsistent with the existing community. See *id.* DHCD has not approved, to date, a single request for an SGOD at a reduced density. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

45. The term Eligible Location is defined as

- (1) an area near a rapid transit or commuter rail station, or a bus or ferry terminal, plus any qualifying Adjacent Area; (2) an area of concentrated development, including a city or town center, an existing commercial district, or an existing rural village district, plus any qualifying Adjacent Area; or (3) another highly suitable location, in each case that qualifies under the criteria set forth in 760 CMR 59.04(1)(a). If a portion of a parcel of land falls within an Eligible Location, then all of such land, to the extent of its legal boundaries, may also be deemed an Eligible Location.

760 C.M.R. 59.02 (2005); see also 760 C.M.R. 59.04(1)(a)(1) (2005).

46. An “Area of Concentrated Development” is defined as the following:

A city or town center or an existing commercial district shall be presumed to qualify as an Area of Concentrated Development if:

- a. it is currently served or scheduled to be served (as shown by sufficient documentation) within five years of the application by public sewer(s) and/or private sewage treatment plant(s);
- b. at least fifty percent (50%) of the total land area within the proposed District is either Substantially Developed Land or Underutilized Land; and
- c. the primary current use (or, in the case of Underutilized Land, the primary current zoning) of land and/or buildings in the District is commercial (including retail, office, or industrial businesses) or mixed use. Land designated as a commercial center under M.G.L. c.40, §60 shall be presumed to qualify as an Area of Concentrated Development. In areas that are not sewered or scheduled to be sewered, an existing rural village district shall be presumed to qualify as an Area of Concentrated Development if:
 - i. it contains part or all of the land area located within one-half mile distance from the principal road intersection or other center point of the district;
 - ii. it contains two or more of a town hall, post office, public library, public school, or public safety facility, or it contains an existing village retail district; and

- iii. at least fifty percent (50%) of the total land area within the proposed District is either Substantially Developed Land or Underutilized Land.

760 C.M.R. 59.04(1)(a)(2) (2005).

47. “Highly Suitable Location” is defined as the following:

The Department shall presume that a location is highly suitable if it has been identified as an appropriate locus for high-density housing or mixed-use development in a local comprehensive plan, community development plan, area specific plan, regional policy plan, or other plan document, in each case adopted or updated after a public planning process no more than five years prior to its submission under 760 CMR 59.00, or if it has been designated as a development district under M.G.L. c. 40Q. Otherwise, the Municipality must provide satisfactory evidence that designation of an area, by virtue of its existing or Planned Infrastructure, existing or Planned transit or other transportation access, existing underutilized facilities, and/or location, is consistent with the statutory goals for smart growth set forth in M.G.L. c.40R, §1 and 760 CMR 59.00.

760 C.M.R. 59.04(1)(a)(3) (2005).

48. “Mixed Use Development” is defined as

- a. Project containing a mix of some or all of multi-family residential, 2- and 3- family residential, or single-family residential uses, together with commercial, institutional, industrial, or other non-residential uses, so long as the applicable residential densities set forth in 760 CMR 59.04(1)(d)1 through 3 apply to the Mixed-Use Development Project.

760 C.M.R. 59.02 (2005); see also 760 C.M.R. 59.04(1)(d) (2005).

49. See 760 C.M.R. 59.04(1)(g) (2005).

50. Section 2 of chapter 40R defines Affordable Housing as that which is affordable to persons earning less than 80 percent of the area median income, and subject to an affordability restriction of at least 30 years. The DHCD has been reluctant to approve a 40R measure which requires more than 20 percent of the units in a “for sale” development to be affordable, arguing that this discourages production. Telephone conference with Donald J. Schmidt, DHCD chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008). However, when 25 percent of the units are affordable in a rental project, the DHCD will count all of the units—market rate and affordable—towards the municipality’s 10 percent goal in the subsidized housing inventory (“SHI”) maintained by DHCD, which matches the treatment of rental projects permitted pursuant to chapter 40B. For this reason, a municipality may draft a SGOD that requires 25 percent of rental units to be affordable. The benefits of 40R over 40B are discussed in Part II. A, *infra*.

51. See MASS. GEN. LAWS ch. 40R, § 6(a)(9) (2006), and 760 C.M.R. 59.04(1)(b) (2005).

52. See MASS. GEN. LAWS ch. 40R, § 6(a)(10) (2006), and 760 C.M.R. 59.04(1)(c) (2005).

53. See 760 C.M.R. 59.05(1) (2005). The initial hearing concerns the application, not just the zoning ordinance or by-law. It is intended to assure DHCD that the application was not submitted in a vacuum, without prior public knowledge and participation.

54. The elements of the application are set forth at 760 C.M.R. 59.03 (2005).

preliminary determination of whether the city or town is eligible for the financial incentives offered in return for SGOD acceptance.⁵⁵

Once issued a letter of preliminary eligibility, the municipality must amend its zoning in accordance with chapter 40A.⁵⁶ The planning board must hold a public hearing and make a recommendation to the town meeting or city council.⁵⁷ Enactment is by a vote of two-thirds of the local legislature.⁵⁸ DHCD must then grant final approval⁵⁹ before the commonwealth makes the “one time” zoning incentive payment.

B. Municipal Incentives

After enactment of the SGOD and the DHCD’s final approval thereof, cities and towns are entitled to receive incentive payments.⁶⁰ These “one time” zoning incentive payments vary according to project size:

Up to 20 units:	\$10,000
Between 20-100 units:	\$75,000
Between 101-200 units:	\$200,000
Between 201-500 units:	\$350,000
Over 500 units:	\$600,000 ⁶¹

The payment is based on the potential new units created under chapter 40R, less the number of units that could have been created as-of-right under existing zoning.⁶²

Cities and towns are also eligible to receive a density bonus payment of \$3,000 for each unit of new housing upon issuance of a building permit.⁶³ This is the so-called “bonus payment.”⁶⁴ In larger

SGODs, the potential windfall to communities easily tops \$1 million.⁶⁵ Those communities that adopt SGODs also receive priority during state consideration in awarding discretionary grant programs, such as Community Development Action grants and Public Works Economic Development grants.⁶⁶

The original concept of chapter 40R in 2003 included payments for the education of the school-aged children who become residents of a project within a SGOD.⁶⁷ This provision was deleted from the final version of the law. However, in 2005, chapter 40S was adopted by the legislature.⁶⁸ Chapter 40S payments are available only to those cities and towns with a chapter 40R smart growth district.⁶⁹ Such municipalities may receive “smart growth school cost reimbursement” from the commonwealth.⁷⁰ The reimbursement

shall be equal to the positive difference, if any, between: (i) total education cost for eligible students, and (ii) the sum of local smart growth revenues for education plus additional Chapter 70 aid. The Department of Education shall add the smart growth school cost reimbursement amounts to each district’s required net school spending, as defined in Chapter 70. For purposes of the net school spending calculation, the Department shall allocate a municipality’s smart growth school cost reimbursement among the districts to which it belongs in proportion to the number of eligible students from the municipality attending each district.⁷¹

To date, no municipality has qualified for chapter 40S payments.⁷²

55. See MASS. GEN. LAWS ch. 40R, § 4(a) (2006), and 760 C.M.R. 59.05(2) (2005).

56. MASS. GEN. LAWS ch. 40R, § 3 (2006).

57. Such amendment must take place within three years of the DHCD determination of preliminary eligibility. See 760 C.M.R. 59.05(3) (2005).

58. See MASS. GEN. LAWS ch. 40A, § 5 (2006 & Supp. 2008).

59. See MASS. GEN. LAWS ch. 40R, § 4(b) (2006), and 760 C.M.R. 59.05(4) (2005).

60. See MASS. GEN. LAWS ch. 40R, § 9(a) (2006), and 760 C.M.R. 59.06(1) (2005).

61. See MASS. GEN. LAWS ch. 40R, § 9(a) (2006), and 760 C.M.R. 59.06(1) (2005).

62. The total projected number of units of new construction is used in calculating the payment. See MASS. GEN. LAWS ch. 40R, §§ 8, 9 (2006).

63. See MASS. GEN. LAWS ch. 40R, § 9(b) (2006), and 760 C.M.R. 59.06(2) (2005). Again, this payment is for net new units only. It is important to note that the establishment of a 40R district does not require the developer to build out the project at the full density authorized by the SGOD. Where the SGOD allows a hypothetical density of 100 dwelling units and the developer chooses to build only 80 units, the municipality will receive a bonus payment of \$3,000 for each of the 80 units, assuming all are net new units. There is no consequence to the developer’s choice to forego the 20 units not built.

64. The DHCD did not make any bonus payments until the end of 2007. However, bonus payments have now been made to several communities, including Haverhill, North Reading and Norwood. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

65. A word of warning: municipalities must repay to the DHCD all money paid if within three years “no construction has been started.” The clock starts ticking on the date the commonwealth makes the “one time” payment. See MASS. GEN. LAWS ch. 40R, § 14 (2006). Obviously, the statute is too new for an example of repayment. Sure to be troublesome is the statutory standard “no construction has been started.” See generally, MARK BOBROWSKI, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW § 5.02[13](2d ed. 2002) for

treatment of the like standards in Mass. Gen. Laws c. 40A, §§6 and 9 (2006). The DHCD’s regulations, at 760 C.M.R. 59.07(1)(f) (2005), do attempt some useful clarification.

66. See MASS. GEN. LAWS ch. 40R, § 9(c) (2006).

67. See 2003 Task Force Report 3. It is worth noting that the fiscal 2005 state budget merely directed DHCD, in consultation with the department of education and the department of revenue, to study the impact on schools that chapter 40R development would cause. See St. 2004, c. 149, §367.

68. St. 2005, c. 141, eff. Nov. 22, 2005. Again, the inspiration was the Commonwealth Housing Task Force. Its May 2005 report, *Chapter 40R School Cost Analysis and Proposed Smart Growth School Cost Insurance Supplement*, called for supplemental payments to “cover any net education costs incurred by the community for public school students living in Smart Growth Districts, after taking into consideration increased property tax and excise tax revenues.” The 2005 report advocated for this supplemental payment because its authors feared that chapter 40R SGODs would not be enacted if the school costs loomed over the local legislatures. See page 3 of the *School Cost Analysis*, available at <http://www.tbf.org/uploadedFiles/SchoolsHousingFINALrev.pdf> (last visited Dec. 8, 2008).

69. MASS. GEN. LAWS ch. 40S, § 2 (2006).

70. See *id.*

71. *Id.* Note that Mass. Gen. Laws chapter 70 governs school funds and state aid for public schools.

72. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008). Moreover, using the formula prescribed by the statute, it is unlikely that municipalities in the upper half of the commonwealth’s municipal profiles would qualify. In order to verify that accurate information would be provided to one local legislature (which shall remain nameless) the author caused the chapter 40S formula to be applied in four contexts: (1) 75 percent market rental/25 percent moderate income; (2) 80 percent market rental/20 percent low income; (3) 60 percent market rental/40 percent low income; and (4) 50 percent market rental/50 percent low income. Only the last option resulted in chapter 40S payments and the payments did not erase an overall deficit in school costs. *Caveat oppidum!*

II. FAVORABLE ASPECTS OF CHAPTER 40R

A. A Positive Alternative to Chapter 40B

Chapter 40R represents an alternative to housing production under chapter 40B of the General Laws.⁷³ Chapter 40B, first adopted in 1969, prescribes a streamlined procedure for the issuance of comprehensive permits.⁷⁴ It is specifically intended to help developers avoid the long delays associated with proposals for affordable housing.⁷⁵ More importantly, the statute “confers on boards of appeals and the Housing Appeals Committee the power to override local ‘requirements and regulations,’ including zoning ordinances or by-laws, which are not ‘consistent with local needs.’”⁷⁶

Although chapter 40B has produced plenty of affordable and market rate dwelling units, it has perhaps inspired more in the way of suburban hostility.⁷⁷ One of chapter 40B’s chief defects is the absence of municipal control over appropriate siting. In order to apply for a comprehensive permit, the applicant needs only a “project eligibility letter” from a subsidizing agency.⁷⁸ The subsidizing agencies have routinely issued project eligibility letters for greenfields as well as brownfields, for forested hillsides as well as village centers.⁷⁹ Chapter 40B does not screen applicants for “eligible locations.”⁸⁰

If chapter 40R fosters “smart growth,” no component of the statute is smarter than the requirement of an “eligible location.” As discussed earlier, the statute requires 40R projects to be at an “eligible location”⁸¹ and defines that term⁸² as:

- (1) areas near transit stations, including rapid transit, commuter rail and bus and ferry terminals;
- (2) areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns, and existing rural village districts; or
- (3) areas that by virtue of their infrastructure, transportation access, existing underutilized facilities, and/or location make highly suitable locations for residential

or mixed use smart growth zoning districts.⁸³

Cities and towns must vote, by a two-thirds majority, to amend the ordinance or by-law to accept this eligible location and allow for residential development as-of-right. The approval of a chapter 40R district is tantamount to a referendum on the acceptability of the proposed development; its location, design and potential impacts are key questions in the debate. Because 40R’s eligible locations are so “smart,” the hostility associated with inappropriate 40B siting is generally missing from this debate. Bad projects fall by the wayside, usually long before the vote of the local legislature. Smart projects are welcomed by a supermajority of local voters or not welcome at all.

Some chapter 40B projects are easily transformed into 40R projects. For example, Midway Realty, LLC, of Dartmouth, Massachusetts proposed a 308-unit project located at the long dormant site of an old amusement park, known locally as Lincoln Park.⁸⁴ The board of selectmen gave approval to the 40B application under the “Local Initiative Program” (“LIP”),⁸⁵ often referred to as a “friendly chapter 40B.” When chapter 40R became an option, the 40B application was shelved and the town meeting approved a SGOD for the same project. The difference? As a chapter 40B project, Dartmouth received only the reward of creating affordable housing. As a 40R project, Dartmouth received a one-time payment of \$350,000 and is eligible for up to \$924,000 in bonus payments.⁸⁶ This \$1.274 million represents considerable relief in a time of municipal budget crisis.

For municipalities, it is crucial that chapter 40R affordable dwellings “count” toward the chapter 40B affordable housing goal of 10 percent of total housing stock.⁸⁷ As is the case with rental projects under chapter 40B, rental projects developed under chapter 40R will also count 100 percent of the dwelling units, where at least 25 percent of the dwelling units are restricted for occupancy by moderate-income households, or 20 percent of the dwelling units are restricted for occupancy by low-income households.⁸⁸

For developers, chapter 40R has two key advantages over chapter

73. MASS. GEN. LAWS ch. 40B §§ 1-30 (2006).

74. *Milton Commons Associates v. Board of Appeals of Milton*, 14 Mass. App. Ct. 111, 115 (1982).

75. *Id.*; see also *Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 363 Mass. 339, 347 (1973).

76. *Id.* at 355. This is not the place for a comprehensive overview of chapter 40B. For a thorough discussion of the statute, see BOBROWSKI, *supra* note 65, ch. 18.

77. For example, a recent citizen’s petition to repeal chapter 40B gathered more than 31,000 signatures, but fell short of the 66,539 signatures required to put the measure before the voters. Supporters claimed that the petitions contained signatures hailing from 90 percent of the commonwealth’s 351 cities and towns. State House News Service, Dec. 19, 2007.

78. See 760 C.M.R. 56.04(2) (2008).

79. The author has served as legal counsel to zoning boards of appeal in more than 30 communities in the review of dozens of 40B projects, from downtown Haverhill to the forests of Holliston.

80. To be fair, there has been some recent progress by subsidy sources in screening chapter 40B projects. The DHCD has adopted “Sustainable Development Principles” to inform its decision making, including the issuance of project eligibility letters. Effective January 1, 2006, MassHousing has linked its support of project eligibility to the DHCD’s Principles.

81. See MASS. GEN. LAWS ch. 40R, § 6(a)(1) (2006) and 760 C.M.R. 59.04(1)(a)(1) (2005).

82. See MASS. GEN. LAWS ch. 40R, § 1 (2006) and 760 C.M.R. 59.02, 59.04(1)(a)(1) (2005).

83. The Romney administration determined that all state hospitals qualified as highly suitable locations. Several were approved as chapter 40R sites: Lakeville, Reading and Northhampton. It remains to be seen if the Patrick administration will follow suit. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

84. For more details, see *The Village at Lincoln Park*, <http://thevillageatlincolnpark.com/> (last visited Dec. 8, 2008).

85. See 760 C.M.R. 56.00(2008).

86. The breakdown: \$350,000 from the one time payment and \$924,000 if each of the proposed 308 dwelling units is permitted.

87. Under chapter 40B, a developer may seek to override local zoning in a community where less than 10 percent of its annual housing stock is not affordable to households earning no more than 80 percent of area median income, so long as the development proposed under the comprehensive permit plan contains not less than 25 percent of the units for affordable housing. The DHCD maintains the housing subsidized inventory (“SHI”) showing the progress of each city and town toward the 10 percent housing goal. DHCD, Chapter 40B Subsidized Housing Inventory (SHI) as of September 9, 2008, <http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm> (last visited Dec. 8, 2008).

88. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

40B. First, there is no profit limitation. Under chapter 40B, the developer of a “for sale” project is limited to a profit, as developer, of not more than 20 percent of total project development costs.⁸⁹ The developer of a 40B rental project is limited to a return on invested equity of not more than 10 percent per year.⁹⁰ Both rental and for sale projects face a tough “cost certification” when the last unit is sold or rented.⁹¹ This audit has been the source of enormous recent controversy.⁹²

Under chapter 40R, profit is not limited at all. Thus, there is no cost certification provision in the local regulatory agreement.⁹³ Without a profit limitation, the developer is under no obligation to share a project “pro forma” with the approval authority, as is the custom in chapter 40B projects. The developer is free to pay market price for the locus, even if the value is inflated by potential chapter 40R development. This also runs counter to practice under chapter 40B. It will certainly have the effect of making a chapter 40R development site easier to sell once the zoning has been enacted by the city or town.

A second advantage to developers is the generous appeal provision of chapter 40R. Section 11 of chapter 40R first establishes jurisdiction for judicial review in the usual venues.⁹⁴ Then, chapter 40R departs significantly from the Zoning Act:

Review shall be based on the record of information and plans presented to the approving authority ...

(g) A complaint by a plaintiff challenging the approval of a project under this section shall allege the specific reasons why the project fails to satisfy the requirements of this chapter or other applicable law and allege specific facts establishing how the plaintiff is aggrieved by such decision. The approving authority’s decision in such a case shall be affirmed unless the court concludes the approving authority abused its discretion ... in approving the project

89. For a thorough discussion analyzing the economics of a homeownership project under chapter 40B, see *Rising Tide, LLC v. Lexington Zoning Bd. of Appeals*, Mass. Housing App. Comm. No. 03-05 (June 14, 2005).

90. For a thorough discussion analyzing the economics of a rental project under chapter 40B, see *Bay Watch Realty Trust v. Marion Bd. of Appeals*, Mass. Housing App. Comm. No. 02-28 (Dec. 5, 2005). The Housing Appeals Committee prefers the “Return on Total Cost” (“ROTC”) to the Internal Rate of Return (“IRR”) approach to this measurement. See, e.g., *Paragon Residential Props., LLC v. Brookline Zoning Bd. of Appeals*, Mass. Housing App. Comm. 04-16 (Mar. 26, 2007); *8 Grant Street, LLC v. Natick Zoning Bd. of Appeals*, Mass. Housing App. Comm. 05-13 (Mar. 5, 2007).

91. The cost certification is imposed in the regulatory agreement required by both DHCD and MassHousing. The Housing Appeals Committee has endorsed the recommendations found in Edith Netter, *Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to MGL Chapter 40B*, published by the Massachusetts Housing Partnership (Nov. 2005) for the conduct of the cost certification. See http://www.mhp.net/uploads/resources/local_40b_v3_loav_res.pdf (last visited Dec. 8, 2008). See also *Paragon Residential Props., LLC v. Brookline Zoning Bd. of Appeals*, Mass. Housing App. Comm. No. 04-16 (Mar. 26, 2007) (homeownership); *8 Grant Street, LLC v. Natick Zoning Bd. of Appeals*, Mass. Housing App. Comm. 05-13 (Mar. 5, 2007) (rental).

92. Connie Paige, *Report bolsters town — IG: 40B developer padded profits*, BOSTON GLOBE July 6, 2008, at 1; Connie Paige, *Inspector general blasts Billerica condo project: Profits excessive*, BOSTON GLOBE, Dec. 20, 2007, at 8; See, e.g., Christine McConville, *Towns urge crackdown on housing law violators*, BOSTON GLOBE, Oct. 11, 2006, at B1;

93. This does not eliminate the need for a regulatory agreement. The developer must promise that future resales of the affordable units will satisfy the standards

(h) A plaintiff seeking to reverse approval of a project under this section shall post a bond in an amount to be set by the court that is sufficient to cover twice the estimated: (i) annual carrying costs of the property owner, or a person or entity carrying such costs on behalf of the owner for the property, as may be established by affidavit; plus (ii) an amount sufficient to cover the defendant’s attorneys fees, all of which shall be computed over the estimated period of time during which the appeal is expected to delay the start of construction. The bond shall be forfeited to the property owner in an amount sufficient to cover the property owner’s carrying costs and legal fees less any net income received by the plaintiff from the property during the pendency of the court case in the event a plaintiff does not substantially prevail on its appeal.⁹⁵

These provisions of section 11 contain powerful incentives for developers to use chapter 40R. Review by the court is based on the record produced at the approval authority. Thus, the local decision is reviewed by the court using the same procedures as those prescribed under chapter 30A of the General Laws, the commonwealth’s Administrative Procedures Act.⁹⁶ Unlike zoning trials pursuant to an appeal under section 17 of chapter 40A, there is no *de novo* review. Instead, once the local record has been assembled and transmitted to the court, a motion for judgment on the pleadings is decided without trial.⁹⁷

Moreover, the chance of an appeal by an alleged “aggrieved person” is, to say the least, highly unlikely. The bond and penalty provisions of section 11 of chapter 40R are so stiff as to be a developer’s dream.⁹⁸ The requirement of a bond to cover *twice* the annual carrying costs and *twice* the estimated attorney’s fees is without parallel in the Zoning Act,⁹⁹ the Subdivision Control Act¹⁰⁰ or the Administrative Procedures Act.¹⁰¹

for affordability set forth in 760 C.M.R. 56.00 (2008).

94. “Any court authorized to hear appeals under G.L. c. 40A, §17 shall be authorized to hear an appeal from a decision under this section by a party who is aggrieved by such decision.” MASS. GEN. LAWS ch. 40 R § 11(f) (2006). General Laws chapter 40A, section 17, in turn, provides for an appeal

to the land court department, the superior court department in which the land concerned is situated or, if the land is situated in Hampden county, either to said land court or, superior court department or to the division of the housing court department for said county, or if the land is situated in a county, region or area served by a division of the housing court department either to said land court or superior court department or to the division of said housing court department for said county, region or area, or to the division of the district court department within whose jurisdiction the land is situated except in Hampden county.

MASS. GEN. LAWS ch. 40A, § 17 (2006).

95. MASS. GEN. LAWS ch. 40R, § 11 (2006).

96. See MASS. GEN. LAWS ch. 30A, § 14 (2006) and Mass. Superior Court Standing Order No.1-96.

97. See generally, Mass. Superior Court Standing Order 1-96: Processing and Hearing of Complaints for Judicial Review of Administrative Agency Proceedings.

98. As to the constitutionality of this provision, see *Damaskos v. Bd. of Appeal of Boston*, 359 Mass. 55, 62-64 (1971).

99. See MASS. GEN. LAWS ch. 40A, § 17 (2006).

100. See MASS. GEN. LAWS ch. 41, § 81BB (2006).

101. See MASS. GEN. LAWS ch. 30A, § 14 (2006).

B. A Flexible Planning Tool

One of chapter 40R's greatest assets is shielding projects from "spot zoning" attack.¹⁰² Spot zoning arises "where a zoning change is designed solely for the economic benefit of the owner of the property receiving special treatment and is not in accordance with a well considered plan for the public welfare."¹⁰³ In effect, "spot zoning" occurs where a suspect area has been singled out for treatment less onerous than that imposed upon nearby, indistinguishable properties.¹⁰⁴

"Spot zoning" is illegal on constitutional grounds.¹⁰⁵ "Spot zoning" has also been repeatedly held to violate the uniformity requirement contained in chapter 40A, section 4.¹⁰⁶

Chapter 40R allows for the rezoning of small parcels without the risk of a "spot zoning" challenge.¹⁰⁷ This presents opportunities to create small SGODs or small subdistricts within SGODs. For example, the Karsten Company of North Weymouth proposed a multifamily development in Norwood on the site of the former Saint George Roman Catholic Church after purchasing the property from the Archdiocese of Boston. The proposal called for 11 units in the former church, two in the former rectory and two in the former convent.¹⁰⁸ The property contained only 34,398 square feet. Norwood's zoning by-law limited development in this General Residence District to two units per lot with a minimum lot area of 10,000 square feet. A rezoning pursuant to chapter 40A could be challenged as "spot zoning,"¹⁰⁹ rezoning under chapter 40R could not.

Similarly, subdistricts *within* the SGOD are bulletproof by virtue of the DHCD regulations. An example is found in Haverhill's Downtown SGOD. Haverhill's emphasis is vacant or underutilized

buildings. The parcels on which these buildings are located constitute the subzones shown on the Downtown SGOD map.

Each subzone represents a potential multifamily project otherwise requiring special permit approval from the city council. For example, the Archdiocese of Boston owns the land comprising Subzone B. The Archdiocese has plans to rehabilitate the empty building and develop a 57-unit multifamily dwelling. The subzones are small, but they have high densities.

The density requirement for the subzones was derived by dividing the size of the existing building¹¹⁰ by the acreage of the parcel. The resulting subzone area and density requirements are shown on the Haverhill SGOD chart.

Subzone	Developable Acres	Density (Units/Dev. Acre)
A	2.306	220
B	1.832	120
C	1.192	65
D	26.512	20
E	3.777	12

The DHCD regulations promote the creation of such subzones. With few exceptions, existing downtowns can be subzoned in this manner, even at lower densities. For example, Pittsfield's chapter 40R map shows nine subzones, the largest of which has 2.98 developable acres.¹¹¹ The largest project contemplated for any subzone will contain 107 units. Like Haverhill, all of the subzones are potential multi-family projects otherwise requiring special permit approval

102. The test for "spot zoning" was succinctly stated in *Leahy v. Inspector of Bldgs. of New Bedford*, 308 Mass. 128 (1941):

A city council is empowered to amend a zoning ordinance when the character and use of a district or the surrounding territory have become so changed since the original ordinance was enacted that the public health, morals, safety and welfare would be promoted if a change were made in the boundaries or in the regulations prescribed for certain districts; but mere economic gain to the owner of a comparatively small area is not sufficient cause to involve an exercise of this amending power for the benefit of such owner.

Id. at 132-33. Where "spot zoning" is alleged, the challenger has the burden of proof. "To sustain that burden they must prove facts which compel a conclusion that the question whether the amendment falls within the enabling statute is not even fairly debatable." *Crall v. City of Leominster*, 362 Mass. 95, 103 (1972). The court has characterized this burden as "heavy." *Id.*

103. *Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 363 Mass. 339, 362 (1973). On the other hand, where a change from residential to commercial "serves to increase the town's tax base and...increase the availability of retail services and employment opportunities," no spot zoning had occurred. *Rando v. Town of N. Attleborough*, 44 Mass. App. Ct. 603, 606 (1998).

104. *Leahy v. Inspector of Buildings*, 308 Mass. 128, 134 (1941). The court now favors a balancing test to assess a "spot zoning" challenge. Changes to the neighborhood or area are certainly relevant and important facts, but they are not controlling. *Raymond v. Comm'r of Pub. Works of Lowell*, 333 Mass. 410, 413 (1956). "It is not [even] necessary to find a substantial change in the locus to support a change in its zoning classification." *Cohen v. City of Lynn*, 333 Mass. 699, 704 (1956). Similarly, economic benefits accruing to a singled-out parcel do not require a finding of "spot zoning," where there are also benefits to the general public. *Raymond v. Bldg. Inspector of Brimfield*, 3 Mass. App. Ct. 38, 42 nn.3 & 4 (1975); *see also* *Fabiano v. City of Boston*, 49 Mass. App. Ct. 281, 286 (2000). Nor is the size of the parcel controlling. *Town of Marblehead v. Rosenthal*, 316 Mass. 124, 126 (1944) ("The invalidity of 'spot zoning' depends upon more than the size of the 'spot.'"); *see also* *Lanner v. Bd. of Appeal of Tewksbury*, 348 Mass. 220, 229 (1964); *Raymond v. Bldg. Inspector*, 3 Mass. App. Ct. at 42. In assessing "spot zoning" challenges, it is quite proper to consider the effect of the zoning change on the municipality as a whole. *Lanner*, 348 Mass. at 228-29;

Cohen, 333 Mass. at 704; *Rando*, 44 Mass. App. Ct. at 606. This is especially important where the growth of the municipality has been addressed by a plan. *Rosko v. City of Marlborough*, 355 Mass. 51, 53 (1968); *Durand v. Superintendent of Pub. Bldgs. of Fall River*, 354 Mass. 74, 77 (1968). In fact, the failure to study the effect of a zoning change using conventional planning techniques may result in invalidation of the amendment. *Nat'l Amusements v. City of Boston*, 29 Mass. App. Ct. 305, 310-11 (1990).

105. Any exercise of the zoning power to effect a private benefit constitutes a denial of equal protection under the United States and Massachusetts Constitutions. *Bd. of Appeals of Hanover*, 363 Mass. at 362 n.15; *see also* *Sinn v. Bd. of Selectmen of Acton*, 357 Mass. 606, 611 (1970).

106. "Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted." MASS. GEN. LAWS ch. 40A, § 4 (2006). *See* *Schertzer v. City of Somerville*, 345 Mass. 747, 751 (1963); *Shapiro v. City of Cambridge*, 340 Mass. 652, 658 (1960); *Canteen Corp. v. City of Pittsfield*, 4 Mass. App. Ct. 289, 293 (1976).

107. 760 C.M.R. 59.04(1)(d) (2005) states that "[a] District may contain two or more sub-districts, zoned separately for single-family, 2- and/or 3-family, and/or multi-family residential uses, or with varying allowable densities for the same residential use, so long as each sub-district individually meets the applicable minimum allowable density requirement set forth in 760 CMR 59.04(1)(d)1. through 3." This constitutes an exemption from "spot zoning."

108. The author served as counsel to the Karsten Company. These facts are taken from the application to the Norwood Planning Board.

109. *See, e.g.*, *Beal v. Bldg. Comm'r of Springfield*, 353 Mass. 640, 644 (1968) (three lots comprising 0.4 acres held "spot zoning"); *Smith v. Bd. of Appeals of Salem*, 313 Mass. 622 (1943) (one-half acre lot was "spot zoned").

110. DHCD will allow a unit size of 1,000 square feet to be used in this calculation to estimate the yield of dwelling units. However, some reasonable space—here 20 percent—was subtracted for necessary common space in the building, for elevators, halls, utility rooms, and the like. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

111. The author served as counsel to the city in the preparation of this map.

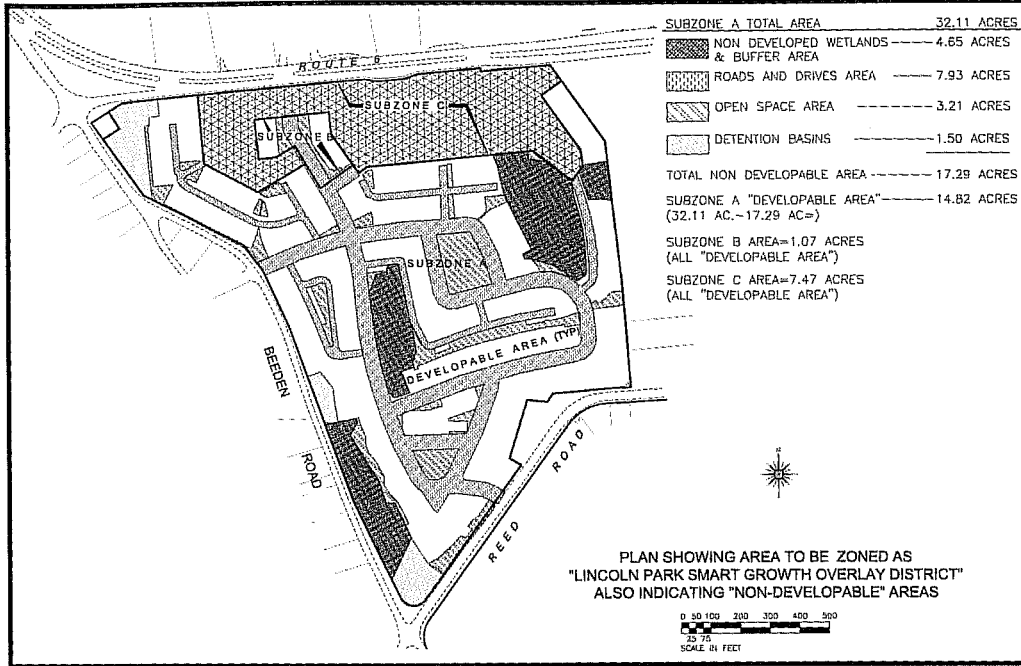
from the city council.¹¹²

In addition to providing relief from a “spot zoning” challenge, chapter 40R rewards creative map-making. At first blush, the density requirements of the statute appear daunting, if not overwhelming. With a minimum density requirement of 20 dwelling units per acre for multifamily projects,¹¹³ many municipalities reject even the notion of investigating a SGOD. But, the density requirement is

result is a developable area of 15.95 acres. This yields a multifamily density of 308 dwelling units, a far cry from the 800 dwelling units the overall tract acreage would otherwise predict.

In fact, the mapping of the chapter 40R district need not follow property boundaries. Consider the Fisherville SGOD in Grafton. Subzone A, on the north side of Route 123A, is a multifamily subzone, with a required density of 25 dwelling units per acre.¹¹⁶ The

property boundary lies across the Blackstone River to the west of the 40R district boundary. By carving the chapter 40R district back to a 10-acre tract, two acres of which are wetlands, the density requirements of the statute were satisfied by placing 200 dwelling units and a restaurant in this subzone. Subzone B, south of Route 123A, addresses a second, 10-acre parcel. However, the subzone consists of only four acres, two of which are subtracted because of wetlands, rights of way, or stormwater management. The two remaining developable acres will support 40 dwelling units and 40,000 square feet of commercial space, with a density of 20 dwelling units per acre. The excess property may be restricted by covenant or by the existing underlying zoning.



based on the net developable area.¹¹⁴ This allows even a large tract to be whittled to a manageable result.

Consider the Lincoln Park SGOD of Dartmouth. The total tract size is 40.65 acres, 7.47 of these acres are reserved exclusively for commercial development.¹¹⁵ The right-of-way of the various internal roadways contains 7.93 acres. Wetlands and steep slope areas occupy 5.94 acres. 1.59 acres are set aside for stormwater management. Ten percent of the tract, or 1.77 acres, is reserved as open space. The net

Finally, chapter 40R allows for the flexible use of a waiver provision. Zoning by-laws or ordinances adopted pursuant to chapter 40A cannot be “waived.” Variances are possible pursuant to section 10 of the statute, but only where the very difficult statutory criteria are met.¹¹⁷ The special permit process may be used to “deviate” from otherwise applicable dimensional requirements.¹¹⁸ The land court has ruled that a waiver is not permissible under site plan review.¹¹⁹ Under chapter 40R, the DHCD and

112. Information taken from the Pittsfield chapter 40R application.

113. MASS. GEN. LAWS ch. 40R, § 6(a)3 (2006).

114. “Developable Land” is defined as

all land within a District that can be feasibly developed into residential or Mixed-Use Development Projects.

Developable Land shall not include: Substantially Developed Land; or

- (a) Open Space;
- (b) Future Open Space;
- (c) the rights-of-way of existing public streets, ways, and transit lines;
- (d) land currently in use for governmental functions (except to the extent that such land qualifies as Underutilized Land); or
- (e) areas exceeding one-half acre of contiguous land that are:
 1. protected wetland resources (including buffer zones) under federal, state, or local laws;
 2. rare species habitat designated under federal or state law;
 3. characterized by steep slopes with an average gradient of at least 15%; or
 4. subject to any other local ordinance, by-law, or regulation that would prevent the development of residential or Mixed-Use

Development Projects at the As-of-right residential densities set forth in the Smart Growth Zoning.

760 C.M.R. 59.02 (2005).

115. The author served as counsel to the town. These facts are taken from the application to DHCD.

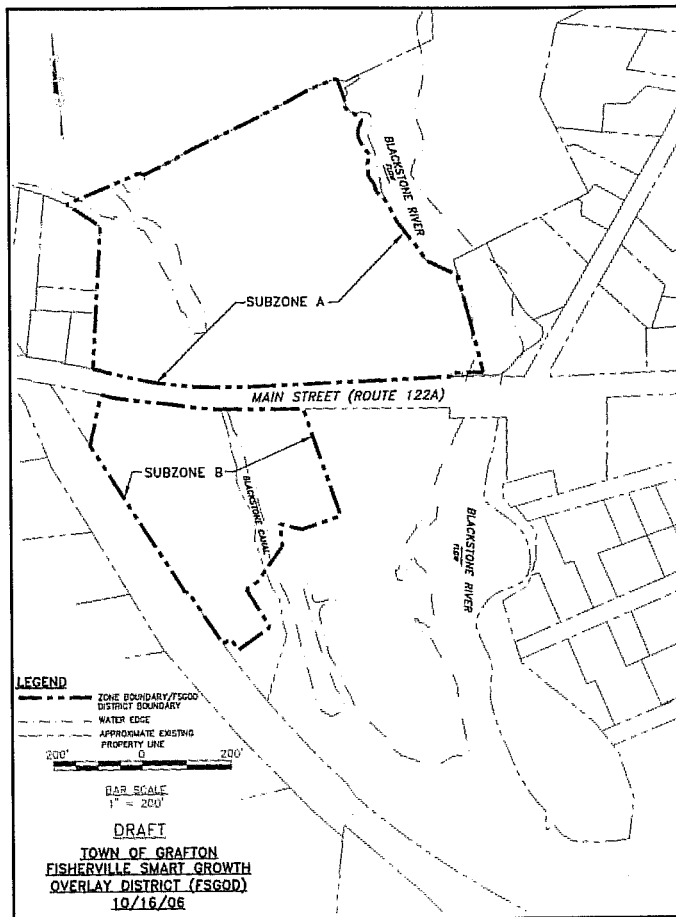
116. The author served as counsel to Fisherville Redevelopment Corporation, the landowner. These facts are taken from the application to DHCD.

117. Variances may only be issued by the permit granting authority where owing to circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.

MASS. GEN. LAWS ch. 40A, § 10 (2006).

118. See Emond v. Bd. of Appeals of Uxbridge, 27 Mass. App. Ct. 630 (1989).

119. See generally Aloha Found. v. Zoning Bd. of Appeals of Norwood, 4 LCR (Landlaw) 199, 202 (Mass. Land Ct. 1996).



the office of the attorney general¹²⁰ have routinely approved SGODs containing a broad waiver clause.¹²¹

III. CRITIQUE OF CHAPTER 40R

Chapter 40R has been a useful vehicle for housing production. Certainly, the Haverhill, Brockton, Kingston and Pittsfield SGODs will foster “smart growth” housing in — by anyone’s definition — the right place. These projects will bring apartment dwellers to downtowns with newly renovated train stations, and they will serve as the catalyst for the next wave of downtown revitalization in these aging cities.

But chapter 40R has also promoted random development of sites that barely meet “smart growth” standards. For example, the Lunenburg Tri-Town SGOD authorizes the construction of 204 dwelling units at the site of a still-operating drive-in movie theater.¹²² DHCD approved the site as a suitable location and the town meeting amended the zoning by-law to accommodate the proposal.¹²³ Does that make it “smart growth”? There are undoubtedly dozens of sites in Massachusetts more consistent with smart growth principles than this 10-acre site in Lunenburg, which is somewhat distant from employment centers and a train station.

The benefits of chapter 40R may be random, but they are hardly inconsistent with the DHCD’s random efforts at statewide planning. Unlike many nearby states,¹²⁴ Massachusetts does not have a cadre of state planners producing transportation, economic development and land use visions for the commonwealth’s regions and municipalities. In fact, the DHCD has no staff currently performing this planning function.¹²⁵ Chapter 40R would be a better tool if it did. True “smart growth” priority sites — identified by DHCD planners with the commonwealth’s goals and objectives in mind — would be better targets for our limited resources. A vote to rezone Lunenburg’s Tri-Town SGOD deserves some reward. Priority sites — those key to the DHCD’s regional economic, housing and transportation goals and objectives — deserve even more reward. Municipalities taking on prioritized sites might receive some form of augmented or guaranteed payments or a boost in competing for discretionary funds.¹²⁶

120. Pursuant to MASS. GEN. LAWS ch. 40, § 32 (2006), the office of the attorney general must approve all by-laws from the commonwealth’s towns. Cities are exempt from this requirement.

121. For example, the Northampton SGOD contains the following provision: 20.14 Decision.

1. Waivers. Upon the request of the Applicant, the Plan Approval Authority may waive dimensional and other requirements of Section 20.0, including the design standards of Section 20.11, in the interests of design flexibility and overall project quality, and upon a finding of consistency of such variation with the overall purpose and objectives of the SG District, or if it finds that such waiver will allow the Project to achieve the density, affordability, mix of uses, and/or physical character allowable under this Section 20.0.

Northampton, Mass., Code § 350-20.14 (2008).

122. The author represented the proponent of the rezoning.

123. See Lunenburg Zoning By-Laws, § 4.13 (2006).

124. E.g., New Jersey and Rhode Island. In 2006, the New Jersey Council on Affordable Housing (COAH) was working with 287 of the 566 municipalities in the state to develop regional plans for affordable housing. An additional 78 municipalities are or were at one time under the jurisdiction of the court. See

State of N.J., Department of Community Affairs, Council on Affordable Housing, <http://www.state.nj.us/dca/affiliates/coah/index.html> (last visited Dec. 8, 2008). In Rhode Island,

[t]he Statewide Planning Program is charged with preparing and maintaining plans for the physical, economic, and social development of the state; encouraging their implementation; and coordinating the actions of state, local and federal agencies and private individuals within the framework of the state’s development goals and policies...as established by Sections 42-11-10 and 12 of the General Laws.

State of R.I., Division of Planning, <http://www.planning.ri.gov/> (last visited Dec. 8, 2008).

125. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

126. Currently, municipalities vying for discretionary grants (such as Community Development Action Grants and Public Works Economic Development Grants) must participate in the Commonwealth Capital Program which scores municipalities based on the number of local initiatives undertaken to comply with myriad “smart growth” principals. The program’s scorecard could be amended to associate points if prioritized sites are taken on by the host community.

Priority “smart growth” siting by the commonwealth could address another problem: DHCD has not seen many chapter 40R applications from municipalities operating without a private partner.¹²⁷ The reasons for municipal inaction or disinterest are complicated and connected. Municipalities are wary of chapter 40R. The fixed density requirement is a source of concern. Municipalities cite past broken promises by the commonwealth as another source of discouragement.¹²⁸ Accordingly, chapter 40R has worked best where the development is promoted by the private sector, and the municipality has, once educated, agreed to collaborate in the rezoning process. As discussed above, smart growth sites promoted by developers in cooperation with cash-short municipalities are a hit-or-miss proposition.¹²⁹

A priority list of “smart growth” sites would serve notice to municipalities that DHCD will enthusiastically review a proposal for those sites, with or without a private sponsor. Cities and towns need an additional assurance. Because chapter 40R requires repayment after three years in the event no construction is commenced,¹³⁰ a municipality has little or no incentive to rezone its best parcels for smart growth in the absence of a private partner. Some of our cities and towns are cash strapped but transit rich, with nearby housing begging for rehabilitation; in these locations, chapter 40R acts to promote as-of-right residential development where it is best suited. A simple tweak of the repayment provision, extending the “build or else” mandate to six years (or forgiving the mandate altogether for priority sites) could inspire cities and larger towns with downtowns to rezone for residential growth.

Finally, the uncertainty over the promised payments needs to be addressed. All chapter 40R and 40S incentives are funded through the Smart Growth Housing Trust Fund. These incentives are subject to legislative appropriation.¹³¹ One of the greatest impediments to

chapter 40R’s success is the uncertainty and adequacy of the appropriations made to the trust. According to the Task Force, many cities and towns have expressed an unwillingness to participate, not because of any distaste for developing under chapter 40R, but because there is no credible plan for providing 40R and 40S funding in the foreseeable and distant future since the trust is subject to appropriation.¹³²

CONCLUSION

Chapter 40R presents a rare opportunity for municipalities and developers to work in concert toward the common goal of increasing our housing stock. At its best, chapter 40R promotes a public/private partnership with rewards for both sides. Unlike chapter 40B, where confrontation is too often the rule, chapter 40R requires cooperation. Ultimately, the adoption of a chapter 40R SGOD is a referendum on the proposed development project. Two-thirds of the town meeting or city council must be on board for the project to have a future.

When chapter 40R was adopted in 2005, few of the details had been worked out. It remained for the DHCD to fill in the details by regulation in the months after the statute was enacted, and to decide how this tool could be best used. Happily, the DHCD has shown great flexibility and creativity in the implementation of chapter 40R. As the program has matured, the standards have become clearer and more predictable. Municipalities are well-advised to revisit chapter 40R as a possible tool for housing production. In the right place and for the right project, there are enormous advantages. The legislature and the DHCD might wish to clarify some of the more mystifying aspects of the statute. Most importantly, chapter 40R needs to be targeted so that its best features are implemented with regard to selected, not random, development sites.¹³³

127. Only the Haverhill and Brockton applications fit this description. All of the remaining applications were primarily driven by the development side.

128. While chapter 40R can be an effective tool that communities may wish to use to develop much-needed housing, the caveat remains that all incentives paid to chapter 40R communities are subject to the uncertainty of the legislative appropriations process. There have been several occasions where the legislature failed to uphold its statutory obligations. For example, Mass. Gen. Laws chapter 81 requires that 7.5 percent of gas tax collections be returned to cities and towns for transportation-related purposes. While cities and towns had relied heavily on this revenue sharing commitment, the legislature decided to “zero out” the program several years ago, thereby eliminating the nearly \$50 million annually this account provided all communities across the state. This unfulfilled statutory obligation still exists on the books today.

129. Take, for example, Dartmouth’s SGOD. Eighteen months after the adoption of the SGOD, the developer has not proposed housing for the site. Only the commercial component of the development has been approved after review.

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

131. See MASS. GEN. LAWS ch. 10, § 35BB (2006).

132. Testimony of Ted Carman on behalf of the Commonwealth Housing Task Force before the Massachusetts legislature’s Joint Committee on Housing (June 4, 2007). As discussed in note 35, *supra*, two bills were filed in the 2007 legislative session to help rectify these deficiencies: House Bill 160 filed by Rep. Kevin Honan of Boston, H.R. 160, 2007 Leg., 185th Sess. (Mass. 2007), and Senate Bill 132 filed by Sen. Harriette L. Chandler of Worcester, S. 132, 2007 Leg., 185th Sess. (Mass. 2007), both of whom were the key state legislators in enacting both chapters 40R and 40S. Neither was enacted by the legislature in the last session. However, both legislators have refiled the measures in the current legislative biennial session that commenced January 2009. See H.R. 197, 2009 Leg., 186th Sess. (Mass. 2009) and S. 86, 2009 Leg., 186th Sess. (Mass. 2009). The legislature should move quickly to signal support for chapter 40R by passing these measures.

133. The same focus needs to be added to chapter 43D, the so-called “expedited permitting” statute, which provides cities and towns financial assistance if they opt to designate sites within the community that ensure a 180-day permitting timeframe. MASS. GEN. LAWS ch. 43D, §§1–16 (2006).

Ch. 40R

**Smart Growth Zoning &
Housing Production**

**NORTH
ATTLEBOROUGH**

**Blatman, Bobrowski, Haverly
& Silverstein, LLC**

What is Ch. 40R?

- Housing production within the Commonwealth has not kept pace with the growing number of households looking for an affordable place to live
- To help meet this demand, the Commonwealth adopted Ch. 40R to allow municipalities to encourage housing production that is aligned with the principles of “smart growth”
- Communities doing so may obtain funds through housing incentive payments



Location, Location, Location. . .

- A Chapter 40R Smart Growth Overlay District shall be located in an “eligible location”



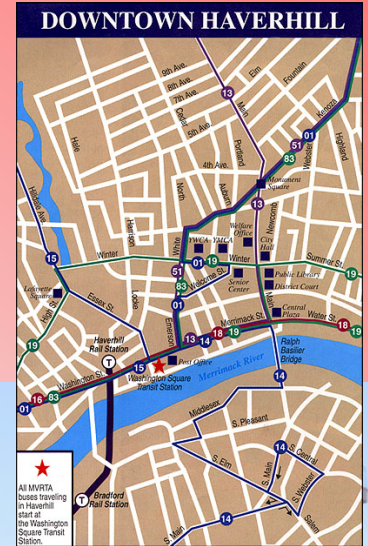
- Eligible locations include:
 - areas within 1/2 mile of any rapid transit/rail station or bus/ferry terminal
 - areas of concentrated development, such as existing city/town centers, commercial districts or rural village districts
 - areas qualifying as highly suitable locations, such as those identified as appropriate for high-density and/or mixed-use housing

Example: Location Near Transit

Downtown Area, Haverhill, Massachusetts



HAVERHILL
IS THE PICTURE OF PROGRE



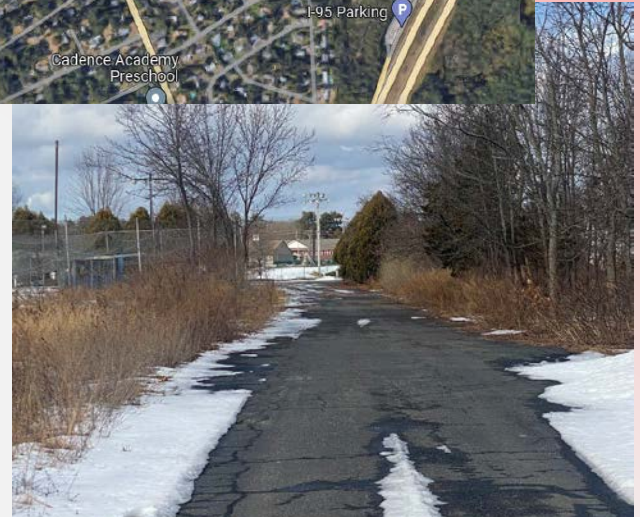
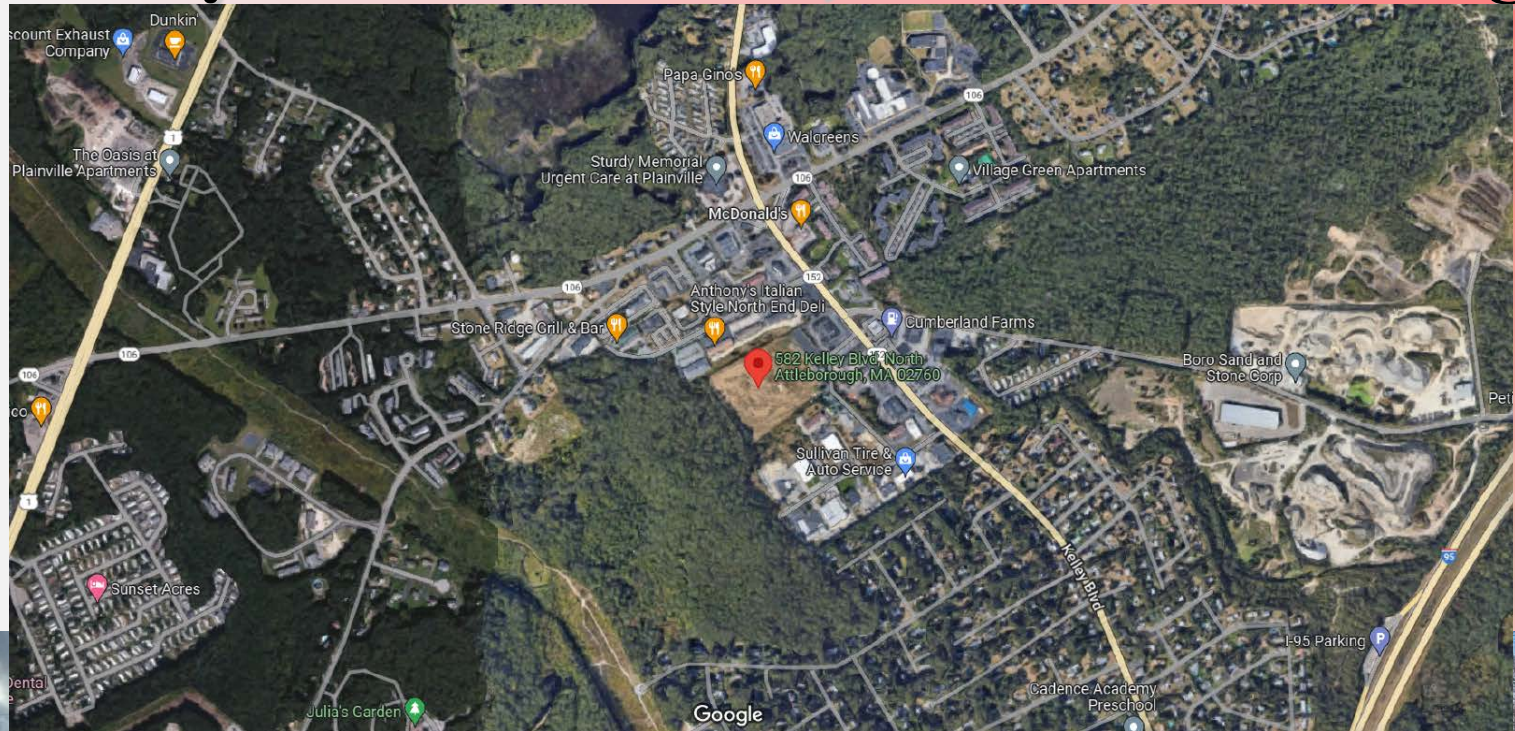
Example: Area of Concentrated Development

Village at Lincoln Park, Dartmouth, Massachusetts



Example: Highly Suitable Location

582 Kelley Boulevard Rear, North Attleborough



Example: Highly Suitable Location

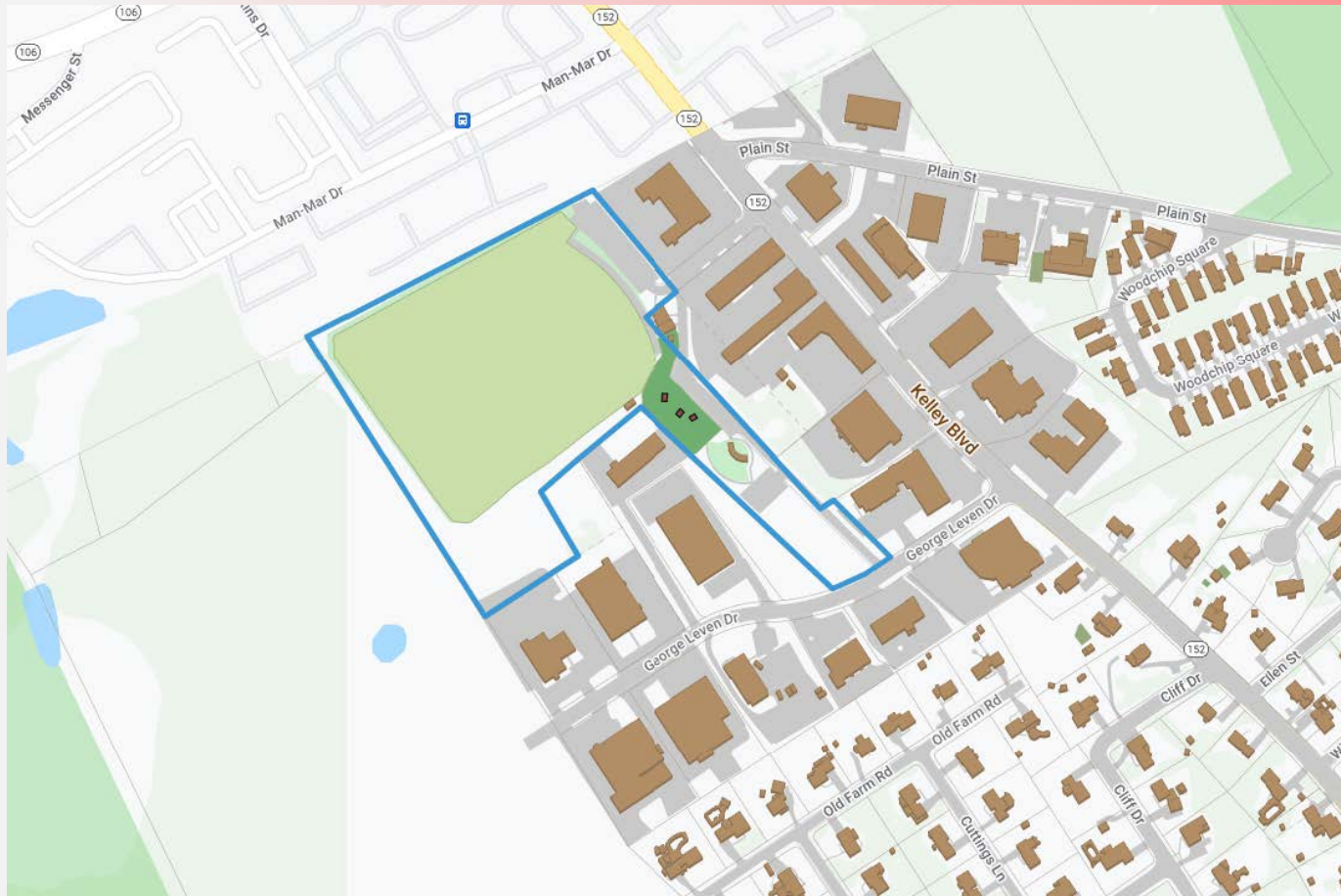
NORTH ATTLEBORO

Kelley Boulevard Smart Growth Overlay District

- A contiguous 13.679-acre parcel
- Currently improved with a driving range, batting cages, miniature golf and associated parking areas
- Located in North Attleborough Special Industrial Zoning District and the Aquifer Protection Zoning District
- Access to public sewer and water.

Site Location

NORTH ATTLEBORO



Site Location

NORTH ATTLEBORO



Density

- Within a Smart Growth Overlay District, the minimum allowable as-of-right density shall be as follows:
 - eight (8) units per acre for developable land zoned for single-family residential use
 - twelve (12) units per acre for developable land zoned for two- and/or three-family residential use
 - twenty (20) units per acre for developable land zoned for multi-family residential use



Examples: Density



8 Units Per Acre



12 Units Per Acre



20 Units Per Acre



North Attleborough Density

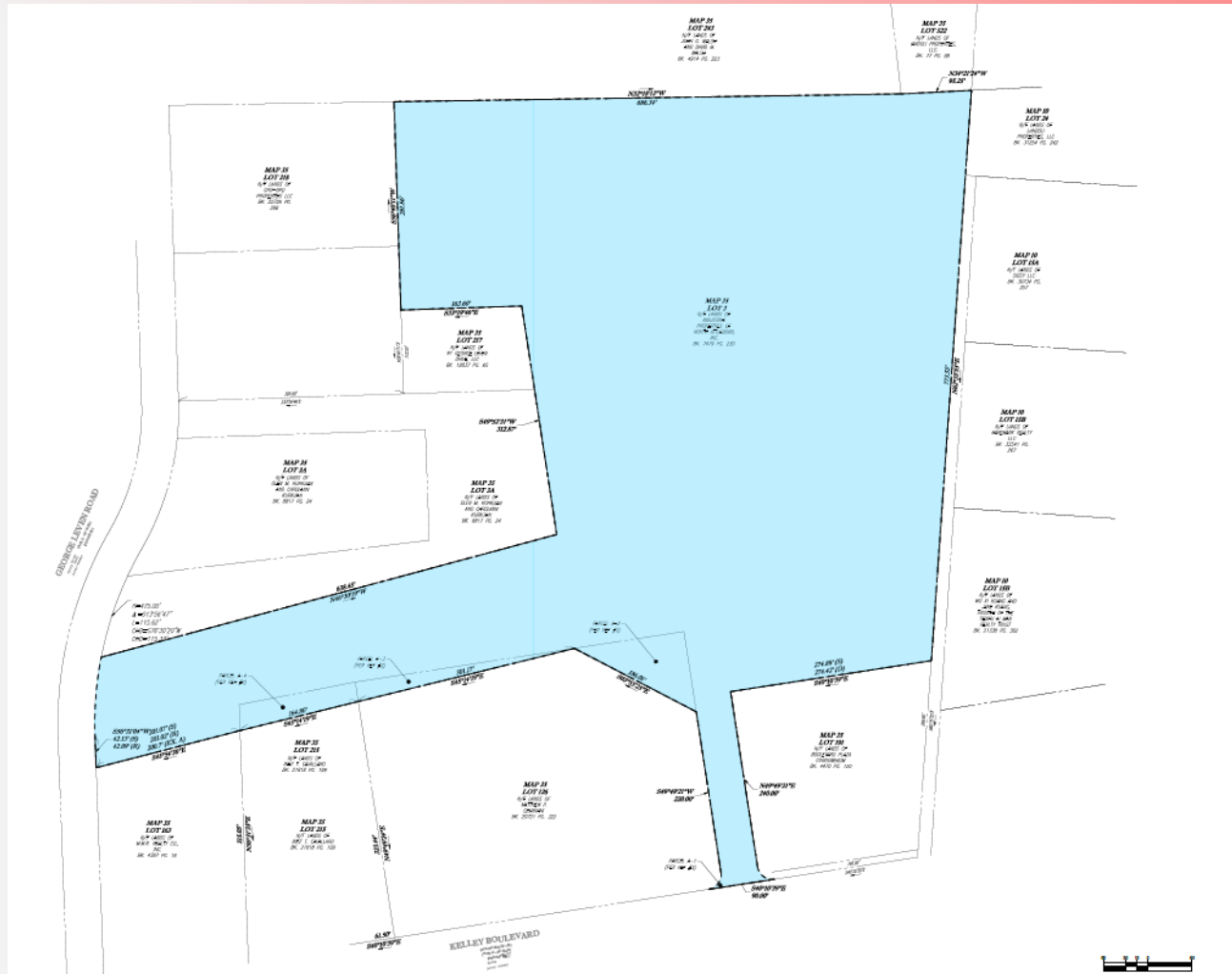
- Kelley Boulevard Smart Growth Zoning District contains 13.679 Acres, all “developable”
- 311 dwelling units are proposed for the Kelley Boulevard Smart Growth Zoning District
- Accordingly, Proposed Density = **22.74**
Units/Acre

Mapping the District

- A Ch. 40R Application submitted to the Department of Housing and Community Dev't shall include a zoning map of the proposed district, a developable land plan and a residential density plan
- The size/shape of the district and subdistricts depends on the desired density, the area of development and any areas not intended for development
- All land shall be categorized as developable (including under-utilized land), substantially-developed or non-developable (including open space, rights-of-way, public streets and ways, land used for governmental functions and environmentally-constrained land)



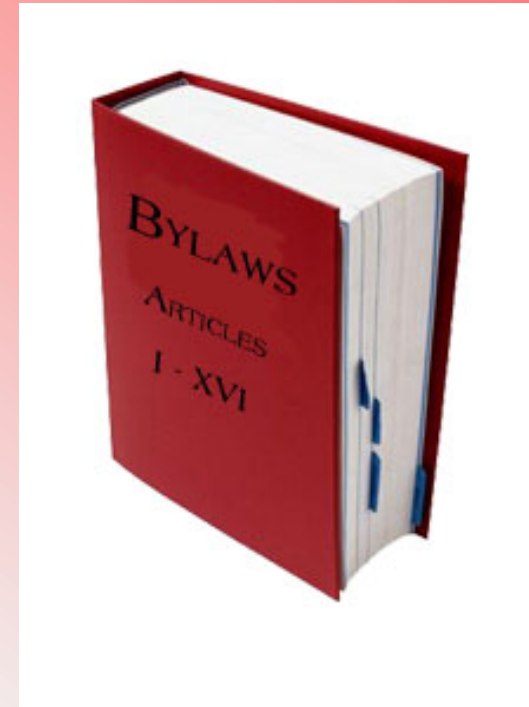
Proposed Zoning Map NORTH ATTLEBORO



Drafting the Zoning Bylaw/Ordinance

- Ch. 40R Zoning Bylaw creates the Smart Growth Overlay District and shall include a map of the district, and:

- provisions for the types of uses allowed by right
- affordability requirements
- dimensional, density and parking requirements
- a description of the plan approval process, identifying the plan approval authority



- design standards/guidelines
- waiver and plan amendment authority and procedures

Affordability

- ♦ Ch. 40R requires that not less than 20% of the housing units *in projects of more than twelve (12) units* be “affordable”
- ♦ For all housing units in a rental project to count on the Subsidized Housing Inventory, at least 25% of said units must be “affordable”
- ♦ “Affordable” housing units are those affordable to and occupied by households earning less than 80% of the area-wide median income, as per the U.S. Dept. of Housing and Urban Dev’t and “countable” on DHCD’s Subsidized Housing Inventory.



Approval Process

- Step 1: The chief elected official of the municipality holds a public hearing on the creation of a Smart Growth Overlay District
- Step 2: Said chief elected official submits a Ch. 40R Application Form with supporting materials to the Department of Housing and Community Dev't (DHCD)
 - if incomplete, notification is provided within 30 days
 - a preliminary determination of eligibility is provided, if appropriate, within 90 days
- Step 3: Upon issuance of a preliminary determination of eligibility, the municipality adopts the 40R District as it would any other zoning proposal



Approval Process, Cont'd.



- Step 4: Following adoption of the 40R District, the municipality provides proof thereof to the Department of Housing and Community Dev't
 - confirmation of final approval is provided, if appropriate, within 30 days
- Caveat: Any amendment/repeal of the 40R District, its boundaries or the design standards in the bylaw/ordinance require review and approval of the Department of Housing and Community Dev't

Payments

- Within ten (10) days of approval by the Department of Housing and Community Dev't of a Smart Growth Overlay District, the Commonwealth shall pay to the municipality a “Zoning Incentive Payment”
- Said payment shall be made as per the following schedule, with “Incentive Units” being those allowed as-of-right in the 40R District minus those allowed as-of-right by the underlying zoning:

Zoning Incentive Payments

<u>Incentive Units</u>	<u>Payment</u>
Up to 20	\$10,000
21 to 100	\$75,000
101 to 200	\$200,000
<i><u>201 to 500</u></i>	<i><u>\$350,000</u></i>
501 or more	\$600,000

Payments, Continued



- ◆ Additionally, a municipality is entitled to a one-time “Density Bonus Payment” of \$3,000 for each “Bonus Unit” constructed within the Smart Growth Overlay District
- ◆ “Bonus Units” are those developed in a project in excess of the number allowed as-of-right in the project by the underlying zoning
- ◆ Said payment is made on a unit-by-unit basis, within ten (10) days of submission of proof that a building permit has issued

North Attleborough Payments Under Proposed 40R Zoning

- **Zoning Incentive Payment**

311 Units = \$350,000

- **Density Bonus Payment**

- \$3,000 Payment for every developed in a project in excess of the number allowed as-of-right in the project by the underlying zoning
- Underlying Zoning does not permit any units as-of-right

311 Units = \$933,000 Bonus Payment

TOTAL = \$1,283,000

Resources

- ♦ More information on Ch. 40R is available at:
 - G.L. c. 40R
 - 760 CMR 59.00
 - www.mass.gov > Housing and Community Dev't > Sustainable Community Planning Initiatives
 - Department of Housing and Community Dev't, (617) 573-1100



The End



Blatman, Bobrowski, Haverty & Silverstein, LLC