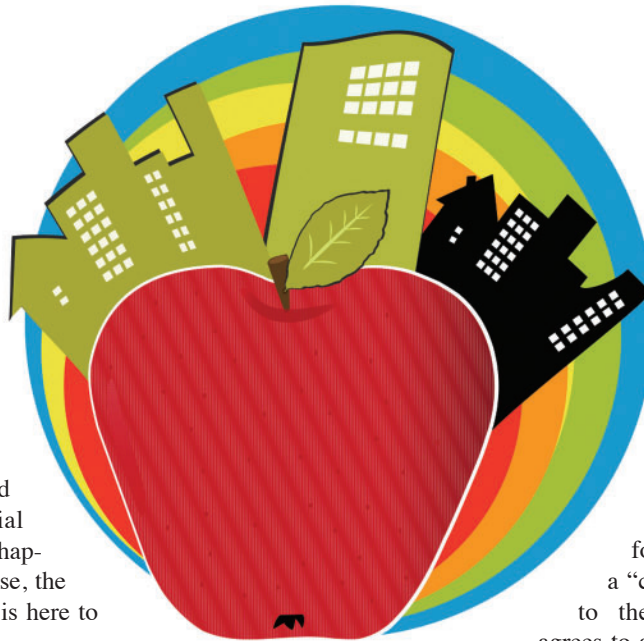


# LAW: Is There a ‘Smarter’ Way to Build Affordable Housing in Massachusetts?

By MATTHEW G. FEHER



**I**n November, the state’s voters overwhelmingly rejected a ballot measure that would have repealed the state’s controversial affordable housing law, Chapter 40B. For better or worse, the forty-one-year-old statute is here to stay (at least for the time being).

Under Chapter 40B, the percentage of year-round affordable housing stock located in a community primarily determines whether a private developer can build housing developments “as-of-right,” without much consideration of local needs and concerns. Because 40B developments are immune from local zoning controls, there’s no guarantee that such projects won’t be built far from urban centers. Instead of encouraging physical activity, the resultant “sprawl” forces residents to spend countless hours in automobiles instead of walking or bicycling.

In order to be “40B-proof,” a community’s affordable housing units must account for at least ten percent of its year-round housing stock. This ten percent threshold applies to all communities—large and small, rural and urban. Communities that reach this threshold are no longer subject to the law’s “stick” approach. But 288 Massachusetts communities fall short of the threshold, and they are struggling with how to reach it without surrendering local control. How can they guarantee that development will be sustainable—and even receive some state assistance to offset costs associated with development?

Appearing in the same volume of the General Laws is Chapter 40R, a housing development tool created in 2004

that may present a “smarter” solution as it relates to local control and sustainable development. Because communities opt into 40R and receive incentives for doing so, the program provides a “carrot” to municipalities as opposed to the 40B “stick.” The community agrees to adopt certain local zoning rules that encourage “smart” development, with an affordable

housing component. Affordable units required to be created under Chapter 40R count toward the community’s ten percent affordable housing goal. In fact, all rental units in a 40R development count toward the threshold.

Chapter 40R also requires that any development conform with the state’s “smart growth” principles, which promote more vibrant, healthier communities. These principles discourage sprawl, encourage transit-oriented development, and foster viable city and town centers. Because housing in 40R districts is close to transportation as well as commercial and business centers, residents find that they enjoy easy access to the office, school and supermarket. As a result, they drive less and walk more. Not only are downtowns revitalized, but the folks living there are too.

## What’s “Smart” About 40R?

While “smart growth” is a buzzword that has been used by many public policy makers for years, Chapter 40R supplies a statutory definition: “a principle of land development that emphasizes mixed 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

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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.”

Chapter 40R generally requires dense housing development, with an affordable housing component, in close proximity to a city or town center and transit stations or in another suitable location determined by the state’s Department of Housing and Community Development. The intent is to promote vibrant downtowns, less traffic, and more physical activity.

In return for opting to develop pursuant to 40R’s requirements, the community receives state assistance to offset the costs associated with development, notably an up-front payment upon plan approval and density bonus payments for each building permit issued pursuant to the plan.

The statute requires the following densities in a 40R “Smart Growth Overlay District”: at least twenty units per acre for multi-family dwellings of four or more units, at least twelve units per acre for multi-family dwellings of two or three units, or at least eight units per acre for single-family units. Lower densities may be approved by the Department of Housing and Community Development in towns with populations below 10,000 that can demonstrate hardship. A single Smart Growth Overlay District cannot exceed fifteen percent of the total land area in the municipality, unless a waiver is approved by the DHCD, and the total land area of all such districts cannot exceed twenty-five percent of the city or town’s total land area. Commercial, institutional and industrial uses are permitted in a Smart Growth Overlay District so long as the density requirements are applied to such “mixed-use” projects. The municipality is also able to develop “design standards” to ensure that the nature of the 40R development is consistent with the surrounding community characteristics.

Not less than twenty percent of the residential units built in a project of more than twelve units must be set aside as affordable to persons earning less than eighty percent of area median income. This affordability restriction must be maintained for at least thirty years.

Smart Growth Overlay Districts must be sited in “smart” locations. Eligible locations are those (a) within one-half mile (or three-quarters of a mile if pedestrian access is available) of a rapid transit, commuter train, bus or ferry station; (b) in areas of concentrated development; or (c) in another “highly suitable location” as determined by the DHCD. If any portion of a parcel falls within an eligible location, then the balance of the parcel shall also be considered an eligible location. The 40R regulations define “concentrated development” as a city or town center or existing commercial district if such area will be served by sewer or private treatment plant within five years, if at least fifty percent of the proposed Smart Growth Overlay District is substantially developed land or underutilized land, and if the primary use or zoning of the proposed district is commercial or “mixed-use.” The DHCD will presume that a location is “highly suitable” if the proposed district is appropriate for high-density residential or mix-use development in a local comprehensive or similar plan that has been adopted after a public process not

more than five years prior to submission of the 40R application. Alternatively, a municipality may qualify the location of a proposed Smart Growth Overlay District as “highly suitable” if it can demonstrate that the location is consistent with “smart growth” objectives.

## **Give and Take**

From the municipal perspective, the principal “give” in this process is to adopt zoning that conforms to 40R. This procedure is spelled out in the 40R regulations and resembles that of the state’s Zoning Act (Ch. 40A). The chief municipal official holds a public hearing on both the zoning required under 40R as well as the application the community would submit to the DHCD. Prior to municipal approval of the requisite zoning, the DHCD has sixty days after receipt of the application to render its preliminary determination of whether the municipality is eligible. After receiving such determination, the city or town must amend its zoning pursuant to Chapter 40A. Only after the local zoning bylaw or ordinance is amended will the DHCD grant final approval.

A city or town that adopts Chapter 40R stands to receive direct state assistance to help minimize to some extent the 40R development costs. Upon receiving eligibility status from the DHCD, the community is in line to receive a one-time zoning incentive payment according to the number of projected housing units within the Smart Growth Overlay District. The payments are as follows:

Up to 20 units: \$10,000

Between 20 and 100 units: \$75,000

Between 101 and 200 units: \$200,000

Between 201 and 500 units: \$350,000

More than 500 units: \$600,000

The statute requires construction to commence pursuant to the approved Smart Growth Overlay District plan within three years. If it does not, the municipality must return its up-front payment.

Cities and towns also receive a \$3,000 “density bonus” payment for every building permit issued pursuant to its 40R plan within ten days of submitting the permit to the DHCD. Chapter 40R does not require that 100 percent of planned units be constructed.

Cities and towns with approved Smart Growth Overlay Districts also receive priority for discretionary grant programs such as Public Works Economic Development and Community Development Assistance. These cities and towns are also in line to receive formula-driven payments to defray the school costs associated with 40R development. To date, two communities have received these payments.

## **Smart Growth Fund**

The Smart Growth Housing Trust Fund supplies the funding for the local incentives, but this fund is subject to the uncertainty of the legislative appropriation process. The fund initially received approximately \$20 million, but the Legislature diverted much of that amount to fill state budget gaps in recent years. Today,

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just under \$2 million remains available to provide the statutorily required 40R incentive payments.

According to the DHCD, more than \$10 million in zoning incentive payments have been received by the thirty municipalities whose Smart Growth Overlay Districts have been approved. More than 11,000 units of housing have been zoned pursuant to these approved plans, with 945 of these units permitted and constructed. In the event that all of the zoned units were to be constructed, the thirty host municipalities would be entitled to receive more than \$33 million in density bonus payments from the Smart Growth Housing Trust Fund. Eight more Smart Growth Overlay Districts are currently awaiting approval by the DHCD, accounting for an additional 2,000 units of housing.

As a result of the initial reception of 40R by cities and towns, the Smart Growth Housing Trust Fund is overcommitted. All current 40R funding obligations have been fulfilled, but the future of 40R appears uncertain. Unless the Legislature and governor replenish the fund, the potential successes of Chapter 40R may not be realized, and many municipalities may be deterred from opting into the program.

One additional consideration that may influence local decisions about whether to accept Chapter 40R is the law's requirement that those who appeal an approved 40R project must post a bond sufficient to cover twice the amount of the property owner's annual carrying costs and twice the estimated attorney's fees of the defendant. This provision is apt to discourage any local challenges to approved projects. ❁