



ON THE GROUND: 40B Developments Before and After

Prepared by: Alexandra DeGenova | Brendan Goodwin | Shannon Moriarty | Jeremy Robitaille

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Tufts
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and Sciences



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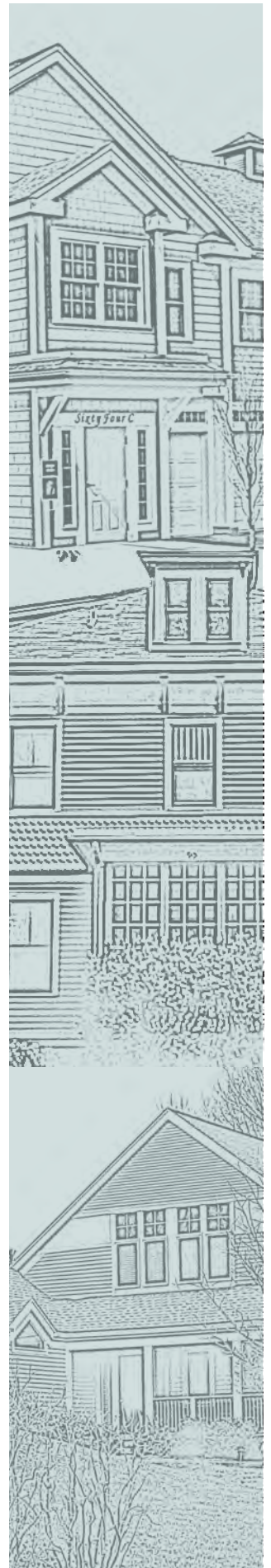




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ABSTRACT

The Massachusetts Chapter 40B statute has been in existence for 40 years and allows local Zoning Boards of Appeals to approve housing developments under flexible zoning rules if 20-25 percent of the units are permanently restricted as affordable. Many 40B developments have been proposed and built without conflict. Others, however, have encountered controversy concerning issues of density, environmental concerns, impacts on property values, safety, traffic and burdens on municipal services, among others. This report examines four case studies of controversial projects developed under Chapter 40B. It concludes that the concerns raised by abutters, city and town officials and others during the permitting processes were overstated. In fact, most of the controversy has evaporated since the developments have been built and occupied and there is evidence that in some of the cases, the controversy led to more proactive approaches to affordable housing development.



EXECUTIVE SUMMARY

On the Ground, examines controversial housing developments built under Massachusetts Chapter 40B, the Commonwealth's Affordable Housing Law. The purpose of the research was to determine the extent to which concerns raised during the permitting process were realized once the developments had been completed and occupied. Anecdotal evidence influenced the study hypothesis that the concerns were not realized at all, or not realized to the extent that they were originally feared, once the development had been built and occupied for some time.

In order to select the sites for the case studies, the researchers compiled lists of 40B developments from several sources and applied a series of filters to them. Among these filters were qualifiers that the developments must have had identifiable and documented controversy and have been completed before June 30, 2006 in order to ensure the availability of sufficient data and observation. The four cases chosen represent both rental and homeownership developments and ranged in size from nine to 300 units. The following developments were chosen for this report: The Preserve in Walpole, Kayla's House Development in Newton, Hastings Village in Wellesley and Dickson Meadow in Weston.

Through archival research, site visits and semi-structured interviews with key players, the researchers identified the key controversies and concerns raised during the permitting process. Among the fears and concerns that were uncovered were: municipal service capacity and adequacy (i. e. schools, water, sewer and emergency services), density, neighborhood change, environmental impacts, health and safety, property values, and the preservation of open space.

The research showed that the controversies surrounding these cases were not realized to the extent feared. The concerns raised varied for each project, but it can be concluded that the underlying roots of these controversies are the loss of local control over zoning and fear of

the unknown impacts of the developments. In fact, now that the projects have been built and occupied for more than two years, most of the controversies have evaporated.

In three of the four case studies, the experience of the 40B controversy made the municipality more aware of the need for affordable housing and more proactive in the planning for the development of that housing. This new, proactive approach will likely involve working *with* developers, city and town government officials, and with community residents and groups, resulting in less controversy in future projects.



Chapter 1

PROJECT OVERVIEW

This project was commissioned by the Citizens' Housing and Planning Association (CHAPA) (heretofore referred to as "the Client") with the support of Tufts University's Urban and Environmental Policy and Planning Department. This research examines controversial 40B developments in Massachusetts in order to determine the extent to which adverse impacts that were feared during the permitting process have been realized since the developments were built.

Study Hypothesis

Anecdotal evidence suggests that the controversy surrounding housing developments built under Chapter 40B largely subsides after the projects are completed. This study tests the hypothesis that the concerns raised during the permitting process are either not realized or not realized to the extent originally feared once a development is built and occupied.

CHAPA 40B Legislation Overview

Massachusetts General Law Chapter 40B was enacted by the State Legislature and signed into law by Governor Francis Sargent in 1969. This law was seen as one of the earliest recognitions of the racial and economic segregation often imposed by exclusionary zoning practices such as minimum lot sizes and bans on multi-family housing.¹ The purpose of the law is to "address the shortage of low and moderate income housing in Massachusetts and to reduce regulatory barriers that impede the development of such housing."²

Often referred to as the "Anti-Snob Zoning Law," the "Comprehensive Permit Law" and the "Massachusetts Affordable Housing Law," Chapter 40B is seen as a "one-stop"

permitting process for developers proposing low and moderate-income housing projects. Rather than applying to many local boards, the developer applies for a “comprehensive permit” to one local authority—the Zoning Board of Appeals (ZBA).³

Chapter 40B is significant in that it was one of the first instances in which a state exerted authority over local control in land use zoning.⁴ Therein also lays its controversy. Under 40B, a developer has the right to appeal to the state Housing Appeals Committee (HAC) if it is denied a comprehensive permit for a qualified project, or if it is granted one with conditions making the project uneconomic.⁵ Under 40B, ZBAs are able to approve projects with higher density than current zoning allows, making it more economically feasible to develop affordable housing.⁶

In order to qualify for a comprehensive permit, the project must have long-term affordability restrictions on 20-25 percent of the units and meet the following requirements:⁷

- The applicant must be a public agency, non-profit organization or a limited dividend organization
- The project must be subsidized by a low or moderate-income housing subsidy program
- The applicant must have site control⁸

Chapter 40B establishes a requirement that 350 of Massachusetts’ municipalities provide a minimum of 10 percent of their housing stock as affordable (zoning in the City of Boston is controlled by the Boston Redevelopment Authority).⁹ This threshold is determined by the Subsidized Housing Inventory (SHI) compiled and maintained by the Department of Housing and Community Development (DHCD).¹⁰ As of September, 2008, 55 towns in Massachusetts have obtained this goal.¹¹ Because they have met the 10 percent threshold, municipalities are largely immune from Chapter 40B zoning overrides. Developers may still invoke 40B, however, to obtain the more streamlined comprehensive permit in municipalities that have met the 10 percent SHI threshold. Cities and towns that have not met the threshold must grant the comprehensive permit unless they can prove that denial of the permit is “consistent with local needs,”¹² which normally refers to issues of health, safety or welfare.

A number of regulatory modifications have been implemented to assist municipalities in achieving the goals of 10 percent SHI, including the Local Initiative Program (LIP) and Housing Production Plan (HPP). The LIP, started in 1990, expanded the definition of subsidy to include technical assistance between DHCD, the developer and/or the municipality, thus creating more incentives for cities and towns to develop housing without the state or federal financial requirement.¹³ In 2008, DHCD began allowing cities and towns to submit a Housing Production Plan (HPP). Once the plans are approved, the municipalities are certified by DHCD as being in compliance with that plan and the certification lasts for a determined number of years.¹⁴ During the certification period, a ZBA decision in these communities will be upheld as “consistent with local needs,” pursuant to Chapter 40B.¹⁵ At last count, there were 81 DHCD-certified communities with plans.¹⁶

Controversies

While many projects completed under the Comprehensive Permit law have been non-

controversial, the law, and the housing it creates, has garnered considerable contention in its 40 years. At the heart of these controversies is the fact that 40B overrides local zoning laws, allowing housing developments to be built that otherwise would not have conformed to what the municipalities had originally envisioned or planned for. Many scholars and advocates argue that “not in my backyard” (NIMBY) attitudes around affordable housing have underlying tones of racism and/or classism. This report does not attempt to explore this issue, but rather focuses on documented concerns raised by specific communities during the proposal and permitting process of 40B developments, and the extent to which those concerns were realized—if at all—once they were built and occupied. Included among these controversies are changes to the character of a community, decreases in property values of surrounding units, environmental concerns, infrastructure and traffic and increased burdens on municipal services. These controversies are detailed further in the report’s case studies.

Since its inception, Chapter 40B has created 48,000 units in 900 projects, including 26,000 affordable units. This number includes 33,700 rental units and 14,600 homeowner units accounting for 34 percent of all housing production and 80 percent of all rental housing production in the Greater Boston area.¹⁷ While Massachusetts was one of the earliest states to create regulatory incentives for affordable housing, many other states have followed its lead through other measures. Along with Massachusetts, New Jersey and California are widely recognized as having model land-use regulations to promote and require affordable housing development. The Mount Laurel Court decisions in New Jersey during the 1970s and 1980s, declared zoning ordinances that prohibited low- and moderate-income housing unconstitutional. As a result, exclusionary zoning ordinances can be challenged in court and judges can enforce the Mount Laurel decisions through a “builder’s remedy” which allows developers to override local zoning to construct affordable housing.¹⁸ California is recognized as a leader in inclusionary zoning. Under inclusionary zoning, cities enact ordinances mandating a certain percentage of units to be affordable or allowing developers to pay fees in lieu of providing the housing.¹⁹ Other inclusionary zoning may provide density bonuses to help pay for the affordable units. Many states and localities have looked to California’s model and success to enact their own inclusionary zoning ordinances. Finally, Rhode Island has also adopted regulatory measures to ensure more affordable housing. In 2004, it enacted The Comprehensive Housing Production and Rehabilitation Act, which bears many similarities to Massachusetts’ 40B, but also includes a planning component.

Since its inception, Chapter 40B has created 48,000 units in 900 projects, including 26,000 affordable units, accounting for 34 percent of all housing production and 80% of all rental housing production in the Greater Boston area.

Methodology

This study uses case-study methodology to examine four developments created under Massachusetts Chapter 40B that were controversial during the permitting process. The following strategies were employed to select four viable case study sites.

Site Selection

The sensitive nature of this topic required careful consideration in selecting which cases would be included in the study. Because of the multitude of projects completed under 40B during its 40 year history, we applied the following baseline criteria in our site selection process. Each of the four case studies in this report has met the following criteria:

MIXED METHODOLOGY

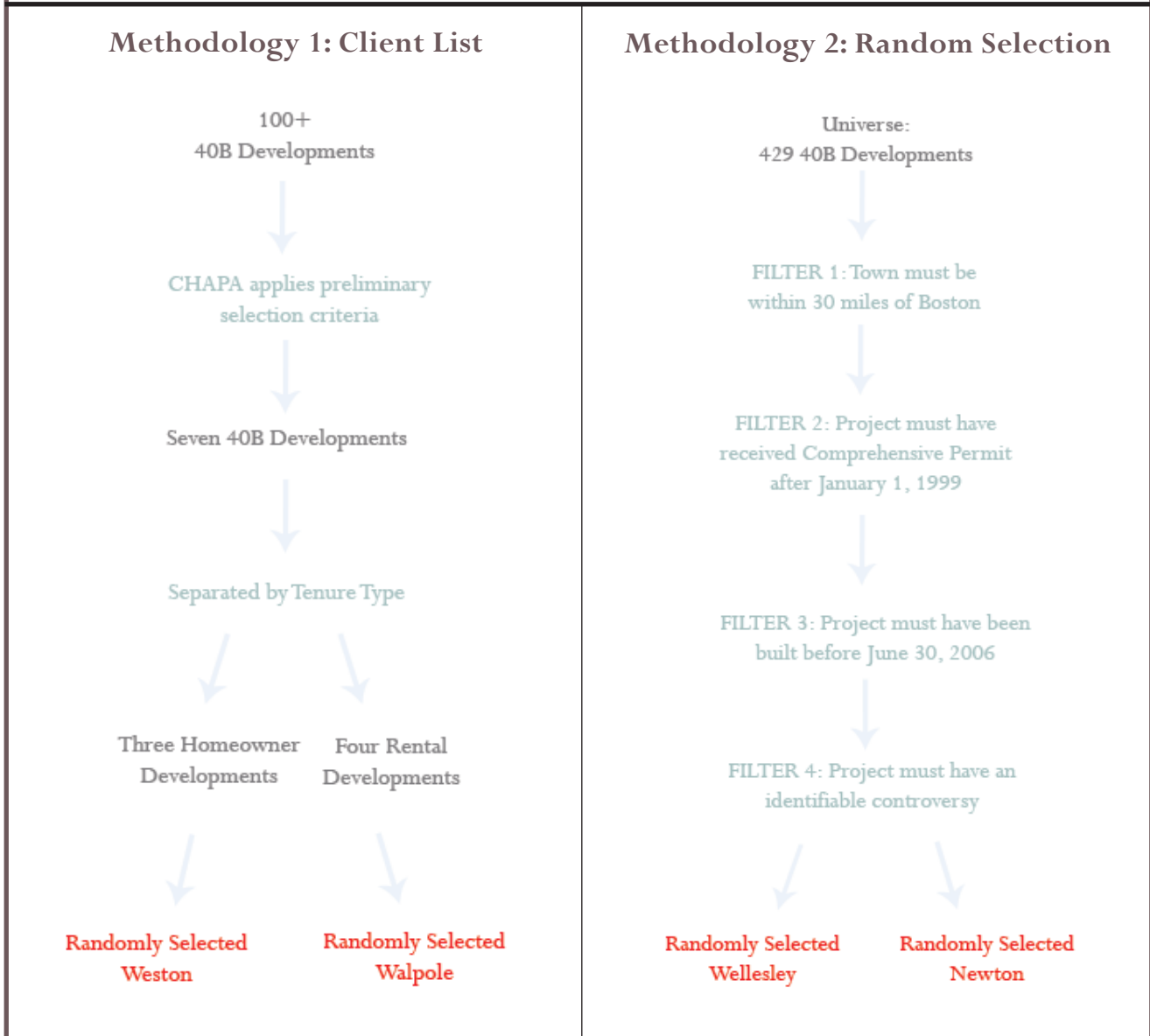


Table 1: Mixed Methodology

1. The project must have received its comprehensive permit after January 1, 1999 and had to have been constructed and occupied before June 30, 2006.

The first qualifier was chosen to improve the chances that stakeholders involved in the proposal and permitting process would be accessible. The second qualifier was chosen to ensure the availability of sufficient, measurable data and/or the opportunity for community observations. This also takes into account the length of time controversial 40B developments may take to build. Each development selected must have been built and occupied for at least two-and-a-half years to be eligible for this study.

2. The project had an identifiable and documented controversy.

In order to revisit key controversies from the 40B development process, it was necessary to ensure that the developments selected were indeed controversial. For the purposes of this

study, “identifiable controversy” meant that opposition to the development was recorded in the public record (e. g., newspaper articles, written correspondence, hearing transcripts, or community meeting notes).

3. The project must be located within 30 miles of Boston.

This is simply a convenience criterion for the researchers, in view of distance and travel times to the sites.

4. The project must not be located in or near communities with pending comprehensive permits.

This criterion was selected to avoid reigniting controversy about development via 40B in communities currently considering 40B developments. As a monitor of 40B developments, the Client cross-referenced potential sites with its records of 40B projects under review, and eliminated potential case studies in or near communities of current projects.

Mixed Methodology

After identifying the baseline criteria for developments to be included in this study, a mixed methodology was applied to select the four case studies. This mixed methodology was designed to utilize the Client’s familiarity of 40B developments while also employing a random-selection methodology. The goal was to ensure a range of community-level debates representative of 40B controversies.

Client List

The Client, CHAPA, is keenly aware of the day-to-day controversies surrounding 40B projects across the state. Using the preliminary selection criteria created by the researchers, the Client identified seven possible developments for this study from a pool of more than 100 projects. The researchers separated this list into two groups based on tenure type, which included three homeownership developments and four rental developments. From each of these lists, one site and an alternate were randomly selected. Through this methodology, the researchers selected The Preserve in Walpole (rental) and Dickson Meadow in Weston (homeownership).

Random Selection

The final two case studies were selected by combining two additional lists. The first was a list of 25 developments suggested by Werner Lohe, Chairman of the Housing Appeals Committee. The second was a list of 404 developments proposed under Chapter 40B between 1999 and 2005, which was compiled by MIT researcher Lynn Fisher in 2007 and 2008 through surveys of 349 Massachusetts communities. This combined list was filtered using the site selection criteria outlined above (See Figure 1). The remaining projects were randomly grouped, sorted by tenure type, and drawn at random. From this process, the final two case study sites – Wellesley (rental) and Newton (homeownership/rental) – were chosen.

Field Research Process

In order to determine the controversies and concerns involved with each case study, the researchers gathered information through the following methods:

1. **Archival Research** - The researchers gathered extensive documentation of the permitting processes and controversies through sources such as Zoning Boards of Appeals, the Housing Appeals Committee, local newspapers and electronic media.

2. **Site Visits** - The research team visited each of the 40B developments discussed in this study. This field research allowed for observation and documentation of the development in its built state.

3. **Interviews** - The researchers conducted semi-structured interviews with a total of 40 people from the four case study communities. Those interviewed included abutters, town and city officials, developers, residents of the developments, property managers, and others who played a role in the permitting process. Primary source quotations used throughout this study have been cleared with the interviewees. In cases in which an interviewee did not wish for his or her name to be identified, the term “interviewee” was substituted.

Study Limitations

The limitations of this study include the following:

1. Study findings cannot be applied for all 40B projects

Considering the volume of housing developed under Chapter 40B, the research team acknowledges that four case studies is a very limited sampling. While extensive research was completed to arrive at the findings presented for these four cases studies, care should be taken in inferring the results to all developments completed under Chapter 40B.

2. Inability to comprehensively apply quantitative methodology to the measurement of community concerns

After identifying community concerns expressed during the 40B permitting process, the research team set out to determine if these fears were, in fact, realized once the project had been built. While attempts to assess these impacts through quantitative methods were made, this was not always possible due to limitations in or access to the data. In these instances, evidence was drawn from narrative data to determine the impacts of these developments on their surrounding communities. Thus, the accuracy of information gathered from interviews may be limited by the interviewees’ inaccurate or incomplete recollection of events and details.

3. Logistical limitations

In controversial 40B developments, the permitting process is long, especially when permits are appealed. Given this, the research team experienced challenges accessing some individuals directly involved in the permitting processes. At times, the researchers were unable to speak with individuals because they had left their positions. In other cases, individuals elected not to participate in the study.

Endnotes

¹ Krefetz, 381, 383

² Massachusetts Regulations, Code Title 760 §56.01

³ Massachusetts General Laws Chapter 40B § 21

⁴ Krefetz, 384

⁵ Citizens’ Housing and Planning Association (CHAPA), “Fact Sheet on Chapter 40B, The State’s Affordable Housing Zoning Law”

⁶ Ibid

- ⁷ Ibid. Projects with affordable units targeted at 80 percent area median income (AMI) are required to have 25 percent of the units allocated as affordable. A rental project can provide 20 percent of the units as affordable if they are targeted to households below 50 percent AMI.
- ⁸ The requirements are all taken from Mass. Regs. Code Tit. 760 §56.04
- ⁹ Massachusetts Regulations, Code Title, 760 §56.03 (3)
- ¹⁰ Massachusetts Regulations, Code Title, 760 §56.03 (2)
- ¹¹ Massachusetts Department of Housing and Community Development, Chapter 40B Subsidized Housing Inventory
- ¹² Mass. Gen. Laws Ch. 40B §20
- ¹³ Massachusetts Department of Housing and Community Development, “Local Initiative Program,” DHCD Fact Sheets (accessed on April 22, 2009)
- ¹⁴ Mass. Regs. Code Tit. 750 §56.03(4)
- ¹⁵ Massachusetts DHCD, “760 CMR 56,” DHCD Regulations (accessed on April 22, 2009)
- ¹⁶ Massachusetts DHCD, “Housing Production Plan,” (accessed April 22, 2009)
- ¹⁷ CHAPA, “Fact Sheet on Chapter 40B”
- ¹⁸ Capuzzo, “Mount Laurel: A Battle That Won’t Go Away”
- ¹⁹ Pendall, “From Hurdles to Bridges: Local Land-Use Regulations and the Pursuit of Affordable Rental Housing”



Chapter 4 2

WALPOLE THE PRESERVE

Due to its location in a predominantly commercial area and about five miles away from the center of Walpole, The Preserve case is unique among the four cases presented in this report in that there was no abutter opposition. The concerns raised around the development were brought by town government and revolved around the increased burden or stress a high-density development would place on municipal services. This case concludes that the Town's concerns were overstated and not realized to the extent feared.

Walpole Community Profile

While Walpole has early roots as an industrial mill town, today only a small industrial base remains. Walpole is now a growing bedroom community in close proximity to both Boston and Providence and accessible to Boston by bus and commuter rail.¹ Walpole's motto is "The Friendly Town," and the Town Administrator, Michael Boynton, lauds the volunteerism of its residents.

According to Boynton, the town is overwhelmingly reliant on its residential tax base; and that, while it is working towards more economic development, Walpole remains heavily dependent on state aid. The town has a mix of both blue-collar and white-collar workers with rising home values and incomes. The ACS 2005-2007 estimates a median household income of \$90,736 and a median home value of \$442,800, both significantly higher than 2000 census figures, representing the changes the town has seen over the past several years.²

Residential development has had a major impact on the town since the late 1980s. According to Boynton, Walpole has experienced a jump in population from 18,000

to 24,000 in that time period; and, while the town provides exemplary services to its residents, the service delivery level has been unable to keep pace with development.

Prior to construction of The Preserve apartments in 2005, the town had a few small 40B developments and some multi-family housing in the downtown area, but a very small SHI stock at just 138 units, or less than two percent of its total housing units. All but twelve of those units were for elderly or disabled individuals.³ The Preserve was not only the town’s first full-rental project, but also its first major 40B development, raising Walpole’s SHI to 5.4 percent.⁴

The Preserve

On March 16, 2000, Gatehouse Management, Inc., operating as Hilltop Preserve Limited Partnership, applied for a comprehensive permit from the Walpole Zoning Board of Appeals under Chapter 40B.⁵ The original plans called for 408 apartment units to be developed on 42 acres of land overlooking the Ganawatte Pond. The site is located in a predominantly commercial area near the Foxborough town line on Route 1 in south Walpole.⁶ It is

about one mile from Gillette Stadium—home of the New England Patriots. The number of units was scaled down to 344 at the time Gatehouse filed for a comprehensive permit and subsequently reduced to 300 units.^{7,8} The development includes 72 one-bedroom, 180 two-bedroom and 48 three-bedroom units in 13 three-story wood frame buildings.⁹ Initial plans called for 25 percent of the units to be set-aside as affordable to residents at 80 percent AMI. As a result of later negotiations with MassHousing, the developers changed that figure to 50 percent of the units being designated as affordable to those at 60 percent AMI, or below. MassHousing financing for the project included: a \$32.5 million loan, \$2 million in tax credits and an additional interest-free \$1 million loan with payments suspended until the end of the 30-year mortgage.¹⁰

After convening a hearing and reviewing evidence on the proposal, the Walpole ZBA denied Gatehouse’s request for a comprehensive permit on October 4, 2000, citing that the “local need for affordable housing was greatly outweighed by safety, infrastructure and planning concerns raised by the plans for the project.”¹¹ Gatehouse subsequently appealed its case to the state HAC. The HAC conducted a site visit and held six days of de novo evidentiary hearing with sworn witnesses, cross-examination and verbatim transcript.¹² On April 10, 2002, it concluded that Walpole failed to prove that the need for affordable housing in the region was outweighed by health and safety concerns of the project and directed

WALPOLE DEMOGRAPHICS	
Population	22,824
Area (square miles)	20.53
Race	95.4% White 1.6% Black 1.1% Asian
Median Household Income (1999 dollars)	\$74,757
Total Housing Units	8,229
Owner Occupied	85.1%
Rental Occupied	14.9%
Median Home Value	\$245,700
Subsidized Housing Inventory (SHI)	
SHI Before Development (1997)	1.98% (138 units)
SHI After Development (2008)	5.8% (472 units)

Figure 2: Walpole Demographics
Sources: 2000 Census Data, DHCD Community Profile, and DHCD Subsidized Housing Inventory

the Walpole ZBA to issue a comprehensive permit to the developers. In its decision, the HAC rejected nearly all of the arguments ZBA members used in denying the original permit.¹³

On the Ground: Before

Schools

One interviewee explained that while the community, “supports education to the highest degree and their generosity is admirable,”

Walpole continuously falls below the state average for expenditures per pupil. Schools are often the major costs to a municipality facing a growing population. School costs are not only determined by the number of students, but also by their needs; and Walpole feared that the increased costs would be beyond its means.

During the permitting process, officials presented wide-ranging estimates of the number of students that could be expected from The Preserve. In one estimate, Nancy Gallivan, a School Committee member, used a formula that another town was using to estimate the number of school-aged children that were likely to live in a development: 1.6 students per unit. Gallivan predicted that Walpole would have 564 new students from The Preserve; while another School Committee member, Ed Thomas, said 260 was a more realistic number.¹⁴ The ZBA stated that, “it may be safely estimated that between 400 and 600 children of all ages will live in this Project... a substantial number of those children will be enrolled in Walpole schools.”¹⁵ School Committee officials feared that the influx of students would increase the schools’ budget by 5 percent or \$1 million, requiring the hiring of 13 additional teachers.^{16,17} The developer rebutted these figures, estimating that the apartments would bring 61 school-aged children into the system.¹⁸

There are no documented estimates of the number of students coming from The Preserve that officials expected to be English Language Learners (ELL) students or enrolled in special education programs. Similarly, the town did not raise specific concerns about the types of needs the projected students might have. However, one interviewee noted that The Preserve is a rental project with half of the units being affordable to those making 60 percent AMI and it could be expected that its residents would follow socio-economic trends for lower-income, rental housing residents. This may include language barriers and special education needs that could create an increased burden on the schools’ budget by necessitating additional, specialized staff and services.

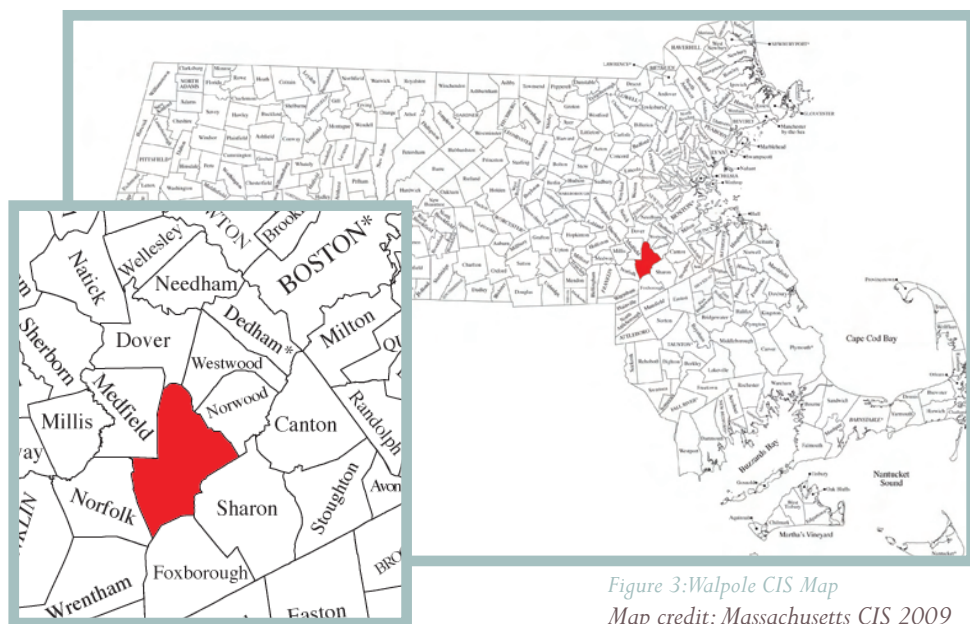


Figure 3: Walpole CIS Map
Map credit: Massachusetts CIS 2009

The Preserve site (red) consists of 300 apartment units in 13 buildings on 42 acres of land. The site overlooks the Ganawatte Pond in a predominantly commercial area near the Foxborough town line on Route 1 in south Walpole.



Figure 4: The Preserve Site Map
Photo credit: Google Earth

Sewer and Water Capacity

Town officials worried that the sewer system did not have the capacity to handle the new development. They stated that the Master Sewer Plan of the town considered the proposed site to be able to accommodate a maximum of 42 single-family homes (1 unit per acre). One interviewee explained that Walpole officials were mostly concerned about a known deficiency in their system in that area of town in which the sewer pipe crossed a river at a relatively flat point. As the demand on the system increased, manholes would occasionally surge at this point, but not to the point of overflowing. Town officials raised significant concerns over the increased demand that a 300-unit development would place on the system and the ability of the town to make the necessary infrastructure improvements. Sewer and Water Commission Chairman Steven Davis told the ZBA that the town could not supply adequate water and sewer service to the development in the timeframe envisioned in the development plans.¹⁹

At the time The Preserve was proposed, the area of south Walpole was served by a one million gallon water tank that had an effective capacity of 300,000 gallons. The south Walpole tank provides water to 25 percent of the total services of the town. Officials originally estimated that the peak demand from The Preserve could be 200,000 gallons of water per day.²⁰ This figure, provided by an engineering firm, was countered by the developer's own consultants who argued that usage could be estimated at 57,204 gallons per day.²¹ Again, town officials claimed that the necessary improvements could not be made within the development timeframe; and that south Walpole could expect water shortages because it would take several years before the town could provide enough water for the complex.²²

Emergency Services and Pedestrian Safety

Testimony by the Fire Chief at the time, Kenneth Erickson, is well-documented in ZBA and HAC proceedings as well as in archival news articles. The Chief argued that the site was too distant from the fire station in the center of town, which would lead to an increased

response time of almost six minutes, in ideal conditions, to get to the site.²³ If there were a Gillette Stadium event, that response time would be further increased.

Erickson also raised concerns about the type of construction used in the buildings and the sprinkler systems chosen by the developers. He claimed that wooden truss buildings without sprinklers in the attic, in combination with the distance of the site from the fire station, could cause a fire to engulf the building before the department could arrive.²⁴ Officials also pointed out that the height of the buildings combined with steep grading around them prohibited the current fire equipment and ladders to reach the top of the buildings in the case of a fire.

The Fire Chief and Town officials were very concerned about the amount of water pressure located in the south Walpole pressure zone and claimed that tests their consultant conducted showed that there was not adequate water pressure to fight a large-scale fire at The Preserve.

The Preserve apartments are located in south Walpole on Route 1, a busy state highway where the average speed is 50 mph.²⁵ Chief Erickson and other Town officials cited many concerns regarding the safety of pedestrians along Route 1. Erickson claimed that most of the town's attractions were located on the west side of the highway—across from The Preserve site—and he worried that pedestrians could be hit trying to cross.²⁶ The Town wanted to require Gatehouse to build sidewalks along Route 1. They also raised concern about students waiting for school buses alongside the highway.

Inconsistency with Community Planning

Town officials expressed dismay over the loss of 42 acres that they had wanted to develop commercially. As the Town Administrator stated, Walpole is overwhelmingly reliant on its residential tax base, and Town officials had been working to create more economic development opportunities for the town in that area. A consultant had previously identified the site as one of Walpole's most promising areas for business development because of its proximity to Gillette Stadium. The report resulted in the rezoning of the site for "light manufacturing" use earlier in 2000, before the Gatehouse proposal. Ken Fettig, then Chairman of the Economic Development Committee, said that the Town felt, "this property could produce significant tax revenue for the town;" and that, "with all of the stadium development. . . the land as housing is less desirable."²⁷

“This property could produce significant tax revenue for the town. With all of the stadium development. . . the land as housing is less desirable.”

On the Ground: After

Schools

In a review of School Committee minutes stating enrollment numbers and current data provided by officials, it is safe to say that the number of students coming from The Preserve is significantly lower than the number that the Town expected. In a September 12, 2005 School Committee meeting, the first school year that The Preserve opened, principals from the middle schools estimated that 22 new students enrolled from the development.²⁸ Numbers from the high school were not represented in the minutes. Once The Preserve was fully occupied, the school enrollment from the development increased a bit. During the 2008-2009 school year, Walpole schools had a total of 90 students from The Preserve (36 at the elementary school, 23 at the middle school and 31 at the high school). This

Public school enrollment from The Preserve is only one-sixth of the 564 students that some officials had feared.

number is nearly 50 percent more than the 61 students the developers estimated, but only about one-sixth of the 564 students that some officials had feared. One interviewee noted that the school system had to hire the equivalent to an additional half of a bus to handle the students from The Preserve. This has cost the Town about \$35,000 per year.

While the town has experienced some impacts on their schools because of the development, the schools, traditionally under-funded have nevertheless managed the growth well. The numbers of students and costs originally projected were significantly overstated and did not bring the schools “into a state of crisis” as one School Committee member had originally predicted.²⁹ A greater problem is that Walpole is consistently below the state average in expenditures per pupil. If the Walpole school district enrollment continues to grow at its normal rate of five percent each year, this is going to continue to be a significant problem. This challenge is not connected to The Preserve or 40B development.

Walpole schools have seen an increase in the number of ELL students; and much of that can be attributed to The Preserve. Michael Stanton, Principal of Boyden Elementary, explained that the school received 65 total new students in the 2005-2006 school year; 35 of those came from The Preserve. Also, during that school year, Boyden saw its ELL number increase from zero students to 22, with 15 of those coming from The Preserve. In total, 70 percent of the ELL students at Boyden are residents of The Preserve. At Bird Middle School, current numbers of ELL students are lower—at just eight with three of those students living at The Preserve. There was not any information at the high school level. In total, the Walpole district has hired one-and-a-half additional teachers to handle the increase in ELL students over the past several years.

Special education numbers vary by the school. At the elementary school, 13% of students were enrolled in special education plans during the 2008-2009 school year. Less than one percent of the students enrolled were from The Preserve. That is to say that less than three percent of students from The Preserve are enrolled in special education at the elementary school. It was different at the middle school, however, which showed 30 percent of the students from The Preserve being enrolled in special education plans and two students (out of 16) being enrolled in the “special needs” program, requiring significant individual instruction. Finally, the high school presented numbers of 38.7 percent or 12 students from The Preserve enrolled in special education during the 2008-2009 school year. This is in comparison to 15 percent or 158 students from the total school population.

While acknowledging the other impacts the development may have had on the town, Stanton stated, “[The Preserve] has brought a lot to the school in a positive sense.” He continued, saying that the school is more diverse, with a population that is now 10 percent non-white and with four languages spoken in students’ homes. This is an encouraging sign that the original intent of the law—to combat some of the racial and economic segregation that exclusionary zoning practices can encourage—is being realized. He also stated that while there has been a significant increase in enrollment at the school, there is a perception that all of it is coming from The Preserve, which is not entirely true. Mr. Stanton also pointed out that the school district has reached out to new students from The Preserve in proactive ways, such as working with the management to offer an open house for the students and their families.

Sewer and Water

The Preserve utilizes a pump system, owned and maintained by the development, which stores waste in on-site storage tanks before pumping it into the Walpole sewer system during off-peak hours. This has avoided any surges in the sewer system and has mitigated the increased demand from the new units. The known deficiency in the pipe that raised concerns for the Town was later remedied as a condition for a commercial development located in Foxborough that wanted to be connected to the Walpole sewer system. Boynton explained that since The Preserve opened, there has been an odor problem, due to possible off-gassing in the surrounding neighborhood. He noted that it coincided with the times in which The Preserve pumps its waste into the system, but stressed that it has not been directly correlated to the development itself. According to another interviewee, the Town is currently installing a new pipe, at a cost of \$165,000, to remedy this problem.

While Town officials raised density concerns, stating that the Master Sewer Plan accounted for a maximum of 42 single-family homes; the developers pointed to the fact that the site had recently been re-zoned for light manufacturing, which could “well exceed sewer flows contemplated by The Preserve.”³⁰

In regards to water capacity, the fear that The Preserve would use 200,000 gallons of water per day was overstated. In 2008, the development averaged 35,000 gallons of water use



Photo credit: Brendan Goodwin



Photo credit: Brendan Goodwin

per day, significantly less than either the town or developer had estimated. Concerns about water capacity were debated in great detail during the HAC hearings. Ultimately, the HAC ruled in favor of the developers, citing calculation errors by the Town’s consultant and the fact that the Town already had future plans to rehabilitate its wells. Indeed, a Town official confirmed that Walpole, through a state loan, made significant infrastructure improvements in June 2004, before completion of The Preserve. These included the addition of another 1.5 million gallon tank, increasing water storage in the area two-fold, and the reactivation of a well in that area.

Emergency Services and Pedestrian Safety

In responding to these concerns, the HAC concluded that the town did not satisfy “its burden of proving a local health and safety concern that outweighs the regional need for housing.”³¹ The HAC also pointed out that residents of The Preserve are the same distance or even closer to emergency services than residents of the Ganawatte Farm subdivision, a new market rate development in the area.³² The increased response time during stadium events is not a result of The Preserve and, in fact, Walpole has made arrangements with the stadium to pay for fire personnel to be stationed at nearby Station Three and for police officers to be stationed on-site at The Preserve to respond to any on-site emergencies.

The Preserve was constructed in accordance with all state fire safety and building codes, including the requirement that the buildings be equipped with a sprinkler system. There is no evidence that the construction type increases fire hazards; and, in fact, some argue that fire safety might be even better in a multi-unit building than a single family home because there may be more warning and help from neighbors in the case of a fire. In response to concerns about the current fire equipment being able to reach the tops of the buildings, the developers reduced the grading around the buildings to remedy the issue. An unanticipated problem discovered after construction, however, is that because the buildings do not have elevators, when an ambulance responds to a call at The Preserve it must take

extra personnel in case they need to carry a patient down the stairs of one of the three-story buildings. With an eight-man department, the interviewee explained that this type of situation places significant burden on Walpole's emergency personnel.

While the Town's consultant claimed there was inadequate water pressure for firefighting in the area, those tests were trumped by calculations by both the developer's consultant and the HAC. An interviewee explained that the one million gallon water tank that existed in south Walpole had an 80 percent capacity for water at the necessary pressure to fight fires; and that there have been no pressure problems since The Preserve was constructed.

An unanticipated consequence of the development was the strain it would place on the Walpole Police Department. Several people contacted inferred that there was a lot of police activity at the development since it opened in 2005. One official did not believe that there were necessarily more calls to The Preserve than what might be seen in other parts of the town; but rather that because it is a population-dense area, this may create a perception that there is more police activity at the site. The official continued, saying, the nature of the police calls to The Preserve are of the same nature as is "typical of highly concentrated areas": larceny, domestic disputes and harassment issues with kids. Additionally, there has been an increase in crime in Walpole. But the interviewee did not attribute this to The Preserve, instead explaining it as a general trend throughout the town. Finally, the same concerns raised by other emergency services were also seen in the police department. Because of the distance between the police station and The Preserve, two officers have to respond to every call at the site because it is too far to allow for backup to arrive quickly, if it was needed. This represents two-thirds of the department's on-duty force.

Regarding pedestrian safety, the developers responded in their appeal to the HAC, that, "the development will create no greater safety issues than those created by many other smaller, market rate . . . developments near or adjacent to Route 1 . . ." ³³ The HAC sided with the developers saying that these concerns were not grounds for denial of the comprehensive permit; and that, in fact, there were other attractions along Route 1 likely to "draw young pedestrian traffic including the FunWay Amusement Center, the Iorio Dormitory and the Goddard School," all developments in which the Town did not require sidewalks. ³⁴ Since The Preserve opened, there have been no major accidents. But one official explained that he saw pedestrians on Route 1 "all the time" and the problem has never been addressed. To address the concerns of students waiting for buses, the developers agreed to construct three bus stops within the development, off of Route 1. In addition, they expanded the width of the entrance driveway so that buses could turn around and not have to back out of the development.

Inconsistency with Community Planning

It is difficult to determine the impact that housing, as opposed to commercial development, has had on this area, because we cannot know what, if anything, would have been developed in place of The Preserve. While the Town's chief concern was the loss of 42 acres that could have been used for economic development, as The Preserve was completed the Town of Walpole published an eight-page promotional piece touting its many available commercial properties and economic development opportunities. ³⁵

According to the town Assessor's Office, Walpole maintains a current residential tax rate of \$11.67 per \$1000 in assessed value, while the commercial rate stands at \$15.16. The

The HAC concluded that the town did not satisfy "its burden of proving a local health and safety concern that outweighs the regional need for housing."

SUMMARY OF CONTROVERSIES AND OUTCOMES

Controversy	Concern	Outcome
School Impacts	<ul style="list-style-type: none"> • Influx of 260-564 new students • Need to hire 13 new teachers • Increase in students would bring the district “into a state of crisis” 	<ul style="list-style-type: none"> • 90 students (2008-2009) • 1.5 ELL positions created • The numbers were significantly lower and the district seems to have managed it well
Sewer and Water Capacity	<ul style="list-style-type: none"> • Sewer system would fail under increased demand • The Preserve would consume 200,000 gallons of water per day • Infrastructure improvements could not be made before the development was completed 	<ul style="list-style-type: none"> • Demand was remedied by pump system • Average consumption was 35,000 gallons per day (2008) • All improvements were completed by 2004, before the project was completed
Emergency Services and Pedestrian Safety	<ul style="list-style-type: none"> • Response times due to distance from center of town and increased time during stadium events • Insufficient water pressure for firefighting • Lack of sidewalks at The Preserve 	<ul style="list-style-type: none"> • No major incidents. Stadium pays for police and fire at The Preserve during events • Other tests showed sufficient pressure. No problems experienced • No incidences and sidewalks were not required for other commercial and market-rate developments
Inconsistency with Community Planning	<ul style="list-style-type: none"> • Loss of 42 acres that could have gone to economic development • Loss of commercial tax revenue 	<ul style="list-style-type: none"> • Town advertised many opportunities and spaces for commercial development after construction • The Preserve generates approximately \$371,000 in tax revenue per year

Figure 5:Walpole Demographics

Preserve apartments were most recently valued at \$31,789,400, which generates nearly \$371,000 in tax revenue for the town at the residential rate.

Conclusion

It is not surprising that a small, suburban town would have concerns about a 300-unit rental development, whether it includes affordable or market-rate units. The Town of Walpole, in its stewardship, raised many legitimate concerns about The Preserve apartments, which were taken to the Housing Appeals Committee and almost all the way to the Supreme Judicial Court, before the case was settled. Its HAC case is considered a landmark

40B court decision in that it exhaustively examines why a local ZBA cannot deny a comprehensive permit on the grounds of the project's impact on municipal services.³⁶ The HAC decision also states that the services that Walpole was worried that the development would disrupt are services that the Town is legally required to provide.

As detailed in this case study, many of the concerns that were raised by the ZBA and town officials have not been realized to the extent that they were originally feared. This is particularly evident in the number of school-aged children from the development and the water usage numbers. Less quantifiable, and perhaps somewhat subjective, are the impacts of the loss of land for economic development, pedestrian safety concerns and some of the fire, police and safety concerns. However, based on interviews and other research, it is clear that The Preserve development has not caused extraordinary, adverse impacts to the quality of the services that Walpole is able to provide its residents.

In fact, Boynton admitted that, after the HAC decision, the Town entered into very constructive negotiations with Gatehouse to mitigate some concerns and move the project forward. Additionally, there have been some benefits that came out of the development, including, that the town "learned a lot from the flat out denial" by the HAC; and that the town is more aware of its housing needs and goals. Boynton explained that Walpole's Subsidized Housing Inventory grew from 1.98 percent to 5.7 percent, largely because of The Preserve. This has brought Walpole significantly closer to the 10 percent affordable housing threshold required under 40B. Jon Rockwood, Chair of the Housing Partnership Committee (called the Affordable Housing Committee during the time of The Preserve case), said that this project "changed the debate in town." Rather than focusing solely on homeownership, Walpole is now taking a more proactive approach towards meeting the 10 percent threshold through more manageable, smaller developments. Previously, the Affordable Housing Committee was reactive in nature; it has now been reformed as a partnership with a plan to use programs such as the Local Initiative Program (LIP) and the Smart Growth 40R initiative to develop more affordable units in the future. Don Johnson, the Town Planner, stated that the town's Master Plan went through a major update in 2003-2004 and included the recommendation that the Town "take the lead in the creation of affordable housing" by creating a Housing Partnership and a Housing Production Plan (HPP). DHCD approved the HPP in February 2008, certifying it for the next four years. A certified HPP means that any decision by the Walpole ZBA will be deemed "consistent with local needs" and will be upheld by the HAC, essentially granting immunity from 40B challenges for the term of the certification, provided that the objectives of affordable housing creation within the plan are being achieved.³⁷ Johnson stated that the Walpole Housing Partnership was established in early 2009. Under the Partnership, the Town is taking a proactive role in the creation of affordable housing, rather than just reviewing private petitions.

Affordable housing and Chapter 40B proponents have long argued that communities have had 40 years to bring their affordable housing inventory up to the ten percent threshold so that they would not be vulnerable to the comprehensive permit law. Walpole has fully realized the importance of reaching that threshold and now appears to be proactively working towards that goal.

*As a result of
The Preserve,
Walpole is
taking a
more proactive
role in the
creation of
affordable
housing.*

Endnotes

- ¹ Walpole Visitor Center, “About Walpole”
- ² U.S. Census Bureau, American Community Survey, 2005-2007, 3-Year Estimates: Summary Population and Housing Characteristics: Walpole, Massachusetts
- ³ Glynn, “Apartments Seen Offering Some Advantages to Town”
- ⁴ Ibid
- ⁵ See Hilltop Pres. Ltd. P’ship v. Walpole Bd. of Appeals, Mass. Housing Appeals Comm. No. 00-11, April 10, 2002
- ⁶ Glynn, “Plan for 408 Apartments Gets Chilly Reception”
- ⁷ Glynn, “Gatehouse Cuts Number of Apartments”
- ⁸ Glynn, “Gatehouse Scales Back”
- ⁹ Glynn, “Plan for 408 Apartments Gets Chilly Reception”
- ¹⁰ Glynn, “State Gives Gatehouse \$1 Million Loan”
- ¹¹ Glynn, “Plan for 408 Apartments Gets Chilly Reception”
- ¹² Ibid
- ¹³ Burns, “State Approves Gatehouse”
- ¹⁴ Beam, “School Committee Expresses Concerns about Gatehouse”
- ¹⁵ Glynn, “ZBA Rejects Gatehouse”
- ¹⁶ Glynn, “Gatehouse Claim to Site is Challenged”
- ¹⁷ Beam, “School Committee Expresses Concerns about Gatehouse”
- ¹⁸ Glynn, “Town Officials Cite Hyannis Case”
- ¹⁹ Glynn, “Gatehouse Scales Back”
- ²⁰ Glynn, “Commissioner Says Test Shows Inadequate Water Flow for Firefighting”
- ²¹ Koningisor to Walpole ZBA, “Re: Responding to Written Comments Filed with the MEPA by the Town of Walpole”
- ²² Glynn, “Gatehouse, Town Disagree About Water”
- ²³ Burns, “Fire Chief Testifies at Hearing”
- ²⁴ Glynn, “Gatehouse Decision Up to State”
- ²⁵ Burns, “Fire Chief Testifies at Hearing”
- ²⁶ Ibid
- ²⁷ Beam, “Town Meeting Rezones Gatehouse Site”
- ²⁸ Walpole Schools, “Walpole School Committee Meeting Minutes”
- ²⁹ Glynn, “Gatehouse Claim to Site is Challenged”
- ³⁰ Koningisor to Walpole ZBA, “Re: Responding to Written Comments”
- ³¹ Hilltop Pres. Ltd. P’ship v. Walpole Bd. of Appeals, Mass. Housing Appeals Comm.
- ³² Glynn, “Plan for 408 Apartments Gets Chilly Reception”
- ³³ Glynn, “Gatehouse Files Appeal”
- ³⁴ Burns, “State Approves Gatehouse”
- ³⁵ Burns, “Innovative Development Plan in Walpole”
- ³⁶ Regnant and Haverty, “Compelling Reasons Why the Legislature Should Resist the Call to Repeal Chapter 40B”
- ³⁷ Mass. Regs. Code tit. 760 §56.01



Chapter 5 **3**

NEWTON THE KAYLA'S HOUSE DEVELOPMENT

The Chapter 40B controversies surrounding the Kayla Rosenberg House Development (Kayla's House) in Newton centered on community process and neighborhood change. The neighborhood association led a movement to derail the developer from bringing transitional housing to the neighborhood. Concerns about environmental and health risks, increased traffic, and the developer's inexperience with producing market rate units were presented to the ZBA. These concerns were not realized, and the community has since accepted the development. Additionally, the city has learned to integrate more sophisticated community involvement processes into the development of affordable housing.

Newton Community Profile

Newton, Massachusetts, or “the Garden City,” is a suburban city situated approximately six miles west of Boston. Newton’s median household income is \$86,052 (compared to \$50,502 in Massachusetts), median family income is \$105,289 (compared to \$61,664 in Massachusetts) and per capita income is \$45,708 (compared to \$25,952). In 2000, among owner-occupied units, 41.5 percent of dwellings were valued between \$300,000 and \$500,000, with 37.9 percent of homes valued at greater than \$500,000, and the remaining 20.6 percent at less than \$300,000. Under one-quarter (23.3 percent) of the dwellings in Newton were constructed after 1960.¹

The Kayla’s House Development

The Kayla’s House Development² lies in a Mixed Use 1 Zone, directly adjacent to a Single Residential 3 Zone.³ The property is situated near one of the few remaining industrial areas in Newton.⁴ The development sits on a 35,393 square foot lot and has 120 feet

of property line facing the street.⁵ The development is a hybrid of rental and ownership dwellings consisting of nine total units, five of which are transitional, rental units and four are homeowner condos. The five rental units in Kayla’s House are designated for single mothers earning less than \$24,000 per year; and one of the four homeowner condo units has been designated for a first-time homebuyer making less than \$56,000 per year. The three market rate units were projected to sell for \$425,000; and the first-time home-buyer unit was put on the market at a deed-restricted price of \$256,000.⁶

On the Ground: Before

The building now known as Kayla’s House had been used for many years as a group home, but the administering agency moved out and the owner decided to put the house up for sale.⁷ Citizens for Affordable Housing in Newton Development Organization, Inc. (CAN-DO) identified the property as a viable opportunity to develop affordable housing. In partnership with the Newton Community Services Center (NCSC), CAN-DO bought the property for \$500,000 in August of 1999.⁸ The unit was to be rehabilitated and then house clients of NCSC’s Young Parents Program, which would provide transitional housing for a vulnerable population of young, single mothers. CAN-DO received assistance from the City of Newton Planning and Development Department and its Community Development Block Grant (CDBG) funds, and NCSC received a federally-funded HUD McKinney grant.⁹

NEWTON DEMOGRAPHICS	
Population	83,829
Area (square miles)	18.22
Race	88.1% White 7.7% Asian 2% Black
Median Household Income (1999 dollars)	\$86,052
Total Housing Units	32,112
Owner Occupied	69.5%
Rental Occupied	30.5%
Median Home Value	\$438,400
Subsidized Housing Inventory (SHI)	
SHI Before Development (2002)	4.88% (1,554 units)
SHI After Development (2008)	7.6% (2,435 units)

CAN-DO held three community meetings in the fall of 1999 and in early 2000 to discuss its plans for the Kayla’s House property leading up to the initial filing of a comprehensive permit with the Newton Zoning Board of Appeals on May 2, 2000.¹⁰ Over the course of these meetings, CAN-DO and NCSC expressed their plans for the property to members of the community. The development was originally proposed in two phases; phase one would involve the rehabilitation of the existing Victorian house, which would be followed by phase two, the construction of two duplexes, with two of the four proposed units deed-restricted affordable to moderate-income, first-time home buyers. However, upon the suggestion of the Planning and Development Department, several modifications were made to the original plans, increasing project costs to the point of making the original plan economically infeasible. The proposal brought before the ZBA on May 2, 2000 called for one project (both the rehab and new construction) in which only one of the four homeowner units would be deed-restricted affordable to a family with an income of less than

Figure 7: Newton Demographics
Sources: 2000 Census Data, DHCD Community Profile, and DHCD Subsidized Housing Inventory

80% AMI.¹¹ It was proposed that the remaining three condominium units be sold to Newton city employees at “an affordable rate,” per funding under the Community Preservation Act.¹²

An abutter filed suit with the Massachusetts Land Court on June 29, 2000 in opposition to the CAN-DO proposal. The suit called for the annulment of any ZBA decision to grant CAN-DO a comprehensive permit.¹⁴ The Newton ZBA initially granted the Comprehensive Permit

with 34 conditions on July 18, 2000. These conditions included various steps to be taken prior to receiving a permit to build, specifications on what modifications would need to be made to landscaping, curbing and a retaining wall, and requirements on the experience and bonding of the contractor.¹⁴ This suit was quickly withdrawn, however, when the developer agreed to move the two duplexes further away from the abutter’s property (closer to the western edge of the lot and the boundary with the abutting chemicals manufacturer) and the inclusion of additional screening trees between the developer’s and the abutter’s respective properties. The petition to amend the original comprehensive permit was filed on March 6, 2001 and approved by the ZBA on April 17, 2001.¹⁵ Construction got underway in May 2002 and was completed in June 2003.¹⁶

Community Process

When Chapter 40B became law in 1969, the Newton Community Development Foundation proposed six 40B sites simultaneously in various parts of Newton. All were denied comprehensive permits based on the lack of detail provided by the petitioner and the mobilization of opponents. Because of the concurrence of projects throughout Newton, the various neighborhoods mobilized in common cause against the removal of local control over zoning.¹⁸ Newton was then the first Massachusetts city to adopt inclusionary zoning in 1977.¹⁹ The recent history of Chapter 40B in Newton has been, for the most part, amicable. Among the 113 Massachusetts communities studied in a 2007 report, 40B developments had a greater chance of approval in Newton than in other communities.¹⁹ Most have been considered “friendly 40Bs,” with only one or two since 1997 not having the support of the Planning and Development Department and local planning board, including larger-scale projects.²¹ Given this history, CAN-DO and Newton city planning staff members were surprised when this development was met with opposition.

A non-profit developer proposing dense development on the boundary between single-family residential and industrial mixed-use zones should have been uncontroversial.²¹ Josephine McNeil, Executive Director of CAN-DO, thought that the neighbors would welcome a residential use in lieu of further encroachment of the nearby commercial/ industrial zone.²² According to Michael Kruse, the Director of Planning and Development

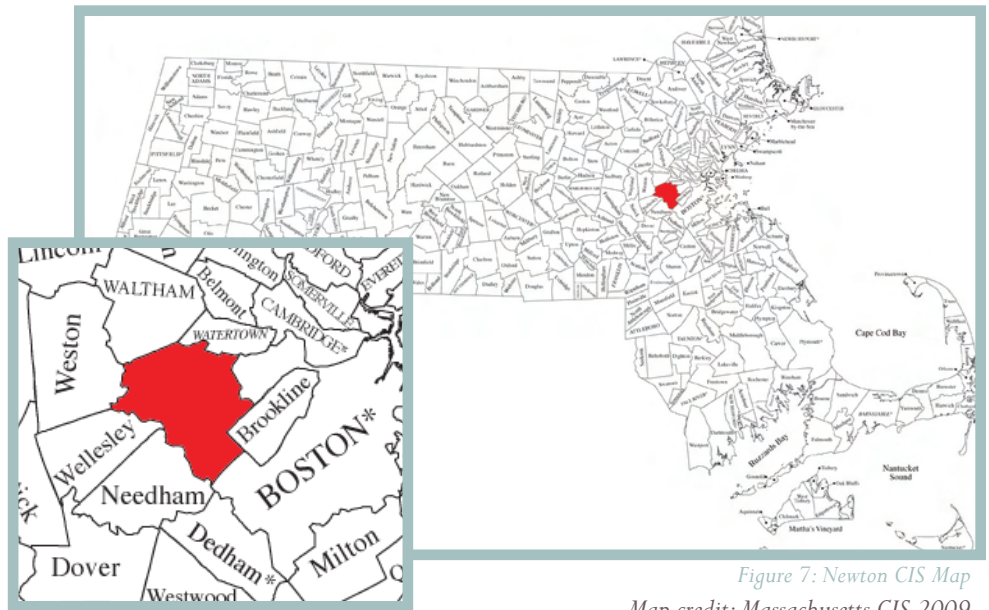


Figure 7: Newton CIS Map
Map credit: Massachusetts CIS 2009

The western edge of the lot (along the white fence) sits across the railroad tracks from the boundary with the abutting chemicals manufacturer.



Photo credit: Jeremy Robitaille

in Newton, a heated discussion erupted at the first public meeting over the neighbors' distrust of the city's initial investment in acquiring the property. The city had assisted CAN-DO with the purchase of the property, but the developer did not approach the neighborhood to communicate its intentions until after this transaction. Kruse was truly surprised by the criticism leveled at the City and the Planning and Development Department. Angry neighbors were not convinced that they were being told the whole truth; Kruse sensed that they viewed the development as a *fait accompli*, with their input and concerns only being nominally heard.²³ Additionally, four aldermen spoke in favor of the project before the ZBA, including the Ward representative, Alderman Myra Tattenbaum. This proved somewhat unusual, as Newton aldermen are known for being somewhat hesitant to stand up to their constituents.²⁴ This may have contributed to the local residents' feeling of distrust and powerlessness in this particular community process.

Neighborhood Change

After the first public meeting, the local neighborhood association leafleted the community in an effort to halt CAN-DO's proposed development. A local resident of the neighborhood, Eileen Freiberg-Dale, remembers receiving a pamphlet at her door calling on the neighborhood to "Stop This Project!" A social worker by training, Freiberg-Dale was familiar with the Newton Community Services Center and trusted that they would run a viable program. She found her way to Josephine McNeil and agreed to lead the effort to mobilize in support of the proposed development, holding meetings in her living room and attending the public meetings to endorse the CAN-DO/NCSC project.²⁵

Local opponents argued that the neighborhood should remain zoned for single-family units only. Many asked why this development could not be built on the other side of a major thoroughfare, in a less affluent neighborhood. Given the intended use of Kayla's House,

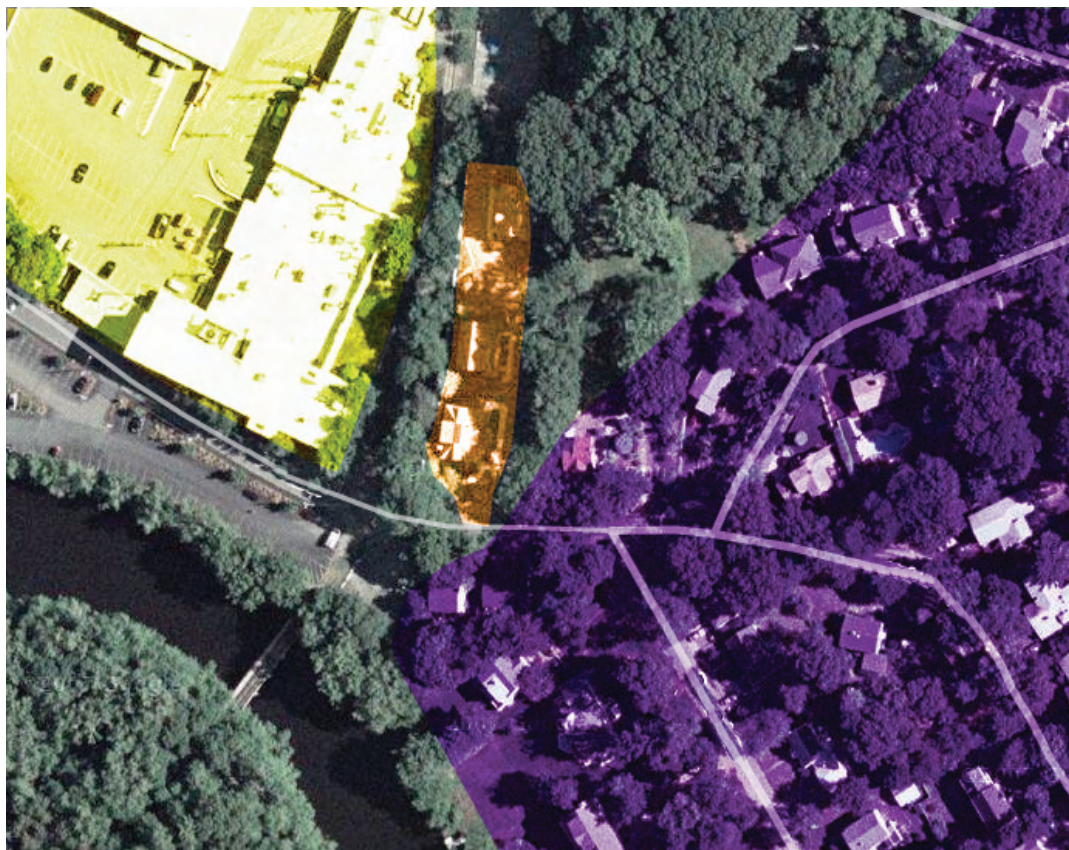
there was a perception among the vocal neighborhood opponents that “these were wayward women who would bring dangerous men into their neighborhood along with delinquent children.”²⁶ McNeil also received a call from an outraged neighbor who exclaimed that “there was no way there was going to be public housing in his neighborhood. He had lived in public housing and knew what kind of people those people were.”²⁷

Environmental Threats and Impact on Public Health

The Newton Zoning Board of Appeals also entertained three other concerns raised by the neighborhood. These were: (1) environmental threats to future residents and the impact on public health posed by abutting industries, (2) increased traffic volume and (3) concerns over the developer’s inexperience building market rate units. All three were argued with varying degrees of success, and prompted some mitigating action.

An October 1993 fire at the abutting chemical factory seriously injured eleven firefighters in Newton. An explosion occurred when the firefighters attempted to douse a sodium fire with water.²⁸ Eileen Freiberg Dale recalls, “I remember the explosion. We knew something terrible had happened. People were really injured, firefighters, etc. I didn’t even know there was a danger down there until then.”²⁹ This was fresh in the minds of the Kayla’s House neighborhood when a deadly fire ravaged a Route 9 commercial building in Newton on Wednesday, February 9, 2000 in Newton.³⁰

The timing of this 2000 fire seems to have been crucial to the framing of the environmental and health risk argument by the neighborhood association. The association sent a letter to the Newton Health Department expressing its concerns about the potential threats to the



The Kayla’s House Development (orange) lies in a Mixed Use I Zone, directly adjacent to a Single Residential 3 Zone (purple) and one of the few remaining industrial areas in Newton (yellow).

Figure 8: Kayla’s House Site Map Map credit: Google Maps 2008

There was a perception among the vocal neighborhood opponents that “these were wayward women who would bring dangerous men into their neighborhood along with delinquent children.”

health and environment of their neighborhood. The letter outlined concerns pertaining to dust particles, a “sulfur-like” odor, and noise pollution coming from the factory. Reference was made to the 1993 fire, as well as the need for a “green buffer zone” between the residential and industrial areas.³¹

The Newton Health Department requested an inspection of the abutting factory premises by the Massachusetts Department of Environmental Protection (DEP) to investigate the neighborhood’s concerns about odors and noise. This inspection took place on June 1, 2000. The factory agreed to install noise abatement equipment. The facility also planned to install a Hydrogen Sulfide Scrubber to address the odor complaints.³² The conditions required of the developer in the initial comprehensive permit also stipulated the completion of a 21E Phase II survey to ensure that the property had not been contaminated.³³ To address the concerns over a “green buffer zone,” the comprehensive permit conditions also required the Director of Planning and Development to approve a final landscape plan. It required that the landscaping be “maintained in good condition and any plant material that has become diseased or dies shall be replaced annually with similar material.”³⁴

Traffic

The Kayla’s House Development is located between two blind turns in the road. This, along with the poor conditions of the road, prompted the neighborhood association to outline additional concerns regarding the development’s location at a segment of the street that “is maintained very poorly and presents a permanent danger of potential traffic accidents.”³⁵ In a letter to the Newton ZBA, the president of the neighborhood association cited the 13 accidents that had been reported in the last four years (1996-2000), and that the addition of the CAN-DO development would add traffic volume to an already dangerous area.³⁶ Freiberg-Dale acknowledged the concerns with traffic, as this street is often taken as a means to avert the heavier traffic on a main route into the neighboring city of Needham. However, a report employing Institute of Transportation Engineers (ITE) trip generation statistics estimated the addition of 28 trips per day. According to City of Newton Traffic Engineer at the time, this was considered minimal and no cause for concern.³⁷

Experience of the Developer

The capability of CAN-DO as a developer was called into question by opponents for a number of reasons. First, CAN-DO neglected to present a bid from a contractor, providing only its own estimated costs. Second, the neighborhood association called into question the proposed market-rate price of \$375,000, citing that this valuation failed to take into account the property’s abutment to an industrial establishment and the density of units on the property.³⁸ The abutter expressed concern about CAN-DO’s lack of experience developing market-rate units. According to this abutter, adjustments had not made to the value given that “the proposed units [would be] located directly next to a factory as well as sharing a lot with low-income housing.”⁴⁰

The number and specific types of conditions included in the ZBA’s initial approval suggest that the concerns about the developer’s experience were considered. The petition for a comprehensive permit was granted, but subject to 34 conditions.⁴⁰ McNeil noted that others outside of Newton were of the opinion that the number of conditions was excessive.⁴² Michael Kruse maintains that this number was pretty typical, reflecting the change over time where city officials have held developers to high levels of scrutiny to include as much detail as possible in any board decision. However, Kruse maintained that at



Photo credit: Amy Yuhasz, Newton Dept. of Planning and Development

least one of the conditions was unusual.⁴² This condition read: “That the selected contractor be required to have a minimum 15 years experience and have successfully completed 10 low/moderate income developments.”⁴³ The types of conditions imposed upon CAN-DO in the granting of a permit to build enabled the city to keep rather close watch over the developer, perhaps due to concerns about the developer’s apparent inexperience with developing market rate units. As a result of the 34 conditions, CAN-DO had to obtain additional sources of city funding, as well as donations from several area patrons.⁴⁴

On the Ground: After

Today, over five years have passed since the Kayla’s House Development was constructed and occupied. Neighbors and municipal officials contend that the neighborhood has not fundamentally changed, but some unintended consequences have occurred. One notable change is how many of those involved learned from CAN-DO’s experience and worked to improve how the city communicates about the development of affordable housing in Newton.

Community Process

Trisha Guditz, Housing Programs Manager of the Newton Planning and Development Department maintains, “I’ve seen the city become more sophisticated in knowing what is



Photo credit: CAN-DO

going to happen with a 40B [development].”⁴⁶ This is reflected in the “Summary of the ‘Step-by-Step’ Comprehensive Permit Process” document drafted in February 2005. Among its 16 steps, number four states: “[the] Petitioner is strongly encouraged, but not required, to meet with abutting neighbors/neighborhood associations and the Housing Partnership to review the preliminary concept plans.”⁴⁶ For Michael Kruse, the Kayla’s House comprehensive permit process was a lesson in communicating with the community when it comes to affordable housing development. This project prompted the Newton Planning and Development Department to consider different paths to take in dealing with developments that need to apply for a comprehensive permit versus those that may only need financial assistance. The Department considered whether or not to tell neighbors about a proposed project even when approvals were not required. There has also been a culture change where high standards can be mitigated and compromised when it comes to developing affordable housing.⁴⁸ Jason Rosenberg, a Newton land use attorney who represented CAN-DO throughout the development process, claims that all too often in Newton, the attitude is that: “this is Newton, we want the project to be absolutely perfect.”⁴⁸

The overriding of local zoning for the purposes of building affordable housing can have a real impact on the residents of the surrounding community. The extent to which city officials can encourage proactive involvement by developers early and often in the process may speak to the potential for a 40B development to get completed. Of course, one interviewee affirmed that despite having no problem with the current residents of Kayla’s House Development, they remain opposed to the development on principle:

It does violate our rights and makes an exception for some and not for others. They would not allow me or my neighbors to build a multifamily house [. . .] Projects like that create a deep distrust of the authorities and resentment among citizens who feel these projects are being shoved down their throats.

It is doubtful that any amount of communication earlier in the development process would have changed this interviewee’s mind. Nevertheless, the CAN-DO development was an unusual case where the city invested in the property before plans were set into motion. Had the neighborhood been brought into the process before Newton assisted CAN-DO’s purchase, perhaps the concerns and fears of some opponents may have been mitigated.

Neighborhood Change

According to Kruse, the neighborhood has experienced very little turnover since the completion of Kayla’s House. Even though people once felt threatened by the prospect of nine units being built on a lot of less than an acre, today most people don’t seem to give the development much thought. Kruse is not aware of any complaints or issues from the neighborhood since the development has been occupied.⁴⁹ The division of the neighborhood over the development process may have had some lingering effects.

Freiberg-Dale also noted that neighborhood block parties seemed to cease right around the time of the controversy. She stops short of suggesting that the disputes resulting from this process caused this decline in block parties. However, she does recall that some opponents became increasingly hostile toward the neighbors, and some relationships have not recovered.⁵⁰

Jason Rosenberg maintains that the residents of Kayla's House have become a part of the neighborhood.⁵¹ The site looks very nice, and is well maintained,⁵² suggesting that locating the development here has not caused wholesale change to the neighborhood. What may also contribute to the community's acceptance of the development is the fact that during the process, it was learned that the Newton Housing Authority owned a house in the neighborhood. Michael Kruse posits that this may have put some of the residents' fears to rest about public housing not fitting in with the neighborhood.⁵³ In fall 2008, Josephine McNeil received a call from a resident of the neighborhood who wanted to let CAN-DO know that she would soon be selling her house, if they were interested. Josephine explained that because of past controversies, CAN-DO no longer develops housing in that neighborhood. The woman disclosed that she had been a member of that opposition, but now she felt so bad about it, because the site looks so beautiful and the neighborhood did not change as was originally feared.⁵⁴ A current NCSC employee involved with the Young Parents' Program has also confirmed that a few children living in the Kayla's House Development have made friends with neighborhood children.

Environmental Threats and Impact on Public Health

The concerns outlined in the ZBA files have not been realized. Since the DEP inspection of the chemicals manufacturer in June 2000, the Newton Health Department confirmed that no additional action has been taken to mitigate potential environmental or health concerns in the neighborhood. Amy Yuhasz, Community Development Program Manager with the City of Newton Planning and Development also confirmed that no studies or tests have been requested or performed at the development related to the abutting chemicals factory.

Traffic

Concerns over the increased traffic and the risk of more accidents have also not come to pass. The Newton City Traffic Engineer confirmed that no post-occupancy traffic studies have been requested or commissioned since the Kayla's House Development



Photo credit: CAN-DO

SUMMARY OF CONTROVERSIES AND OUTCOMES

Controversy	Concern	Outcome
Community Process	<ul style="list-style-type: none"> City of Newton provided developer with financial support before the community is approached about the proposed development 	<ul style="list-style-type: none"> City of Newton inserted strong recommendations for developers to elicit community input early in future 40B permitting process
Neighborhood Change	<ul style="list-style-type: none"> Fears that transitional housing would bring wayward women, dangerous men, drug addicts and delinquent children 	<ul style="list-style-type: none"> Kayla's House residents keep to themselves Neighborhood residents have largely accepted these residents
Environment/Public Health	<ul style="list-style-type: none"> Noise and air pollution would adversely impact the health of incoming residents Construction would detract from green buffer zones between industrial and residential areas 	<ul style="list-style-type: none"> No subsequent complaints regarding the environment and public health have been reported to the Newton Health Department Additional tree screening was added to appease an abutter ZBA required developer to agree to landscaping approvals and yearly upkeep
Traffic	<ul style="list-style-type: none"> The density of the proposed development would bring too much additional traffic to a poorly maintained portion of the street between two blind turns 	<ul style="list-style-type: none"> Christina Street has experienced almost half as many traffic accidents from 2003-2007 than the period 1996-2000.
Experience of Developer	<ul style="list-style-type: none"> The developer's lack of experience in building market rate units 	<ul style="list-style-type: none"> ZBA granted the comprehensive permit with 34 stipulations, among them requiring the contractor to have 15 years experience and at least 10 low and moderate income housing projects in their portfolio

Figure 9: Newton Controversy Summary

was occupied. An analysis of Massachusetts Highway Department Crash Data Information for the City of Newton from 2003-2007 revealed no increase in traffic accidents on Christina Street as the neighborhood association had feared. In fact, while there were 13 accidents on Christina Street from 1996-2000, the period of September 2003 to September 2007 saw only seven traffic accidents on Christina Street.⁵⁶ Rosenberg also stated that there has been no discernable difference in traffic volume documented.⁵⁷

Experience of the Developer

Evidence suggests that fears pertaining to the developer's inexperience with producing market rate units have not been realized. All four condominium units of the Kayla's House Development experienced property value increases from FY2005 to FY2007.⁵⁸ CAN-DO had constructed the Louis H. Garfield House in Newton Corner, three units of transitional housing, before embarking on the Kayla's House project. CAN-DO has since thrived, producing another 26 units, 22 of which are deed-restricted affordable.⁵⁹ This speaks to the capability of the developer and the strong working relationship the developer has forged with the City of Newton.

"I've seen the city become more sophisticated in knowing what is going to happen with a 40B [development]."

Conclusion

The story of the Kayla's House Development can teach us something about how 40B battles between municipalities and the Commonwealth can impact people at the neighborhood level. Just as localities can feel betrayed by the Chapter 40B process when ZBAs permit a 40B project, or when the HAC overrides a local ZBA determination, local residents can feel threatened by the imposition of zoning alterations without warning. It behooves localities to engage neighborhood residents as early as possible in the community process when introducing plans to add any new housing. Understanding the local context is also crucial. One interviewee suggested that the demographics of the neighborhood might have helped fuel the controversy. This person thought that some immigrant homeowners felt that the inclusion of public housing in the neighborhood was unfair, when they had worked hard to be able to afford a home in Newton.⁶²

Communication and transparency on the part of municipal governments is a key component to moving 40B projects through successfully in order to mitigate potential conflict that might arise when residents feel threatened by the introduction of affordable housing in their neighborhoods. Just as Newton enhanced the attention heeded to community concerns earlier in the 40B process, other communities seeking to take a more proactive approach to dealing with the creation of affordable housing might benefit from enhancing and formalizing the inclusion of local residents toward these ends. "Grassroots" approaches to enhancing the community process may instill a sense of agency in the process for many localities, and this could be extended to local residents.

Endnotes

¹ U.S. Census Bureau, Fact Sheet, 2000.

² In accordance with the request of Newton Community Services Center to respect the confidentiality of the participants of the Young Parents' Program, references to the development and its location in Newton are as non-descriptive as possible.

³ Newton Zoning Map, March 10, 2009.

⁴ Michael Kruse, interview by authors, March 30, 2009. Only 1.1 percent of Newton's 18.22 square miles was being used for industrial purposes (and another 1.5 percent for Mixed Use development) and Industrial property was assessed at a value of \$110,349,000 or 1.08% of total property valuations (See City of Newton, "Demographic and Socioeconomic Profile," 7-8).

⁵ City of Newton Assessor's Database.

⁶ Rowland, "'Affordability' Gets New Meaning Lower-Priced Homes are Luring Mid-Income Buyers."

⁷ Josephine McNeil, interview by the authors, March 13, 2009.

⁸ Josephine McNeil, Prepared Statement.

⁹ CAN-DO, "The Christina Street Story." The Stewart B. McKinney Homeless Assistance Act of 1987 (which was renamed the McKinney/Vento Act in 2000), created a number of programs administered by HUD and DHHS to provide housing and services to people who are homeless. The Emergency Shelter Grant (ESG), preceding the McKinney Act in 1986, was eventually consolidated with the McKinney Act and provides formula funding to states and localities for activities including: conversion, renovation and rehabilitation of facilities and delivery of essential services (See Schwartz, 211).

¹⁰ McNeil, Prepared Statement".

¹¹ Ibid

¹² CAN-DO, "The Christina Street Story." Community Preservation Act (CPA) funds are made available to developers who produce housing affordable to those at or below 100% of Boston AMI. See City of Newton, "Housing Programs & Services."

¹³ Commonwealth of Massachusetts Land Court, June 29, 2000.

¹⁴ City of Newton Zoning Board of Appeals Docket #25-00.

¹⁵ City of Newton Zoning Board of Appeals Docket #12-01.

¹⁶ CAN-DO, "The Christina Street Story."

¹⁷ Jason Rosenberg, interview by the authors, Newton, Massachusetts, March 30, 2009.

¹⁸ Pendall, 251.

¹⁹ Fisher, "Chapter 40B Permitting and Litigation."

²⁰ Michael Kruse, interview by authors, March 30, 2009. The term "friendly 40B" often refers to the Local Initiative Program, where a developer first seeks approval of the local board of town selectmen before applying for a comprehensive permit.

²¹ Rosenberg, interview by the authors.

²² McNeil, interview by authors.

²³ Kruse, interview by authors.

²⁴ McNeil, interview by authors.

²⁵ Eileen Freiberg-Dale, interview by authors, April 2, 2009.

²⁶ Ibid

²⁷ McNeil, interview by authors.

²⁸ Pomerantz, "Ready for the worst."

²⁹ Freiberg-Dale, interview by authors.

³⁰ Helman, "It was a sight I had never seen."

³¹ [Neighborhood association], Letter to Newton Health Department.

³² Massachusetts Department of Environmental Protection, Inspection Report

³³ City of Newton Zoning Board of Appeals Docket #25-00.

³⁴ Ibid, 6.

³⁵ [Neighborhood association], Letter to Newton Health Department.

³⁶ [Neighborhood association], Letter to Harold Meizler, Chair, Newton ZBA.

³⁷ Roy Lamotte, Jr., Memorandum to Bob Merryman, Newton Planning Department.

³⁸ [Neighborhood association], Letter to Meizler. The abutter also challenged the suggested market value of the proposed condo units. In the abutter's view, CAN-DO's market comparison utilized single family residences with an average lot size of 14,248 square feet, but did not adjust for a projected lot size for the proposed units of 3,694 square feet (See [Abutter], Letter to the Newton ZBA).

³⁹ [Abutter], Letter to the Newton ZBA.

⁴⁰ City of Newton Zoning Board of Appeals, Docket #25-00, 5.

⁴¹ McNeil, interview by the authors.

⁴² Michael Kruse, interview by the authors.

⁴³ City of Newton Zoning Board of Appeals Docket #25-00, 8.

⁴⁴ McNeil, interview by the authors. CAN-DO received additional help from the City of Newton in bringing the Kayla's House project to fruition. In March, 2003, CAN-DO was accorded a \$378,000 subsidy from Newton's Community Preservation Act fund. With this money, the price of the three market rate units would have been reduced from \$425,000 to \$300,000, allowing them to be sold to Newton city employees earning about \$80,000. Unfortunately, CAN-DO learned of the funding too late in the process to make this arrangement work out, so the three units in question were sold at market rates.

⁴⁵ Trisha Guditz, interview by the authors, March 13, 2009.

⁴⁶ City of Newton Zoning Board of Appeals, "Step by Step – The Comprehensive Permit Process."

⁴⁷ Trisha Guditz, interview by authors.

⁴⁸ Rosenberg, interview by the authors.

⁴⁹ Kruse, interviewed by the authors.

⁵⁰ Freiberg-Dale, interview by the authors.

⁵¹ Rosenberg, interview by the authors.

⁵² Freiberg-Dale, interview by the authors.

⁵³ Kruse, interview by the authors.

⁵⁴ McNeil, interview by the authors.

⁵⁵ Amy Yuhasz, interview by the authors, Newton, Massachusetts, March 13, 2009.

⁵⁶ Massachusetts Department of Highway Department, Crash Data Information. Data was given for the entire city of Newton and the authors analyzed this data for occurrences of Christina Street accidents. The dates of September 2003 to September 2007 were used to approximate a four year period of post-occupancy to compare with the four year period provided by the neighborhood association to the Newton ZBA in 2000. The Newton Police Traffic Bureau confirmed that the Bureau does not track accident statistics at the neighborhood level

⁵⁷ Rosenberg, interview by the authors.

⁵⁸ City of Newton, "Real Property Database." Information for FY2004 was available for these units. The property values of four directly abutting properties were also analyzed, and found to increase from FY2004 to FY2007. All property values experience a decline from FY2007 to FY2008, while all have maintained or slightly increase value from FY2008 to FY2009. It is beyond the scope of this study to evaluate the causes of property value decline from FY2007 to FY2008.

⁵⁹ CANDO, "Housing Table."

⁶⁰ According to the 2000 Census, Newton was 18 percent foreign born, with 15,116 of 83,829 born outside the United States. According to more recent estimates, 16,417 (18%) of Newton's total population of 91,309 are foreign born (See: U. S. Census Bureau, American Community Survey, 2005-2007).