A New Approach to Housing: Changing Massachusetts’s Chapter 40R from an Incentive to a Mandate

“But how do you build up when neighbors want down?”

I. INTRODUCTION

The United States is facing a housing crisis. Simply put, there is an enormous demand for affordable housing and the country’s supply is not keeping up. Both the private housing market and state subsidies for affordable housing have succeeded in increasing the housing stock, but have largely failed at closing the gap between supply and demand, leaving housing prices out of reach for many. While the country as a whole feels the effects of this economic phenomenon, coastal cities experience the worst effects as an increasing number of jobs cluster into these areas. As such, within the last year, both the California and Massachusetts state legislatures have attempted to address the root of the problem: local land use restrictions on constructing homes.

A state government encouraging the development of new, affordable homes is not an innovative approach. In Massachusetts, chapter 40B of the Massachusetts General Laws (Chapter 40B or 40B) already provides legislative tools for private developers to build affordable housing where local zoning forbids such action. What is new, however, is the recent shift from simply building affordable housing to building housing near transit. This is a subtle shift, in the sense that the goal of affordable housing remains the same, but a shift that nonetheless has the potential to remake both large metropolitan cities and small municipalities alike.

In California, State Senator Scott Weiner proposed a Transit Zoning Bill (SB 827) that would have usurped local building restrictions for new construction near transit hubs. The bill would have allowed residential developers to skirt local rules on height, density, and parking if their buildings are within a half-mile of transit. Soon after, Senator Weiner proposed a revised version, Senate Bill No. 50 (SB 50), that attempted to add areas classified as “job-rich” to the transit areas covered in SB 827. Less radically, in Massachusetts, Governor Charlie Baker proposed An Act to Promote Housing Choices (HB 4075), which would allow cities and towns to change their zoning practices by a simple majority, rather than the two-thirds supermajority currently required.


8. See MASS. GEN. LAWS ch. 40B, § 21 (2018) (allowing affordable housing developer to bypass zoning board review); see also CAL. GOV’T CODE § 65581 (West 2020) (outlining legislative intent to ensure local governments address state housing needs).


12. See id. § 2 (providing exemption for “transit-rich housing project”).


between the two states’ approaches is the severity of the state preemption, as California’s bills would have allowed developers in qualifying districts to build without local zoning input. The Massachusetts proposal would simply make it less onerous for a municipality to change its local zoning laws through a majority vote rather than an often unattainable supermajority.

Although incomparable in land area size, both California and Massachusetts have robust and extensive mass transit systems that are vital to each state’s economy. These systems are not limited to urban areas such as Boston, Los Angeles, and San Francisco, but rather connect suburban, residential communities to urban areas where jobs are clustered. These urban and suburban connections offer a case study for the housing crisis as a whole, as dense urban environments build a substantial number of housing units, while the suburban communities these transit connections serve are unable to build more housing due to local land use restrictions. To combat the housing crisis, these communities must build more housing.

This Note will first examine the local land use controls used to restrict housing supply beginning in the early twentieth century. It will then compare and contrast the various state legislative responses in the twentieth century to a growing affordable housing crisis. This Note will also compare the twenty-first century approaches, examining Massachusetts’s transit-based initiatives to

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21. See infra Section II.A (discussing zoning authority and restrictions).

22. See infra Section II.B (examining mid-century zoning legislation); see also Edward L. Glaeser et al., Why Have Housing Prices Gone Up?, 95 AM. ECON. REV. (PAPERS & PROCS.) 329, 329 (2005) (discussing supply constraints effect on housing).
bypass local zoning control in comparison with California’s attempts to completely preempt local zoning regulations by allowing housing development near existing transit. Part III of this Note will argue that Massachusetts’s incentive-based approach to housing production has both failed to effectively address the crisis in the past and will fail again under the rebranded “Housing Choice Initiative.” Finally, this Note will argue that preempting local authority, as attempted in California, and establishing a nexus between housing and transportation provides a necessary solution to one of the country’s biggest challenges: a critical lack of affordable housing.

II. HISTORY

A. Local Control

1. The Origins of Zoning: The Euclid Decision

As set forth in Village of Euclid v. Ambler Realty Co., local zoning regulations are a valid exercise of state police power. At issue in Euclid was a local ordinance that not only separated residential uses from commercial and industrial uses, but also separated certain types of residential uses from residential districts, namely apartment houses. In its reasoning, the Supreme Court acknowledged the practical wisdom of separating land uses from one another, highlighting the traffic, fire safety, and noise concerns zoning can address. But the Court also alluded to the exclusionary effects of zoning when it condemned apartment houses as “mere parasite[s]” when constructed in single-family neighborhoods. In doing so, the Court held that segregating housing types is not only constitutional, but also sound municipal policy that courts will

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23. See infra Section II.C (examining modern legislative responses).
24. See infra Sections III.A-B (critiquing incremental approach); see also Mark Bobrowski, The Massachusetts "Smart Growth" Experiment: Chapter 40R, 92 MASS. L. REV. 1, 6 (2009) (discussing prior Massachusetts legislative response to affordable housing crisis). The supermajority requirement has thwarted Chapter 40R’s “opt-in” approach, where municipalities elect to adopt zoning overlay districts near transit. See Bobrowski, supra, at 1.
25. See infra Section III.C, Part IV (analyzing and concluding why Massachusetts should model its housing reform after California).
27. See id. at 387, 395 (holding constitutional zoning regulations not clearly arbitrary or unreasonable); City of Aurora v. Burns, 149 N.E. 784, 788 (Ill. 1925) (explaining reasonable segregation of industries may bear rational relation to community welfare).
28. See Euclid, 272 U.S. at 390 (narrowing issue to excluding all uses from residential districts). The Court explained its intent was to address the trend of recent zoning legislation, focusing specifically on the particular exclusion at issue. See id.
29. See id. at 394 (discussing conclusions drawn from expert reports relating to public health and safety).
30. See id. at 394-95 (noting apartment houses in single-family home environment almost constitute nuisances). The Court stressed that apartment houses on their own are not nuisances and can even be “highly desirable” if placed in the correct environment. See id.
not interfere with if there is a rational basis for the zoning classification.31

State legislatures swiftly responded to *Euclid*.32 All states eventually passed a zoning enabling act—modeled after the Standard State Zoning Enabling Act (SSZEA)—that delegated zoning authority from the state level to municipalities.33 State legislatures intended these acts to promote zoning schemes that adhered to a comprehensive plan, rather than the “hodgepodge” of authorities previously governing land use.34 These zoning acts reflected the prevailing opinion of the time, namely that zoning is primarily a local concern, best handled by residents of that particular community.35 And so, “Euclidean zoning” was born.36

31. See *id.* at 391-92, 395 (describing review standard); *State ex rel. Civello v. City of New Orleans*, 97 So. 440, 443-44 (La. 1923) (requiring lower standard than rational basis for municipal zoning ordinances). “It is sufficient that the municipal council could reasonably have had such considerations in mind. If such considerations could have justified the ordinances, we must assume that they did justify them.” *Civello*, 97 So. at 444.

32. See *Jay Wickersham, Jane Jacobs’s Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. Envtl. Aff. L. Rev. 547, 555 (2001) (discussing evolution of zoning before and after *Euclid*). The *Euclid* decision both validated zoning measures already enacted and provided a template for zoning going forward. See *id.*


35. See *Adler v. Deegan*, 167 N.E. 705, 711 (N.Y. 1929) (Cardozo, C.J., concurring) (describing local features of zoning resolutions). “A zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting, as it does, the density of population, the growth of city life, and the course of city values.” *Id*.; see Nicholas, *supra* note 33, at 1072 (arguing adopting SSZEA removed doubt surrounding local authority over land regulation). This development model assumes a relationship between the entity making the decisions—the local government—and the area receiving the benefits and incurring the costs—the local community. Nicholas, *supra* note 33, at 1072.

Since state legislatures passed their zoning enabling acts, zoning power is largely concentrated with local decision-makers. And as the Court noted in Euclid, courts give deference to state and local land use decisions. As such, cities and towns enjoy almost unlimited power to restrict the use of property as long as they can provide a rational basis for doing so.

2. The Mechanics of Local Control

State zoning enabling acts give municipalities zoning power. From there, zoning ordinances and bylaws aim to promote the public health, safety, and welfare by regulating both land uses and building types. In exercising their zoning rights, municipalities act under their independent police power, entitling them to the traditional deference this power affords.

Due to this broad grant of power, there is no shortage of ways in which a municipality can restrict where and what type of building a developer can construct. Courts have upheld minimum lot size and setback requirements, single-family residential districts, and height restrictions as a valid use of the police power. In this sense, the power to zone is best thought of as the power

37. See City of Raleigh v. Fisher, 61 S.E.2d 897, 902 (N.C. 1950) (outlining how municipal authority exercises state police power when enacting and enforcing zoning regulations); Nicholas, supra note 33, at 1072 (stating following SSZE A, local governments given authority to regulate land).


39. See Eliza Hall, Note, Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning, 68 U. Pitt. L. Rev. 915, 919 (2007) (proposing Euclidean zoning’s negative effects). The police power has such a low standard of deferential review that zoning codes can restrict property to an almost unlimited extent. See id.

40. See MASS. GEN. LAWS ch. 40A, § 1A (2018) (granting municipalities expansive regulatory power over land, buildings, and structures). Massachusetts law defines zoning as “ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants.” Id.


42. See Lanner v. Bd. of Appeal, 202 N.E.2d 777, 783 (Mass. 1964) (discussing review standards for local zoning decisions). “Every presumption is to be made in favor of the amendment and its validity will be upheld unless it is shown beyond reasonable doubt that it conflicts with the enabling act.” Id.


44. See Simon v. Town of Needham, 42 N.E.2d 516, 517-18 (Mass. 1942) (approving minimum lot size requirement); Town of Lexington v. Bean, 172 N.E. 867, 868-70 (Mass. 1930) (upholding constitutionality of
to exclude. But the power to exclude is not limited to types of buildings or uses; rather, it often includes the power to exclude people. For example, municipalities may set minimum lot sizes far above what a prospective buyer needs, thus significantly inflating the cost of entry into the market. Likewise, minimum lot space requirements force buyers to purchase larger houses than they can afford, and age restrictions force families to compete for a limited supply of housing. In essence, the original purpose of zoning—to prevent overcrowding and congestion—justifies using zoning ordinances to exclude all but a well-off few.

3. Effects of Local Control

The exclusionary phenomenon of land use regulations, which prevents a new supply of housing, negatively affects prospective homebuyers and contributes to residential stagnation. Areas with high demand for jobs are unable to attract new workers due to exclusionary land use restrictions. Without workers to satisfy demand, residential stagnation suppresses economic growth and separates communities along class lines.

In a similar vein, exclusionary zoning contributes to, if not causes, racial segregation. It is well-settled that a zoning law explicitly seeking to exclude single-family district); Welch v. Swasey, 79 N.E. 745, 745-46 (Mass. 1907) (declaring height restriction constitutional).


46. See Batchis, supra note 43, at 380 (noting zoning’s dark side). Exclusionary zoning not only segregates buildings, but also people according to race, class, and lifestyle. See id.

47. See Paul Boudreaux, Lotting Large: The Phenomenon of Minimum Lot Size Laws, 68 ME. L. REV. 1, 9 (2016) (analyzing effect of minimum lot size regulations on home prices); see also Note, Exclusionary Zoning and Equal Protection, 84 HARV. L. REV. 1645, 1645-46 (1971) (summarizing exclusionary zoning techniques). Minimum lot sizes, minimum floor space requirements, and multifamily dwelling bans are all pervasive forms of exclusionary zoning. See Note, supra, at 1645-46.

48. See Span, supra note 45, at 8-9 (explaining connection between exclusionary zoning techniques and low-income housing). “In short, exclusionary zoning keeps out lower-income households in three main ways: (1) by raising the cost of housing generally, (2) by restricting supply of low-income housing types and mandating minimum land and housing purchases, and (3) by zoning out families with school-aged children.” Id. at 9.

49. See id. at 10 (arguing zoning enabling acts encourage excluding low-income housing construction and limiting overall housing supply).


51. See Schleicher, supra note 50, at 115 (stating demand for living outpacing supply in major economic areas).

52. See id. at 116-17 (explaining connection between land-use restrictions and economic growth).

racial minorities is unconstitutional. But exclusionary zoning techniques that raise the price of housing or discourage renting indirectly bar poor minorities from living in certain areas and exacerbate segregation. Finally, exclusionary zoning negatively affects the environment by producing “sprawl.” Restraining the supply of new homes does not restrain the demand for new homes, creating a phenomenon where development sprawls outward from urban areas into open land. This sprawl causes longer vehicle trips and commutes, which in turn increases carbon dioxide emissions. Likewise, exclusionary zoning pushes development into environmentally-sensitive areas, such as wetlands, once cities and towns effectively ban new development.

Courts, when evaluating zoning challenges, consider only whether the municipality enacted zoning “to further the general welfare.” This standard’s vagueness makes a zoning challenge almost impossible, as municipalities only need to argue they proceeded “with the welfare of its own residents in mind.” Further, courts are reluctant to step into an area they view as a matter of local control. As such, one of the most effective approaches to overcoming local zoning control was a landmark piece of Massachusetts legislation, Chapter 40B,
aptly referred to at the time as the “Anti-Snob Zoning Law.”

B. The Response to Local Control: A Chronology of Massachusetts and California Zoning Legislation

1. The 1960s: Massachusetts’s Comprehensive Permit Law

In 1969, Massachusetts confronted exclusionary zoning and the state’s affordable housing shortage in a landmark piece of legislation commonly referred to as Chapter 40B. Similar to other states, the Massachusetts Legislature granted zoning power to individual municipalities through a zoning act. But after decades of possessing this right, a legislative committee found widespread abuse of zoning power.

In response, the state legislature attempted to encourage affordable housing production by creating a statutory override of local zoning regulations. Under the scheme, developers can apply for a “comprehensive permit” from the local Zoning Board of Appeals (ZBA) if 10% of the total housing units in a municipality are not low-or-moderate income housing. If the local ZBA subsequently denies the proposal, the developer may appeal to the Housing


64. See MASS. GEN. LAWS ch. 40B, §§ 21-23 (2018) (supplying relevant law); see also Theodore C. Regnante & Paul J. Haverty, Compelling Reasons Why the Legislature Should Resist the Call to Repeal Chapter 40B, 88 MASS. L. REV. 77, 77 (2003) (summarizing 40B statutory scheme). The law is frequently referred to as the anti-snob zoning statute, the Comprehensive Permit Law, or Chapter 40B. Regnante & Haverty, supra, at 77.


66. See Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 403-04 (Mass. 1973) (summarizing legislative committee’s findings). The legislative report found:

(1) Large lot requirements (minimum lot size) have a substantial negative effect on the availability of land in the suburbs which could be used for low and moderate income housing. The Report listed twenty-one municipalities, including Hanover, that restricted 50% or more of their territory to large lot zoning. (2) Building height limitations were also found to have a significant negative impact on low and moderate income housing. . . . To the extent that inner suburban communities prohibit multifamily and apartment housing, or attach height or other restrictions which make such housing feasible only on a “luxury” basis, the modest income housing problems of the entire metropolitan area are aggravated.

Id. at 403 (citations omitted); see Dardeno, supra note 7, at 133-34 (tracing 40B’s legislative history through committee to passage). The legislative committee “found that municipalities abused [their zoning power] by implementing restrictive zoning practices that frustrated the construction of low-income housing.” Dardeno, supra note 7, at 133.

67. See Dardeno, supra note 7, at 134 (detailing 40B statutory requirements).

68. See ch. 40B, §§ 20-21 (describing “consistent with local needs” requirements and process to issue comprehensive permit). If the municipality has not met the 10% requirement, a proposed affordable housing development is presumed “consistent with local needs” under the statute. See id. § 20.
Appeals Committee (HAC). At this point, the law provides that in communities where at least 10% of housing units are affordable, the HAC will not overturn the local ZBA. Conversely, the HAC may overturn the decision if the community does not meet the 10% affordable housing threshold.

Under this scheme, the threat of 40B intervention seeks to streamline the development process for affordable housing production changes, rather than dramatically alter or circumvent local zoning power. But even this small incentive has met significant opposition since its inception. Common arguments against 40B are that developers build projects too densely under applicable zoning laws and that the number of projects filed overwhelm the municipalities’ ability to provide services. Nevertheless, 40B has survived years of judicial and legislative opposition and remains a nationwide model for affordable housing construction.

Since its inception, 40B has both initiated and produced a substantial amount of affordable housing across Massachusetts. Before 40B, only four Massachusetts municipalities met the 10% threshold for affordable housing, while as of 2012, forty towns meet the threshold. Housing advocates credit the law with producing around 58,000 housing units, 31,000 of which are affordable. These results confirm that even after fifty years, 40B remains the “principal vehicle” for creating affordable housing in Massachusetts.

70. See ch. 40B, § 20 (defining appeals process). “Requirements or regulations shall be consistent with local needs when imposed . . . in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent . . . .” Id.
71. See MASS. GEN. LAWS ch. 40B, § 23 (2018) (outlining HAC’s power to overturn ZBA’s decisions); Krefetz, supra note 63, at 387 (detailing when HAC may overturn).
72. See Krefetz, supra note 63, at 386 (outlining legislative intent to streamline and simplify affordable housing construction).
73. See Christopher Baker, Note, Housing in Crisis—A Call to Reform Massachusetts’s Affordable Housing Law, 32 B.C. ENVTL. AFF. L. REV. 165, 166 (2005) (commenting on local opposition to 40B). “Massachusetts’s experience with 40B has been marked with ugly tension between the state and municipal governments.” Id.
75. See Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 414 (Mass. 1973) (upholding HAC’s ability to override local zoning); see also Dardeno, supra note 7, at 137-39 (discussing failed legal challenges to 40B’s authority).
76. See Krefetz, supra note 63, at 392-94 (outlining 40B’s positive effects). “[I]t seems clear that without the Act the amount of affordable housing that does exist would be much lower, and the locations of this housing would be far more limited . . . .” Id. at 394-95.
78. See id. (stating housing creation figures).
79. See Dardeno, supra note 7, at 139 (detailing results of 40B).
2. The 1980s: California’s Housing Element Law

Like its Massachusetts counterpart, California’s state legislature recognized a lack of affordable housing options in 1980. In response, California passed the “housing element statute,” or California Government Code sections 65580-89.8 (Housing Element Law). The Housing Element Law requires each municipality to plan for new housing.

The Housing Element Law has several required components. One component is an “assessment of housing needs and an inventory of resources and constraints relevant to the meeting of these needs.” This assessment is ultimately a numerical figure representing the number of housing units needed to meet the community’s demand. At the heart of the law, communities must adopt an “action program” that defines a five-year schedule to achieve the housing goals articulated in the assessment and identifies adequate sites for new housing.

Notably, the Housing Element Law has no state-level enforcement authority. Instead, the law provides for private enforcement, and any interested party may bring an action to force compliance with the statute. Absent a statutory enforcement mechanism, a considerable number of California municipalities fail to fulfill the law’s requirements.

3. The 2000s: Massachusetts’s Chapter 40R

Continuing to address housing concerns, Massachusetts made another notable update to its zoning law in 2004 when it passed the Smart Growth Zoning Overlay District Act (40R). The goal—similar to its predecessor 40B—is facilitating “the building of single-family homes on smaller lots and [increasing]
the construction of apartments for families at all income levels." 91 In keeping
with 40B’s incentive-based approach to affordable housing construction, 40R
allows municipalities to adopt overlay zoning districts called Smart Growth
Zoning Districts (SGZD). 92 SGZD districts do not replace existing zoning
requirements, but rather allow higher density developments than normally
allowed.93

To adopt such a district, the project must receive approval from the local
municipal government and the state’s Department of Housing and Community
Development (DHCD). 94 DHCD’s approval is based primarily on the location
and density of the SGZD and the affordable housing increase in the district. 95
Most notably, areas available for overlay designation include areas near transit
stations and areas of concentrated development.96 Designating these factors
reflects the aims of “smart growth,” which seeks to encourage high-density,
clustered development near transit areas.97 As of 2018, “37 of the state’s 351
municipalities have created 42 [SGZDs], authorizing over 15,000 ‘future zoned
units.’”98

Regardless of 40R’s progress, the same continued opposition to affordable
housing construction that 40B encountered has muted the law’s intended
effects.99 In fact, many projects approved in early 40R districts were already
either under discussion or approved without 40R, leading some to question its

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91. See Karla L. Chaffee, Note, Massachusetts’s Chapter 40R: A Model for Incentive-Based Land Use Planning and Affordable Housing Development, 10 VT. J. ENVTL. L. 181, 192 (2008) (stating 40R’s goals and legislative history).
92. See 760 MASS. CODE REGS. 59.01 (2019) (establishing authority for 40R’s smart growth programs); Chaffee, supra note 91, at 193 (outlining 40R approval process).
93. See Chaffee, supra note 91, at 193 (describing 40R’s “as-of-right” zoning feature).
94. See id. (explaining 40R approval process).
95. See id. (describing location factor influencing DHCD’s approval).
96. See MASS. GEN. LAWS ch. 40R, § 2 (2004) (amended 2016) (defining “eligible locations”). The law defines eligible locations as “areas near transit stations, including rapid transit, commuter rail and bus and ferry terminals” and “areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns, and existing rural village districts.” Id.
97. See id. § 1 (stating 40R’s purpose).
98. See id.; see id. § 2 (describing types of “eligible locations”).
impact as an incentive. These concerns can heavily influence the approval process for a 40R project, especially where approval requires a two-thirds supermajority of the local government body. As such, regardless of 40B and 40R’s lofty intentions to increase affordable housing, a municipality can still block affordable housing construction quite easily. Continued opposition to housing construction ensures that the affordable housing crisis will endure unless significant action is taken.

C. The Tipping Point: Taking Back Zoning Control from Municipalities

1. Housing Choice Initiative

In December of 2017, Massachusetts—ever searching for answers to increase housing production—released a new proposal involving another incentive to produce affordable housing. In a press release, the Massachusetts governor’s office proposed the Housing Choice Initiative (HCI), which takes aim at the two-thirds supermajority required by cities and towns to adopt specific zoning measures, such as a 40R district. Most states require a simple majority vote to change zoning laws, and so HCI’s goal is to further streamline the 40R process and prevent local opposition from blocking the project.

Only the Massachusetts Legislature, however, has the authority to change state zoning law, and so the HCI was accompanied by a legislative action: HB 4075. HB 4075 would amend Massachusetts zoning law to allow local municipalities to approve certain zoning changes by a simple majority, rather than a supermajority.

No zoning ordinance or by-law or amendment thereto shall be adopted or changed except by a two-thirds vote of all the members of the town council, or of the city council where there is a commission form of government or a single branch, or of each branch where there are two branches, or by a two-thirds vote of a town meeting.

100. See Erika Barber, Note, Affordable Housing in Massachusetts: How to Preserve the Promise of “40B” with Lessons from Rhode Island, 46 NEW ENG. L. REV. 125, 150 (2011) (arguing rezoning efforts under 40R occurred prior to legislature passing law).


102. See Chaffee, supra note 91, at 206 (arguing 40R process leaves municipalities with “reasonable degree” of local control). In fact, compared with 40B, 40R places a “substantial degree” of control in the hands of local communities compared with 40B. See id. at 205.

103. See supra notes 49-51 (discussing lack of supply produces lack of affordable homes).

104. See Press Release, supra note 14 (explaining legislature intended law to provide tools and incentives for towns to build affordable housing).

105. See id. (outlining legislative proposal). “Building mixed-use, multi-family, and starter homes, and adopting 40R ‘Smart Growth’ zoning in town centers and near transit” would qualify for the simple majority threshold. Id.

106. See id. (noting most states lack supermajority requirement).


108. See id. § 4 (listing zoning amendments subject to simple majority). The law subjects a number of as-
40R district by a simple majority, fulfilling the goal of the HCI.\textsuperscript{109}

Less obvious in HB 4075’s text are the multiple as-of-right provisions that would allow municipalities to implement with a simple majority.\textsuperscript{110} These provisions demonstrate that the bill’s sponsors recognize the need for a stronger housing solution than allowing amendments by a simple majority.\textsuperscript{111} Allowing a 40R development as-of-right gives municipalities who want to build housing a tool to do so more easily.\textsuperscript{112}

2. California Senate Bill 827

Around the same time as Massachusetts’s HCI, California proposed a stronger solution, SB 827, which involved a radical break from local control over zoning stretching back to the \textit{Euclid} decision.\textsuperscript{113} SB 827 would have altered the applicable zoning for any “transit-rich housing project,” or a residential development within a one-half mile radius of a major transit stop.\textsuperscript{114} These projects would have been exempt from, among other things, local density controls, minimum parking requirements, and height restrictions that historically hinder housing construction.\textsuperscript{115} This bill echoed 40R’s “as-of-right” elements, but departed from 40R significantly in that the local government would not need to approve the project.\textsuperscript{116} Thus, SB 827 would have preempted local control by allowing a development in transit areas to go forward even if the municipality opposed the project.\textsuperscript{117} Not surprisingly, SB 827 was met with fierce criticism arguing against the loss of local control, and failed to pass.\textsuperscript{118}

of-right amendments, accessory dwelling units, bulk and height restrictions, and special permits to the simple majority requirement. See \textit{id).

\textsuperscript{109} See \textit{id}. § 10 (proposing simple majority for votes to adopt zoning measures).

\textsuperscript{110} See \textit{id}. § 4 (listing amendments). The law would “allow as of right, by special permit and/or with site plan approval multi-family housing in a location that would qualify as an eligible location for a smart growth zoning district under [40R].” \textit{id}.\textsuperscript{111}

\textsuperscript{111} See Press Release, supra note 14 (outlining initiative support). “Our region is in a housing crisis. Solving it will require bold action and a comprehensive solution set.” \textit{id}. (quoting Mayor Joseph Curtatone of Somerville, Massachusetts).

\textsuperscript{112} See \textit{id}. (stating initiative goals). The legislation is designed to “remove barriers to improved land use[,]” like the supermajority requirement, and add new housing, “by promoting the adoption of local zoning best practices.” \textit{id}.


\textsuperscript{114} See \textit{id}. § 2 (defining “transit-rich housing project”). A project would not qualify under this district if the district already prohibited the construction of housing as a principal or conditional use, such as industrial or manufacturing districts. See \textit{id}.

\textsuperscript{115} See \textit{id}. (proposing to amend California Government Code). The law contains a provision for limiting height increases if the increase would have a “specific, adverse impact upon public health or safety, and there is no feasible method to satisfactorily mitigate or avoid” this impact. \textit{id}.

\textsuperscript{116} See Dougherty & Plumer, supra note 6 (discussing SB 827’s preemption goals). Localities would be prevented from restricting areas zoned for residential use and within a half-mile of train stations to single-family homes. See \textit{id}.

\textsuperscript{117} See Graber, supra note 15 (discussing SB 827’s radical departure from traditional zoning assumptions). “It’s just about the most radical attack on California’s affordability crisis you could imagine.” \textit{id}.

\textsuperscript{118} See Jane Kim, SB 827 Postmortem: Let’s Build More Housing the Right Way, S.F. EXAMINER (Apr.
3. California Senate Bill 50

Undeterred by SB 827’s failure, California legislators proposed a revised version of the bill featuring the same preemptory teeth. The new bill, SB 50, focused on incorporating three changes from SB 827 to combat opposition from tenant groups and municipalities. First, SB 50 would have prevented developers from using the bill’s preemption provisions on properties that renters had occupied within the previous seven years. Second, it would have allowed communities to propose alternative plans to boost homebuilding without using the bill’s framework. Third, SB 50 would have expanded on SB 827’s preemption provisions for transit-rich areas by preventing land use restrictions near “job-rich” areas, such as Silicon Valley. Nevertheless, in early 2020, SB 50 failed to gain majority support on California’s senate floor, and thus failed to pass. Despite the continued failure of housing bills, the plan in California...


120. See Dillon, supra note 119 (explaining major changes from SB 827); Liam Dillon, A Major California Housing Bill Failed After Opposition from the Low-Income Residents It Aimed to Help. Here’s How It Went Wrong, L.A. TIMES (May 2, 2018, 12:05 AM), https://www.latimes.com/politics/la-pol-ca-housing-bill-failure-equity-groups-20180502-story.html [http://perma.cc/FBC3-L4DF] [hereinafter How SB 827 Went Wrong] (discussing SB 827 opposition). The divide between low-income, minority residents who fear new housing and wealthier, white residents who embrace new housing was one of the primary reasons for SB 827’s failure. See How SB 827 Went Wrong, supra.

121. See Cal. S.B. 50 (proposing residential development eligibility requirements). Eligible sites cannot contain “[h]ousing occupied by tenants within the seven years preceding the date of the application.” Id.

122. See id. (encouraging communities to lead planning process). The law would have “allow[ed] a local government, in lieu of the requirements of this chapter, to opt for a community-led planning process aimed toward increasing residential density and multifamily housing choices near transit stops.” Id.

123. See id. (requiring certain criteria for developments). A “job-rich housing project” is “a residential development within an area identified by the Department of Housing and Community Development and the Office of Planning and Research.” Id. The agency bases its determinations on “proximity to jobs, high area median income relative to the relevant region, and high-quality public schools.” Id.; see Editorial Bd., California Needs a Housing Revolution, BLOOMBERG: OPINION (Dec. 14, 2018, 8:30 AM), https://www.bloomberg.com/opinion/articles/2018-12-14/sh-50-a-welcome-response-to-california-housing-crisis [https://perma.cc/G7FF-XF22] (praising SB 50’s efforts to combat housing crisis). SB 50’s reach would have extended to the “gilded real-estate meccas of Silicon Valley.” Editorial Bd., supra.

remains the same: “upzone” residential areas located near transit and jobs at the state level to prevent municipalities from banning housing construction.  

4. Massachusetts’s Current Crisis Compared to California

Massachusetts, like California, faces a housing crisis. This crisis is predominantly due to a “low rate of housing production which has not kept pace with population growth and needs, soaring rents that have outpaced wages, and the lingering effects of the foreclosure crisis.” Shockingly, 207 of Massachusetts’s 351 cities and towns have not permitted construction of any multifamily housing with more than five units in over a decade. Additionally, over a third of Massachusetts’s municipalities have permitted only single-family housing. Contrast this anemic building pace with job demand and the solution becomes clear: 17,000 new homes are needed each year through 2040 just to maintain Massachusetts’s current job base.

In California, the situation is equally as dire. California needs 1.8 million


127. SENATE REPORT, supra note 126, at 4 (noting housing production “economic imperative” for Massachusetts).


129. See SENATE REPORT, supra note 126, at 22 (noting lack of multifamily zoning most significant barrier to affordable housing). The report stated unequivocally that multifamily zoning is “so basic a requirement that no other long-term production goals can be achieved successfully without it.” Id.


to 3.5 million homes by 2025 just to absorb demand and population growth, but it is currently only building 80,000 homes a year—creating a 100,000 per year home gap between supply and demand.\textsuperscript{132} Further, most of the construction that is occurring takes place far from job growth areas, thus increasing sprawl.\textsuperscript{133} In economic terms, California loses over $140 billion per year in output (6\% of state gross domestic product) due to the housing shortage.\textsuperscript{134} Simply put, this crisis “threatens to cut the state’s economic boom off at the knees.”\textsuperscript{135}

III. ANALYSIS

Massachusetts needs more housing.\textsuperscript{136} But building has been maddeningly frustrated by local opposition as well as complex and inefficient zoning laws.\textsuperscript{137} The historical approach in Massachusetts has been to incentivize housing production by threatening state-level preemption.\textsuperscript{138} The current housing crisis, however, demands stronger action.\textsuperscript{139}

A. The State Granted Zoning Authority to Its Municipalities and It Can Take It Away

The Supreme Court in \textit{Euclid} granted the states zoning power as a function of their police power.\textsuperscript{140} Once granted, most states passed that authority onto...
municipalities, recognizing that zoning is primarily a local function.\textsuperscript{141} Massachusetts is no exception.\textsuperscript{142}

Municipalities, however, have largely used that power to prevent housing construction in their communities rather than facilitate housing construction at the local level.\textsuperscript{143} Even though each municipality has the authority to build how much or how little housing it desires, existing homeowners within each municipality often dominate local zoning decisions in favor of exclusionary zoning.\textsuperscript{144} The current dynamic, therefore, is that a few cities build the vast majority of new housing in the state while the rest do nothing.\textsuperscript{145} This is unsustainable.\textsuperscript{146}

The Massachusetts Legislature’s first response was to preempt local control of zoning by enacting 40B.\textsuperscript{147} This preemption was the first acknowledgement that municipalities were unable to provide sufficient housing on their own.\textsuperscript{148}

Roughly forty years later, the Massachusetts Legislature again offered a preemption tool to circumvent local land use controls.\textsuperscript{149} Enacting 40R was another acknowledgement that municipalities were not doing enough to meet housing needs.\textsuperscript{150} The new preemption tool, however, was another incentive to construct housing that was not required.\textsuperscript{151} Although the historical incentive-
based approaches do not remove land use decisions from localities, they do ultimately recognize both the power and the need to do so.\textsuperscript{152} This is evident in the approaches of both laws to remove the local barriers to new housing construction, rather than have the state construct new housing.\textsuperscript{153}

\textbf{B. The Housing Choice Initiative Is Another Incremental Step Where a Leap Is Required}

Massachusetts’s recent HCI proposal is yet another acknowledgement that the state must do more to confront the continued lack of affordable housing.\textsuperscript{154} In addition to its housing crisis, the Boston area suffers from arguably the worst traffic congestion in the country.\textsuperscript{155} These two problems are connected, as people forced to move farther away from where they work face longer commutes, and must spend more time driving each day.\textsuperscript{156}

Although Massachusetts acknowledges the severe impacts of its housing crisis, the state continues the status quo policy of incentivization.\textsuperscript{157} The HCI would simply change the voting procedure for municipalities to encourage them to implement zoning changes on their own.\textsuperscript{158} The HCI states explicitly that it is \textit{not} a mandate, and thus compares with Massachusetts’s long history of refusing to hold cities and towns accountable for banning multifamily housing.\textsuperscript{159} It is contradictory to acknowledge such a crisis but offer the same tired solutions.\textsuperscript{160}

\textsuperscript{152} See Dardeno, \textit{supra} note 7, at 133-34 (discussing intent behind 40B’s preemptory powers). 40B was intended in part “\textit{to prevent unreasonable exclusion of low-income housing.” Id. at 134. To do so, developers are allowed to “\textit{flout}” local zoning regulations, which leads to an inference that the local zoning regulations are the problem. See id. at 134-35. Likewise, “Chapter 40R may necessitate adjustments to existing zoning laws[,]” again inferring that existing zoning laws are the problem. Id. at 151.

\textsuperscript{153} See Barber, \textit{supra} note 100, at 129, 149-50 (describing 40B and 40R’s approaches). Prior to 40R’s passage, when municipalities were faced with the “\textit{stick}” of 40B, they were already considering proposals for affordable housing. See id. at 150.

\textsuperscript{154} See Press Release, \textit{supra} note 14 (acknowledging price increases for homes and rent). “Massachusetts home prices have increased at the fastest rate in the nation, and the metropolitan Boston rent prices rank among the highest in the country.” Id.\textsuperscript{155} See Swasey, \textit{supra} note 130 (reviewing Greater Boston traffic).

\textsuperscript{156} See \textit{supra} note 58 and accompanying text (discussing relationship between traffic and sprawl).

\textsuperscript{157} See Press Release, \textit{supra} note 14 (outlining legislative goals behind HCI). The HCI, if enacted, does not include any municipal mandates. See id. Rather, the HCI espouses the hope that allowing land use decisions by majority vote would spur housing production and align Massachusetts law with that of other states. See id.

\textsuperscript{158} See id. (encouraging municipal zoning changes). One initiative proponent said as much, explaining “\textit{the Housing Choice Initiative will provide municipalities with the tools and incentives needed to drive meaningful housing production that is appropriate for their community.” Id.\textsuperscript{159} See id. (clarifying HCI does not mandate zoning changes); Sherman, \textit{supra} note 128 (describing 40B’s shortcomings). Remarkably, it has been “[n]early 50 years since [40B] was enacted, and more than eight in every ten of the 351 Massachusetts municipalities still fall short of the 10 percent benchmark. Almost 50 percent have less than 5 percent of affordable housing units and 42 communities don’t count a single unit.” Sherman, \textit{supra} note 128 (emphasis added). Although “[t]here’s no monetary penalty if a community falls below the 10 percent benchmark[,]” the law does give developers leverage. Id.

\textsuperscript{160} See \textit{Senate Report}, \textit{supra} note 126, at 22 (proposing housing production solutions). The Senate Report, after explaining that the vast majority of municipalities do not build enough housing, proposes legislation requiring “all communities to permit a reasonable, minimum level of multifamily housing for increased housing
C. Massachusetts Should Model Its Housing Reform on California’s Proposed Housing Legislation

Both of California’s recent legislative proposals, SB 827 and SB 50, attempted to take the final and necessary step to fully address the housing crisis: preempting local zoning as-of-right.\(^{161}\) SB 50 recognized the need for housing both along transit corridors and in job-rich areas while simultaneously recognizing that local municipalities will not build it.\(^{162}\) Although SB 50 failed to pass, the bill’s preemptory measures are an example of a bold, yet necessary response to a growing crisis.\(^{163}\)

Massachusetts acknowledged this dynamic when the legislature passed 40R, and thus allowed municipalities to circumvent local zoning restrictions in transit corridors.\(^{164}\) Rather than mandate the local land use circumvention, however, 40R favors an opt-in approach.\(^{165}\) Massachusetts’s recent HCI would only make this opt-in easier without mandating any municipal action.\(^{166}\)

Modeling 40R after the recent California proposals, where transit-rich areas are exempted from local zoning restrictions, would do more to accomplish the legislative goals behind both 40B and 40R by finally allowing, rather than incentivizing, housing development.\(^{167}\) Similar to 40R, SB 827 and SB 50 recognized the nexus between housing and transportation and sought to allow, rather than incentivize, the production of new housing near transit stations.\(^{168}\)

[^161]: See Dillon, supra note 119 (discussing SB 50 preemption); Dougherty & Plumer, supra note 6 (discussing SB 827 preemption). The bills’ as-of-right provisions were at the root of the public outcry against them, because the fear of losing local control over zoning suggests a radical change from the status quo. See Dougherty & Plumer, supra note 6. “[L]ocal activists and homeowners too often use zoning codes to prevent apartments from being built in California’s cities.” Id.

[^162]: See Dillon, supra note 119 (discussing SB 50’s goals). The bill addressed “how far the state should impinge on local authority to shape community development amid a housing shortage that’s been estimated in the millions.” Dillon, supra note 119. Since both SB 827 and SB 50’s failure, housing costs in California have remained at or near record highs, and the state is failing to reduce vehicle travel. See id.; Dougherty, supra note 124 (noting “higher-density neighborhoods near job centers . . . crucial to curbing emissions”).

[^163]: See Dillon, supra note 119 (addressing intense opposition to both SB 50 and earlier legislation); Dougherty, supra note 124 (describing examples of opponents). State Senator Scott Wiener, SB 50’s sponsor, declared “[w]e have to be bold in solving” the estimated 3.5-million-home deficit in California. Dillon, supra note 119.

[^164]: See supra note 17 and accompanying text (providing 40R’s legislative purpose).

[^165]: See MASS. GEN. LAWS ch. 40R, § 3 (2018) (indicating municipalities may adopt smart growth principles). The law explains that a municipality “may adopt a smart growth zoning district[,]” but does not include any new requirement or enforcement measure for 40B. Id.

[^166]: See Press Release, supra note 14 (explaining HCI incentivizes without mandating).

[^167]: See Rios, supra note 6 (discussing removing supermajority requirement to spur housing construction). “Some say that threshold (to get a supermajority in a three-member body, for instance, there must be unanimity) is hindering housing production at the local level.” Id.

[^168]: See Dougherty & Plumer, supra note 6 (noting SB 827’s preemptory procedures). Because “zoning codes are governed by tens of thousands of municipalities nationwide,” it is difficult to change zoning rules piece by piece. See id.
These California bills confronted a situation, similar to Massachusetts, where local municipalities who have the authority to build housing are using that authority to block it.\textsuperscript{169} SB 827 and SB 50 would have addressed this situation not by incentivizing municipalities with transit stations to remove height restrictions or increased density, but by rezoning these areas at the state level.\textsuperscript{170} 

The HCI and its legislative counterpart, HB 4075, which are currently stalled in the Massachusetts Legislature, reflect an incremental, incentive-based approach to housing production.\textsuperscript{171} The idea is to give municipalities the tools to allow housing production, so that they will build more housing units.\textsuperscript{172} But the United States’ and Massachusetts’ housing history has shown the opposite to be true: Give municipalities the authority to build housing and they will stop building.\textsuperscript{173}

\textbf{IV. CONCLUSION}

Since municipalities were given authority of local land use decisions in the early twentieth century, they have been restricting housing growth. For over seventy years, state governments have been crafting ways to incentivize, and sometimes mandate, the construction of housing, and yet the country is still facing an ever-growing housing shortage. Although a continuing battle, California’s goal to remove local authority over housing construction is the right way to combat a status quo of static housing construction. On the other hand, Massachusetts’s proposal offers an adjustment to local control, changing the supermajority requirement to a simple majority, without addressing the local control itself. There is little to suggest municipalities, who already intentionally do not build enough housing, will begin to build more now that it is easier for them to do so. Massachusetts should therefore join California in recognizing that

\textsuperscript{169} See Dillon, supra note 131 (explaining California housing crisis response). In a radical new step, California is proposing to punish communities that block homebuilding by withholding state tax dollars. See id. The aggressive approach “speaks to the depth of the state’s [housing] problems,” which have forced millions to pay more than half of their income on rent, increased home prices, and added thousands to the homeless population. Id. Such a plan is another example of state action on the housing crisis that would “mark an incursion by the state into how housing is approved at the local level.” Id.


\begin{enumerate}
\item A residential development that meets the criteria specified in Section 65918.52 shall receive, upon request, an equitable communities incentive as follows: (1) Any eligible applicant shall receive the following: (A) A waiver from maximum controls on density. (B) A waiver from maximum automobile parking requirements greater than 0.5 automobile parking spots per unit. (C) Up to three incentives and concessions pursuant to subdivision (d) of Section 65915.
\end{enumerate}

Id.

\textsuperscript{171} See Press Release, supra note 14 (providing incentive language).

\textsuperscript{172} See id. (attempting to promote best practices).

\textsuperscript{173} See supra Section II.A.2 (discussing local control mechanisms).
the problem is the municipalities, not the laws, and begin to question whether municipalities should have local control over housing construction at all.

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