Spring 2022

Similar Laws, Different Outcomes; Affordable Housing Production in Massachusetts and Connecticut

Brian Kleckner
brian.kleckner@trincoll.edu

SIMILAR LAWS, DIFFERENT OUTCOMES; AFFORDABLE HOUSING PRODUCTION IN MASSACHUSETTS & CONNECTICUT

A THESIS SUBMITTED TO

THE FACULTY OF THE DEPARTMENT OF PUBLIC POLICY AND LAW

IN CANDIDACY FOR THE BACCALAUREATE DEGREE

WITH HONORS IN PUBLIC POLICY AND LAW

BY

BRIAN D. KLECKNER

HARTFORD, CONNECTICUT

MAY 2022

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Acknowledgements:

Professor Williamson: *Thank you for challenging me these past two semesters and helping me understand the complexity of affordable housing and zoning.*

Family: *Thank you for always loving and supporting me throughout this process. To Nana and Nonno, thank you for keeping watch over me.*

Friends: *Thank you for always reminding me to stay positive and move forward.*

Abstract:

Although Massachusetts and Connecticut have similar affordable housing appeals legislation and share many other characteristics, the difference in outcomes is clear; multifamily and affordable housing production from Section 8-30g in CT has lagged far behind that of Chapter 40B in MA. To uncover the driving forces behind this disparity in production, I ask the question: *Do variations in state affordable housing appeals legislation shape differing housing development outcomes in Massachusetts and Connecticut?* More specifically, I ask: *do differences in the structure of local approvals, the state-level appeals process, and the local moratoria procedure contribute to varying opportunities for restricting affordable housing production?* Uncovering these differences most closely tied with production and constraints is crucial to reform efforts because policymakers need to make sure the law is working as intended. If this is not the case, lawmakers must enact meaningful reforms to improve efficacy and reach those who need affordable housing the most. To strengthen 8-30g, I suggest that Connecticut lawmakers should adopt: (a) streamlined permitting, (b) a housing commission, (c) shorter and stricter moratoria, and (d) better data collection methods. While most policy recommendations are centered around Connecticut, it's still important to note that Chapter 40B is an imperfect law. Tensions between state and local control have stalled meaningful reform and the law has not been amended in any significant way since its inception. As lawmakers and housing advocates agree that Massachusetts cannot rely on Chapter 40B alone. Ultimately, the best solutions will feature a creative mix of incentives for private development and mixed-income housing while also taking into account considerations of equity, sustainability, and local autonomy.

Chapter 1: Introduction

Like food or water, housing is a basic necessity for every individual. As a result, public policy should strive to provide stable, affordable, and long-term housing for those who are most at-risk. Instead, current and past policy choices have ensured inequality and exclusivity; a combination of exclusionary zoning and localism have in effect segregated most metro areas across the United States. In the well-to-do suburbs surrounding Boston, Massachusetts, strict zoning requirements for affordable and multi-family housing have exacerbated racial and socioeconomic disparities by limiting Black and Latino families' access to high-opportunity communities with the best-funded public schools. In nearby Connecticut, these targeted restrictions have had a similar, if not greater, effect. To thwart exclusion and stimulate much-needed affordability, state legislators in each setting have passed similar laws that set statewide affordable housing standards, incentivize private development, and outline a process for state override of local zoning decisions. Yet, as it stands, the Massachusetts law – Chapter 40B – has succeeded in generating more affordable housing per capita than the Connecticut law – Section 8-30g. So far, the literature has failed to explain this state-level disparity in production conclusively. The question then becomes, do variations in state affordable housing legislation shape differing housing development outcomes in Massachusetts and Connecticut? Specifically, do differences in the structure of local permit approvals, the state-level appeals process, and the local affordable housing moratoria procedure contribute to varying opportunities for restricting affordable housing production?

As housing inequality continues to perpetuate broader racial/ethnic and socioeconomic inequities and as the United States struggles with a growing homelessness and eviction crisis amidst the ongoing COVID-19 pandemic, limits, and constraints to current policies need to be better understood. Uncovering the factors most closely tied with affordable housing production is critical to reform efforts. Ultimately, it

is the hope that state and local policymakers can use the findings of this research to strengthen legislation and pursue more sound planning and development strategies.

Although both Massachusetts and Connecticut have similar affordable housing appeals legislation and share many other characteristics, the difference in production outcomes presents an opportunity for an interesting case study. Building off prior research, I identify the most salient variation between the Massachusetts law and the Connecticut statute as some combination of the local permit process, the state-level appeals, and the temporary moratoria procedure. When compared to an equivalent process in Connecticut, each variation appears to yield some relative advantage for the Massachusetts system in terms of production. Furthermore, I find that relative disadvantages in Connecticut may leave 8-30g more vulnerable to the influence of local resistance.

With regard to local permitting, I find that the streamlined comprehensive permit process in 40B may be responsible for generating more developer interest, local permit approvals, and affordable housing development overall in Massachusetts. 8-30g stipulates more stringent affordability for developers and lacks a streamlined permit approval process, likely serving as a deterrent to developers in Connecticut. These increased barriers to development could result in fewer 8-30g applications, and more being withdrawn or simply abandoned in the state. Further, I conclude that the timeline established by a streamlined permit process may allow developers in Massachusetts to adapt 40B proposals more flexibly and better manage local opposition. Meanwhile, without a consolidated permit process in Connecticut, I find that local opposition could play a larger role in increasing burdens for 8-30g applications.

In terms of variation in the state-level appeals process, I find that while both state appeals processes produce the same favorable results for developers, the members of the administrative-level commission in Massachusetts may possess more expertise than state court judges in Connecticut. Thus, the administrative body in Massachusetts appears to be better suited to resolve disputes and issue negotiated

settlements that bring projects to fruition. Meanwhile, because 8-30g appeals are heard by state court judges who are likely less acquainted with the intricacies of affordable housing, the law lacks a more established process for negotiated settlements. Since more settlement agreements will ultimately lead to the increased construction of 40B projects, the administrative review of appeals could be a significant driver of the higher rate of production in Massachusetts. Additionally, even if an application is denied or received unfavorably by a locality in Massachusetts, negotiations through the administrative-level commission provide an opportunity for 40B developers to proceed without the cost and delay of litigation and appeal.

In terms of differences in the temporary moratoria procedure, I argue that because the exemption is shorter in Massachusetts and more stringent in terms of criteria, municipalities with a 40B moratorium may still be held accountable for their affordable housing production goals. Conversely, because 8-30g moratoria are longer and less comprehensive in terms of their affordability and planning requirements, the provision may be discouraging production and leaving room for the influence of local opposition. Overall, while 40B and 8-30g appear similar on the surface, the success of 40B relative to 8-30g is likely due to its consolidated local permit process, administrative review of appeals, and stringent but flexible one-to-two-year moratoria.

Affordable Housing in the United States

Before considering the scope of issues in MA and CT, the problem of affordable housing needs to be examined on a national level. To begin, scholars have long attempted to define and classify affordability (Gabriel & Painter 2020, Brooks 2021). The word "affordability" elicits questions like what is affordable, who qualifies, and how for long? Primarily, researchers measure affordability by the level of cost-burden, or the fraction of income a household spends on housing (Brooks 2021). The terms "cost-burdened" or "rent-burdened" have come to describe any individual or household that pays more than 30% of their total income on expenses associated with housing. This percentage includes mortgage payments and regular maintenance costs, such as taxes, electricity, and water – yet the US Department of Housing and Urban Development (HUD) does not include transportation costs (Brooks 2021).

Cost-burdens are a major indicator of affordability, and the data is clear: metropolitan, suburban, and rural communities across the country are in the midst of a crisis (Gabriel & Painter 2020; O'Regan 2017; Mueller and Tighe 2007; Joint Center for Housing Studies 2021). In 2015, a full one-half of all households could be classified as rent-burdened (Gabriel & Painter 2020). Studies suggest that cost burdens are associated with a myriad of adverse outcomes for millions of low-income households, including residential crowding, long commutes, low levels of family expenditure on health care and other vital needs, as well as problems of child well-being and development (O'Reagan 2017). Findings also demonstrate that rent burdens result in disparate access to high-quality services tied with residential areas like education (Mueller and Tighe 2007). Moreover, the supply of affordable rental housing has lagged far behind demand – in 2016, rental vacancy rates fell to their lowest level in 30 years (O'Regan 2017). Combined, the housing shortage and continued growth of cost-burdens have disproportionately affected lower-income households and people of color. On top of this, issues like homelessness and a looming

eviction crisis amidst the COVID-19 pandemic have amplified the call to action (Joint Center for Housing Studies 2021; Wang & Balachandran 2021).

In order to examine the critical lack of affordably priced housing in the United States, scholars tend to focus on the dramatic shift in political philosophy over the last 40 years which has led to the widespread decentralization and privatization of housing policy (Graddy & Bostic 2010; Hananel 2014). Since the creation of Section 8 programs in the early 1970s, no new federal program has been endowed with the necessary funding to target the massive scope of unaffordability (National Low Income Housing Coalition 2015). Currently, federal authorities rely on lower levels of government to implement housing priorities with the goal of strengthening local control over planning and zoning. However, faced with the budgetary and logistical constraints associated with a massive retraction of federal funding, lower levels of government are simply unable to unilaterally address the wide-ranging social and economic implications of affordable housing. Therefore, state and local governments must enlist private actors and non-profits to carry out the function of creating affordable housing (Graddy & Bostic 2010). However, in any type of policy, decentralization and privatization entail risks. One concern is that local government will create obstacles in order to increase its revenue. In the case of affordable housing development, local authorities would likely prefer the development of single-family homes for wealthy households, which would generate higher property taxes and raise the socioeconomic level of the locality. Meanwhile, the development of affordable housing for lower-income brackets would likely create a financial burden on the locality (Hananel 2014).

In practice, granted unprecedented autonomy, localities across the country have implemented well-documented zoning restrictions to dissuade affordable housing development. For decades, researchers have paid close attention to these policies and their consequences, as well as potential remedies (Goetz & Wang 2020; Schuetz, Meltzer, & Been 2009; Hananel 2014; Dillman & Fisher 2009;

Schuetz 2009). These features of local zoning regulations such as density limits, minimum lot sizes, minimum square footage for living space, parking requirements, and other requirements that drive up the per-unit cost of housing have come to be known collectively as exclusionary zoning (Goetz & Wang 2020). In sum, the literature suggests that exclusionary zoning regulations contribute to lower levels of construction, higher rents, and a decrease in the supply of affordable rental housing (Schuetz 2009). Findings also demonstrate that local land-use practices in predominantly white, affluent communities are a significant contributor to the segregated spatial patterns of race and poverty in American metropolitan areas (Goetz & Wang 2020). These conclusions shed light on the relative racial and socioeconomic homogeneity of suburban communities as well as the concentration of subsidized housing in urban areas.

To confront the constraints of exclusionary zoning, increased privatization, and declining federal assistance, state and local governments have been forced to search for new and innovative policy solutions. One tool that has grown in popularity over the past 30 years is called inclusionary zoning, or IZ. Also known as inclusionary housing (IH), these policies can require or encourage private housing developers or nonprofits to include affordable housing in market-rate projects in an attempt to tie affordability to growth (Schuetz, Meltzer, & Been 2009; Wang & Balachandran 2021). Inclusionary housing policies are attractive to lower levels of government because they require little to no direct public subsidy from federal authorities. Instead, state governments and municipalities are able to incentivize in other ways. This could include waiving zoning requirements in order to allow a private housing developer to build at a higher density if they agree to include an affordable component in their project (Schuetz, Meltzer, & Been 2009). Studies as recent as 2017 have identified a total of 1,379 IH programs in 791 jurisdictions – many of which are located in New Jersey, California, and Massachusetts (Wang & Balachandran 2021). Together, these states had introduced 65,000 affordable housing units from incentives and inclusionary requirements by 2004 (Porter 2004). Nonetheless, IH can be a complicated and controversial policy approach due to the variety of political landscapes. In addition, scholars outline

how the efficacy of IH can vary based on the role of the private sector, the level of local control over zoning, as well as the presence of statewide affordable housing legislation (Wang & Balachandran 2021; Schuetz, Meltzer, & Been 2009).

Similarities Between MA and CT

Massachusetts and Connecticut have each been historically classified as "home rule" states – a status in which municipalities enjoy a high degree of autonomy over an extensive range of legal and policy matters. In addition to noting how local governments wield immense power to shape zoning and land-use policy in both states, scholars have also remarked on the impact such authority has on housing development (Schuetz 2009; Crump, Mattos, Schuetz, & Schuster 2020; Bronin 2021). A 2015 report by the Connecticut Department of Housing found that over 57% of municipalities did not include provisions for affordable housing. Of those municipalities that mention affordable housing, 95% required a special permit for such development, and 68% limited affordable housing to certain zones (DOH 2015). Those who study housing policy in Connecticut say the economic, social, and civil harms of this highly exclusionary zoning have been severe (Bronin 2021). Likewise, in Massachusetts, many towns lack developable land that is zoned to permit multi-family housing, even two-family dwellings (Crump, Mattos, Schuetz, & Schuster 2020; Dain 2019). Out of the roughly 144 towns in the Boston metropolitan area, only a mere 1% of the total land is zoned for multi-family housing (Fisher 2007). A recent economic and population boom in the Boston area has also amplified calls for action to address the region's dire housing shortage. While area job growth rose around 14% between 2010 and 2017, housing production grew just over 5% (Dain 2019). These findings conclude that the disconnect in supply and demand is hardly a natural outcome of market forces. Instead, exclusionary zoning requirements like restrictions on height and density artificially drive up housing prices by limiting the scope of new housing development altogether. As a result, low-income households earn too little to pay for the inflated market-rate housing.

In order to counteract widespread exclusionary zoning, both states have implemented a unique type of affordable housing legislation (Hananel 2014; Eaton 2020). More broadly classified as state affordable housing appeals systems, or SAHAS, these programs typically enable developers of certain below-market-rate and mixed-income housing projects to request a state override of local land-use regulations (Marantz & Dillon 2018; Dillman & Fisher 2009; Marantz & Zheng 2020). While private entities and municipal governments are the central actors in both IH policies and SAHAS, appeals systems are different because they explicitly facilitate state intervention. In total, at least six states have some version of SAHAS on their books — Massachusetts, New Jersey, Connecticut, New Hampshire, California, and Rhode Island. Out of these states, only Connecticut, Massachusetts, Rhode Island, and New Jersey, have adopted what scholars classify as, "*strong* SAHAS" (Marantz & Dillon 2018). While the specific mechanisms vary in each of the four states, strong SAHAS primarily: (a) shift the relevant burden of proof in favor of private developers, and (b) expedite the appeals procedure of local decisions (Marantz & Dillon 2018; Marantz & Zheng 2020).

The two laws (which are commonly referred to by their position within the state's general code), Chapter 40B in Massachusetts and Section 8-30g in Connecticut, share many characteristics. Massachusetts was the first of the two states to enact an appeals system. In 1969, state lawmakers passed the Massachusetts Comprehensive Permit Law, better known today as simply 40B. Essentially, 40B allows qualified housing developers who include an affordable component in their proposal to appeal an adverse local zoning board decision. From there, a court may reverse the decision or modify conditions that render the project economically infeasible. Cities and towns that have achieved a 10 percent proportion of all total affordable housing units are deemed exempt from the law, and local zoning boards may once again reject 40B proposals without facing an appeal from the developer (Fisher 2008; Citizens Housing and Planning Association 2014).

Inspired by the model of Chapter 40B in Massachusetts, state lawmakers passed the Connecticut Affordable Housing Land Use Appeals Act 21 years later in 1990. More commonly referred to as Section 8-30g or just 8-30g, the two statutes are similar. Like 40B, 8-30g stipulates that a developer who includes sufficient affordable housing units can challenge a local zoning authority's denial. In a successful appeal, the appellate court must wholly or partly revise, modify, remand, or reverse the decision. Similarly, municipalities in Connecticut become exempt from the 8-30g statute once they reach a benchmark where 10 percent of all housing units can be classified as affordable (Tondro 2001; Reid, Galante, & Weinstein-Carnes 2017).

Scholars have long debated the efficacy of state-level review systems like 40B and 8-30g that enlist private developers, and it's impossible to ignore the controversy surrounding both laws (Marantz & Dillon 2018; Dillman & Fisher 2009; Marantz & Zheng 2020; Hananel 2014; Reid, Galante, & Weinstein-Carnes 2017; Tondro 2001). In particular, 40B has elicited criticism from a broad range of groups with competing interests including developers, local residents, urban planners, academic researchers, and both state and local officials (Hananel 2014). Similarly, 8-30g draws ire from local officials and townspeople alike (Tondro 2001). At the heart of the debate is the delicate balance of state and local control concerning affordable housing and land-use. While some groups have cited the need for more local discretion over planning and zoning, others have pushed for increased state oversight and stricter mandates (Reid, Galante, & Weinstein-Carnes 2017).

Underlying these battles is a well-defined idea called "localism," which suggests that residents who already live in a given area or neighborhood deserve special consideration, while new encroachments into that place deserve extra scrutiny (Manville & Monkkonen 2021). While public participation and civic engagement are critically important to democracy, scholars looking at data from land-use hearings and open meetings conclude that relatively affluent members of suburban communities are often able to disproportionately influence the affordable housing development process (Einstein, Glick, & Palmer

2019; Schuetz 2009). In the well-to-do suburbs that surround Boston, MA, opponents of affordable housing have immense power to litigate, downsize, delay, and even block potential 40B developments altogether (Einstein, Glick, & Palmer 2019). Likewise, in Connecticut, researchers find that local residents and town officials across the state may use similar tactics of litigation and delay to force developers to abandon an 8-30g project (Tondro 2001; Bronin 2021). In sum, local resistance and localism have the capacity to undermine statewide affordable housing goals and diminish anti-exclusionary legislation (Einstein, Glick, and Palmer 2019; Reid, Galante, & Weinstein-Carnes 2017). Regardless of steady resistance, both Chapter 40B and Section 8-30g remain the principal affordable housing legislation in both states.

Differences Between MA and CT

Despite the general similarities between the two states and their primary affordable housing legislation, the difference in outcomes is clear: affordable housing production from Section 8-30g has lagged far behind that of Chapter 40B. In fact, scholars widely regard Chapter 40B as the most effective system of affordable housing appeals, and the law acts as a model for other states (Marantz & Zheng 2020; Reid, Galante, & Weinstein-Carnes 2017; Marantz & Dillon 2018). As of 2014, 40B was responsible for the production of 60,000 total housing units, 32,500 of which have been reserved for low-income households (Hananel 2014). Since the law was enacted in 1969, this means 40B produces roughly 722 subsidized units per year. Meanwhile, from the inception of 8-30g in 1991 to 2013, only 8,977 deed-restricted units and about 24,000 assisted units have been built in the entire state of Connecticut (Office of Legislative Research 2013). Although it is difficult to determine what percentage of these housing units were a direct result of 8-30g, estimates from 2017 suggest the law has produced just over 5,000 units of “affordable housing” in 26 years. This translates to an average creation of 200 subsidized units from 8-30g each year,

a small fraction compared to 40B (Partnership for Strong Communities Housing 2017). Thus, on average, 40B produces around 522 more affordable housing units than 8-30g every year.

Literature carefully observes how variations in the design of affordable housing appeals systems could explain disparities in state-level outcomes (Marantz & Dillon 2018; Dillman & Fisher 2009; Marantz & Zheng 2020; Hananel 2014; Reid, Galante, and Weinstein-Carnes 2017). In the case of Massachusetts, researchers have grouped the advantages of 40B into a combination of –

1. The consolidated local permit process
2. The consistent and expert administrative review of appeals.
3. The one-to-two-year moratorium

(Marantz & Zheng 2020; Marantz & Dillon 2018; Reid, Galante, & Weinstein-Carnes 2017). First, there are several consequential differences outlined in the local approval process. In Chapter 40B, qualified developers of affordable housing must apply for all necessary local approvals in a single comprehensive permit from the Zoning Board of Appeals (ZBA). Section 8-30g in Connecticut does not provide for a comprehensive permit. Instead, any housing developer can apply to any local zoning commission so long as they attach an affordability plan that meets statutory requirements (Reid, Galante, & Weinstein-Carnes 2017). Scholars have said the Massachusetts comprehensive permit process – also known as streamlining – strengthens Chapter 40B relative to other SAHAS because it simplifies the local review of affordable housing and replaces the typical process of acquiring multiple, sequential approvals from separate municipal boards and departments (Reid, Galante, & Weinstein-Carnes 2017; Marantz & Zheng 2020; Hananel 2014). Without a streamlined comprehensive permit, the local approval process may be more arduous and undefined in Connecticut, which could render 8-30g projects less attractive to developers.

Beyond this, scholars contend that additional costs associated with lower income thresholds and more stringent affordability criteria in Connecticut may deter development (Carroll 2001; Tondro 2001). In a

standard 40B proposal, developers must restrict 25% of the total units to lower-income households who earn no more than 80% of the area median income. Alternatively, proposals that call for rental housing must restrict at least 20% of all units to households that make below 50% of the area median income. The units which are set aside as affordable must be restricted as such for at least 30 years. While the affordability threshold for eligible 8-30g projects was initially lower, the Connecticut law was amended in 2000 so that developers must restrict at least 30% of all units to those who earn less than 80% or 60% of the state or area median income. The deed restriction on the affordable units was also raised to 40 rather than 30 years (Tondro 2001; PSC Housing 2022).

Second, in terms of the developer appeals process, both states have drastically different approaches. Under 40B in Massachusetts, when a housing developer appeals a decision by the local ZBA, it is heard by a state-level administrative court known as the Housing Appeals Committee (HAC). From there, the HAC may reverse a denial of the comprehensive permit or modify conditions that render the project economically infeasible (Reid, Galante, & Weinstein-Carnes 2017). The process in Connecticut is similar – except the applicant may appeal a local decision to the state courts rather than an administrative-level commission. If the state courts rule against a local denial or decision that renders the project itself unfeasible, the judge must then wholly or partly revise, modify, remand, or reverse it (Reid, Galante, & Weinstein-Carnes 2017). At first glance, scholars find that HAC members in MA have more expertise and tenure in the area of affordable housing than state courts judges in CT, thus allowing the MA appeals process to more effectively thwart local resistance (Marantz & Zheng 2020; Reid, Galante, & Weinstein-Carnes 2017).

Third, in response to widespread criticism from local communities, both pieces of legislation have added a provision that allows municipalities more time to plan for growth and development. Municipalities in Massachusetts and Connecticut that meet statutorily defined measures of progress may be granted a temporary moratorium, a state agency-issued exemption from the developer appeals process for a variable

period of years. As scholars have remarked, the details of temporary moratoria — such as the qualification and the duration of the moratorium — differ among states with affordable housing appeals systems (Marantz & Dillon 2018; Marantz & Zheng 2020). In Massachusetts, cities and towns with an approved Housing Production Plan (HPP) are provided with an exemption from the 40B appeals process for a period of one-to-two years depending on production levels (Reid, Galante, & Weinstein-Carnes 2017). On the other hand, municipalities in Connecticut that have made focused efforts to significantly increase the supply of affordable housing may receive a 4-year moratorium on proposals filed under 8-30g (PSC Housing 2017). While differences in the length or structure of moratoria may impact production values, literature on the topic remains fairly scarce (Marantz & Dillon 2018)

Methods

In sum, research finds that the strength of the 40B system in Massachusetts relative to Connecticut may be due to the consolidated local permit process, the consistent and expert administrative review of appeals, and the flexible but stringent one-to-two year moratorium (Marantz & Zheng 2020; Marantz & Dillon 2018; Reid, Galante, & Weinstein-Carnes 2017). To determine if these three criteria shape the state-level difference in affordable production between 40B in Massachusetts and 8-30g in Connecticut, I attempt to analyze their legislative properties and impact.

With regard to local permitting, data was scarce in both states. Nonetheless, the record on 40B was more thorough. For data on comprehensive permits in Massachusetts, I examined a sample of 369 cases in 144 towns between 1990 and 2005 (Fisher 2007). I then examine a sample of 55 8-30g appeals cases in 29 Connecticut towns from 1992 to 2013 and compare the findings (OLR 2013). To determine the impact of the variation in appeals procedure, I use the same data set in both states to analyze the record of HAC appeals in Massachusetts and the outcomes of court rulings in Connecticut.

In order to compare the moratoria provisions, I examine data from state housing agencies. In Massachusetts, this data comes from the Department of Housing and Community Development (DHCD) which releases an annual update of HPP proposals and exemptions. The department also outlines relevant standards like the structure and length of the moratorium. In Connecticut, these metrics are published by the Department of Housing, the Department of Economic and Community Development, and advocacy groups. Altogether, I hope to use these analyses to discern how the statutory variations may impact affordable housing production outcomes.

Additionally, because 40B and 8-30g only apply to cities and towns that lack sufficient amounts of affordable housing (<10%), non-exempt communities tend to be more affluent and may potentially experience more local resistance and strict zoning. Therefore, in order to draw an accurate comparison of both legislative environments, I look at two affluent suburban communities – Westport, CT, and Weston, MA. To demonstrate the towns' similarity, I first present a side-by-side chart of the most recent census data on racial, socioeconomic, and housing demographics in both towns. I then compare a list of multi-family zoning regulations by using a zoning atlas map of both locations (Metropolitan Area Planning Council 2022; Desegregate Connecticut 2022). Since both towns have considered multiple affordable housing applications in the past 5 years, I examine these recent cases to determine how state-level statutory variation, along with other local factors, shape the processes and outcomes in each town.

To support my conclusions and gain more information about the statutes, I reached out to several experts in the field of affordable housing in both MA and CT. First, to gain more information about the structure and function of the HAC, I reached out to Werner Lohe. As former chair of the committee for 25 years, Mr. Lohe was able to provide an expert analysis of 40B and the appeals process in Massachusetts. Mr. Lohe also offered valuable insight on the implications of variation between 40B and 8-30g. In addition, I spoke with Glen Falk, an experienced appeals lawyer in Connecticut and professor at Trinity College.

Based on his vast knowledge of the court system, he provided his opinion on the strengths and weaknesses of the judicial review of affordable housing appeals in Connecticut. Furthermore, in my search for information on 8-30g, I reached out to several advocacy groups like Desegregate CT. These groups were able to inform me that the state lacks a central database for permits and appeals.

Chapter 2: Statutory Variation

Chapter 40B and Section 8-30g have significant statutory variation and produce drastically different levels of affordable housing in Massachusetts and Connecticut each year. A review of past research demonstrates the strength of the 40B system in Massachusetts relative to other states due to the consolidated local permit process, the consistent administrative review of appeals, and the flexible one-to-two-year moratorium provision (Marantz & Zheng 2020; Marantz & Dillon 2018; Reid, Galante, & Weinstein-Carnes 2017). To determine how these three criteria shape state-level affordable housing production, I analyze their legislative properties and impact in each state over time.

To examine the impact of the differences in streamlining and appeals on production values, I look at a sample of outcomes from 369 total 40B applications between 1999 and 2005, and 55 formal 8-30g court rulings from 1992 to 2013. Since the sample of cases in Connecticut is far more incomplete and unrepresentative of the entire state than the Massachusetts sample, I also speak to several legal scholars and affordable housing experts to better inform my analysis. Further, in order to uncover if the difference in moratoria procedure is playing a role in production, I examine the structure and length of both provisions, as well as any relevant planning and affordability requirements.

Ultimately, I find that the lack of both streamlining and an established process for the negotiated settlements of appeals represent the greatest disadvantages to the Connecticut system compared to Massachusetts. While a more complete dataset is still needed to draw definitive conclusions, the consolidated nature of the streamlined process may be successful in generating more developer interest, local approvals, and affordable housing production altogether. Without a streamlined permit process, developers in Connecticut remain largely beholden to local permit requirements. These increased barriers inflate costs which may cause 8-30g projects to be abandoned more frequently.

Moreover, if the differing appeals process were contributing to the higher levels of affordable housing in MA, one would expect to see that the HAC overturned more local rulings than the state courts in CT. Instead, I find that both bodies rule in favor of the developer at roughly the same rate. Even though judges in the Connecticut state courts are performing this same basic function, I determine that state court judges in Connecticut do not have the same knowledge about the complex nature of affordable housing as HAC members in Massachusetts and lack a robust process for negotiated settlements. This expert credibility and process factors could explain the large sample of 40B developments that ultimately move forward despite a developer appeal in the form of negotiated settlements issued on stipulation.

Although the impact of the differing moratoria procedure on production is likely less salient than the variation in local permitting and appeals, I determine that the shorter length of the one-to-two-year 40B moratorium and more stringent criteria of the HPP process may hold municipalities in Massachusetts more accountable to their affordable housing production obligations while still allowing for some flexibility with regard to planning. Conversely, I determine that the lack of comprehensive planning requirements and the four-year length of 8-30g moratoria could be contributing to lower overall levels of affordable housing production in the state of Connecticut.

1. Local Permitting

Scholars note the strength of the 40B model which streamlines local approvals through a single comprehensive permit (Reid, Galante, & Weinstein-Carnes 2017; Marantz & Zheng 2020). Meanwhile, researchers find that in states without streamlining, burdensome permit requirements often add to the difficulty and cost of development (Reid, Galante, & Weinstein-Carnes 2017). Building off these claims that streamlining is a relative advantage for states with affordable housing appeals systems, I will analyze the local approval stage in both statutes – one with a comprehensive permit process (40B), and one without (8-30g). In terms of permit outcomes, the municipality may choose to initially approve or reject

an application. Following this decision, the developer may appeal a rejection or the conditions of approval that are deemed unfavorable. Similarly, neighbors and abutters may also challenge a local permitting decision.

In Massachusetts, after meeting certain project eligibility requirements stipulated by 40B, qualified affordable housing developers must apply for all necessary local approvals in a single comprehensive permit from the Zoning Board of Appeals (ZBA). During the approval process, the ZBA may impose conditions, safeguards, and/or limitations as part of its approval of any application. If the application is approved, a comprehensive permit is issued. Shortly after receiving the comprehensive permit, the ZBA is required to notify other local boards and hold a public hearing period that could last up to six months. Following the public hearing period, the ZBA has 40 days to grant or deny the comprehensive permit (Reid, Galante, & Weinstein-Carnes 2017; CHAPA 2011). In addition to the streamlined process, the ZBA may choose to waive certain zoning requirements like minimum height and density which may pose undue burdens to developers of affordable housing. In essence, streamlining simplifies the local approval process by expediting an otherwise sequential and lengthy permit process while also incentivizing developers.

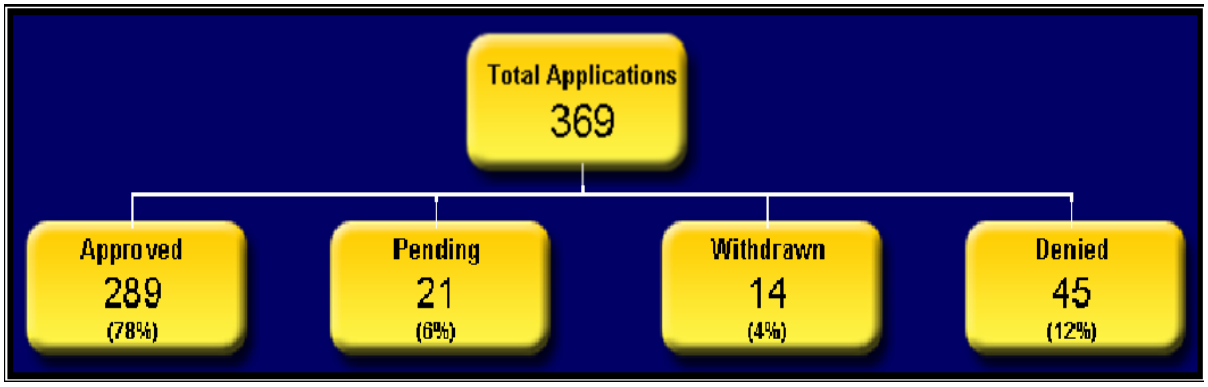
In Connecticut, Section 8-30g does not outline a process for streamlining appeals through a comprehensive permit. Instead, any developer may file an application with any housing commission (Reid, Galante, & Weinstein-Carnes 2017). However, to qualify for 8-30g privileges the developer is required to submit an affordability plan with the application. Initially, it appears that the local approval process is more sequential and undefined in Connecticut. Combined with the lack of a comprehensive permit, 8-30g requires more stringent affordability criteria that developers must meet; the percentage of units that must be reserved as affordable in a standard proposal is 5% higher in Connecticut, and deed restrictions are nearly 10 years longer.

Outcomes

In 2007, the MIT Center for Real Estate published a study that examined a sample of 369 total 40B applications from 144 Massachusetts cities and towns between 1999 and 2005. The study divides permitting and litigation outcomes into several categories. For my analysis of local permitting, I use the categories of initial permit outcomes of all 369 applications and the outcomes of the 237 applications which were approved by the ZBA and not appealed to the HAC. Together, these outcomes strongly suggest that the process of streamlining local approvals through a comprehensive permit has expedited a considerable number of 40B developments.

Figure 2.1 demonstrates the initial outcomes of these 369 applications.

Figure 2.1: Comprehensive Permit Outcomes



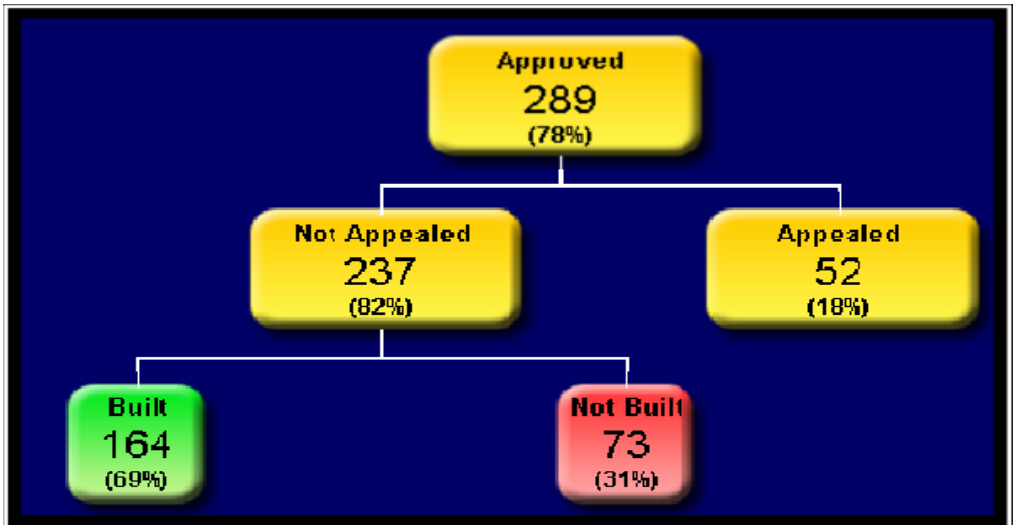
(Figure created by Fisher 2007)

Out of these 369 cases, roughly 78% of comprehensive permits were initially approved by local ZBAs (Fisher 2007). In general, comprehensive permit applications are negotiated promptly and the ZBA typically issues a decision within an average timeframe of 10 months (Fisher 2007). Despite the overwhelming number of initial approvals, applications that are confirmed by the ZBA may not match certain key aspects of the developer's original proposal. Oftentimes, the number of units, either market rate or affordable, may be modified. Furthermore, comprehensive permit approvals often come with a list

of conditions concerning design, materials, and other considerations with which the applicant must abide. As a result, the developer may still appeal the initial approval of a comprehensive permit for conditions that pose undue financial and logistical burdens.

Figure 2.2 demonstrates the status of developments for which comprehensive permits have initially been approved.

Figure 2.2: Approved Comprehensive Permit Outcomes



(Figure produced by Fisher 2007)

Out of the 78% of comprehensive permits that were initially approved, 82% proceeded without a developer appeal to the HAC (Fisher 2007). Moreover, 69% of these non-appealed comprehensive permit approvals had been built by the time the study was published. While the sample in Massachusetts is slightly outdated, it is still a large set of cases over the span of just 6 years. In addition, since the data is relatively detailed and complete, the sample still offers a clear picture of overall permit outcomes.

Conversely, the information on the status of 8-30g applications in Connecticut is strikingly more limited. Unlike the dataset in Massachusetts, there is no Connecticut equivalent that provides the initial permit

outcomes for 8-30g applications. Consequently, the only cases that can be examined are 8-30g applications that were appealed and decided upon by the court. The Office of Legislative Research at the Connecticut General Assembly succeeded in compiling a list of just 55 formal 8-30g court rulings from 1992 to 2013. Even still, this sample does not offer the broad range of possible actions that developers, towns, and the state are shown to undertake in the Massachusetts outcomes. Not only is this sample in Connecticut incomplete, but it is also unrepresentative — the cases stem from only 28 municipalities across the state, mostly suburban communities. In terms of size, proposed developments range from three to over 300 units. In several cases, the applications were subject to extensive litigation, with the developer modifying and resubmitting its application. While most appeals are issued by the developer, it's still important to note that an abutter or other neighbor may also challenge a local zoning commission's approval of an application.

Out of the 55 total cases in Connecticut, only 7 proposals – just 12% – were initially approved at the local level before an appeal was issued (OLR 2013). To add to the low percentage of local permit approvals in Connecticut, 8-30g applications are often complex and multi-faceted. It's not uncommon for developers to request the establishment of new zones or the rezoning of certain properties, a lengthy process that features several stages. Some applications also require separate approvals from local wetland and environmental commissions as well as the planning and zoning commission. Like comprehensive permit approvals in 40B, approved 8-30g applications may not contain all the elements of an original proposal. Instead, the local planning and zoning commission may attach conditions to the application which can substantially affect the economic viability of a development. Out of the seven 8-30g applications which were initially approved, 42% were conditional (OLR 2013).

Conclusion

While data from CT remains limited, based on the available sample cases, local zoning authorities are six times more likely to initially approve a 40B development in Massachusetts than 8-30g developments in Connecticut. Even though approved comprehensive permits may be appealed for unfavorable conditions or stalled in the development stages, the streamlined process may be successful in generating more developer interest, local approvals, and affordable housing production altogether. Furthermore, although stricter affordability requirements that developers must meet before they file an 8-30g application may be a constraint on production values in Connecticut, this does not fully explain the disparity in local approvals. Instead, Connecticut lacks a comprehensive permit process that establishes a clear timeline that is favorable for both the town and the developer. As a result, developers in Connecticut remain largely beholden to local permit requirements. If a locality has stringent permit requirements, which many in Connecticut do, full approval can take up to months and even years. This may also inflate costs and lead developers to abandon a project. Without a more diverse and representative sample of local permitting in Connecticut, the impact of streamlining is ambiguous; however, this analysis suggests it may play a role in shaping incentives for developers.

2. Appeals Process: HAC v. State Courts

Looking past local permitting, perhaps the most salient difference between Chapter 40B and Section 8-30g is the variation in the state-level appeals process. While 40B appeals are heard by an administrative committee known as the HAC in Massachusetts, 8-30g appeals are heard by the state courts in Connecticut. Scholars provide evidence that administrative review, as distinguished from judicial review, might help to expedite adjudication and increase predictability, especially if the members of the review board in question have substantial subject-matter expertise and lengthy terms of service (Marantz & Zheng; Reid, Galante, & Weinstein-Carnes 2017). To determine the impact of this variation in

adjudicatory procedure, I will analyze the structure of the HAC in Massachusetts and compare that to the judicial review process for housing appeals in Connecticut, in part through an interview with a former chair of the HAC. Further, I will examine data on HAC decisions under 40B in Massachusetts and contrast that to the record – or lack thereof – on 8-30g court rulings.

Per Chapter 23B § 5A of the state's general laws, if a local Massachusetts ZBA denies an application or approves it with conditions that make the project economically infeasible, the developer has the right to appeal to a state-level administrative, quasi-judicial body known as the Housing Appeals Committee, or HAC. The committee seats five members who adjudicate disputes as they arise. Three members, one of whom must be an employee of the Department of Housing and Community Development, are appointed by the department's director, who is a gubernatorial appointee. These three members often have extensive expertise and tenure in the area of affordable housing, finance, or both. According to the state's website which lists the members of the HAC, at least two current employees have previously worked for the DHCD in some capacity. Upon further research, both these individuals have vast experience in the field of housing and zoning law. In addition, the current chairwoman of the committee has served on the HAC for 18 years. As of April 2022, there are two vacancies on the committee – one town selectman and one city councilman who are appointed by the governor. Appointees serve for one year; however, they often serve multiple terms (Reid, Galante, & Weinstein-Carnes 2017). Aside from the chair who is compensated, all other positions are volunteer and part-time. During a typical appeal to the HAC, the ZBA must defend its denial or attachment of conditions by demonstrating a valid local concern that outweighs the regional need for housing. Upon formal decision, the HAC has the authority to modify the local ruling, or, in the case of denial, compel the ZBA to grant a comprehensive permit (Fisher 2007; Reid, Galante, & Weinstein-Carnes 2017).

Connecticut's 8-30g appeals process is different – appeals are heard by the state courts rather than an administrative committee. Decisions may be issued by trial courts, appellate courts, or the state supreme

court. Jurisdiction is dependent on the location of the development being proposed; however, the Chief Court Administrator attempts to assign cases to a small number of judges sitting in geographically diverse parts of the state. This way, a consistent body of expertise can be developed. Unlike HAC commissioners, however, judges are appointed by the governor based on their legal credentials rather than housing or finance background. In a typical 8-30g appeal, the local zoning commission must demonstrate that their decision to deny or attach conditions to the project was necessary to protect substantial public interests in health and safety (Tondro 2001). If the commission fails, the court has the option to wholly or partly revise, modify, remand, or reverse the decision from which the appeal was taken (Reid, Galante, and Weinstein-Carnes 2017). Similar to 40B in Massachusetts, appeals are limited to communities that have not met the 10% threshold. As of 2022, there is no comprehensive record of court rulings or the names of judges who preside over them. Outreach to legal scholars and housing experts in CT suggests that judges who hear 8-30g appeals do not typically have specialized knowledge of zoning or affordable housing (Author's correspondence with Glenn Falk and Wener Lohe).

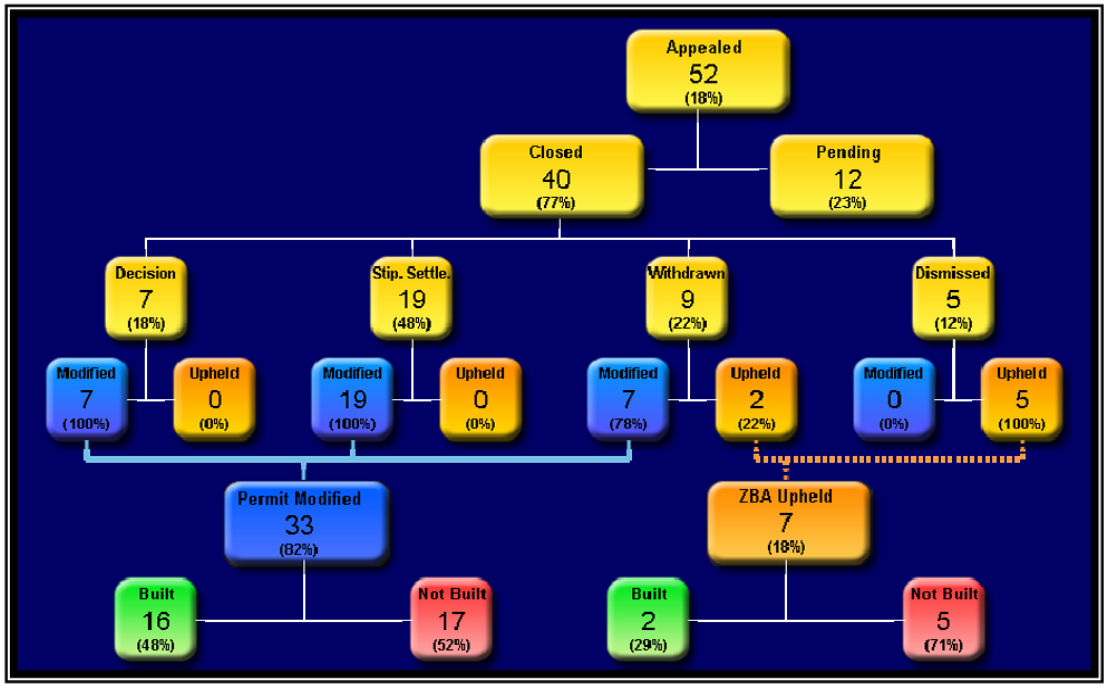
Outcomes

In terms of outcomes, the data on HAC appeals in Massachusetts is relatively established. The state's website, which lists appeals, suggests that the committee has issued at least 272 decisions from 1971 to the present. For my analysis, however, I again rely on Fisher's (2007) analysis of 369 total 40B applications filed between 1999 and 2005. In this case, I display figures from the study which represent 52 comprehensive permits that were approved by the local ZBA but appealed to the HAC due to stringent conditions imposed on developers. Additionally, I provide a figure that represents the 41 comprehensive permits that were denied by ZBAs and subsequently appealed by developers. Appeals to the HAC can net one of several outcomes: they may be decided, settled by stipulation, dismissed, or withdrawn. In the entire sample of 369 cases, 26% were appealed to the HAC by developers, but 12% of all applications are ultimately involved in litigation elsewhere in the Massachusetts legal system (Fisher 2007). This outside

litigation may be filed by abutters and neighbors who feel that a potential development could negatively impact their property in some way.

Figure 2.3 represents cases in which a comprehensive permit was initially approved by a local ZBA but subsequently appealed by the developer for conditions that would render the project economically or logistically unfeasible.

Figure 2.3: Appeals Outcomes, Approved Comprehensive Permits



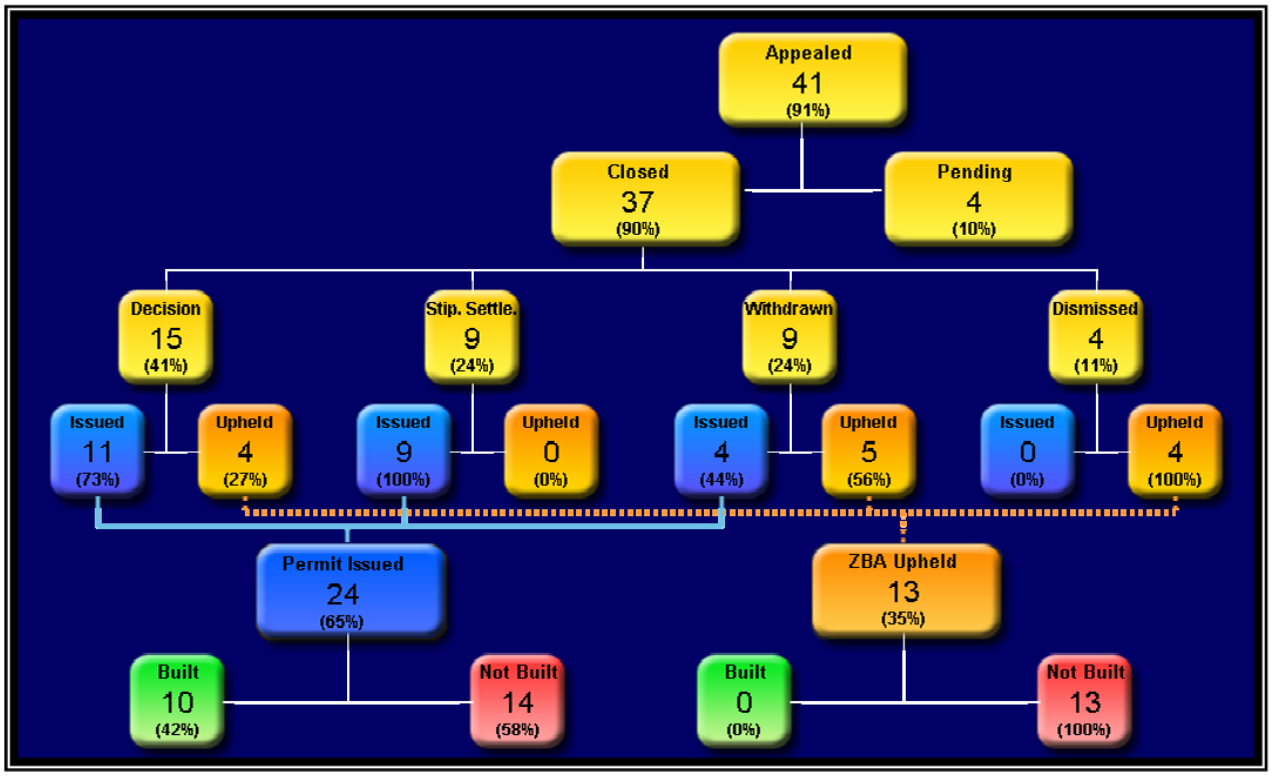
(Figure created by Fisher 2007)

Strikingly, just 18% of cases in this subsection of appeals were resolved with a formal HAC decision (Fisher 2007). Appeals that are not dismissed or decided by the HAC are settled in one of two ways. First, the ZBA and developer may negotiate an agreement and ask for the HAC's approval. Also known as a decision on stipulation, Figure 2.3 shows that 48% of cases in this subsection were resolved in this manner (Fisher 2007). Second, the two parties may reach a private agreement that leads the developer to withdraw the appeal without explicitly presenting the settlement to the committee. Figure 2.3 indicates

that withdrawal occurred in 22% of instances (Fisher 2007). Overall, approximately 72% of appeals in this category were either withdrawn, dismissed, or resolved through negotiation. Together, these figures confirm that the majority of 40B developments are negotiated at the local level.

Figure 2.4 depicts cases in which a ZBA denial of a comprehensive permit application is appealed.

Figure 2.4: Appeals Outcomes, Denied Comprehensive Permits



(Figure produced by Fisher 2007)

Out of the just 12% of applications that are initially denied in their entirety in Figure 2.4, over 90% are appealed to the HAC (Fisher 2007). Additionally, when denials of comprehensive permit proposals are appealed, the HAC only issues formal decisions 41% of the time, and rules in favor of the developer 65% of the time (Fisher 2007). If appeals of a ZBA denial are not dismissed or formally decided by the HAC,

then they are either negotiated between the ZBA and the developer on stipulated settlement (24%) or withdrawn by the developer with no apparent settlement with the ZBA (24%).

In Connecticut, the data on 8-30g appeals is significantly less clear. Despite the lack of current and accessible information on court rulings, recent data indicates there have been about 180 court decisions involving roughly 110 development proposals (PSC Housing 2022). The majority of these appeals take place in the well-to-do suburbs of Fairfield County, where the demand for housing is higher than in other parts of the state (PSC Housing 2022). In addition, researchers estimate that between 1992 and 2006, there were roughly 144 judicial decisions issued pertaining to 98 proposed developments (OLR 2013). In approximately 70% of these cases, the court ruled in favor of the affordable housing developer (OLR 2013). Similarly, research indicates that as of 2008, towns "win" about one-third of cases – a proportion that has fallen from 13 years prior in 1995 when courts upheld municipal rejections nearly half the time (OLR 2013; Tondro 2001). Unlike the data set in Massachusetts, it's impossible to determine how many 8-30g appeals have been resolved at the local level or settled through stipulation. Since the law has been enacted, however, the consensus is that towns have generally begun to work more closely with developers to plan for affordable housing. Nonetheless, it remains unclear to what extent this compares to local cooperation on 40B development in MA.

Conclusion

If the differing appeals process explained the higher levels of affordable housing in MA, one would expect to see that the HAC overturned more local rulings than the state courts in CT. Instead, both bodies rule in favor of the developer in roughly two-thirds of affordable housing appeals decisions. Nonetheless, the members of the HAC appear to represent a consolidated body of expertise that is better equipped to adjudicate housing disputes and issue negotiated settlements than state court judges in Connecticut. Three out of the four sitting members of the HAC have an extensive background in the area of housing or

housing law. These members, especially those who worked at the DHCD, have spent their entire careers surrounded by the intricacies of Chapter 40B and the local planning process. While judges in the Connecticut state courts may be able to discern a valid municipal concern from a capricious one, they lack the same knowledge about affordable housing, which involves a complex mix of interactions between multiple levels of government and the private sector. In addition, because members of the HAC typically serve multiple terms, they likely have a better idea of legal precedence in this arena. These findings are supported by my conversation with the former chair of the HAC, Werner Lohe. As chairman, Lohe served for 25 years and presided over 100 formal decisions, most of which were unanimous. Before being appointed to the role in 1990, Lohe practiced fair housing law in Boston but also cultivated a passion for environmental protection – something affordable housing advocates are often at odds with. In describing the HAC, Lohe said that the committee attracts people with a passion for affordable housing. Additionally, members of the HAC tend to be individuals who understand the complexity of housing, which helps them navigate the specialized landscape of 40B. Together, these features allow the HAC and its members to act as highly credible arbitrators who oversee and encourage cooperation between municipalities and developers. This authority is exemplified by the high number of HAC decisions issued on stipulation, a form of guided settlement. In the sample of judicial decisions that emanate from 8-30g in Connecticut, it appears that this type of mediation is used less frequently by the state courts.

While more 8-30g appeals rulings need to be made accessible in order to draw a definitive conclusion, since both laws were enacted, the HAC has issued almost 100 more appeals decisions than the state courts. This increased precedence may lead to a more uniform appeals process in Massachusetts where all parties are informed of their options and risks. By looking at actions the HAC has taken on similar developments, municipalities may decide to initially approve, deny, or attach additional modifications based on the conditions of the project. Likewise, developers may withdraw the appeal or agree to a settlement in anticipation of a certain ruling. This could help explain the seemingly low number of cases

that are actually appealed and formally decided upon by the HAC. On the other hand, the rules of the game so to speak are far more undefined for towns and developers in Connecticut. Because appeals rulings are issued by state judges with varying judicial philosophies, it's more difficult to predict which type of development will receive which type of decision. Although the proportion of rulings in favor of developers is similar across the two states, the differences in appeals procedure, structure, and personnel may allow the HAC to push forward more negotiated settlements and bolster production levels in Massachusetts.

3. Moratoria

Turning to moratoria, both 40B and 8-30g enable municipalities that fall short of the 10 percent threshold to obtain a moratorium that grants temporary exemption from the law and associated appeals process. Municipalities with this status are able to recoup some local control over planning as they plan to address their affordable housing obligations. Despite this, differences in the structure and qualifying criteria of 40B and 8-30g moratoria may strengthen or constrain production outcomes (Marantz & Dillon 2018). As a result, both moratoria provisions must be compared to determine if there is any relevant impact on affordable housing production.

Under 40B in Massachusetts, there are essentially two ways municipalities can reach the statutory minima for affordable housing; first, if the number of low or moderate-income housing units in the community exceeds 10% of the total number of housing units, or, secondly, if low or moderate-income housing has been developed on sites comprising of 1.5% or more of the total land area in the community zoned for residential, commercial or industrial use (Massachusetts Housing Partnership 2017). However, under pressure from local officials and critics, in 2008, the Department of Housing and Community Development (DHCD) expanded its "safe harbor" provision to allow non-exempt municipalities with an

approved Housing Production Plan (HPP) a one-to-two year moratorium from the appeals process depending on production levels (CHAPA 2011).

The HPP has three required parts: a comprehensive local housing needs assessment, an annual affordable housing production goal, and an implementation strategy (DHCD 2020; Reid, Galante, & Weinstein-Carnes 2017). During the comprehensive needs assessment, a municipality must essentially examine its housing stock and determine the constraints and limitations on its current and future rate of affordable housing growth. Following this, the municipality must outline a plan to mitigate those constraints and set annual production goals. With regards to implementation, municipalities must outline certain actions that will help them to achieve these goals. In particular, municipalities may identify specific zones and geographic areas which are conducive to affordable housing and would encourage the filing of comprehensive permit applications. They may also request that subsidized housing proposals be proposed and developed on municipally-owned parcels of land. Additionally, cities and towns are able to specify their preferred type of affordable housing proposal. Examples of this might include special requests for cluster developments, mixed-use housing, adaptive reuse, and transit-oriented development. Finally, within the implementation plan of an HPP, a municipality may state its intention to join and participate in a regional housing collaboration.

A municipality may only request that the DHCD certify its compliance with an approved HPP if it has increased its number of subsidized housing units in an amount equal to or greater than its 0.50% production goal for that calendar year. If certified, the municipality is granted a one-year moratorium from the developer appeals process. If the DHCD finds that the municipality has increased its proportion of subsidized housing units by at least 1.0% in a calendar year, the length of the moratorium is increased to two years. An application for an HPP must first be adopted by the local planning board, as well as either the select board or city council. Upon adoption, the chief executive officer then submits the HPP to the DHCD for certification. Afterward, the department conducts an initial 30-day review which notifies

the municipality of any deficiencies and offers an opportunity for remediation. Ninety days after this initial review, the department informs the municipality of its decision to either approve or disapprove an HPP.

Under 8-30g the criteria for municipal exemptions is identical – cities and towns in Connecticut become exempt from the law once they meet the 10% benchmark for affordable housing. Regardless, the qualifications and structure of the moratorium procedure are quite different. In 2000, state lawmakers added a provision to allow cities and towns that meet statutorily defined measures of progress a four-year moratorium from the developer appeals process. This move was likely intended to give towns more flexibility with regard to planning and zoning. In order to obtain a moratorium, a municipality must first receive a state certificate of affordable housing completion from the commissioner of the Department of Economic and Community Development. During the application process for this certificate, municipalities must demonstrate progress by calculating a summary of housing unit equivalent points, or HUEs. Essentially, HUEs represent a point system for affordable, deed-restricted housing units that have been created after 1990 (PSC Housing 2017). Figure 2.5 depicts the standard HUE point system:

Figure 2.5: HUE Points

Unit Affordability level	Rental Points	Ownership Points
80% of median income	1.5	1.0
60% of median income	2.0	1.5
40% of median income	2.5	2.0
Age restricted at 80% of median income	0.5	0.5
Market-rate unit in a set-aside development	0.25	0.25

(Figure created by PSC Housing 2022)

In addition to the criteria outlined in Figure 2.5, extra HUE points may be awarded for rental housing and affordable homes for families, as well as some elderly restricted housing. If the total HUE points equal 2% of the town's total housing stock or a minimum of 50 HUEs, then the municipality is eligible to receive the state certification and ensuing moratorium (PSC Housing 2022). After September 30, 2022, certain bonuses will be rescinded and the minimum HUEs required to qualify for a moratorium will return to 75.

To give an example of how the HUE point system works, say a 100-unit development restricts 30% of the units as affordable for 40 years - 15 units at 80% of median income and 15 units at 60% of median income. This development would count as 70 points if the units are rented, and 55 points if the units are owned, even though only 30 units have affordability restrictions (PSC Housing 2022). Since the development in question would surpass 50 HUE points, either way, the municipality would be eligible for the 4-year moratorium. When the commissioner of the DECD concludes that an application is complete, the department will publish a notice in the Connecticut Law Journal that public comment will be accepted for a period of thirty days. In total, the commissioner has 90 days within receipt of the application to either confirm or deny. If approved, the commissioner will publish a certificate of affordable housing project completion in the Connecticut Law Journal. Upon publication, the 4-year moratorium takes effect.

Overall, the criteria for 8-30g moratoria also appear to be less stringent. Municipalities in Connecticut are able to receive enough HUE points to be granted a moratorium through the construction of a single 8-30g development, whereas towns in Massachusetts must increase their proportion of affordable housing by at least 0.5% to reach the same status. As a result, it's likely easier for towns in Connecticut to receive an 8-30g moratorium than it is for towns in Massachusetts to receive a 40B moratorium. On top of this, the requirements for the HPP process seem to be more burdensome and comprehensive. In July of 2017, the legislature amended 8-30g to add a provision mandating that each municipality prepare or adopt an affordable housing plan every 5 years. This plan must specify how the municipality intends to increase the

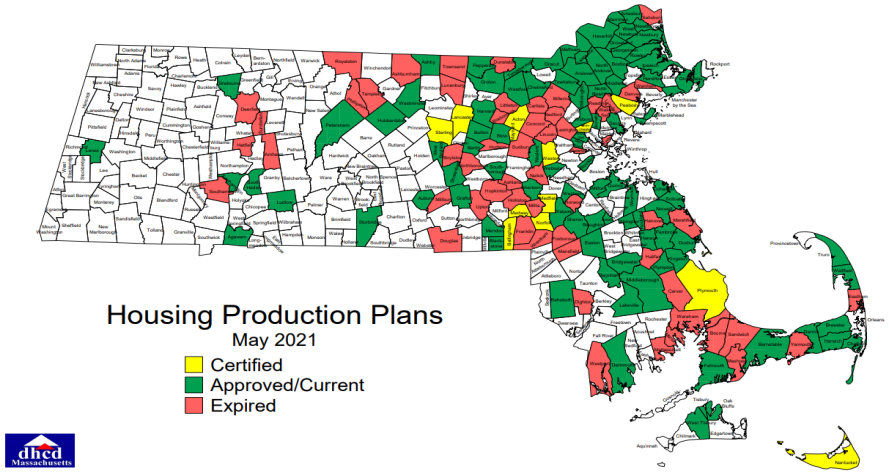
number of affordable housing developments (Town of Westport, CT 2022). While this system is similar to the HPP process in Massachusetts, the law does not require towns in Connecticut to have an approved plan by state officials in order to obtain a moratorium.

Outcomes

As of March 31, 2022, 18 municipalities in Massachusetts had active moratoria on proposals filed under 40B (DHCD 2022). In total, 175 cities and towns have received a moratorium and certified HPP since 2003.

Figure 2.6 displays a map of cities and towns in Massachusetts with past, current, and pending moratoria.

Figure 2.6: Map of Towns in Massachusetts with Current, Past, and Pending HPPs

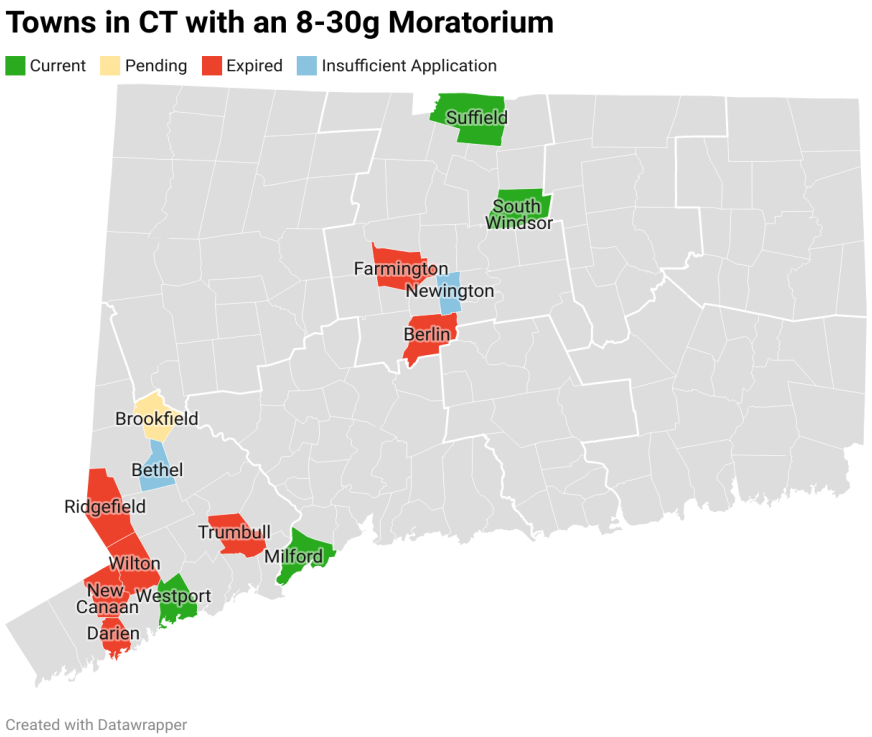


(Map created by DHCD 2021)

As of July 19, 2021, only 4 towns in Connecticut had active moratoria – Westport, Milford, Suffield, and South Windsor. Historically, just 9 municipalities have been granted a moratorium, although some have obtained multiple exemptions (DOH 2021). At the time the data was published, only 1 town, Brookfield, was awaiting state certification.

Since there was no geographic display of municipalities that have achieved 8-30g moratoria in Connecticut, I created Map 2.1 which indicates towns in Connecticut with a past, present, and pending moratorium. Additionally, some towns have initiated the process for moratorium certification only to withdraw.

Map 2.1: Towns in Connecticut with Current, Past, and Pending Moratoria



(data from DOH 2021)

Conclusion

While only a small number of towns in Connecticut have been granted a moratorium, this does not mean the exemption is easier to obtain in Massachusetts. Instead, the relative stringency and technicality of the HPP suggest quite the opposite. To create an HPP, a municipality in Massachusetts must conduct a comprehensive local housing needs assessment, set an annual affordable housing production goal, and develop an implementation strategy. The HPP must then be approved before a municipality can request that the state certify its compliance with production goals and grant a moratorium.

In Connecticut, the application process is much less complex and the requirements to receive a moratorium are far less stringent. Although the legislature recently mandated that municipalities must prepare or adopt an affordable housing plan every 5 years, this is separate from the moratorium procedure which requires cities and towns to receive a state certificate of affordable housing completion from the commissioner of the Department of Economic and Community Development. Rather than having to implement an overarching affordable housing plan in order to obtain this certificate, the municipality in Connecticut simply has to submit a calculation of their HUE points for state approval. Yet, as demonstrated by the example above, a town can gain enough HUE points for an 8-30g moratorium through a single 100-unit development depending on affordability levels. HUE points may also be awarded for more exclusive types of affordable housing like elderly-restricted units. Moreover, an 8-30g moratorium is almost always implemented for a length of four years.

Compare this to the 40B moratorium which requires municipalities to have increased their number of subsidized housing units in an amount equal to or greater than 0.50% for that calendar year in order to receive just a one-year exemption. Obtaining a two-year 40B exemption is even more difficult; municipalities must increase their supply of affordable housing by at least 1.0% in a calendar year. Although more research is needed to rule out other variables, the shorter length and the stricter criteria of

the HPP process and 40B moratorium may hold municipalities in Massachusetts more accountable to their affordable housing production goals while still allowing for some flexibility with regard to planning.

Summary of Conclusions on the Impact of Statutory Variation on Production

In sum, it appears that the variation in local permitting and appeals may be the largest driver of the disparity in state-level affordable housing production. While a more complete dataset is still needed to draw definitive conclusions, the sample in Massachusetts demonstrates that a streamlined comprehensive permit process may be more successful in generating more developer interest, local approvals, and affordable housing production. These conclusions are mainly exemplified by the fact that in the sample available a comprehensive permit in Massachusetts was six times more likely to be initially approved at the local level than an 8-30g application in Connecticut (Fisher 2007; OLR 2013). Moreover, as seen in Table 2.1, nearly 80% of comprehensive permits in the sample cases were initially approved by the locality in Massachusetts as opposed to denied or withdrawn (Fisher 2007). Without a streamlined permit process, it appears that developers in Connecticut may remain largely beholden to burdensome and sequential local permit requirements. As a result, more 8-30g applications in the Connecticut sample may have been withdrawn or simply abandoned. In this way, the differences in local permitting processes may be greatly responsible for the disparity in production. These conclusions are further supported by my conversation with Werner Lohe, an affordable housing appeals expert with over 25 years of experience as Chair of the HAC. When asked what he believed to be the most significant difference driving the disparity between the two laws, Lohe asserted that the lack of a comprehensive permit process under Section 8-30g is likely a large disadvantage for the Connecticut system.

To add to this, although state courts and administrative commissions largely rule in favor of the developer, I still conclude that judges in Connecticut simply don't have the same expert knowledge about affordable housing as HAC members in Massachusetts. This finding could explain why nearly half of the sample

cases in Massachusetts that were appealed by the developer appear to have been resolved through advanced forms of negotiation like stipulated settlements (Fisher 2007). Ultimately, the enhanced credibility and expertise of HAC members may help to expedite the arbitration of affordable housing disputes, thus furthering total production under 40B. On the other hand, this settlement process is mostly absent from the sample of 8-30g rulings. Thus, the settlement of 8-30g appeals on stipulation is likely a less established procedure in the Connecticut state courts, which may severely diminish overall production values in the state.

Although the impact of the differing moratoria procedure on production is likely less significant than the variation in local permitting and appeals processes, the shorter length of the one-to-two-year 40B moratorium and stringent criteria of the HPP process may hold municipalities in Massachusetts more accountable in terms of their production goals while still allowing for some flexibility. Moreover, the requirements to receive a four-year 8-30g moratoria appear to be less comprehensive – municipalities in Connecticut are not required to submit a production plan with an application for state certification of a moratorium. To add to this, cities and towns may be awarded enough HUE points to receive a state-issued moratorium through the construction of a just a single 8-30g development depending on affordability levels whereas municipalities in Massachusetts must increase their proportion of affordable housing by at least 0.5% in order to reach the same status under 40B. Thus, even though 40B moratoria are more common than 8-30g moratoria, the overall stringency of the procedure in terms of planning and affordability requirements may assure that towns in Massachusetts with the status are still upholding their responsibility to create long-term, affordable housing under the law.

Chapter 3: Weston, MA v. Westport, CT

While statutory differences may play a substantial role in shaping affordable housing production, it may be useful to consider the role that affluence, zoning, and localism play in restricting these outcomes. It is conceivable that MA and CT have different environments for local housing restriction activism. Therefore, I compare how 8-30g and 40B operate in two affluent suburban communities – Westport, CT, and Weston, MA. Apart from the state in which they are located, both towns have many demographic similarities, maintain a low percentage of affordable housing, and share a preference for primarily single-family residential zoning. Since the law's inception, many local residents and town officials in Westport have expressed opposition to 8-30g proposals (Rabe Thomas 2019). Critics say that developers are abusing the law's appeal process to override local zoning interests and build market-rate housing where they see fit. Since proposals incorporate public participation and necessitate open meetings, battles are often well-documented and highly debated by local news sources and online forums. In Weston, MA, it's no secret the town has experienced a long and contentious history with 40B development. Despite its spacious character, Weston's strategic location along major highways and its proximity to Boston has made the town highly desirable for all types of development (Weston HPP 2021). Over the past 5 or 6 years, Weston has seen a rise in 40B applications, and the town website even has a separate page to monitor all ongoing proposals. Overall, I consider eight recent affordable housing battles in Weston, MA, and Westport, CT, that shed light on the varying ways in which statutory variation between 8-30g and 40B - in terms of permitting, appeals, and moratoria – may be contributing to different opportunities for local affordable housing opposition.

First, the battles appear to support conclusions drawn in Chapter 2 that a streamlined permit process in Massachusetts is more successful at attracting developer interest and generating local approvals. Moreover, in terms of local resistance, the lack of streamlining in Connecticut may allow for more

opportunities for residents to oppose 8-30g developments. This is primarily exemplified by the fact that all four applications were initially denied a building permit in Westport whereas Weston initially approved two out of the four comprehensive permit applications. Further, in Westport, some developments were denied multiple times, and only an average of only 73% of all total units included in original proposals were advanced in settlement talks. However, in Weston, this proportion was 100%. Even if comprehensive permits are denied, appealed, or stalled, these cases underline that the streamlined 40B permit process may give developers in Massachusetts an edge over local resistance factors.

Despite this general atmosphere of affordable housing opposition and consistent policy of permit denials, Westport was still granted a four-year, state-issued moratorium in March of 2019. Along with comments from Westport town officials, this suggests that since 8-30g moratoria are less stringent in terms of their affordability and planning requirements, the procedure may be enabling more staunch resistance from affluent municipalities in Connecticut.

Meanwhile, when it comes to the differences in appeals, I determine that because both the Connecticut state courts and HAC in Massachusetts are generally ruling in favor of the developer, this variation may hold less influence over the constraint of local resistance on production. Furthermore, in these two towns, stipulated settlements were issued across both states. Nonetheless, by looking at the structure and organization of the four cases that were appealed in Westport, CT, and comparing them to the battle over 518 South Avenue in Weston, MA, the expert authority of the HAC is apparent. Thus, until there is a more representative dataset of court rulings in Connecticut, it's unclear to what extent the variation in appeals processes may be contributing to the overall opportunities to restrict affordable housing development in each state.

Case Justification - Demographics, Zoning, and Affordable Housing:

Weston, Massachusetts, and Westport, Connecticut are both highly affluent suburban communities. As Table 1 displays, average yearly incomes surpass well over $200,000. In fact, as of 2010, out of all the towns in Massachusetts, Weston was the wealthiest (von Hoffman 2010). Likewise, Westport is frequently ranked among the most affluent towns in Connecticut and even the nation (Rabe Thomas 2019). In terms of racial makeup, both towns are overwhelmingly White (US Census Bureau American Community Survey 2019 – 5-year estimates).

As Table 1 displays, both Weston and Westport have an abundance of land zoned exclusively for single-family residences. In addition, according to the most recent HPP put together by the town, single-family homes make up 89 percent of the total housing stock in Weston (Weston HPP 2021). While many of the surrounding towns also share a preference for single-family zoning, they still retain higher levels of multi-family development (Weston HPP 2021). Public forests, conservation lands, and parks occupy almost a fifth of Weston's land area (von Hoffman 2010). In Westport, roughly 97 percent of all land is zoned for single-family housing as of right, and many lavish homes overlook the Long Island Sound (Rabe Thomas 2019; Desegregate CT 2022). Strikingly, the median price of a single-family home exceeds $1,000,000 (see Table 1). Unsurprisingly, as Table 2 demonstrates, both towns have failed to meet statutory thresholds of affordability (<10%). On top of this, it appears that both towns have gone to great lengths to preserve this character of unaffordability. Data from the U.S. Census Building Permit Survey demonstrates that housing development in Weston has been almost exclusively limited to single-family homes (Weston HPP 2021). Moreover, on its website, the Westport Planning and Zoning Commission lists "protecting the town from overdevelopment" as one of its primary goals (Westport PZC).

While the two towns share many similarities, they also maintain several differences. As Table 1 shows, Weston is slightly more affluent than Westport with a higher median income and average yearly income On the other hand, Westport has over twice as many people as Weston (28,000 in the former compared to 12,000 in the latter). Additionally, with a population that is 79% non-Hispanic white and 12% Asian, Weston is slightly more diverse, compared to Westport, which is 90 percent non-Hispanic white and 6 percent Asian (Table 1).

As Table 3.2 shows, Weston has a higher proportion of affordable housing at 8.4% to Westport's 3.74% (see Table 3.2). Up until 2015 however, Weston maintained a smaller lead, and the proportion of affordable housing in both towns remained below 4%. As the third column of Table 3.1 shows, this is because the proportion of affordable housing in Weston jumped 4.15% between the years 2017 and 2020. In terms of units, over the last 13 years, Westport has supported the creation of 148 subsidized housing units, along with existing units that were rehabbed and deed-restricted for affordability (Westport PZC). Meanwhile, in the past 11 years, Weston has supported the creation of approximately 1,070 subsidized housing units (Weston HPP 2021). Moreover, as of April 2021, the Town of Weston only needed to create 64 more units of subsidized housing to reach the 10 percent affordability target (Weston HPP 2021).

Table 3.1: Comparing Westport and Weston's Demographic and Housing Characteristics

Statistics	Westport, CT 06880	Weston, MA 02493
Population	**28,016**	**12,112**
Race		
White Alone	**90%**	**79%**
Black or African American Alone	**1%**	**2%**
Hispanic or Latino	**5%**	**4%**
Asian Alone	**6%**	**13%**
Median Household Income	**$206,466**	**$207,702**
Tenure		
Owner Occupied	**85%**	**86%**
Renter Occupied	**15%**	**14%**
Housing Density		
1, *Detached*	**86%**	**86%**
1, *Attached*	**5%**	**3%**
2	**3%**	**1%**
3 or 4	**2%**	**4%**
5 to 9	**1%**	**1%**
10 to 19	**1%**	**<1%**
20 to 49	**<1%**	**1%**
50 or More	**1%**	**4%**
Housing Value		
$500,000 to $749,999	**15%**	**7%**
$750,000 to $999,999	**18%**	**17%**
$1,000,000 or More	**59%**	**73%**
Median Home Value	**$1,150,400**	**$1,312,300**

(US Census Bureau American Community Survey 2019 – 5-year estimates)

Table 3.2: Affordable Housing Stock (SHI)*

Weston, MA			Westport. CT		
Year	SHI %	Δ	Year	SHI %	Δ
2011	3.54%	-	2011	2.71%	-
2012	3.57%	0.03%	2012	2.71%	0.00%
2013	3.59%	0.02%	2013	2.75%	0.04%
2015	3.77%	0.18%	2015	3.07%	0.32%
2017	4.23%	0.46%	2017	3.57%	0.50%
2020	8.38%	4.15%	2020	3.72%	0.15%
2021	8.40%	0.02%	2021	3.75%	0.03%

(Mass DHCD 2020; Conn DOH 2020)

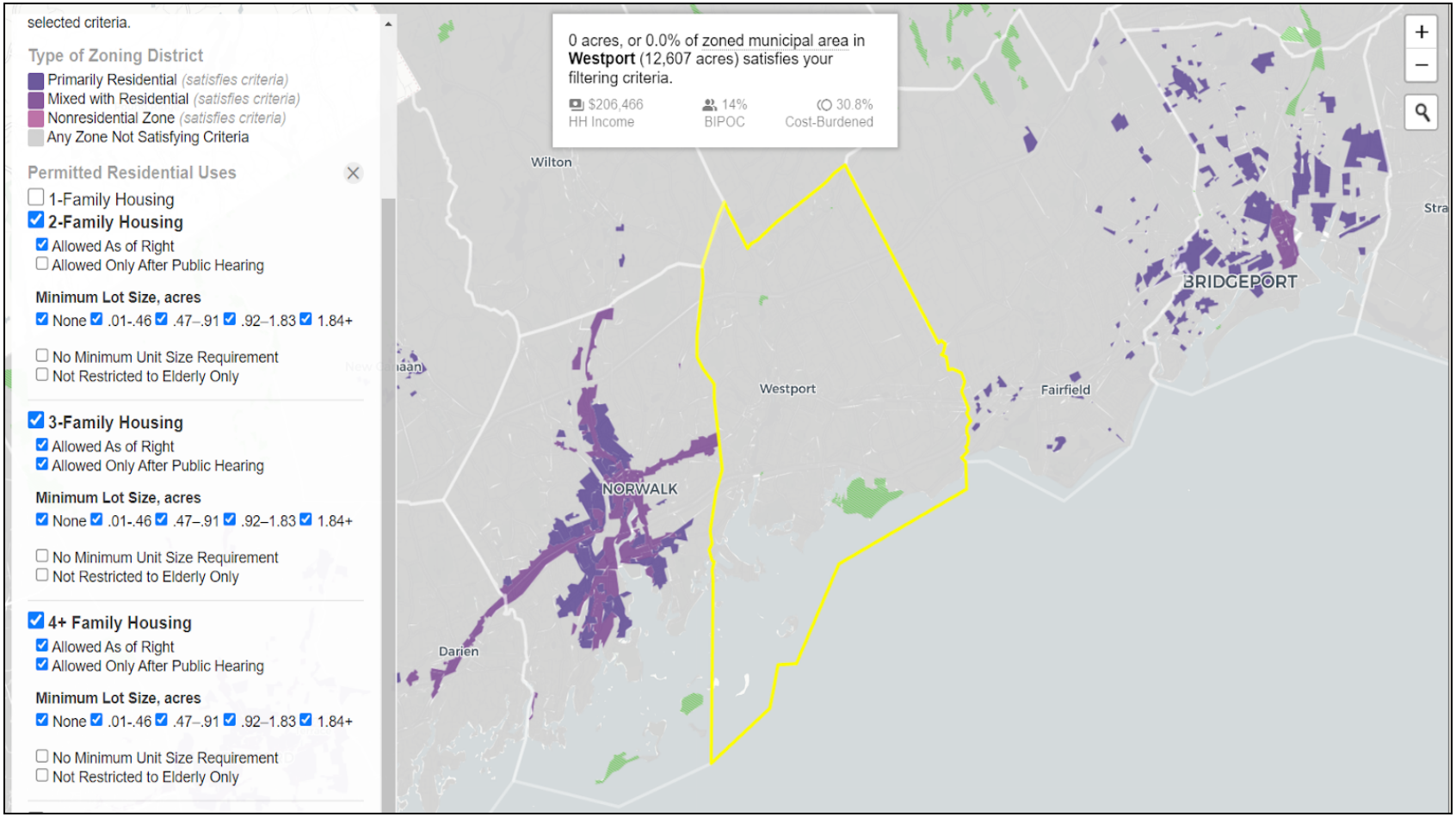
* In Massachusetts, the biennial updated Subsidized Housing Inventory, or SHI, is used to measure a community's stock of low-or moderate-income housing for the purposes of Chapter 40B. While housing developed under Chapter 40B is eligible for inclusion in the inventory, many other types of housing also qualify to count toward a community's affordable housing stock.

* For a measure of SHI in Connecticut, I use the total units column from the annually updated Affordable Housing Appeals Procedure List. This metric is similar to the SHI because it measures both units produced by 8-30g, as well any assisted housing units or housing receiving financial assistance under any governmental program.

Yet, compared to the surrounding communities of Acton, Bedford, Concord, Dover, Framingham, Lexington, Lincoln, Natick, Sherborn, Sudbury, Wayland, and Wellesley, MA, Weston lags behind – around two-thirds of these municipalities have already met the state's 10% benchmark (Weston HPP 2021). Similarly, cities and towns like Norwalk, Fairfield, and Bridgeport, CT all have higher levels of affordable housing than Westport (DOH 2021).

With regards to zoning regulations, Weston currently has three zones that permit two-family homes or larger as of right whereas Westport has none (See Figures 3.1 and 3.2). Even still, the minimum lot size for all three of the Weston zones in question is at least 600,000 sq/ft (Metropolitan Area Planning Council 2022)

Figure 3.1: Multifamily Zoning As of Right in Westport, CT



(Desegregate CT 2022)

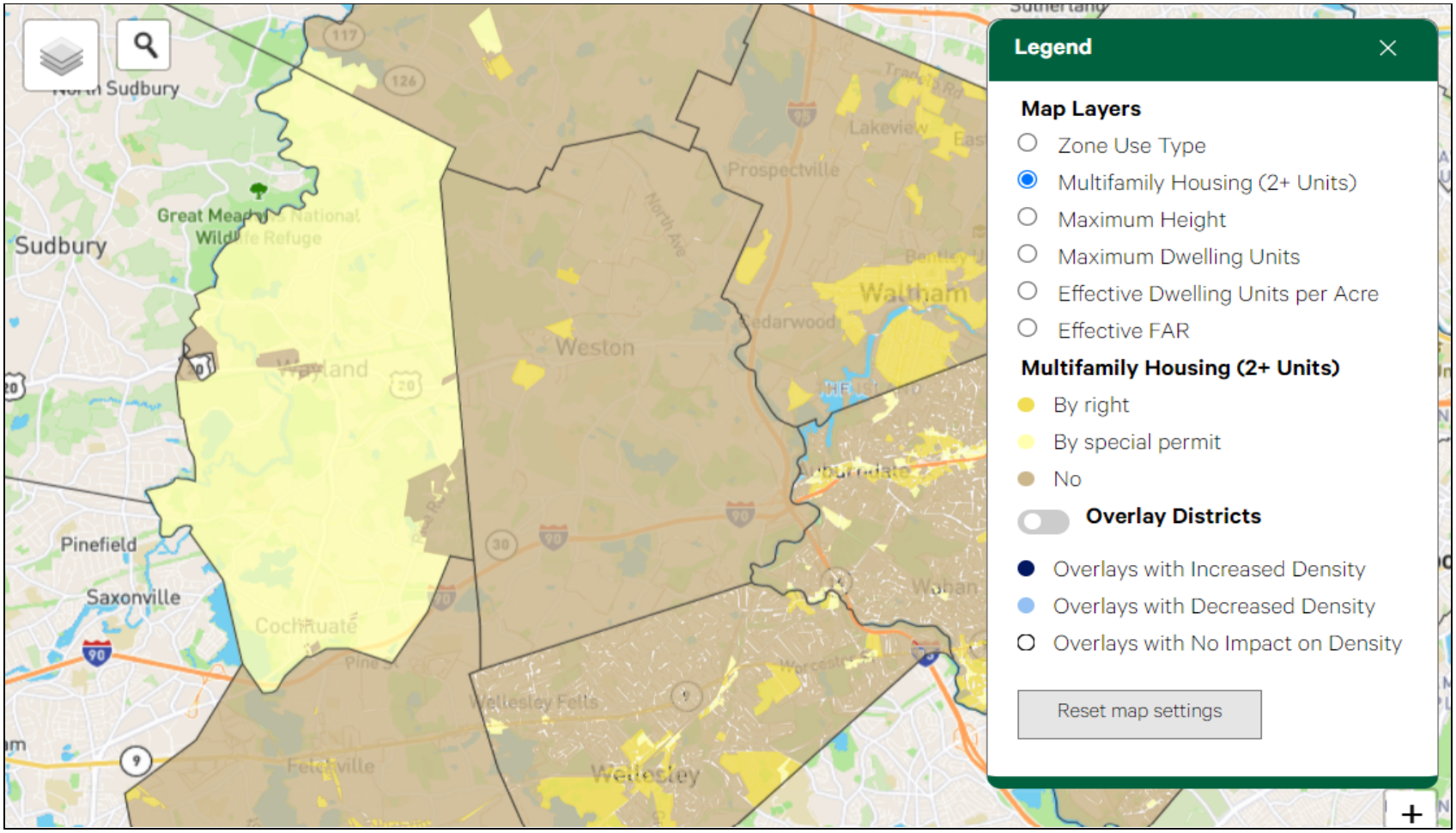


Figure 3.2: Multifamily Zoning in Weston, MA

(Metropolitan Area Planning Council 2022)

Table 3.3: Affordable Housing Application Outcomes

Town	*State*	*Development Site*	*Original Proposal*	*Outcome*	*% of proposed units that went forward*	*Date of Initial Proposal*
Westport	**CT**	**Hiawatha Lane**	**187 units, 30% affordable**	**Denied, Appealed, Stipulated Settlement: 157 units, 30% affordable**	**84% of both total and affordable units**	**Nov-2018**
Westport	**CT**	**1 Lincoln Street**	**81 units, 25 affordable**	**Denied, Appealed, Overturned, Settled: 68 units, 22 affordable**	**84% of total units, 88% of affordable units**	**7-Jun-2018**
Westport	**CT**	**122 Wilton Road**	**48 units**	**Denied, Appealed, Sustained, 19 units, 30% or 60% affordable depending on conditions**	**40% of both total and affordable units**	**Feb-2016 to 18-Oct-2018**
Westport	**CT**	**20-26 Morningside Drive**	**19 three-bedroom townhouses, 6 affordable**	**Denied, Appealed, Stipulated Settlement; 16 three-bedroom condos, 6 affordable**	**84% of total units, 100% of affordable units**	**11-Oct-2018**
Average %					**73% of total units, 78% of affordable**	

Town	*State*	*Development Site*	*Original Proposal*	*Outcome*	*% of proposed units that went forward*	*Date of Initial Proposal*
Weston	**MA**	**104 Boston Post Road**	**154 rental units on 2 acres**	**Denied, Under Appeal**	**N/A**	**22-Feb-2017**
Weston	**MA**	**269 North Avenue**	**16 rental units on 1.46 acres**	**Approved, Litigated, Development Stalled**	**100%**	**1-Mar-2016**
Weston	**MA**	**518 South Avenue**	**180 rental units on 4.5 acres**	**Denied, Appealed to HAC, Overturned, Comprehensive Permit Reopened**	**N/A**	**19-Aug-2019**
Weston	**MA**	**751-761 Boston Post Road**	**180 rental units, 45 affordable**	**Approved with conditions, Appealed, Stipulated Settlement; 180 units, 45 affordable**	**100%**	**20-May-2019**
Average %					**100% of both total and affordable units**	

(Town of Weston, MA 2022; Weston HPP 2021; Westport Planning and Zoning Commission 2022; Manna 2021; Koerting 2021; Chapple 2020; Vaughn 2018-2019; Lomuscio 2019; Woog 2018-2022).

Data on Local Affordable Housing Processes

Table 3.3 displays the outcomes of four 8-30g applications in Westport, CT, and four 40B proposals in Weston, MA. While the initial filing date of each application varies, none were submitted before 2016. In Weston, MA, the town's website has a separate page dedicated to these four pending 40B applications. All of the information included in the table was obtained from this webpage which includes a list of documents associated with each development (Town of Weston 2022). These documents range from original comprehensive permits, final ZBA decisions, and formal HAC rulings. In Westport, CT, the Planning and Zoning commission does not always regularly upload documents pertaining to 8-30g applications. Instead, a series of local blogs and news outlets follow public meetings and provide periodic updates on controversial developments (Manna 2021; Koerting 2021; Chapple 2020; Vaughn 2018, 2019; Lomuscio 2019; Woog 2018-2022).

Outline of Cases

Altogether, the developments from Westport underline that the structure of local approvals, the judicial-review process, and the four-year moratoria procedure allow for more opportunities to restrict affordable housing development in Connecticut. Meanwhile, in the Weston cases, I find that the combination of the comprehensive permit process, the administrative-level review of appeals, and the one-to-two-year moratorium in Massachusetts appear to be somewhat successful at limiting the impact of local resistance and stimulating affordability. In particular, the cases demonstrate that the stringency of the moratoria procedure and consolidated nature of the comprehensive permit process may be uniquely effective at strengthening 40B's defense against local resistance factors.

Local Permitting Outcomes in Cases

Concerning the variation in the local permitting process, all four cases in Westport appear to exemplify that the lack of a comprehensive permit may be fostering more opportunities to restrict 8-30g development in Connecticut. Each of the four cases – Hiawatha Lane, 1 Lincoln Street, 122 Wilton Road,

and 20-26 Morningside Drive – was initially denied by the town's planning and zoning commission (Table 3.3). In the case of the application for Hiawatha Lane which was filed in November 2018, the PZC unanimously denied a zoning amendment that would have enabled a multifamily development on the site. Among a host of other concerns, town planning officials cited increased congestion as their primary reason for issuing a denial (Chapple 2020). Similarly, in June of 2018, the PZC voted 7-0 to deny the proposed 81-unit apartment complex with 25 affordable units on the corner of Cross and Lincoln Street. In this instance, local planning officials said the denial was based on fire, traffic, and other safety concerns, as well as historic preservation.

On top of this, some battles like the development of 20-26 Morningside Drive and 122 Wilton Road featured multiple local permit denials by Westport which further illustrates the barriers presented by the lack of a streamlined permitting process in Connecticut. In October of 2018, developers applied to the Westport PZC to demolish a farmhouse on 26 Morningside Drive and replace it with 19 three-bedroom townhouses in five buildings. Since 6 of the units were proposed to be income-restricted, the application qualified as an 8-30g proposal (Vaughn 2019). Controversy over the site eventually ensued which prompted town officials to deny the proposal. That previous January, the same developer applied to build a mansion on a nearby site which was denied by the town's Historic District Commission. Since both of these sites belonged to a historical district, several groups of residents and preservationists attended public meetings to advocate against the development of the property. Additionally, even though the developers at 122 Wilton Road drastically reduced the number of units from 48 to 19 in their second application, Westport planning officials still refused to offer a potential compromise and later issued a second denial. Overall, these four cases demonstrate that there is a strong likelihood Westport will initially deny an 8-30g application. Lacking a consolidated permit process, 8-30g developers must go through the sequential process of securing multiple approvals from different local boards and departments. Ultimately, this burdensome and lengthy process may allow opponents of affordable housing more opportunities to

participate in public meetings, unduly influence the local permit process, and restrict development altogether. Further, this vulnerability to local resistance may convey to developers that applying for an 8-30g project in the town will be lengthy, difficult, and expensive.

On the other hand, while there was still a fair amount of general resistance in Weston, the consolidation and simplicity of the comprehensive permit process may diminish its influence on production. In total, two out of the four comprehensive permit applications were initially approved by the town – 751-761 Boston Post Road and 269 North Avenue (Table 3.3). While it remains impossible to rule out other variables, these cases appear to support the idea that comprehensive permits may be more effective at netting local approvals and managing the impact of local resistance on development, in part because the streamlined process offers fewer opportunities for local opposition. Although the initial approval for the Boston Post Road development was eventually appealed by the developer for unfavorable conditions, the proposal still advanced through the permitting process and public hearing period where opponents can voice their concerns at a reasonable rate, and a decision was issued within six months of the application's original submission (Town of Weston 2022). Similarly, although the development on 269 North Avenue was likely stalled due to outside litigation (Weston HPP 2021), the ZBA's initial approval of the comprehensive permit may have limited the sum of potential opportunities to restrict development.

Moratoria Outcomes in Cases

While both towns remain primarily opposed to affordable housing and development in general, each law responds in different ways. In the case of Westport, CT, even though all four applications were initially denied and the town proved itself to be deeply resistant, state officials still issued a four-year moratorium in March of 2019 – a provision designed to award towns for their cooperation with affordable housing production goals. This decision and its implications provide key evidence that, in addition to stipulating

less stringent affordability and planning criteria, 8-30g moratoria may also be enabling more opportunities for local resistance.

Perhaps this conclusion is best exemplified by the Hiawatha Lane agreement in which Westport's moratorium status was a key factor in the final settlement agreement (Koerting 2021). Around the same time that developers appealed the initial permit denial, two developers seeking to utilize 8-30g petitioned the DOH for a declaratory ruling on the legality of Westport's four-year moratorium. The developers challenged the issuance of the moratorium on the grounds that the department erred in some of its factual, procedural, statistical, and legal conclusions. In essence, the developers argued that Westport's application did not provide evidence of compliance with 8-30g's affordability requirements. Although the DOH had the opportunity to reconsider their insurance of a moratorium to a resistant Westport, they instead threw out the case for lack of standing. More so, as part of the final settlement agreement, developers were required to drop all lawsuits related to Section 8-30g and the moratorium provision (Koerting 2021). Ultimately, because Westport was able to reach the initial status and maintain it following intense litigation, the weakness of the 8-30g moratoria could be used as a means to restrict multifamily housing development in Connecticut overall.

Alongside this, statements from municipal officials in Westport regarding the development on Hiawatha Lane suggest that local decision-makers feel the moratorium signifies that the town has created enough affordable housing (Chapple 2020). In May of 2019, Danielle Dobin, a planning and zoning commissioner who has since been appointed Chair, stated that the proposed affordable units "are unnecessary" and that, "[t]his commission and the commission before [it] have been very successful in creating so much more affordable housing in Westport." In an article about the application denial, then-Chair Paul Lebowitz said, "[w]e have hit and exceeded the moratorium (Chapple 2020). Together,

these comments indicate that the moratorium is being used by Westport to create as little affordable housing as 8-30g will allow.

Comparatively, despite having a marginally higher percentage of affordable housing and demonstrating some cooperation at the local level, Weston, MA still awaits state certification of its most recent HPP and has yet to receive a 40B moratorium (Table 3.3). Moreover, the case of "Weston Whopper" on 518 South Avenue is a stark contrast to the development on Hiawatha Lane in Westport. Upon receiving the comprehensive permit application for the site, town officials promptly claimed safe harbor from 40B using the state 1.5% minimum general land area threshold. Whereas state housing officials upheld the moratorium provision in Westport however, the DHCD denied the town's claim of safe harbor and determined that the Weston ZBA used improper methodology to calculate the minimum land area threshold. Even after Weston appealed this ruling to the HAC, the committee affirmed the initial ruling and ordered the comprehensive permit hearing process to reopen (HAC 2021).

Unlike the proportion of subsidized housing, the DHCD in Massachusetts does not keep an inventory of land area variables. Only a few communities have ever invoked safe harbor through the 1.5% general land area minimum before 2008 — and there are currently none that qualify. Since 2014, several communities, including the nearby towns of Waltham and Newton, have unsuccessfully claimed achievement of the 1.5% threshold. In each case, the department reviewed the facts and determined that the towns had not met the standard. Like Weston, several of these towns have also appealed a denial of safe harbor to the HAC, but each has met similar results (DeMartino 2018). Although safe harbor is a different process than the moratoria provision, it appears that combined with more stringent affordability and planning criteria, state housing officials in Massachusetts are less likely to grant a 40B exemption – temporarily or indefinitely – to municipalities that have demonstrated strong local resistance.

Appeals Outcomes in Cases

Just as the battle on 518 South Avenue may indicate the relative strength of 40B moratoria to disincentivize local resistance, the case could also be emblematic of the HAC's expert and concise authority. Nonetheless, the findings concerning the impact of the variation in appeals on local resistance in these cases are less clear than those surrounding the variation in local permitting and moratoria procedure. Notably, the judicial and administrative review of appeals produced mostly favorable outcomes for developers in cases across both states. Additionally, in both locations, cases were settled through negotiated settlements issued on stipulation – a conclusion that initially appears to contrast the findings in Chapter 2 that Connecticut lacks an established process for the negotiated settlement of affordable housing appeals. As Table 3.3 displays, three out of the four cases that were initially denied and appealed in Westport resulted in settlement – Hiawatha Lane, Lincoln/Cross Street, and 20-26 Morningside Drive. Moreover, in two of these two cases – Hiawatha Lane and 20-26 Morningside Drive South – the negotiated settlement agreement was approved by the state courts before it was finalized (see Table 3.3). Regardless, the percentage of cases that moved forward in each setting exemplifies a greater set of opportunities to restrict development in Westport through the relatively undefined state court appeals process.

First, the high number of cases that were settled by stipulation in Westport was likely disproportionately influenced by the unique dilemma presented by the moratorium procedure. Since all four of the applications examined were submitted before the town received its four-year moratorium, these cases were likely settled out of fear that developers could win an appeal, and could not be resisted completely.

Without an opportunity to block proposals altogether, Westport town officials turned their attention to downsizing the scale of overall development during the appeals process. In the battle over Hiawatha Lane, a Hartford Superior Court judge approved terms to settle the longstanding dispute in July of 2021

(Vaughan 2021). Although the details of the settlement were already approved in a unanimous vote by the Westport Planning and Zoning Commission and later certified by the Representative Town Meeting, it was still requested that the court issue a final judgment. While the initial proposal called for 187-units, negotiations eventually brought the figure down to 157 and eliminated one of the five proposed buildings. The settlement also added several fire safety stipulations (Koerting 2021). Overall, most of these negotiated conditions seem to have primarily been agreed upon by the town and developer before they consulted the judge. Moreover, as seen in Table 3.3, only 84% of the units in the original proposal were ultimately included in the final settlement – a potential indication that resistance efforts may have permeated the appeals process.

Similarly, the development at 20-26 Morningside was also downsized during guided settlement talks. Under the terms of the May 2019 agreement that was reached in Stamford Superior Court, the developer agreed to drop the 8-30g suit against the town and was permitted to build three architecturally compatible houses on two lots, 20 and 26 Morningside Drive. During negotiations, the developer agreed to downsize the original plan to 16 three-bedroom condominiums – a 16% reduction of the total units (Table 3.3; Lomuscio 2019). Like the case of Hiawatha Lane, it's unclear to what extent the judge was active in these negotiations, thus exposing settlement talks to arbitrary municipal concerns which seek to decrease the size and scope of development.

Around the same time as the development on Hiawatha Lane was resolved, officials in Westport also reached an agreement to end the controversy surrounding the 81-unit proposal for 1 Lincoln Street (Vaughan 2021). Following the initial permit denial, the developer utilized his right to appeal under 8-30g. While the state court ruled in favor of the developer that the need for affordable housing outweighed municipal safety concerns, the town privately negotiated a settlement which was later approved at a public meeting. Under the terms of the settlement, the developer agreed to drastically

downsize the number of apartments to 68 and reduce the number of affordable units to 22. Together these losses translate to a 16% reduction in total units and a 12% drop in affordable units respectively (Table 3.3). Upon being notified of the settlement, the judge expressed his pleasure that both parties were able to reach a mutual compromise without further litigation (Vaughn 2021). While local cooperation with developers of affordable housing to avoid further litigation is seldom unfavorable, the absence of a hands-on negotiation process in the state courts could be a factor in Westport's ability to reduce the number of affordable and multi-family housing units.

Conversely, even though only one case in Weston, MA was ultimately appealed by the developer, the role of the HAC in the final settlement was arguably more concise and involved. In the case of 751-761 Boston Post Road, the Weston ZBA approved the comprehensive permit, albeit with a list of conditions (Town of Weston 2022). Shortly thereafter, the developer appealed to the HAC asking the committee to overturn the comprehensive permit decision and reverse any undue conditions. Following initial proceedings, the town and developer began to engage in negotiations. While the two parties were able to resolve several of their disputes, they issued a joint request to the HAC for stipulated settlement nonetheless (Town of Weston 2022). In November of 2021, the HAC reviewed the terms of the stipulated settlement and determined them to be satisfactory. The committee then instructed local planning officials in Weston to formalize the revised comprehensive permit (Housing Appeals Committee 2021). While the agreement brought about several structural and safety changes, the total number of units that were originally proposed was not impacted or reduced by settlement in any way.

Ultimately, because members of the HAC are extremely knowledgeable, this allows them to directly inform the town and developer of their settlement responsibilities. Thus, the HAC may hold more discretion and oversight over affordable housing appeals negotiations than state courts. In turn, this increased power of arbitration may diminish the opportunity a town has to restrict or downsize a

development through the 40B appeals process. However, without a comprehensive set of appeal outcomes in both locations, the validity of these findings remains speculatory compared to the more definitive conclusions about the connection between local resistance, permitting, and moratoria.

Summary of Conclusions for Weston v. Westport Cases

While a more representative dataset is still needed to distinguish the full impact of local resistance on the two laws and their varying production levels, the developments from Westport, CT highlight that the structure of local approvals, the judicial-review process, and the four-year moratoria procedure allow for more opportunities to restrict affordable housing development in Connecticut. At the same time, in looking at the Weston, MA cases, I find that the combination of the comprehensive permit process, the administrative-level review of appeals, and the one-to-two-year moratorium in Massachusetts appear to be somewhat successful at limiting the impact of local resistance and stimulating affordability. Overall, the cases from both towns demonstrate that the stringency of the moratoria procedure and consolidated nature of the comprehensive permit process may be uniquely effective at strengthening Chapter 40B's defense local resistance factors.

Particularly, without a streamlined comprehensive permit process in Connecticut, 8-30g developers must endure a lengthy and sequential approval process. As a result, this provides countless opportunities for opponents of affordable housing like preservationists at 20-26 Morningside in Westport to resist development at every stage. Eventually, this vulnerability may cause developers to simply abandon a project due to the potential for increased costs and delay like in the case of 122 Wilton Road.

In Weston, MA, the permitting process is more consolidated and its interaction with local resistance is drastically different; the town initially approved two out of the four comprehensive permits. Since

streamlining allows the developers to file for all local approvals in a single permit, this may limit the potential set of opportunities that town officials and residents have to restrict development.

Likewise, I find that the expert authority of the HAC may also limit opportunities for restriction. This is primarily exemplified by the percentage of units from an original proposal that moved forward in each setting. What's more, the process for negotiated settlements appears to be less defined state court appeals process. Still, lacking the necessary appeals data, these findings on the impact of the variation of appeals on housing restriction may be less significant.

Finally, I find that the four-year, state-issued 8-30g moratoria procedure may be enabling towns who seek to resist affordable housing an opportunity to do so in Connecticut. Even after the town of Westport had denied all four applications and proved itself to be deeply resistant to affordable housing, the state still certified their calculation of affordable housing points. Along with lenient affordability and planning criteria, these cases show the vulnerability of the 8-30g moratoria to local resistance factors.

Chapter 4: Conclusion

Past research carefully observes how variations in the design of statewide affordable housing appeals legislation may explain disparities in state-level outcomes (Marantz & Dillon 2018; Dillman & Fisher 2009; Marantz & Zheng 2020; Hananel 2014; Reid, Galante, and Weinstein-Carnes 2017). More importantly, some of these scholars note the unique strength of the Massachusetts legislation (Marantz & Zheng 2020; Marantz & Dillon 2018; Reid, Galante, and Weinstein-Carnes 2017). Nonetheless, the advantages of Massachusetts's Chapter 40B relative to the seemingly similar Section 8-30g in Connecticut have not been studied as extensively.

Overall, my findings seem to support previous research which asserts that the Massachusetts system is advantaged compared to other statewide affordable housing appeals systems due to a unique combination of the consolidated local permit process, the consistent and expert administrative review of appeals. and the flexible one-to-two-year moratorium procedure (Marantz & Zheng 2020; Marantz & Dillon 2018; Reid, Galante, and Weinstein-Carnes 2017). Still, because my analysis focused on the strength of the Massachusetts law relative to Connecticut, I was also able to draw conclusions about the relative weakness of the 8-30g system.

Firstly, initial research finds that in states without a process of streamlining, burdensome permit requirements often add to the difficulty and cost of affordable housing development (Reid, Galante, & Weinstein-Carnes 2017). More specifically, scholars contend that additional costs associated with lower income thresholds and more stringent affordability criteria in Section 8-30g may deter development (Carroll 2001; Tondro 2001). In my analysis, I determine that although 8-30g stipulates more stringent affordability requirements than 40B, the streamlined comprehensive permit process in the latter may be more successful at generating local permit approvals, developer interest, and affordable housing development altogether. Additionally, I find that the lack

of this process in Connecticut may lead to more arbitrary local permitting which could inflate costs and force developers to abandon an 8-30g project.

While Section 8-30g provides for judicial review of appeals, Chapter 40B provides for administrative review. Scholars provide initial evidence that administrative review, as distinguished from judicial review, might help to expedite adjudication and increase predictability, especially if the members of the review board in question have substantial subject-matter expertise and lengthy terms of service (Marantz & Zheng; Reid, Galante, & Weinstein-Carnes 2017). Through my analysis of appeals decisions in both states and conversations with experts in the field, I determine that the differing adjudicatory bodies are ruling for affordable housing developers in roughly the same proportion of cases. Nonetheless, the members of the administrative-level committee which hear appeals in Massachusetts do appear to represent a more consolidated body of expertise that is better equipped to arbitrate housing disputes and issue negotiated settlements than state court judges in Connecticut. This credibility of the quasi-judicial administrative body allows more 40B projects to go forward, even if applications are not approved or developments are received unfavorably at the local level.

With regard to moratoria, scholars have remarked that the details of temporary exemptions — such as the qualifying criteria and the duration — differ among states with affordable housing appeals systems (Marantz & Dillon 2018; Marantz & Zheng 2020). I find that while more research is needed to rule out other variables, the shorter length and the stricter criteria of the moratorium process in Chapter 40B may hold municipalities in Massachusetts more accountable to their affordable housing production goals while still allowing for some flexibility concerning planning.

When factoring in the constraint of localism on affordable housing appeals legislation in Weston, MA, and Westport, CT I find that the structure of local approvals, the state-level appeals process, and the local affordable housing moratorium procedure, may be contributing to more opportunities for restricting development in Connecticut. My conclusions suggest the following:

In terms of local permitting, the cases appear to support the conclusion that without a comprehensive permit, the local approvals process for 8-30g applications is more burdensome and unfavorable for developers. This is highlighted by the fact that the lack of streamlining may enhance the impact of local resistance as all four 8-30g developments were initially denied in the Westport, CT cases. As a result of these hurdles, local opposition may force developers to abandon projects more frequently as seen in the case of 122 Wilton Road. Moreover, I find that because 8-30g moratoria are longer and less stringent in terms of their affordability criteria and planning requirements, the procedure can enable towns like Westport who seek to resist affordable housing an opportunity to do so. Even though fewer towns in Connecticut have received a moratoria relative to an HPP certification in Massachusetts, comments from Westport town officials provide evidence that restrictive municipalities may be using the procedure as a justification to create as little affordable housing as the law will allow.

While both administrative review in Massachusetts and judicial review are both producing stipulated settlement in the Weston and Westport cases, I find that the HAC is still a more experienced body of expertise that provides a more thorough, credible, and defined process for negotiated settlement that is largely absent in the Connecticut state courts. Thus, an administrative review process for appeals may be more effective at diminishing the restraint of local resistance on affordable housing production.

Policy Recommendations

Since the comprehensive permit process, the administrative review of appeals, and the one-to-two-year moratorium process appear to be more successful at increasing affordable housing production and limiting the impact of local resistance on outcomes in Massachusetts, reform efforts in Connecticut should look to incorporate these elements of 40B.

1. ***Streamlined Permitting:*** In theory, a more consolidated and streamlined process could alleviate some of the pressure that burdensome local permit requirements have on developers in Connecticut. By removing these barriers through the implementation of a comprehensive permit type system, 8-30g proposals might generate more interest, thus spurring more local approvals and development. Similarly, if burdensome requirements were reduced through a single comprehensive permit, municipalities in Connecticut may be able to diminish the impact of local resistance and its constraint on development.
2. ***Housing Commission:*** Since the enhanced credibility of an administrative-level commission may help to expedite the resolution of affordable appeals and ultimately bolster production, 8-30g may benefit from an adjudicatory system where members are appointed by state-housing agencies. On top of this, an administrative-level committee may limit the influence of local constraints like resistance in Connecticut because the body is more likely to rule out arbitrary concerns which could hinder settlement agreements.
3. ***Shorter and Stricter Moratoria:*** Firstly, in order to hold municipalities more accountable to affordable housing production, the legislature in Connecticut should first move to decrease the length of the 8-30g moratorium by at least two years. Moreover, although the legislature recently mandated that municipalities must prepare or adopt an affordable housing plan every 5 years, this process is still a separate requirement from the moratorium procedure. Therefore, in order to increase the likelihood that municipalities are upholding their affordable housing obligations, state lawmakers might want to consider joining the two processes and implementing something similar to the HPP in Massachusetts. Essentially, this reform would require that municipalities in Connecticut receive a certification of their affordable housing production plan from the commissioner of the Department of Economic and Community Development before an 8-30g moratorium is even considered. Finally, Connecticut should look to overhaul the HUE point system. As it stands, the simplicity of HUE requirements may

be encouraging towns with low levels of affordable housing to pursue a moratorium with the goal of restricting development and sidestepping state mandates. Altogether, the addition of stricter affordability and planning requirements to 8-30g moratoria could increase affordable housing production in the state and decrease the overall constraint of local resistance.

4. ***Better Data Collection:*** Connecticut state housing agencies would significantly benefit from an established process of data collection. In particular, the state needs a more complete and representative set of data on local permitting and appeals outcomes to get a full picture of the 8-30g process from start to finish. This way, lawmakers can determine if the law is working as intended and consider meaningful adjustments.

While Connecticut could benefit from following Massachusetts' examples, it's still important to note that 40B is an imperfect law. The widespread controversy surrounding the law may be contributing to some of the lengthy legal battles and excessive delays can oftentimes lead developers to withdraw a project. Additionally, a combination of controversy and complexity has stalled reform efforts, and the law has yet to be amended in any significant way since its passage. Facing unprecedented growth and a shortage of developable land, the lack of housing altogether remains perhaps the state's most pressing policy issue. Consequently, state lawmakers in Massachusetts should begin to search for affordable housing policy alternatives that are more impactful in terms of overall development. Given the highly privatized and decentralized environment of affordable housing, the most effective state solutions will ultimately feature a creative mix of incentives for developers of market-rate housing that take into account considerations of equity, sustainability, and local autonomy. Perhaps both states should increase their reliance on laws like Chapter 40R in Massachusetts which seeks to substantially increase the supply of housing and decrease its cost by increasing the amount of land zoned for dense housing and requiring the inclusion of affordable units in most private projects. Proponents of "smart-growth" zoning also point to transit-oriented development as a viable solution to the serious and growing problems of climate change and global energy security by creating dense, walkable

communities that greatly reduce the need for driving and energy consumption. In addition, smart-growth zoning targets areas that are already designated for commercial or industrial uses. However, to effectively implement these solutions which provide mutual benefits for the town, developer, and those who need a stable source of housing, further research is needed.

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