



# Chapter 40B Permitting and Litigation

A report by the Housing Affordability Initiative

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The Housing Affordability Initiative represents a long-term commitment of the Center for Real Estate and the Department of Urban Studies and Planning to focus the resources of MIT on housing affordability issues. The initiative examines and addresses issues of housing affordability, recognizing that serious housing affordability problems exist in many metropolitan areas and that research intended to contribute to solutions should consider an entire metropolitan area housing market. The research agenda draws upon the efforts of a variety of MIT disciplines, including economics, planning, finance, architecture, and engineering, to serve the public interest, broadly defined. The Housing Affordability Initiative is committed to providing data-driven tools and analyses for individuals and institutions involved with housing affordability issues.

Henry O. Pollakowski, Director

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## Executive Summary

This is a study of the residential permitting process created by the Massachusetts Comprehensive Permitting Law (hereinafter referred to as Chapter 40B) which was designed to increase the supply and improve the regional distribution of low and moderate income housing in the Commonwealth. Cities and towns often have zoning and other local regulations which inhibit the construction of housing for low and moderate income households. As a result, a very small portion (1%) of land in 144 towns in the Boston metropolitan area is currently zoned for multi-family housing, and the majority of these towns completely lack land zoned for multi-family developments.<sup>1</sup> It is therefore not surprising that most market participants agree that Chapter 40B is the primary manner by which multi-family development is achieved in the Boston metro area. Because Chapter 40B is so important for multi-family housing production, we want to better understand how much time this process takes and what its outcomes are. In fact, it is not well understood if the special “rules of the game” created by this law have desirable consequences. How costly is this process (especially in terms of time)? How litigious is the process? Which projects are built, and which are discouraged or denied comprehensive permits? What influence does the process have on the design and location of the projects that ultimately get built?

In this study we focus on the process or the steps by which developers pursue comprehensive permits under Chapter 40B. The law specifies that developers may apply directly to a town’s Zoning Board of Appeal (ZBA) for a single, comprehensive permit when “proposing to build low or moderate income housing.” Typically, these projects set aside 25% of the project’s housing units for households earning no more than 80% of Area Median Income. While developers are not entitled to unlimited density or discretion in the design of their project, the comprehensive permit must not render the 40B project “uneconomic” through its provisions. In the event of dispute, developers may appeal the ZBA decision on the comprehensive permit application to the Housing Appeals Committee (HAC), the administrative court established by Chapter 40B for this purpose. Once a town establishes (and then maintains) affordable housing within its borders equal to 10% or more of its total housing stock (as measured by the Subsidized

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<sup>1</sup> One hundred and one towns out of 144 investigated have no multifamily zoning according to MassGIS. It should be noted that multi-family housing can sometimes be built under other sorts of zoning, like mixed used zoning.

Housing Inventory of the Department of Housing and Community Development), it is deemed to have met “local needs” for affordable housing and has the right to deny applications by developers to obtain Chapter 40B comprehensive permits.

To characterize the permitting process, we collect data from 144 towns in the Boston, Massachusetts metropolitan area in a major effort over 9 months. This process yields data for 113 towns, 95 of which have at least one 40B application during the period 1999-2005 (for a total of 369 applications). We find that while nearly 90% of the Chapter 40B applications to Zoning Boards of Appeal (ZBAs) in our sample result in a comprehensive permit, only 55% of the projects had obtained building permits by the first quarter of 2007. Overall, developers appeal 26% of all applications to the Housing Appeals Committee (HAC). At least 12% of all applications are involved in litigation elsewhere in the Massachusetts legal system.

On average comprehensive permits are negotiated in a timely manner between developers and towns. The average time until a ZBA decision is 10 months. However, the rate at which building permits have been obtained for these projects is puzzling. Some of these projects are relatively new, having just received ZBA permits in the last 2 years. For others we find evidence of other litigation. Anecdotally, it is suspected that the recent downturn in the housing market may be causing projects to be put on hold as well. In other cases, the permitted land is sold to another developer which may also result in delays. Finally, we should note that rules and procedures governing the oversight of Chapter 40B projects by state agencies may impact the ultimate amount of time in the permitting and development process.

Further research is warranted to explain the rate of construction of 40B projects and the extent of litigation in other courts besides the HAC. The nature of such litigation, including who brings the suits and the impact of these cases on the timing and success of moderate income housing projects, is not well anticipated by the Chapter 40B. In fact, the “game” created by Chapter 40B involves not only towns and developers, but also private individuals who seek to influence the outcome of comprehensive permit applications.

## **I. Introduction**

This is a study of the residential permitting process created by the Massachusetts Comprehensive Permitting Law (hereinafter referred to as Chapter 40B) which was designed to increase the supply and improve the regional distribution of low and moderate income housing in the Commonwealth. It is well known, however, that laws and regulations do not always fulfill their intent in practice, and therefore, we investigate the “life histories” of Chapter 40B comprehensive permit applications made to towns between 1999 and 2005 in the Boston, Massachusetts metropolitan area. We undertake this research as a first step in assessing the extent to which Chapter 40B has facilitated new supply of mixed income housing and the process by which this is happening. The study also documents the litigation that arises through a special appeals process established by Chapter 40B.

Cities and towns often have zoning and other local regulations which inhibit the construction of housing for low and moderate income households. As a result, a very small portion (1%) of land in 144 towns in the Boston metropolitan area is currently zoned for multi-family housing, and the majority of these towns (101) completely lack land zoned for multi-family developments.<sup>2</sup> It is therefore not surprising that most market participants agree that Chapter 40B is the primary manner by which multi-family development is achieved in the Boston metro area. Because Chapter 40B is so important for multi-family housing production, we want to better understand how much time this process takes and what its outcomes are. In fact, it is not well understood if the special “rules of the game” created by this law have desirable consequences. How costly is this process (especially in terms of time)? How litigious is the process? Which projects are built, and which are discouraged or denied comprehensive permits? What influence does the process have on the design and location of the projects that ultimately get built?

In this study we focus on the process or the steps by which developers pursue comprehensive permits under Chapter 40B. The law specifies that developers may apply

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directly to a town's Zoning Board of Appeal (ZBA) for a single, comprehensive permit when "proposing to build low or moderate income housing." Typically, these projects set aside 25% of the project's housing units for household's earning no more than 80% of Area Median Income. While developers are not entitled to unlimited density or discretion in the design of their project, the comprehensive permit must not render the 40B project "uneconomic" through its provisions. In the event of dispute, developers may appeal the ZBA decision on the comprehensive permit application to the Housing Appeals Committee (HAC), the administrative court established by Chapter 40B for this purpose. Once a town establishes (and then maintains) affordable housing within its borders equal to 10% or more of its total housing stock (as measured by the Subsidized Housing Inventory of the Massachusetts Department of Housing and Community Development), then they are deemed to have met "local needs" for affordable housing and have the right to deny any further applications by developers to obtain Chapter 40B comprehensive permits.

The following sections of the study describe the data collection process and then focus on the points of interaction between towns and developers in the permitting process and on litigation at the HAC. We pay special attention to whether or not the projects ultimately obtain a building permit and how long it takes. We also introduce some intriguing preliminary statistics about litigation outside of the HAC and begin to examine where the 40B projects are being proposed and built. We save further analysis of 40B outcomes for future work.

## **II. Data**

Initially, we requested data from 144 cities and towns in the Boston, Massachusetts metropolitan area about Chapter 40B applications made to them between 1999 and 2005. We mailed requests for this information during the fall of 2006 and followed up with a major effort over 9 months to both confirm and collect additional data at town offices and by phone. We primarily sought data about the timing of Chapter 40B comprehensive permit applications, the nature of the projects proposed and granted in comprehensive permits, and whether the projects were appealed to the HAC or involved in other

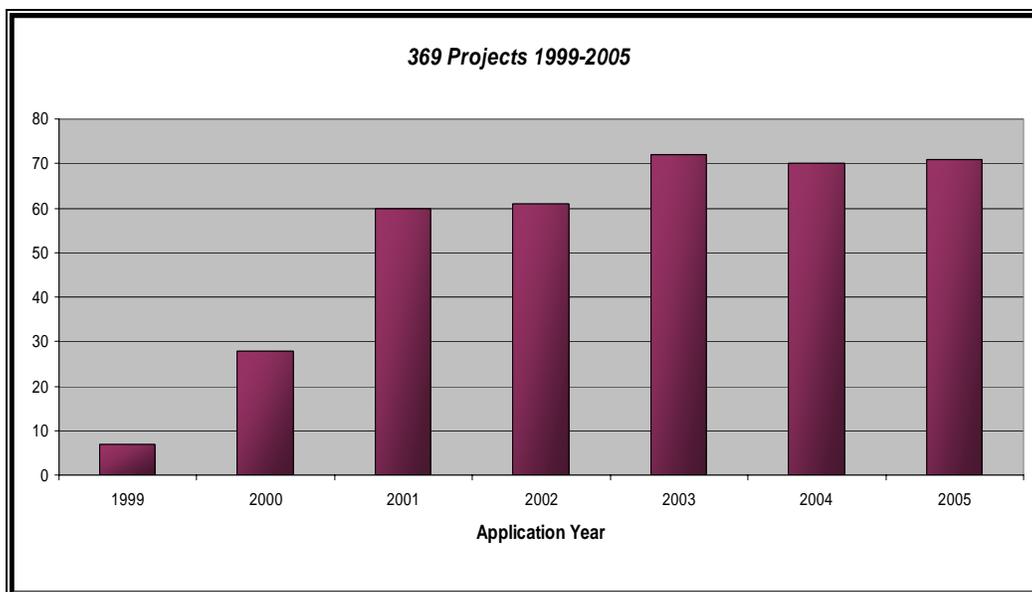
litigation. We expected that town offices were a good place to discover other litigation since they would have to be notified of any litigation affecting a comprehensive permit, and in fact, we were able to identify at least some of these cases. In collecting the data from towns, we carefully stressed our wish to know about all applications, whether or not the application was withdrawn, and whether or not the application was made under the Local Initiative Program (LIP). Finally, additional data was assembled from files at the office of the Housing Appeals Committee in order to characterize the outcomes of appealed cases.

This process yielded data for 113 towns, 95 of which had at least one 40B application during the period 1999-2005 (for a final sample of 369 applications). Our data collection only includes applications submitted before 2005. This decision was made to allow sufficient time to observe associated activity and resolutions through 2006. Data collection on these applications began in the second half of 2006, and we updated information on building permits resulting from these projects as late as the first quarter of 2007.

Map 1 depicts the 113 towns for which data was assembled. Ninety five towns have at least one 40B comprehensive permit application during the study period. Of the remaining 18 towns for which we obtained data and which had zero 40B comprehensive permit applications, 7 appear to exceed the 10% Chapter 40B threshold. For the remaining 31 towns for which we sought but did not obtain data, only one (Lowell) is over the 10% threshold for more than 2 years of the 7 year study period.<sup>3</sup>

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<sup>3</sup> One of the non-respondents crossed the 10% threshold in 2003 and 3 others in 2004.



**Figure 1:** Distribution of 40B Applications by year of submission to a ZBA.

Figure 1 shows the distribution of the 369 study 40B applications by the year in which applications were made to a ZBA.<sup>4,5</sup> For the study period (1999 – 2005), the number of applications in our study towns rose initially and then leveled off at about 70 applications per year. While an apparently high rate of 40B applications overall, when considering our 113 study towns, the average is far below 1 application per town per year.

Most applications are brought by for-profit developers organized as limited dividend companies in order to engage in the 40B process. Of the remainder, 6 applications were submitted by public agencies and 25 by non-profits. Further, applicants can also pursue 40B comprehensive permits through a Local Initiative Program (LIP) sometimes called a “friendly” 40B in which the developer first gains approval of the town’s board of selectmen. There are 50 such LIP projects among the study applications.

A diverse set of projects utilize this permitting process. Proposed projects range in size from one unit up to a maximum 1,750, and can be either owner-occupied or rental. Sites

<sup>4</sup> We should note that there are several observations for which we could not obtain sufficiently complete data, and these observations are not included in the 369 total applications that we refer to the total sample of applications for the 113 towns from which we obtained data.

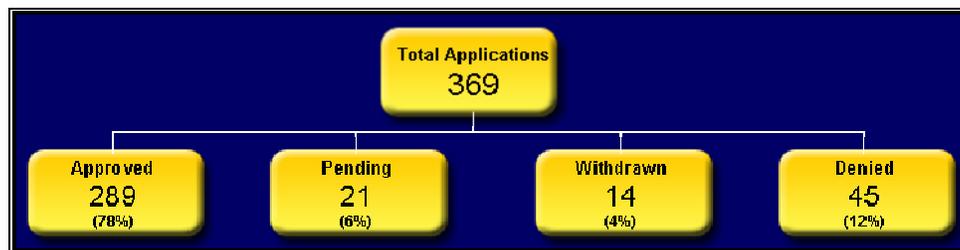
<sup>5</sup> It should be noted that in order to submit a 40B application to the ZBA, a developer must have a site approval or eligibility letter from a state agency such as the Department of Housing and Community Development (DHCD) or MassHousing.

range in size from 1/10<sup>th</sup> of an acre to 240 acres. The average site size is 16 acres (the median is 7.6 acres). In the next section, we delve more deeply into the 40B comprehensive permitting process itself and later return to various project characteristics according to the tenure of the projects and their location.

### III. Life Histories of 40B Applications

This section focuses on several points in the permitting process, beginning with the developer's application to the local ZBA, or in the case of a Local Initiative Program (LIP) application, to the town's board of selectmen. Figure 2 presents the breakdown of ZBA decisions for the 369 study applications. Most (78%) of the applications are approved in some form, and 4% of applications are withdrawn before a ZBA decision.<sup>6</sup> Another 6% of applications were in ZBA hearings or were pending a ZBA decision at the time of data collection.

Approved comprehensive permits may not match certain key aspects of the developer's initial proposal. The number of units, either market rate or affordable, may be changed. Also, permits often come with a list of additional conditions concerning design, materials, etc. to which the applicant must. However, only 12% of all applications are denied in their entirety.<sup>7</sup>



**Figure 2:** Initial outcomes of the 369 study applications.

<sup>6</sup> We do not count applications that are withdrawn, modified and then resubmitted to the ZBA in the count of withdrawn cases. In the overall sample, we only count withdrawn and resubmitted applications one time, that is, as a single application.

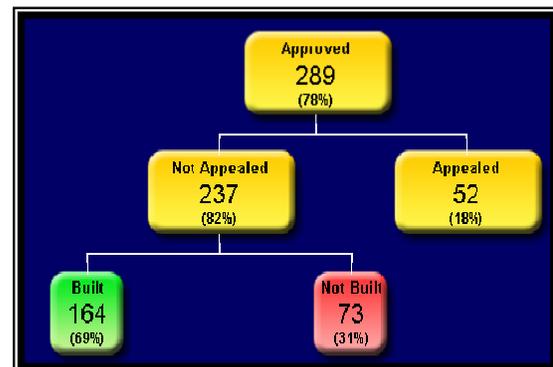
<sup>7</sup> Of course, the decision to approve versus deny will affect which party bears the burden of proof if the decision is appealed to the HAC. Generally speaking, in the case of an approval, the developer must prove why the ZBA's decision renders the project "uneconomic." In the case of a denial, the ZBA must bear the burden of proof as to why a "valid local concern" exists to deny.

The ZBA review process varies widely across projects. For example, the developers associated with our sample applications engaged in anywhere from 1 to 23 public hearings, with an average of 7 public hearings. Likewise, the time from initial application until the ZBA decision ranges from 1 month to almost 6 years, with an average time of 10 months. With respect to litigation, 26% of the 369 study applications are appealed to the HAC. In addition, we make a preliminary estimation that 12% of the projects are involved in litigation outside of the HAC. We view this estimate as a lower bound of the actual rate of “other” litigation in these cases as further data collection may reveal additional cases.

In the next three sections of the report, we describe, separately, the process for projects which are 1) approved by the ZBA and not appealed to the HAC, 2) approved and appealed to the HAC or 3) denied by the ZBA.

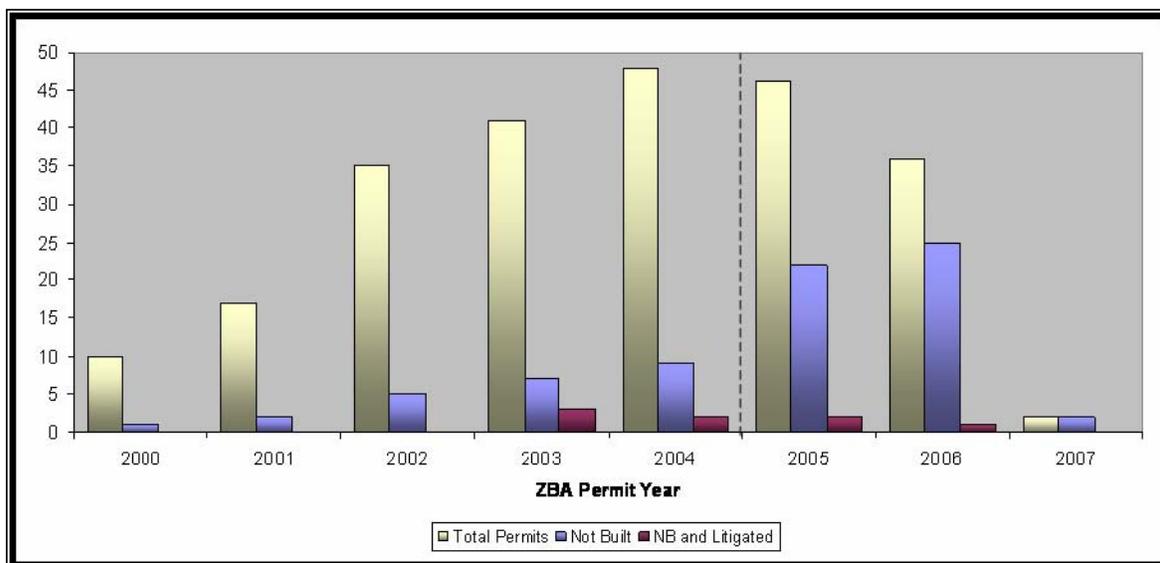
### ZBA Approved Applications, Not Appealed

Most of the 40B comprehensive applications are approved, and Figure 3 shows that 82% (237) of these permitted projects are not appealed to the HAC. Of these study applications that had obtained a comprehensive permit, only 70% of the projects had pulled building permits by the first quarter of 2007. Figure 4 presents the projects (approved and not subsequently appealed) by year of ZBA decision. Notice the non-built applications in the second column corresponding to each year, and observe that many of the non-built projects have quite recently received approvals (since 2005). Of the 153 projects approved by a ZBA before 2005 and not appealed, 24 have not yet received building permits.



**Figure 3:** Final outcomes of the 237 applications which were approved by the ZBA and not appealed to the HAC.

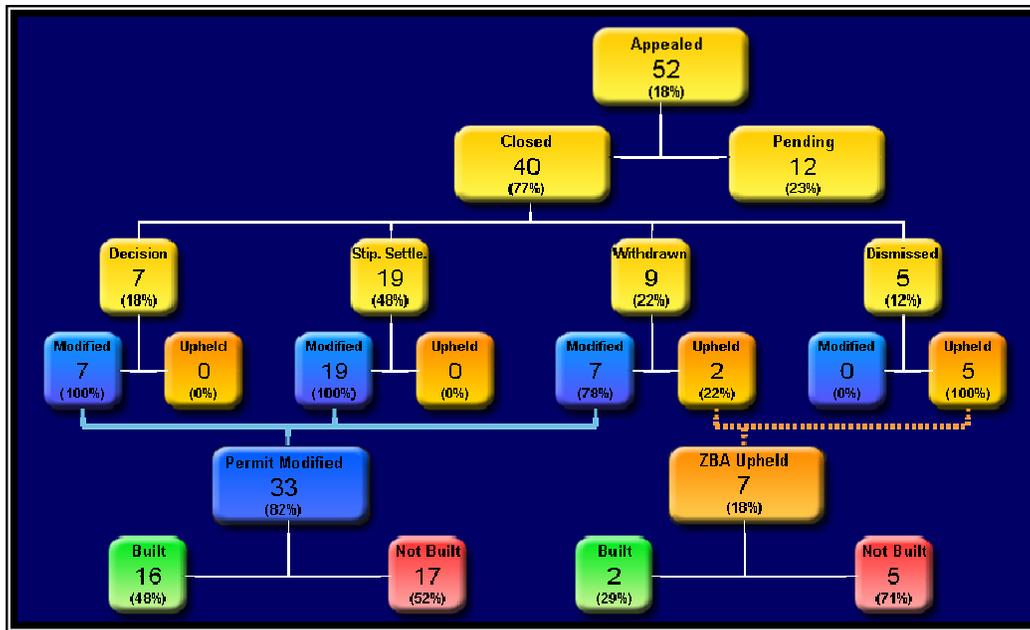
The third column in Figure 4 represents approved 40B applications without building permits which are involved in some other form of litigation other than an HAC appeal. Of the 24 projects permitted before 2005 and not yet built, 5 are (or have been) involved in litigation in other courts. If we set aside these 5 projects for a moment, the overall rate of attrition for unappealed ZBA approved applications is between 10 and 15% for the years 1999 – 2004 during an arguably “hot” housing market. We provide a spatial picture of these projects in Map 2 according to whether or not they have obtained a building permit.



**Figure 4:** Approved and not-appealed permits by year of the ZBA decision. The blue column represents the number of permitted projects which are not yet built. The purple column shows the number of un-built projects which have been in other litigation (not at HAC).

### **ZBA Approved Applications, Appealed to HAC**

Returning to Figure 3, 18% of the ZBA-approved study applications are appealed by developers to the HAC. Because an approval was issued by the ZBA, the burden of proof is on the developer to show why the conditions imposed by the ZBA decision render the project “uneconomic”. In other words, the developer must show that the project does not create sufficient profit once the affordable units are created and other conditions of the permit are met. Figure 5 presents the outcomes for these 52 appealed projects.



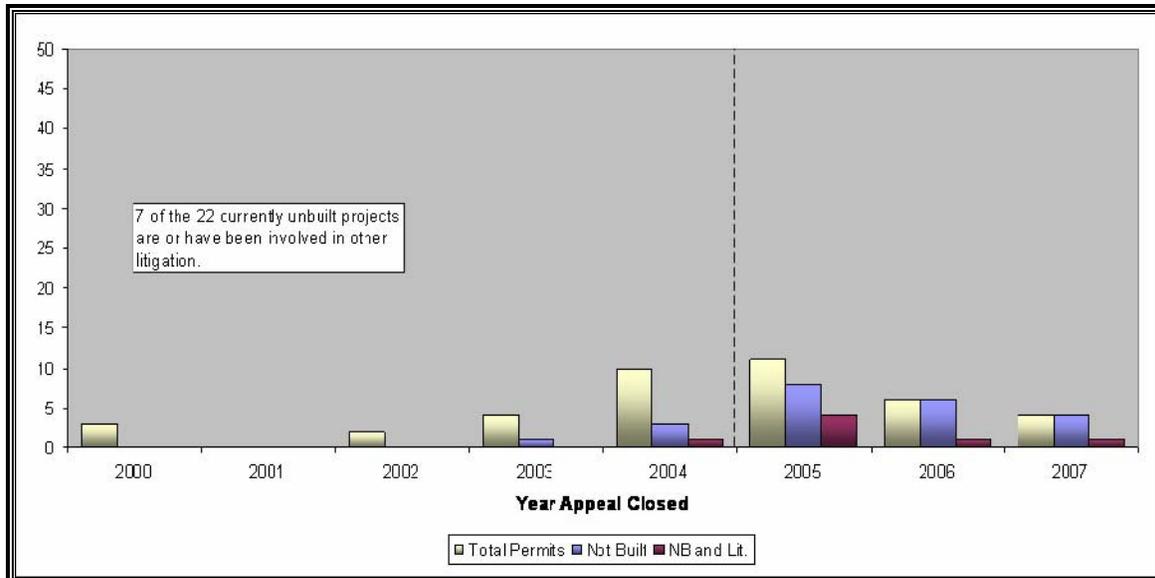
**Figure 5:** Approved cases which developers appealed to the HAC.

Most strikingly, only 18% of these appealed, ZBA-approved applications result in a decision by the HAC. This finding is consistent, however, with outcomes in other courts in which most cases are settled prior to a verdict. For the cases that are decided by the HAC, each decision results in some modification of the original ZBA decision. Also, 5 developer appeals (12% of the approved and appealed cases) are dismissed before the HAC renders a decision.<sup>8</sup> None of the 5 dismissed projects have yet been built, but all were resolved at the HAC in 2005 or 2006 and may thus still be pending.

If appealed cases are not dismissed or decided by the HAC, then they are either settled between the ZBA and the developer or withdrawn by the developer with no apparent settlement with the ZBA (Figure 5). Cases are deemed to be settled between a ZBA and a developer prior to a HAC decision in two ways. First, the parties may come to an agreement and ask for the HAC's approval, known as a decision on stipulation. Second, the parties may reach a private agreement that leads the developer to withdraw the appeal (without explicitly presenting the settlement to the committee). We examine each HAC

<sup>8</sup> In these cases, the developer can appeal the HAC outcome to Superior Court, proceed with the permit in hand, or abandon the project in this form. Only one of these projects was involved in other litigation, and that case was apparently brought by abutters in Superior Court, not by the developers.

case in order to make this determination and identify 26 settlements among the approved and appealed projects. In 2 additional cases where the appeal is withdrawn by the developer, we find no evidence of a settlement that differs from the original permit.<sup>9</sup>



**Figure 6:** Approved and appealed cases by year the appeal was closed. Projects not built following the appeal are shown in blue and the subset of those involved in other litigation (not at HAC) appears in purple.

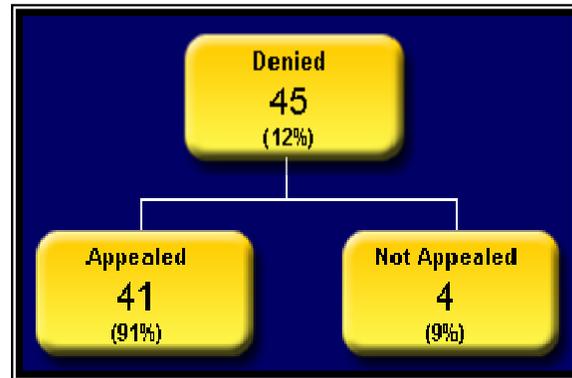
Overall, 82% of the projects which are approved by the ZBA and appealed by the developer result in some modification of the original comprehensive permit. Of these modified comprehensive permits, only 48% of the projects have yet to pull building permits. Of the comprehensive permits upheld in the HAC process, only 2 have resulted in building permits, although all of these cases were recently (since 2005) resolved.<sup>10</sup>

Figure 6 shows the total number of approved and appealed projects by the year in which the appeal is closed (notice that the timing differs from our previous figure in which the year on the horizontal axis was the year of the ZBA decision). As before, we also report projects that are permitted and not yet built, and those not built and involved in other litigation. Only one of the projects for which the HAC appeal closed prior to 2005 was involved in other litigation; however, nearly one-third the unbuilt projects have been

<sup>9</sup> These 2 projects were subsequently built.

<sup>10</sup> All of the upheld comprehensive permits were associated with owner-occupied projects.

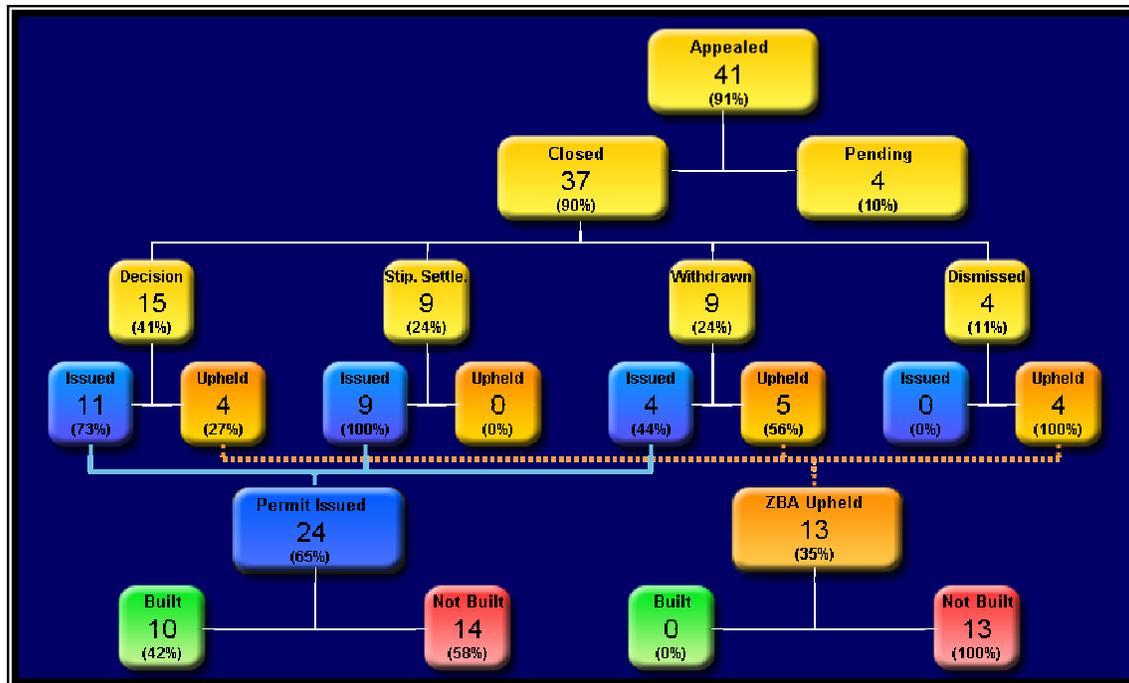
involved in other litigation in addition to their HAC appeal. Map 3 provides further information about the location of these approved and appealed applications.



**Figure 7:** ZBA denied study applications.

### **ZBA Denied Applications**

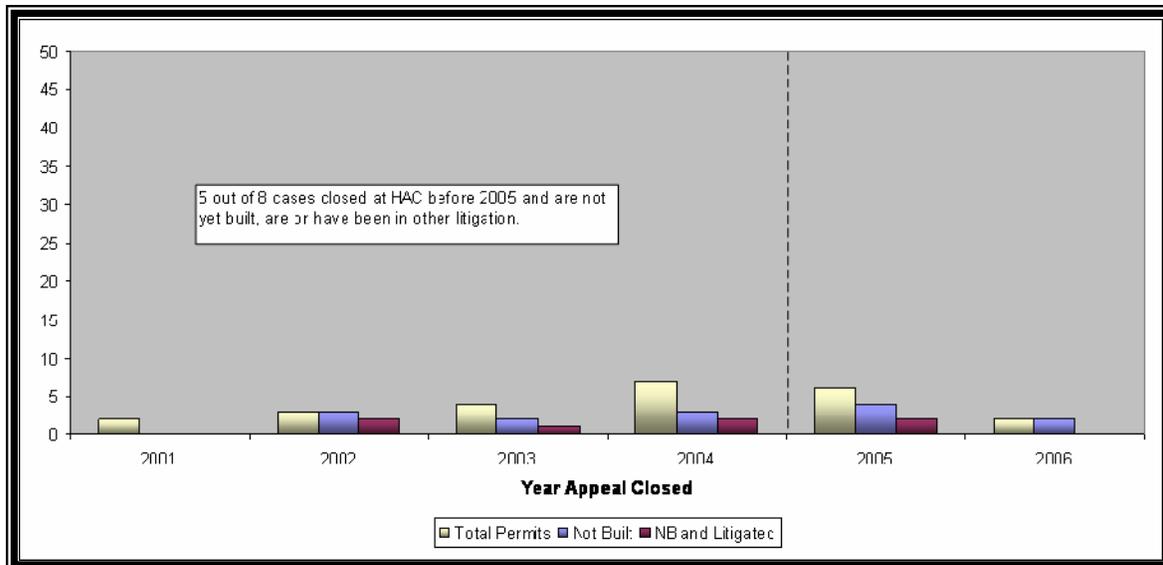
Ninety percent of denied study applications are appealed (Figure 7). Compared to the approved and appealed study applications, the denied applications are more likely to proceed through the hearing process (the “trial”) and reach an HAC decision (Figure 8). In fact, 41% of the denied and appealed cases that are not still pending receive a decision. Other cases are settled, either by agreement between the ZBA and developer with the court’s approval or by private agreement followed by a developer withdrawal of the appeal. We observe 13 such settlements.



**Figure 8:** Denied study applications appealed to HAC by developers.

Some projects are withdrawn by developers with no apparent change in the ZBA decision to deny a comprehensive permit (5). Finally, when we compare the set of approved and appealed study applications to the denied applications which are appealed, the likelihood that the HAC will dismiss the developer appeal appears nearly the same.

Overall, denials of comprehensive permits by ZBAs are overturned by the HAC nearly two-thirds of the time. Of the permits that were issued following a ZBA denial and appeal, less than one-half of the projects had received a building permit by the first quarter of 2007. Figure 9 depicts the 24 denied, appealed, and subsequently permitted projects by the year in which the HAC appeal is closed. As before, we also show the number of projects that are not built and of the unbuilt projects, those which are involved in other litigation. Five of the 8 projects which received permits as a result of an HAC appeal prior to 2005, but which have not yet been built, have been involved in other litigation. Map 4 depicts the denied but eventually permitted projects.



**Figure 9:** ZBA denied applications which were appealed and resulted in a comprehensive permit by the appeal's year of closing. Projects not built are shown in blue and the unbuilt project in other litigation (not at HAC) appears in purple.

## Summary

Overall, an average of 10 months was required for applications to receive a ZBA decision. For the projects ultimately receiving building permits, the average time from 40B application submission to receipt of building permit was nearly 2 years. Perhaps surprisingly, only 55% of the study applications obtained building permits by the first quarter of 2007. We include the entire picture of the “life histories” of these projects in the Appendix as Figure 10 and a map of all of the projects receiving comprehensive permits in Map 5.

We find evidence of other forms of litigation in about 12% of the applications. Breaking this number down, evidence of other litigation is found in about 7% of the applications that are not appealed to the HAC, while appealed projects are involved in other litigation nearly 30% of the time. These statistics should be treated as minimums, since information on litigation was only reported if a town answered our request for data or if our researchers were able to locate related documents in town files. While it is quite difficult to identify all 40B litigation in a variety of court systems, we view this topic as ripe for future research.

#### **IV. Rental versus Owner Occupied Projects**

It is apparent from talking with towns and developers and from the data itself that owner-occupied and rental projects are quite different. In this section, we briefly examine differences by tenure in terms of the projects themselves and their “life histories”. Seventy-one percent of the 369 40B applications in this study were proposed as owner-occupied projects.<sup>11</sup> However, the nearly 31,000 proposed units in our sample are split almost equally between owner-occupied and rental tenures.

Table 3 presents averages of project size and permitting experience for rental and owner-occupied projects in our sample. Notice that the sample number of projects included in this table omits those projects pending before the ZBA at the time of our data collection (21 projects). The first striking difference between owner and rental projects is size. Rental projects (as finally permitted) are 2.5 times the size of owner-occupied projects on average and twice as dense.<sup>12</sup> The permitting experience also differs by tenure. The average time between application and ZBA decision is similar for rental and owner-occupied projects, however, rental projects are denied by ZBAs at nearly twice the rate of owner-occupied projects. And while the rate of developer appeal to the HAC is about equal for the two types of projects, rental projects are almost twice as likely as owner occupied projects to be involved in *other* litigation.

#### **V. Location of 40B Projects**

While the current research is largely focused on the 40B permitting process, we also collected data on *the location of* 40B permitting activity. In this section, we briefly describe the proximity of proposed projects to highways, town lines and transit stops, and describe the land use zoning of the 40B project sites.

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<sup>11</sup> Ten projects were proposed with both rental and owner occupied units. Since these projects tended to be of a scale similar to other all-rental projects, we classified these projects as rental projects. However, when counting owner-occupied and rental units, we split up and allocate the units according to tenure. There are also a handful of projects for which the tenure of the project changes between the developer’s application and the ZBA permit, and those projects are classified as they are initially proposed, although the final permitted units are counted by the tenure in which they are permitted.

<sup>12</sup> Density is calculated here as the number of units permitted divided by the total acreage of the project (unadjusted for water or other features).

As seen in Map 5, 12% of the approved study applications are located within one-half mile of an MBTA train stop (either the “T” (subway) or the commuter rail), and 9% of the project sites are within a half mile of a highway exit.<sup>13</sup> The study projects proximate to transit or highways are more likely to be rental projects than owner-occupied projects.

Map 6 and Map 7 depict the location and size (in units) of proposed owner-occupied and rental projects, respectively. We also find that 25% of the application sites are within 1,500 feet of a town line (Map 8).

Finally, we investigate the land use zoning of the proposed 40B sites. We gathered data from towns as well as from MassGIS, the Commonwealth’s department responsible for the collection, assembly and dissemination of spatial data, in order to classify the zoning of each site at the time of the 40B application. As mentioned in the introduction, one striking feature of the Boston metropolitan area is the lack of zoning for multi-family, as opposed to single-family, housing development. Map 9 depicts the sites that MassGIS currently identifies as zoned for multifamily housing in the 144 towns that we investigate near the city of Boston, representing less than 1% of the total land area in these towns.

Table 1 describes the existing zoning for our study 40B sites. Overall, 72% of the proposed projects are on sites zoned for residential (single-family and multi-family) or mixed residential and agricultural use. Of these residentially zoned sites, only 11 (4%) are zoned for multifamily residential development. 120 of these 266 residential sites (45%) are zoned for lot sizes of greater than 40,000 square feet or for mixed residential/agricultural uses. In other words, just over 30% of all sites on which 40B projects are proposed formerly required minimum lot sizes of about 1 acre or more. The remaining projects proposed on non-residentially zoned land are split between business/commercial designations (18%) and industrial uses (10%).

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<sup>13</sup> Just 3 sites fall within ½ mile of both an MBTA stop and a highway exit.

**Table 1:** Proposed project site zoning

<b>40B Permit Application Site Zoning</b>	
<b>Zoning</b>	<b>Applications</b>
Residential & Agricultural	266
<i>Large Lot SF Res. &amp; Ag.</i>	120
<i>SF Residential (&lt; 40,000 sf)</i>	135
<i>Multi-family</i>	11
Business/Commercial	66
Industrial	37
<b>Total</b>	<b>369</b>

## **VI. Total and Affordable 40B Units**

In this section, we total the number of housing units resulting from the projects in our sample as well as examine just how many “affordable” units result from comprehensive permit negotiations. Nearly 31,000 units of housing were proposed to be built in the 40B comprehensive permit applications that we studied. To put that number in perspective, the 2000 Census counted nearly 1.36 million housing units in the 144 towns in our study. The number of proposed units (over our 7 year study period) is equivalent to 2.3% of that existing housing stock. The number of units built as a result of 40B applications in our study amounts to just over 1% of this total 2000 stock.

Due in part to the influence of non-profits and public agencies who utilize the 40B comprehensive permit process and may propose projects with 100% affordability, the number of affordable units as a percent of total project units exceeds 30% in all three stages of the permitting process that we track (Table 2). If we eliminate the public and non-profit developers from our accounting (essentially counting units proposed or delivered by developers qualified as limited dividend companies), then the 40B projects deliver just over 25% of the total project as units affordable to moderate income households. While there is an option to deliver 20% of the project units as affordable to households earning 60% of Area Median Income (AMI), only 16 of the proposed projects have affordability percentages near 20% as opposed to 25% or higher.

**Table 2:** Total units distributed by developer type.

<b>Units for 40B Proposed, Permitted and Built Projects (369 Projects in 113 Towns, 1999-2005)</b>									
	<b>Limited Dividend</b>		<b>Public / Non-Profit</b>		<b>All Developers</b>		<b>% Aff.</b>	<b>% Aff.</b>	<b>% Aff.</b>
	<b>Total</b>	<b>Affordable</b>	<b>Total</b>	<b>Affordable</b>	<b>Total</b>	<b>Affordable</b>	<b>(Lmtd Div)</b>	<b>(Pub/NP)</b>	<b>(Total)</b>
<b>Proposed Units</b>	27,926	6,787	2,951	1,579	30,837	8,366 <sup>1</sup>	26%	90%	29%
<b>Owner-Occupied</b>	15,096	3,593	283	256	15,379	3,849	26%	94%	39%
<b>Rental</b>	12,830	3,194	2,668	1,323	15,498	4,517	26%	92%	32%
<b>Comp. P. Units</b>	18,713	4,545	2,911	1,562	21,624	6,107 <sup>2</sup>	27%	90%	31%
<b>Owner-Occupied</b>	9,757	2,525	263	244	10,020	2,769	27%	94%	42%
<b>Rental</b>	8,956	2,306	2,648	1,323	11,604	3,629	27%	92%	34%
<b>Bldg. P. Units</b>	12,211	3,060	2,368	1,097	14,579	4,157 <sup>3</sup>	27%	92%	32%
<b>Owner-Occupied</b>	5,413	1,391	57	51	5,470	1,442	25%	93%	38%
<b>Rental</b>	6,798	1,748	2,311	1,046	9,109	2,794	27%	92%	34%

<sup>1</sup> 10 of 369 projects for which the number of affordable units are not confirmed are not reported.  
<sup>2</sup> 12 of 301 permitted projects for which the number of affordable units are not confirmed are not reported.  
<sup>3</sup> 3 of 192 built projects for which the number of affordable units are not confirmed are not reported.  
<sup>4</sup> For projects with confirmed number of affordable units

## VII. Conclusions

The rules created by Chapter 40B legislation in 1969 established a game that developers and towns, among other actors, increasingly play with sophistication. Several facts about the process stand out. While nearly 90% of the applications to Zoning Boards of Appeal (ZBAs) in our sample result in a comprehensive permit, only 55% of the projects had obtained building permits by the first quarter of 2007. Overall, developers appeal 26% of all applications to the Housing Appeals Committee (HAC), and at least 12% of all applications are involved in litigation elsewhere in the Massachusetts legal system.

On average comprehensive permits are negotiated in a timely manner between developers and towns. The average time until a ZBA decision is 10 months. However, the rate at which building permits have been obtained for these projects is puzzling. Some of these projects are relatively new, having just received ZBA permits in the last 2 years. For others we find evidence of other litigation. Anecdotally, it is suspected that the recent downturn in the housing market may be causing projects to be put on hold as well. In

other cases, the permitted land is sold to another developer which may also result in delays. Finally, we should note that rules and procedures governing the oversight of Chapter 40B projects by state agencies may impact the ultimate amount of time in the permitting and development process.

Further research is warranted to explain the rate of construction of 40B projects and the extent of litigation in other courts besides the HAC. The nature of such litigation, including who brings the suits and the impact of these cases on the timing and success of moderate income housing projects, is not well anticipated by Chapter 40B. In fact, the “game” created by Chapter 40B involves not only towns and developers, but also private individuals who seek to influence the outcome of comprehensive permit applications.

## **Appendix**

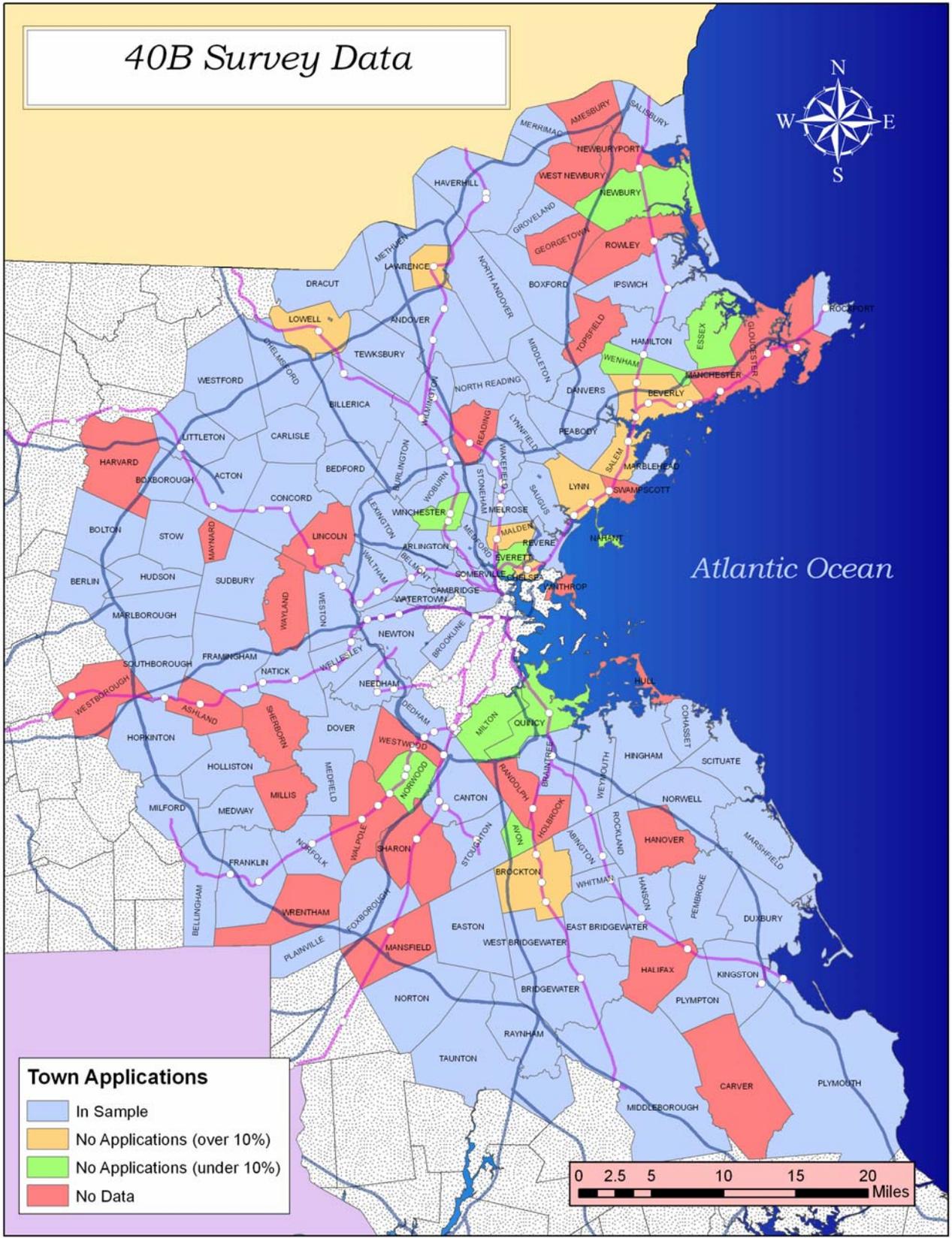
Figure 10. “Life Histories” of Chapter 40B Applications



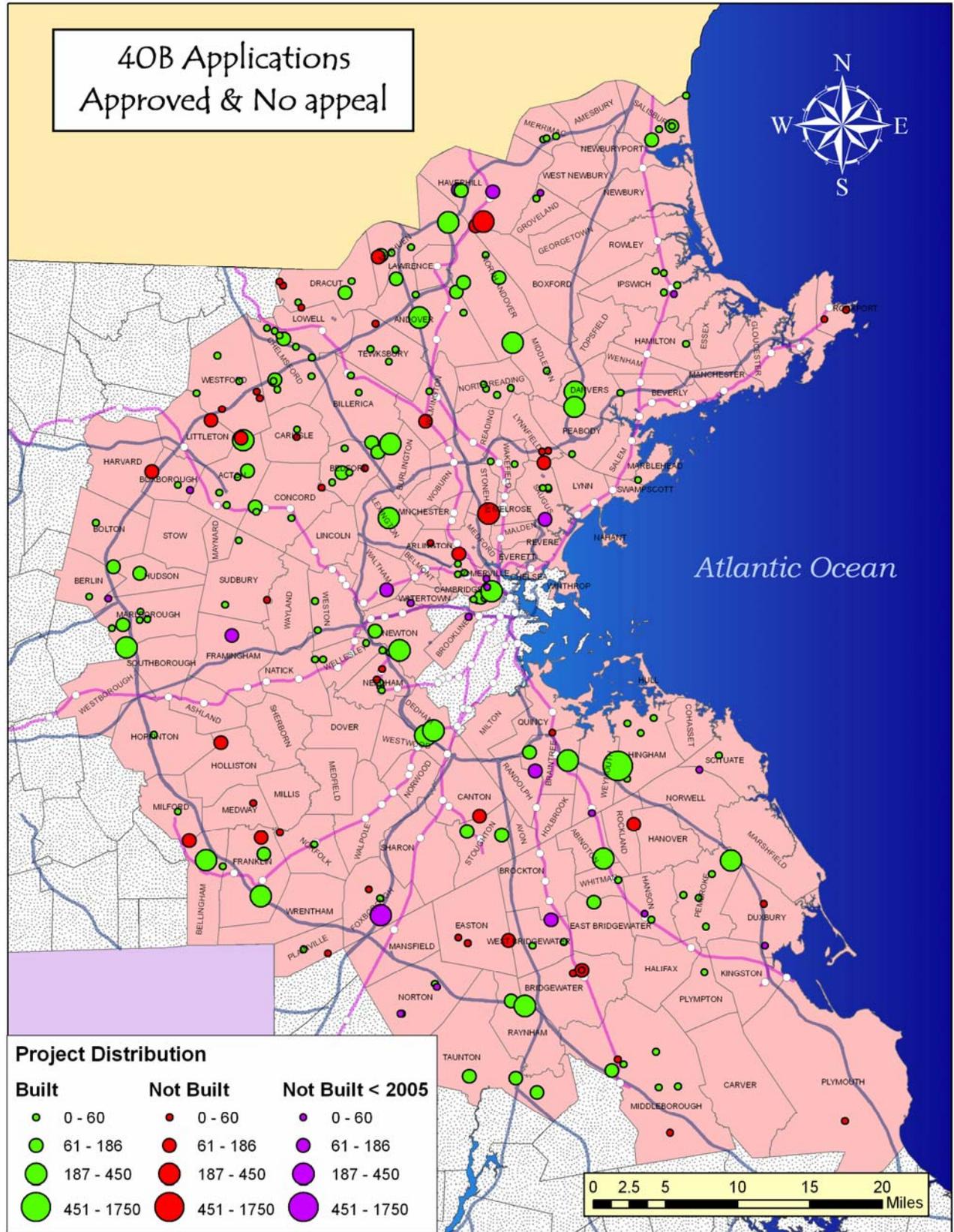
Table 3. Project and Process Characteristics (Averages) by Tenure

			<i>Proposals</i>		<i>ZBA Permits</i>			<i>Following ZBA Permitting</i>					
<i>Decision</i>	<i>Project Tenure</i>	<i>Number Projects</i>	<i>Units in Project</i>	<i>Density (units/acre)</i>	<i>Unit Reduction from Proposed</i>	<i>Reduction (%)</i>	<i>Time to ZBA Decision (Months)</i>	<i>Appealed to HAC? (%)</i>	<i>Other Litigation (%)</i>	<i>Final Units for Permitted Projects</i>	<i>Final Density for Permitted Projects</i>	<i>Building Permit Issued? (%)</i>	<i>Total Time to Building Permit (Months)</i>
<i>Full Sample</i>													
	<i>Owner</i>	243	54	9	9	12%	10	26%	10%	46	8	56%	23
	<i>Rental</i>	105	135	18	13	8%	10	27%	19%	115	19	55%	24
	<i>Total</i>	348 <sup>*</sup>											
<i>By ZBA Decision &amp; HAC Appeal</i>													
<i>Not Appealed</i>	<i>Owner</i>	179	51	8	7	9%	10	0%	7%	45	8	65%	20
	<i>Rental</i>	76	125	21	10	5%	8	0%	7%	114	21	63%	23
	<i>Total</i>	255											
<i>Approved &amp; Appealed</i>	<i>Owner</i>	41	66	13	16	22%	13	100%	24%	48	12	32%	32
	<i>Rental</i>	11	139	10	30	26%	16	100%	55%	113	8	45%	27
	<i>Total</i>	52											
<i>Denied &amp; Appealed</i>	<i>Owner</i>	23	54	11	--	--	9	100%	13%	48	8	30%	48
	<i>Rental</i>	18	178	12	--	--	13	100%	50%	123	12	17%	38
	<i>Total</i>	41											
<sup>*</sup> All applications not currently pending before ZBA.													
Note: One extremely large rental project is omitted from rental unit and density averages, but included in other statistics													

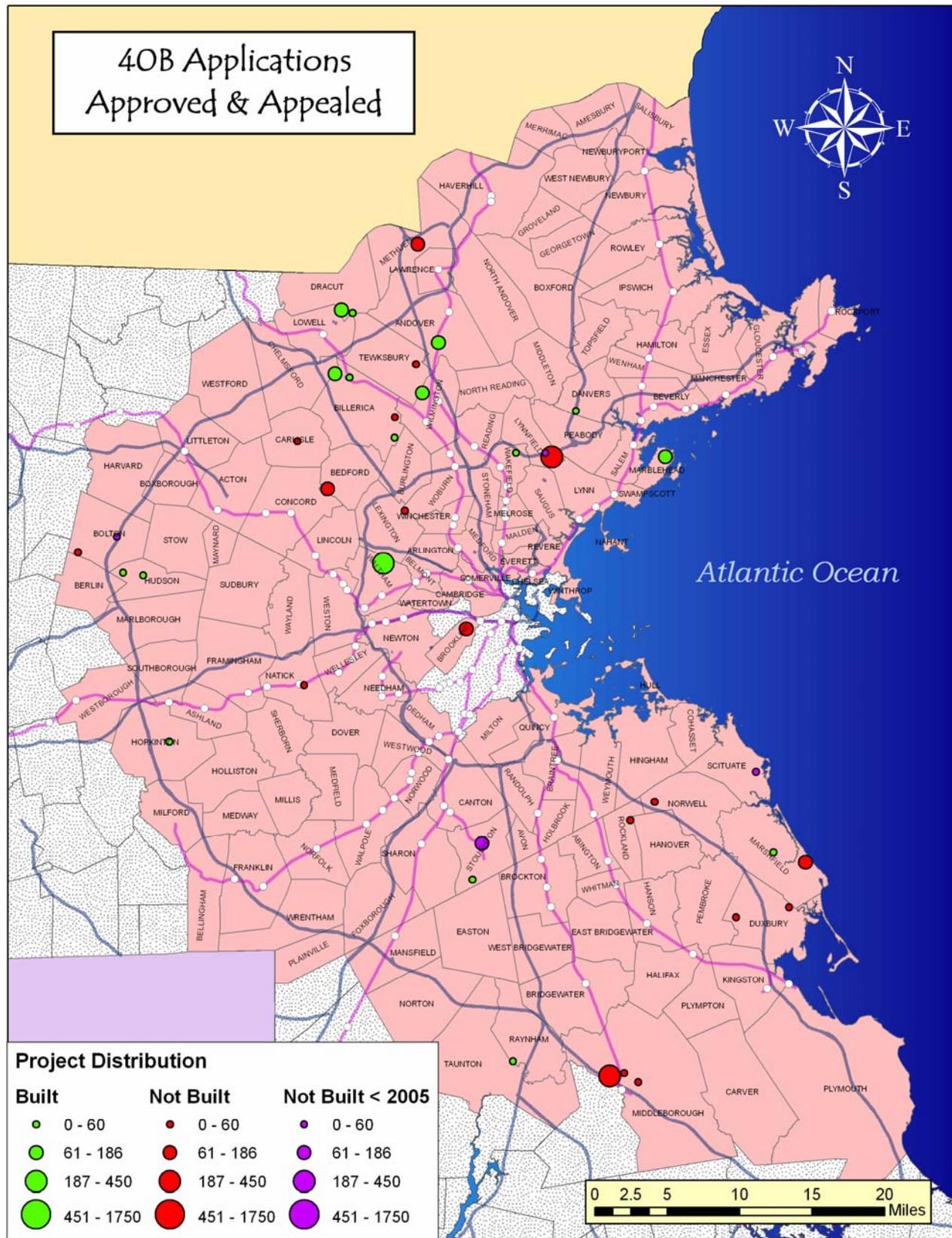
Map 1



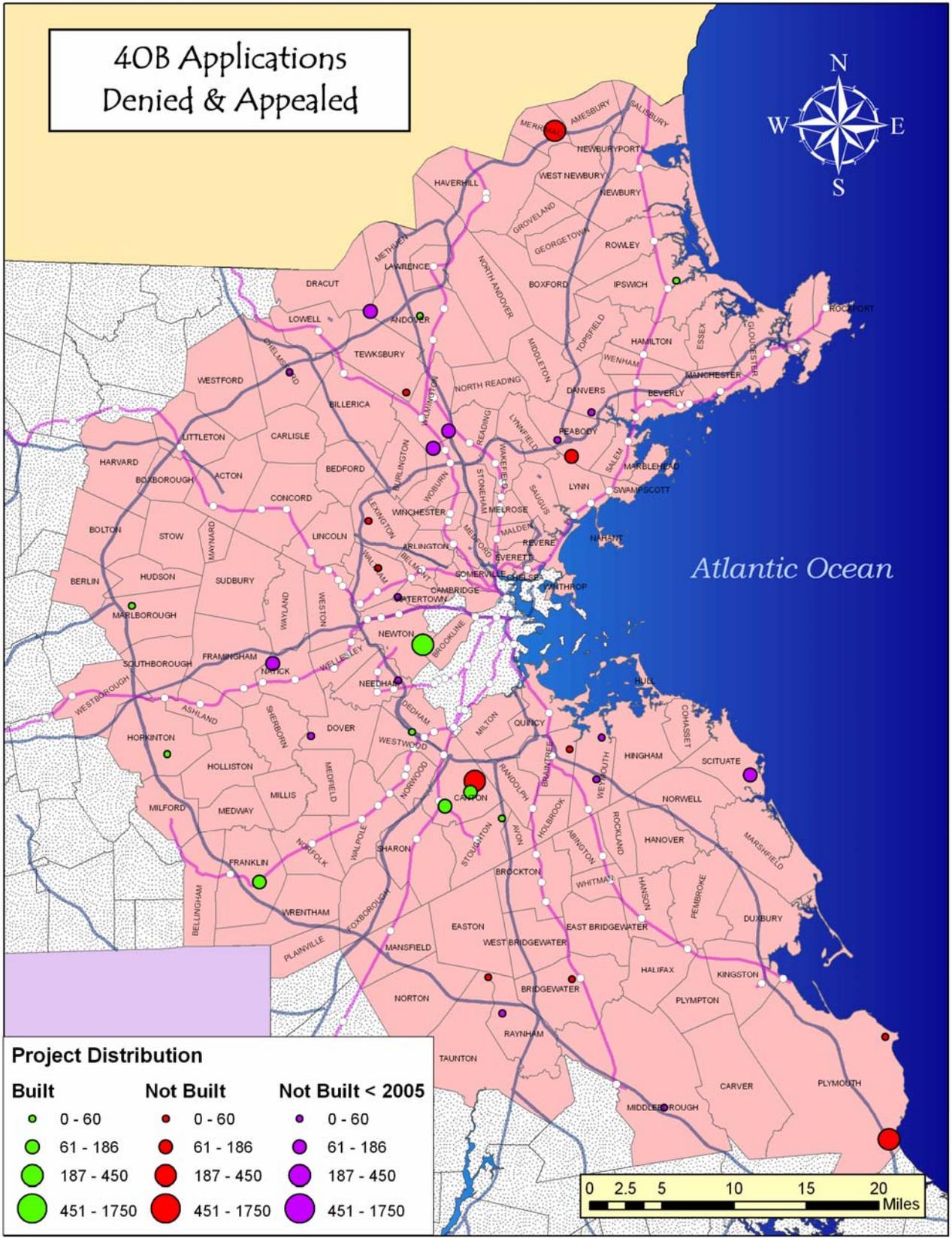
Map 2



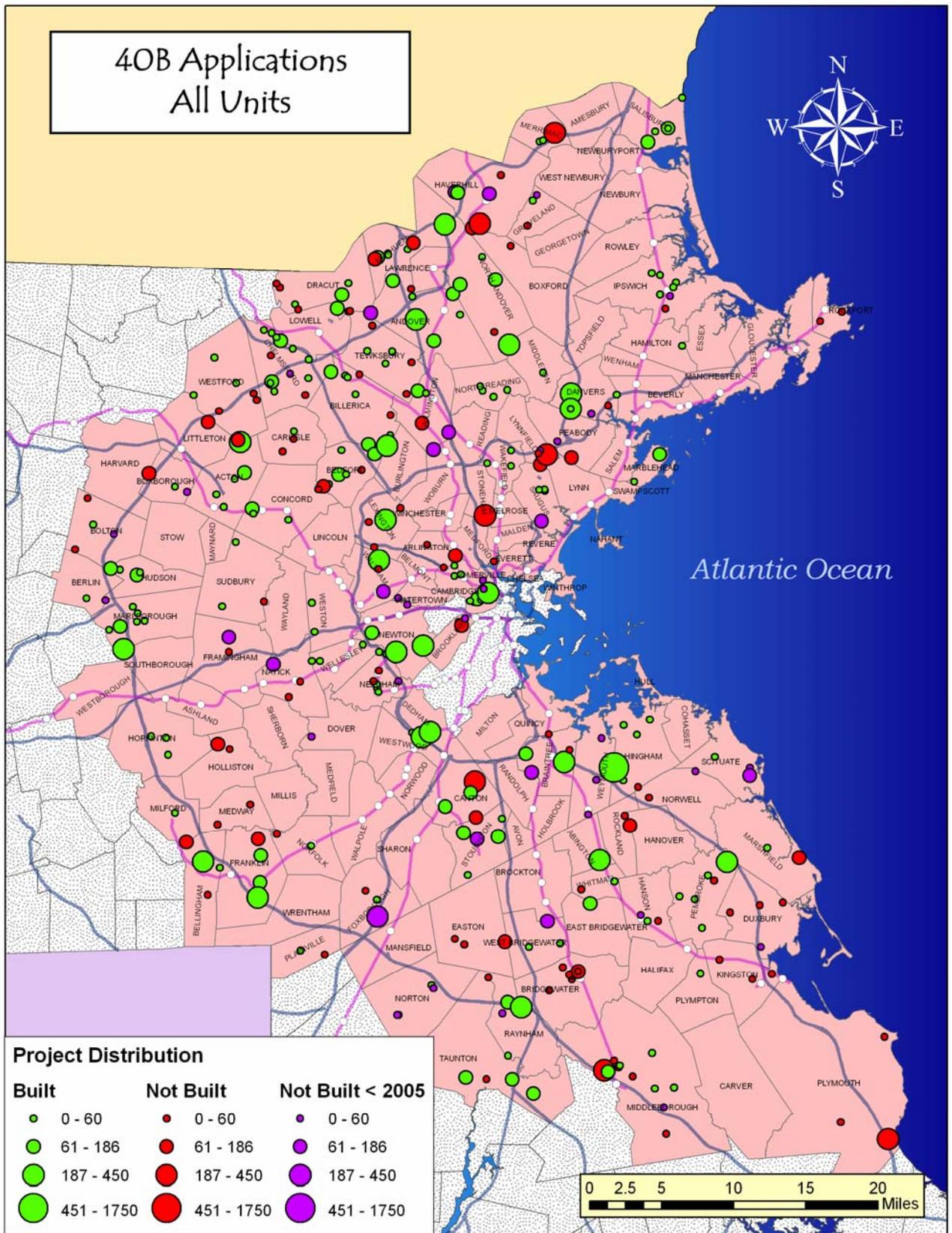
Map 3



Map 4



Map 5

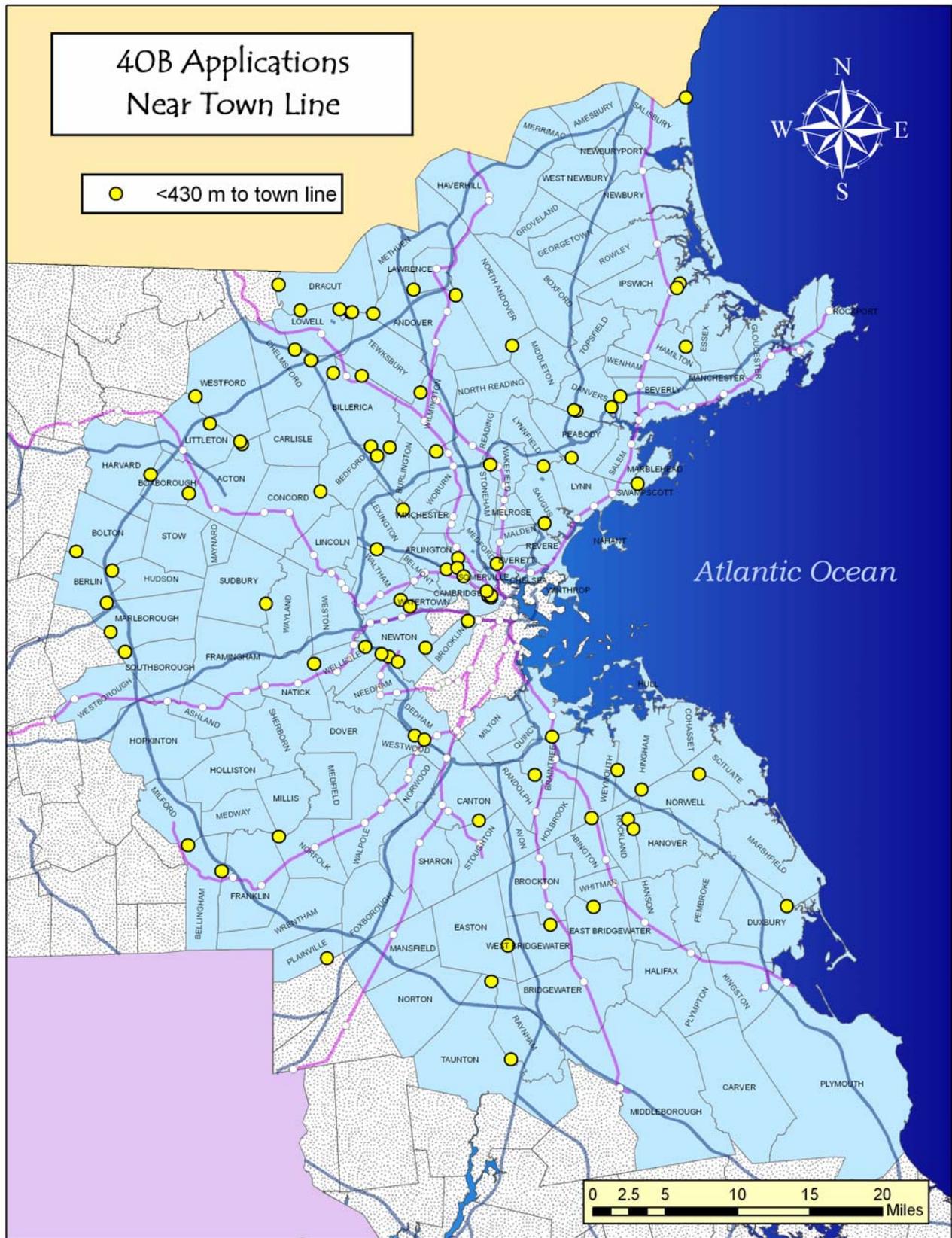




Map 7



Map 8



Map 9

