

The Mount Laurel Doctrine: Where We Are & What Happens Now

CREATING AFFORDABLE HOUSING THROUGH ZONING RELIEF

The Massachusetts 40B Experience



Rutgers Center for Real Estate
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MassHousing



What Is MassHousing?



What is MassHousing?

- State Housing Finance Agency... state's affordable housing bank
- Created by legislative act in 1966
- Independent public authority charged with increasing affordable rental and for-sale housing
- \$20 billion in total lending... currently about \$1 billion/year
- One of every 23 homes in the state financed by MassHousing
- Primary, but not sole, administrator of Chapter 40B



40B FROM 40,000 FEET



What is 40B?

- Referred to as the “Comprehensive Permit Law” or the “Anti-Snob Zoning Act”.
- **Enables local Zoning Boards of Appeal (ZBAs) to approve housing developments under flexible rules** if at least 20-25% of the proposed units have long-term affordability restrictions.
- Encourages a minimum of at least **10%** of a community’s total housing units to be considered affordable.
- Communities that meet this threshold have greater discretion in approving or denying comprehensive permits.
- Allows the override of local zoning for affordable housing when cities/towns are less than 10% affordable.

What is 40B?

- The developer has the right to appeal an adverse local decision to the State **in communities where less than 10% of its housing units are affordable** (or 1.5% of land area)
- Communities that have not yet met one of these thresholds can receive one- or two-year exemptions from State appeals by **adopting a housing production plan** and meeting short-term housing production goals

Accomplishments

- **Produced more affordable housing** than any other land-use approach in the Commonwealth
- Over **60,000** total units and **32,500** affordable units produced in almost **1,200** developments
 - 42,000 rental units (70%)
 - 18,000 ownership units (30%)



A DEEPER DIVE INTO 40B



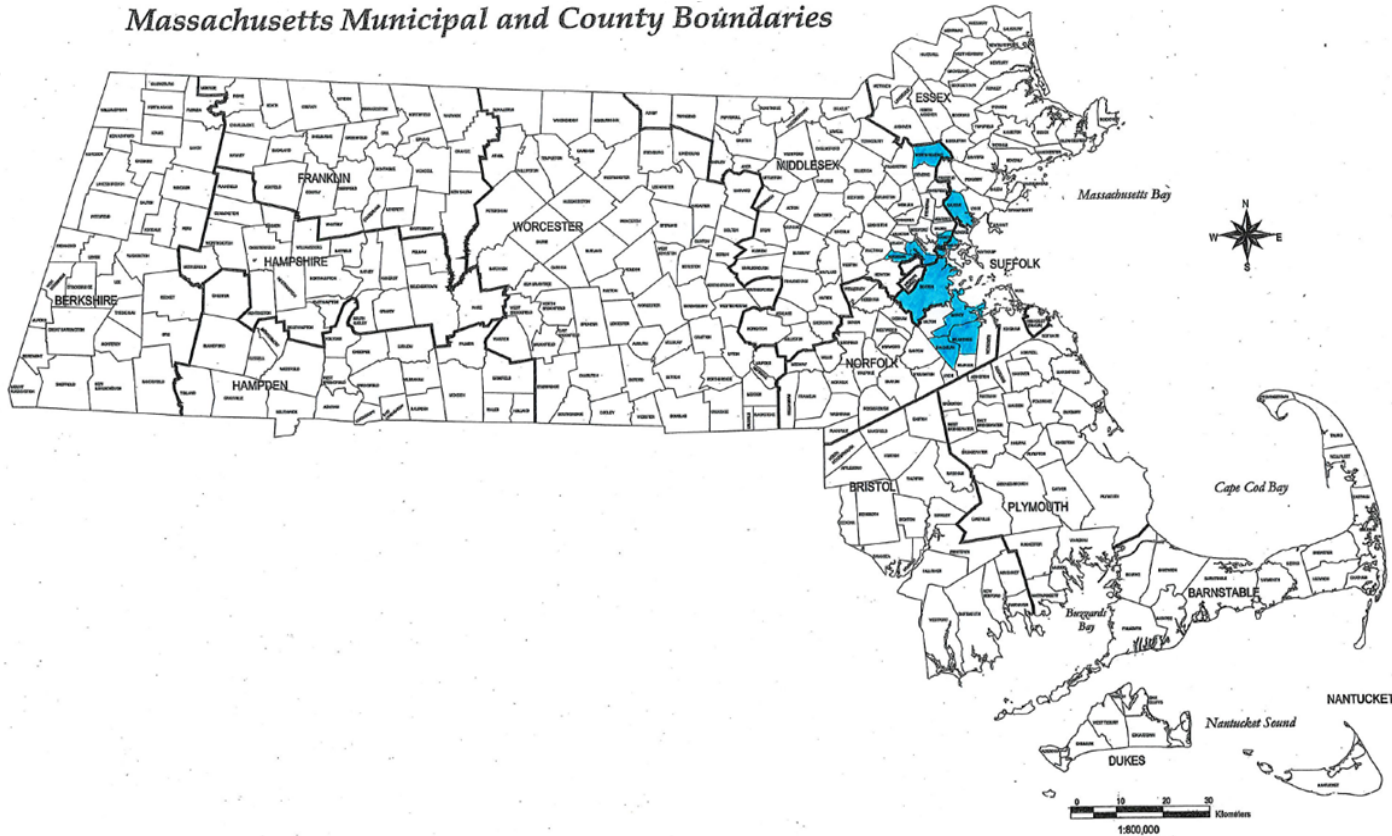
Zoning and Permitting Statutes in Massachusetts

- **G.L. c. 40A** - Enacted in 1975, building off of the 1954 Zoning Enabling Act
 - Designed to promote “home rule,” i.e., municipal self-determination in zoning and permitting matters within a broad, statutory framework.
- **G.L. c. 40B** – The “Anti-Snob Zoning Act” – Enacted in 1969 in response to affordable housing shortage
 - Designed to streamline lengthy & expensive permitting process that can thwart the creation of affordable housing
- **G.L. c. 40R** – The “Smart-Growth District” Act – Enacted in 2004
 - Designed to incentivize proactive municipal zoning that incorporates “smart growth” principles (including affordable housing).

TENSION BETWEEN 40A “HOME RULE” AND 40B STATUTORY MANDATES

Growing Income Disparity

Massachusetts Municipal and County Boundaries



- Half of all MA multifamily (5+ units) housing production in past decade concentrated in 10 cities & towns
- 207 of 351 cities & towns did not permit any multifamily housing in past decade

Battling Lot Size Requirements



Source: MHP presentation titled *Unlocking the Commonwealth*. Given at the Massachusetts Housing Institute, June 2016

How does 40B Work?

- Allows for **single application** to local board of appeals to develop **affordable housing projects**, in lieu of separate applications to various local boards.
 - Other local boards relegated to advisory role
- Board of appeals has **power to issue all necessary permits & approvals**, and the power to attach conditions or requirements for zoning issues.
 - Expedited Permitting: Public hearing within 30 days of receiving application; decision within 40 days of public hearing
 - Expedited Permitting: max 180 days for Board decision; decision within 30 days of hearing
- Right to appeal Board decision if: 1.) denied or 2.) conditions render the proposal uneconomic

When should a board of appeals grant a comprehensive permit without conditions?

1. When the municipality is **below the statutory minima** for affordable housing
 - Less than 10% of total housing is on the Subsidized Housing Inventory (SHI)
OR less than 1.5% of buildable land is occupied by SHI housing
 - Annually, SHI-eligible housing is being built on less than .3% or 10 acres of buildable land

AND

2. The development proposal is **“reasonable”**
 - The proposal meets a regional need for low- and moderate-income housing; protects citizens’ and occupants’ health and safety; the site plan and building design relate to the surroundings, and it adequately preserves open spaces.

If a Board denies the application and the applicant appeals, H.A.C. may order the decision reversed and that the Board issue the necessary permit.

When may a board of appeals impose conditions or requirements on the issuance of a permit?

- If the conditions are “**reasonable**” (relate to public health & safety, as well as site planning issues)

OR

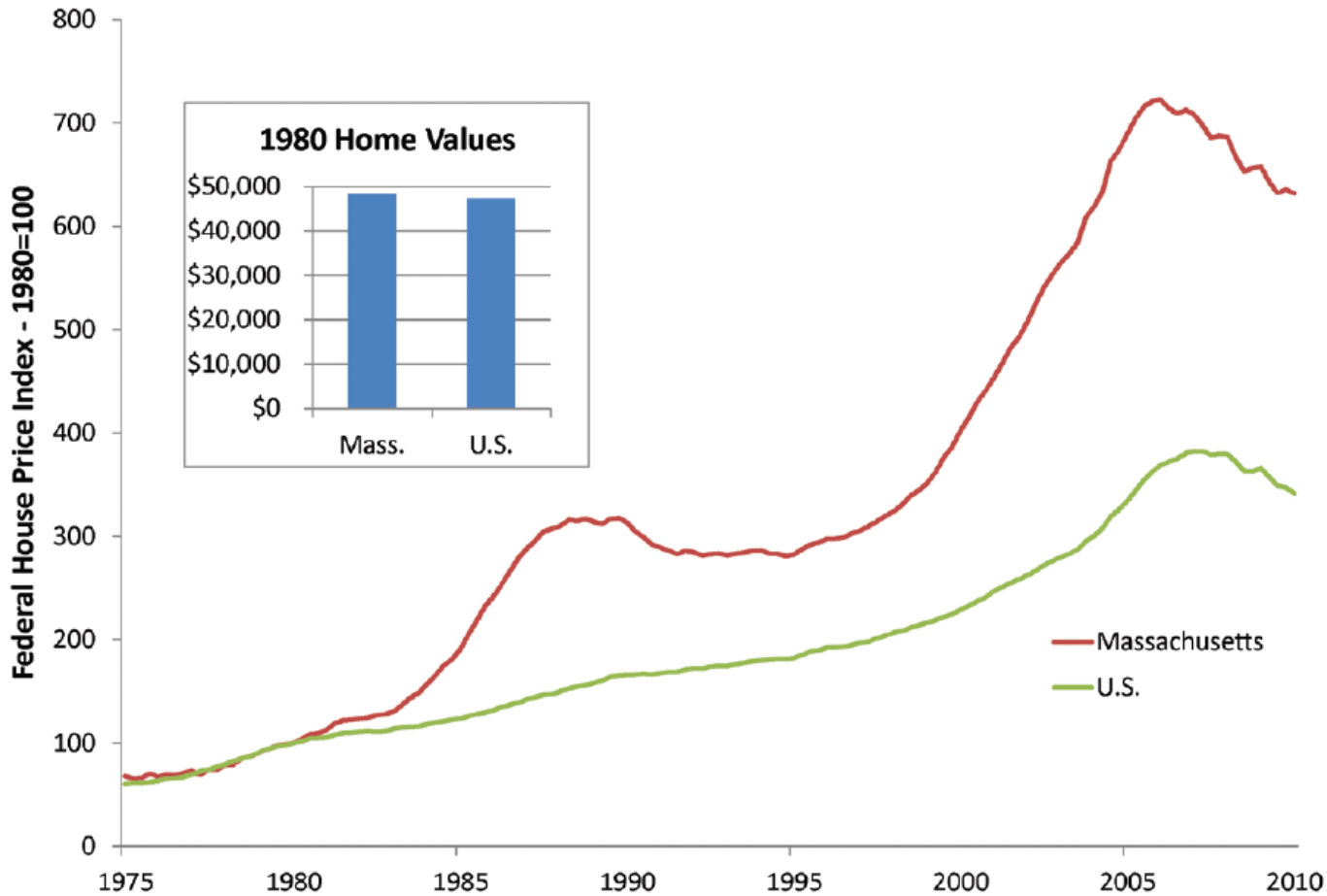
- If the municipality has **met its statutory threshold** of SHI housing

IF the municipality is below the statutory threshold, and the conditions imposed make the project “**uneconomic**” for the developer, H.A.C. may order the **modification or removal of any condition** not required by the overseeing public agency so that the project becomes economical.



KEY FACTS FROM THE MASSACHUSETTS HOUSING MARKET





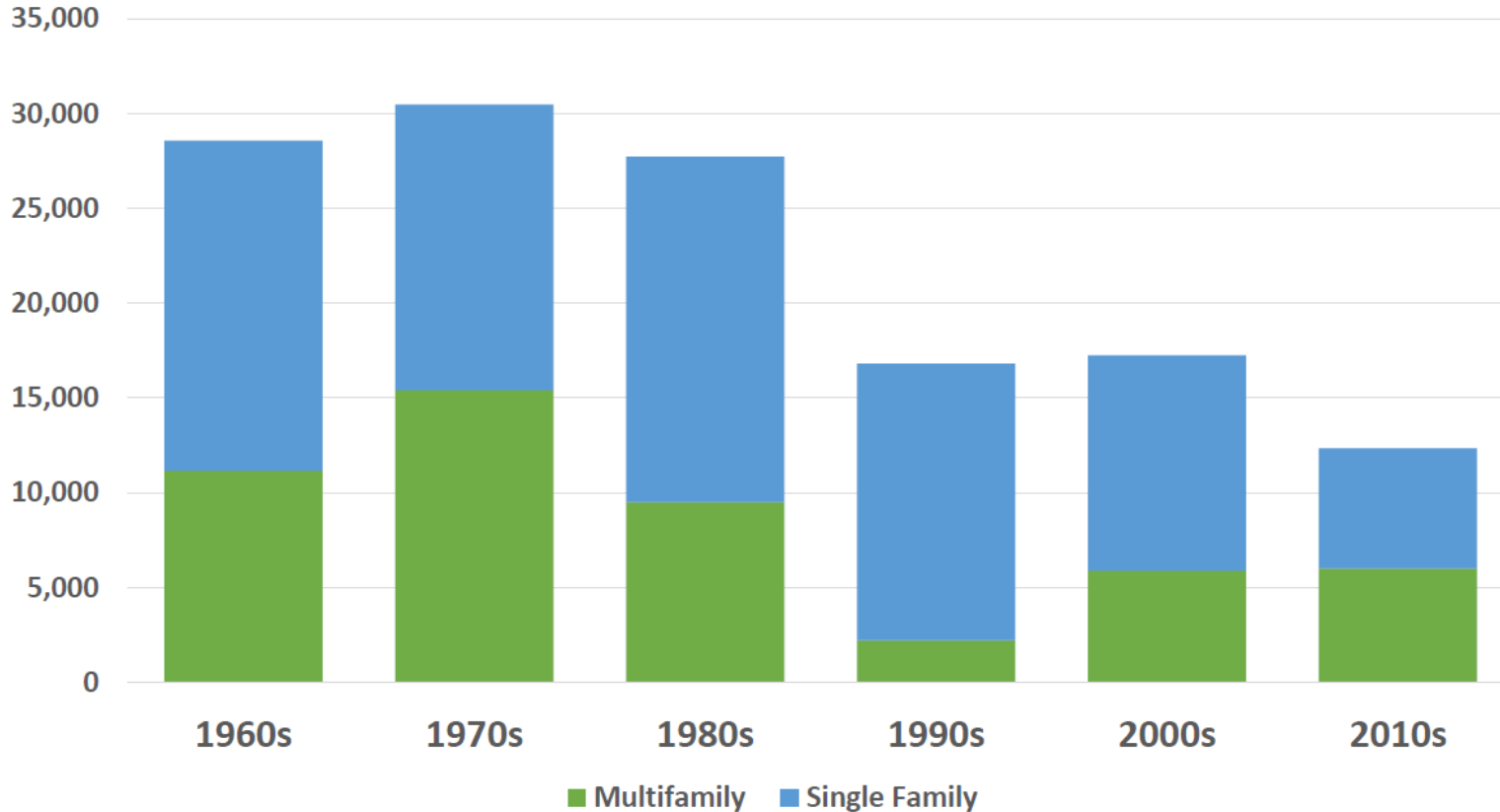
Sources: U.S. Census Bureau and Federal Housing Finance Agency

Source: Figure 1 – Calandra Clark et al. *Unlocking the Commonwealth*.
 Massachusetts Housing Partnership. November 5, 2014.

Home prices in Massachusetts have increased more than six-fold since 1980 and has grown faster than any other state in the U.S.

Declining Production

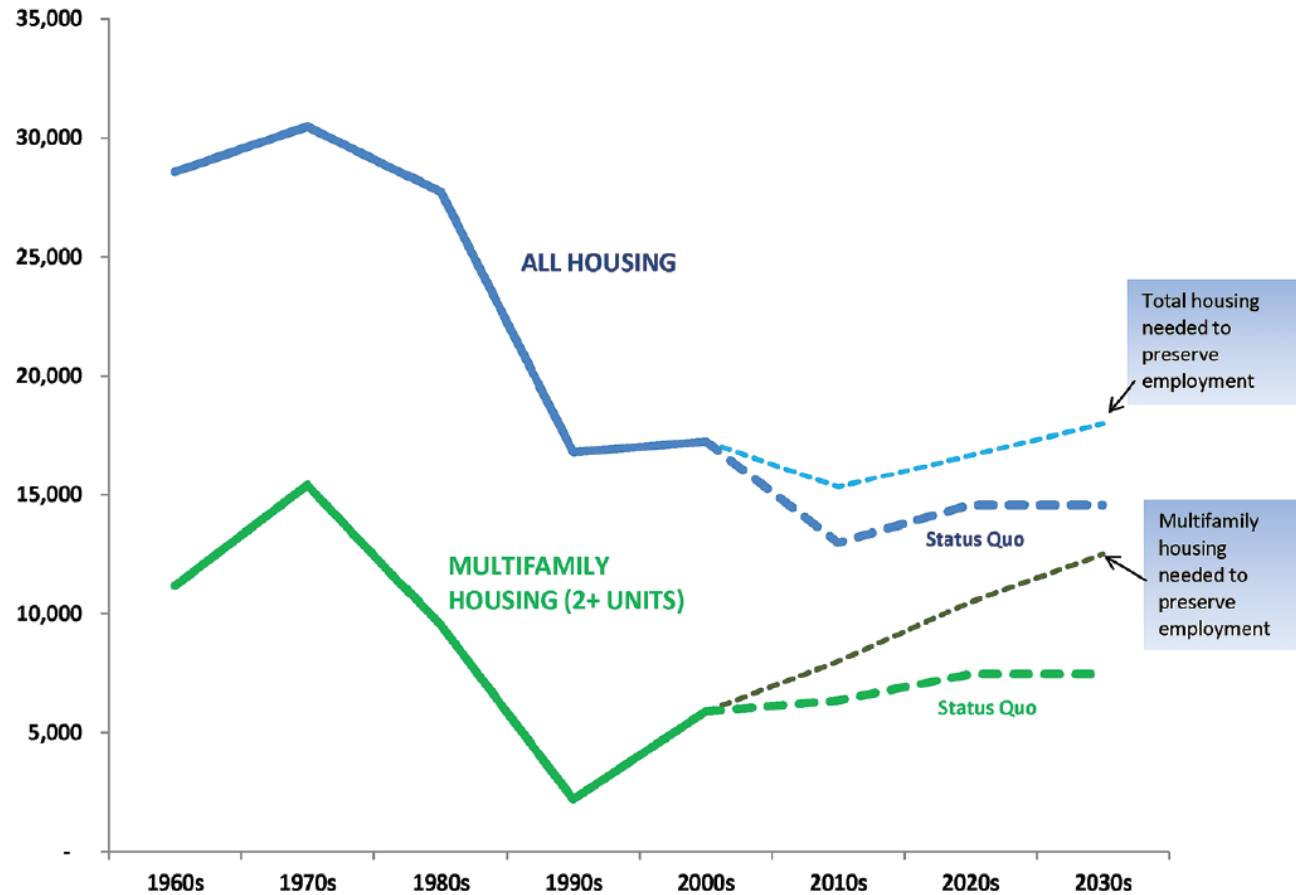
Annual Housing Production in Massachusetts by Decade



Source: MHP presentation titled *Unlocking the Commonwealth*. Given at the Massachusetts Housing Institute, June 2016

Unmet Demand

To maintain the Massachusetts' economy as it is currently, we need to increase total housing construction to 17,000 units per year, still far below production levels in the 1960s



Sources: U.S. Census Bureau; Metropolitan Area Planning Council

Source: Figure 3 – Calandra Clark et al. *Unlocking the Commonwealth*. Massachusetts Housing Partnership. November 5, 2014.

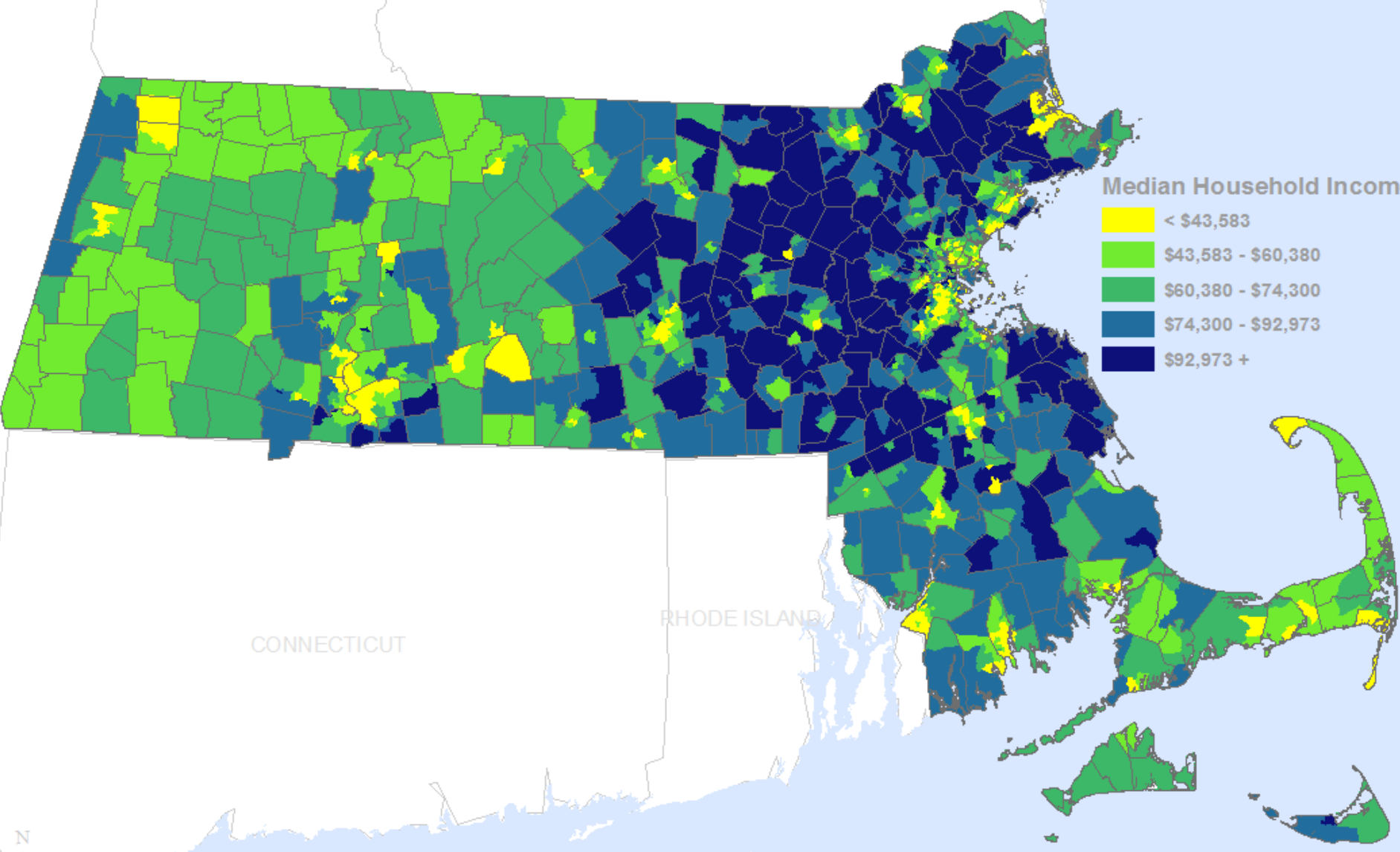


Median Household Income by Town

VERMONT

NEW HAMPSHIRE

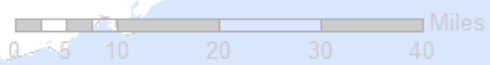
MAINE



CONNECTICUT

RHODE ISLAND

N



Median Home Value by Town

VERMONT

NEW HAMPSHIRE

MAINE

CONNECTICUT

RHODE ISLAND

Median Home Value

- < \$220,700
- \$220,700 - \$283,500
- \$283,500 - \$338,700
- \$338,700 - \$431,600
- \$431,600 +

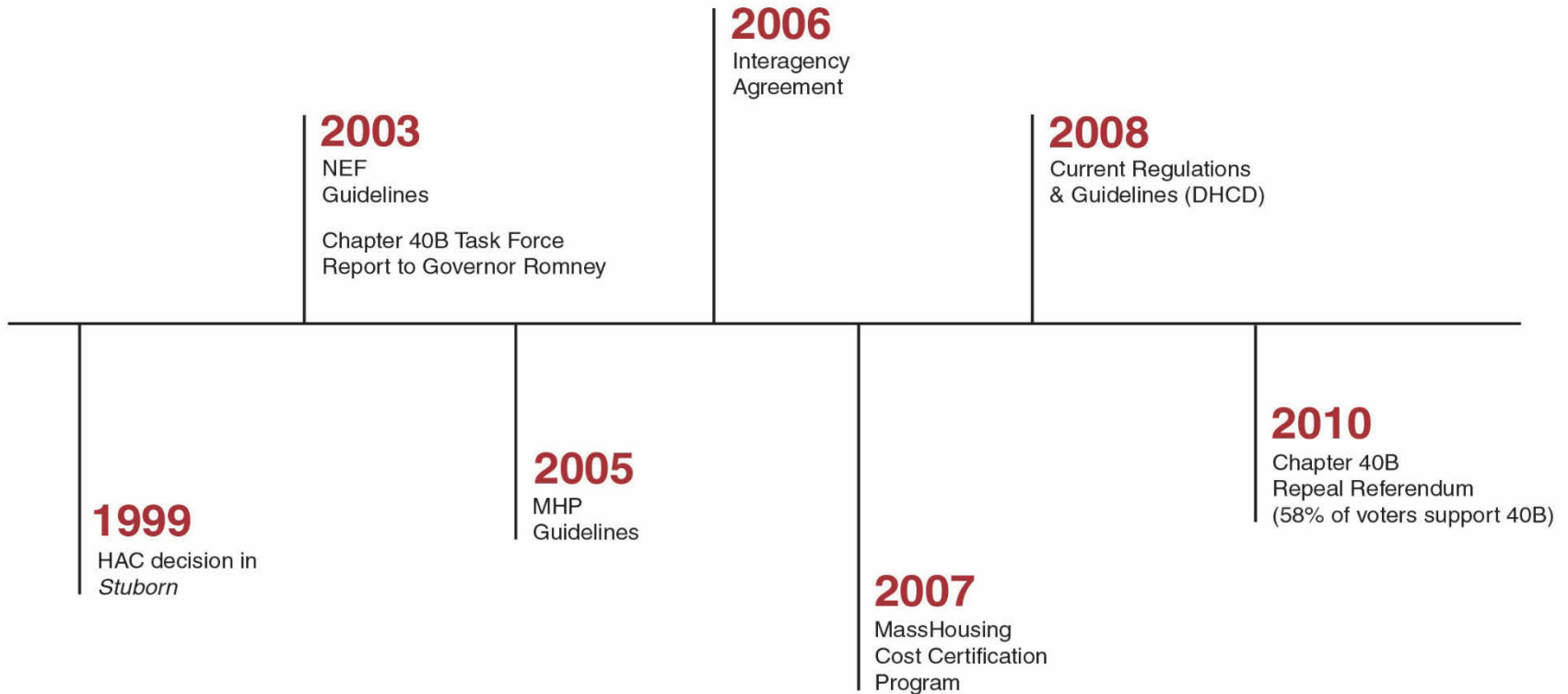




RECENT 40B TIMELINE



MassHousing's Role as Subsidizing Agency Under Chapter 40B



The New England Fund

1999 Housing Appeals Committee decision in (*Stuborn*):

The HAC ruled that Federal Home Loan Bank of Boston member banks could issue Site Approvals under the NEF program.

- In the 30 years prior, all 40B developments were approved under a state housing subsidy program. (“Subsidizing Agencies”)
- For the first time, a site eligibility letter could be obtained from a non-governmental entity.
- A dramatic rise in applications resulted – followed by complaints about lack of oversight.
- July 2002 NEF was briefly suspended.

“Old NEF”

Housing Appeals Committee decision in *Stuborn* (1999):

The HAC ruled that FHLBB member banks could issue Site Approvals under the NEF program as an alternative to established state and federal housing subsidy programs administered by public agencies.

By July 2002 it was clear this system would not work without government oversight and NEF was briefly suspended.

“New” NEF Guidelines

February 2003: DHCD adopts Guidelines for the administration of the New England Fund Program.

February 2003: MassHousing’s Executive Director volunteers the Agency to serve as Project Administrator for the NEF Program.

NEF Programs administered by both Homeownership and Rental Lending departments.

Current DHCD Regulations (760 CMR 56.00)

2008 Regulations formalize the role of **MassHousing** as a project administrator appointed to oversee the NEF Program on behalf of DHCD.

MassHousing's Comprehensive Permit Programs

- **June 2008:** MassHousing consolidated its homeownership and rental 40B project administration roles into the Comprehensive Permit Department.
- The new department is staffed by professionals with relevant experience in the following areas:
 - Municipal Planning
 - Public Accounting
 - Mortgage Finance
 - Legal Analysis



PUBLIC OVERSIGHT: THE KEY TO SUCCESS



Public “touches” Stabilize the 40B Process at Critical Junctures

- Site Eligibility
- Final Approval
- Cost Certification

Responsibilities of the Subsidizing Agency:

Site Approval

- A subsidizing agency must make a preliminary determination of project eligibility that the proposed project is:
 - Generally eligible under the subsidy program
 - Generally appropriate for residential development
 - The conceptual project design is generally appropriate for the site
 - Appears financially feasible
 - An initial pro-forma has been reviewed
 - Applicant is a public agency, non-profit, or limited dividend organization
 - The applicant controls the site

Responsibilities of the Subsidizing Agency: Final Approval

- Review after Comprehensive Permit & Key components of Final Approval post-permit
 - ✓ Reaffirm findings in determining initial project eligibility.
 - ✓ Impose a Regulatory Agreement/Use Restriction
 - Obligations regarding affordability & limitations on profit

Responsibilities of the Subsidizing Agency:

Cost Certification

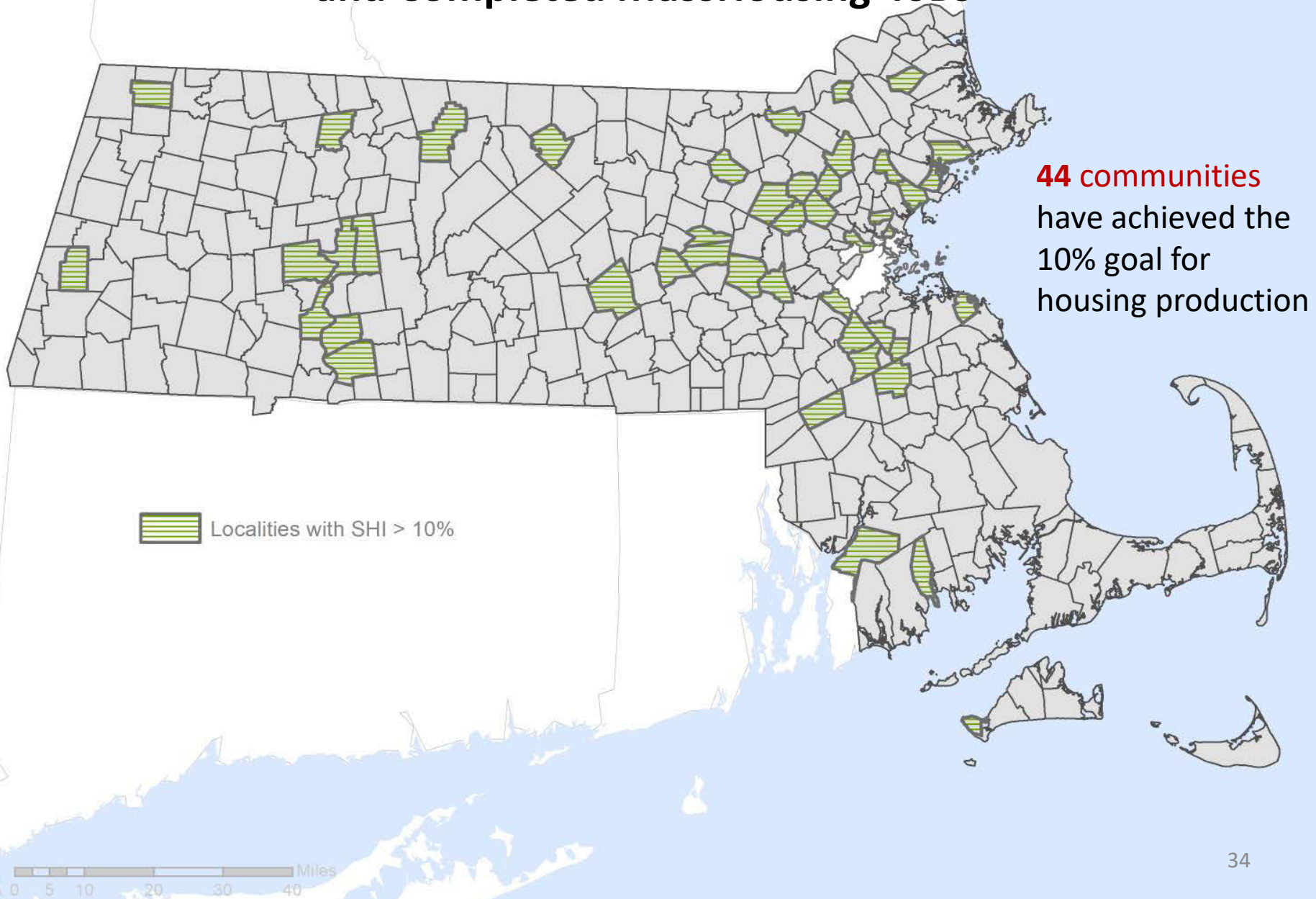
- Determine whether the cost certification complies with legal requirements and published guidelines, including profit and dividend limitations.
- The requirement for financial surety has ensured compliance with this requirement.
- **2007 – 2014:** MassHousing's publication of cost certification guidance in August 2007, the February 2008 publication of amended regulations and associated guidelines by DHCD and Interagency rental cost certification guidance provided much needed guidance to developers, CPAs, municipalities and subsidizing agencies.
- Excess profit returned as payment to community.



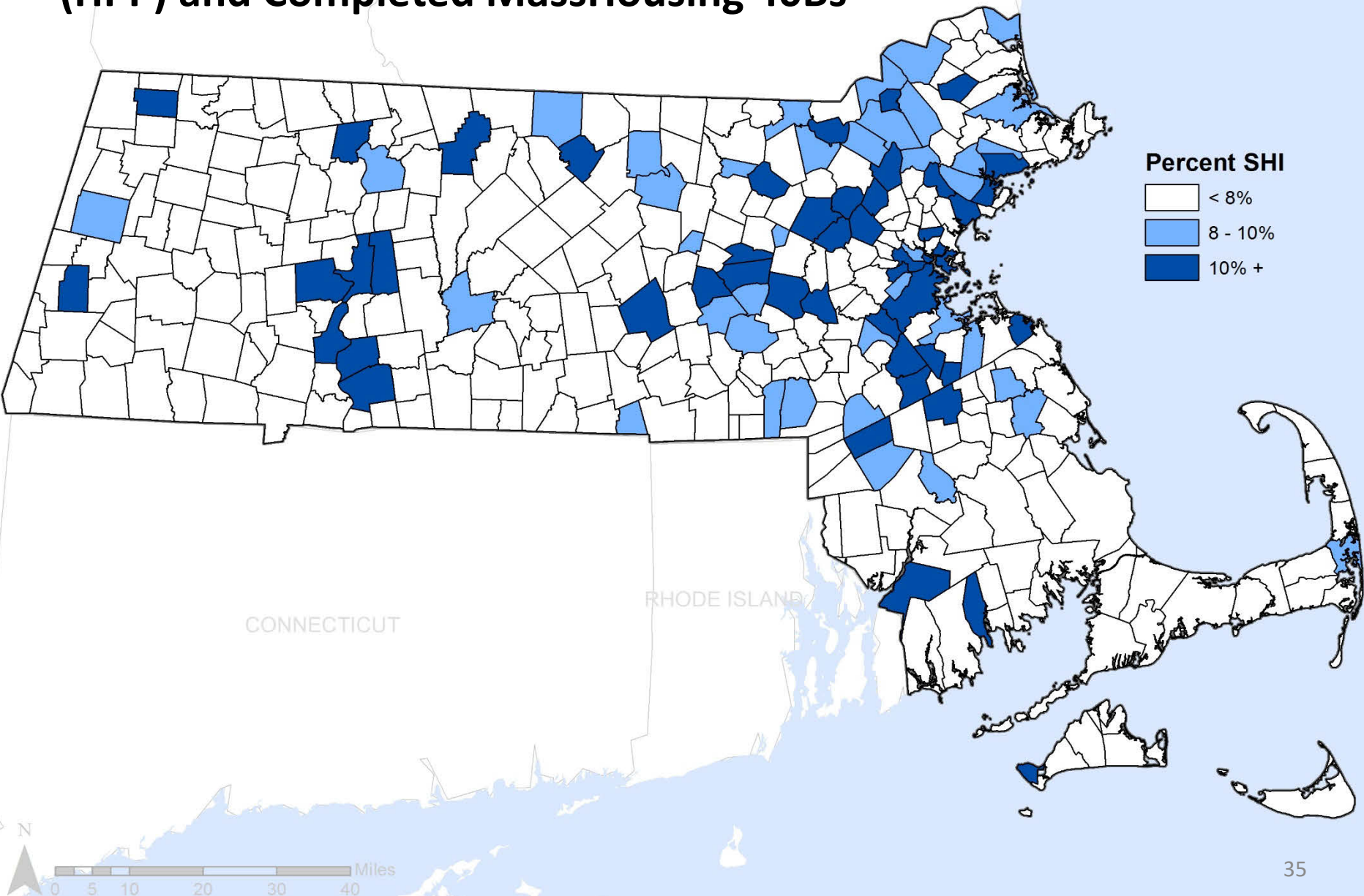
RESULTS



Subsidized Housing Inventory (SHI), Housing Production Plans (HPP) and Completed MassHousing 40Bs



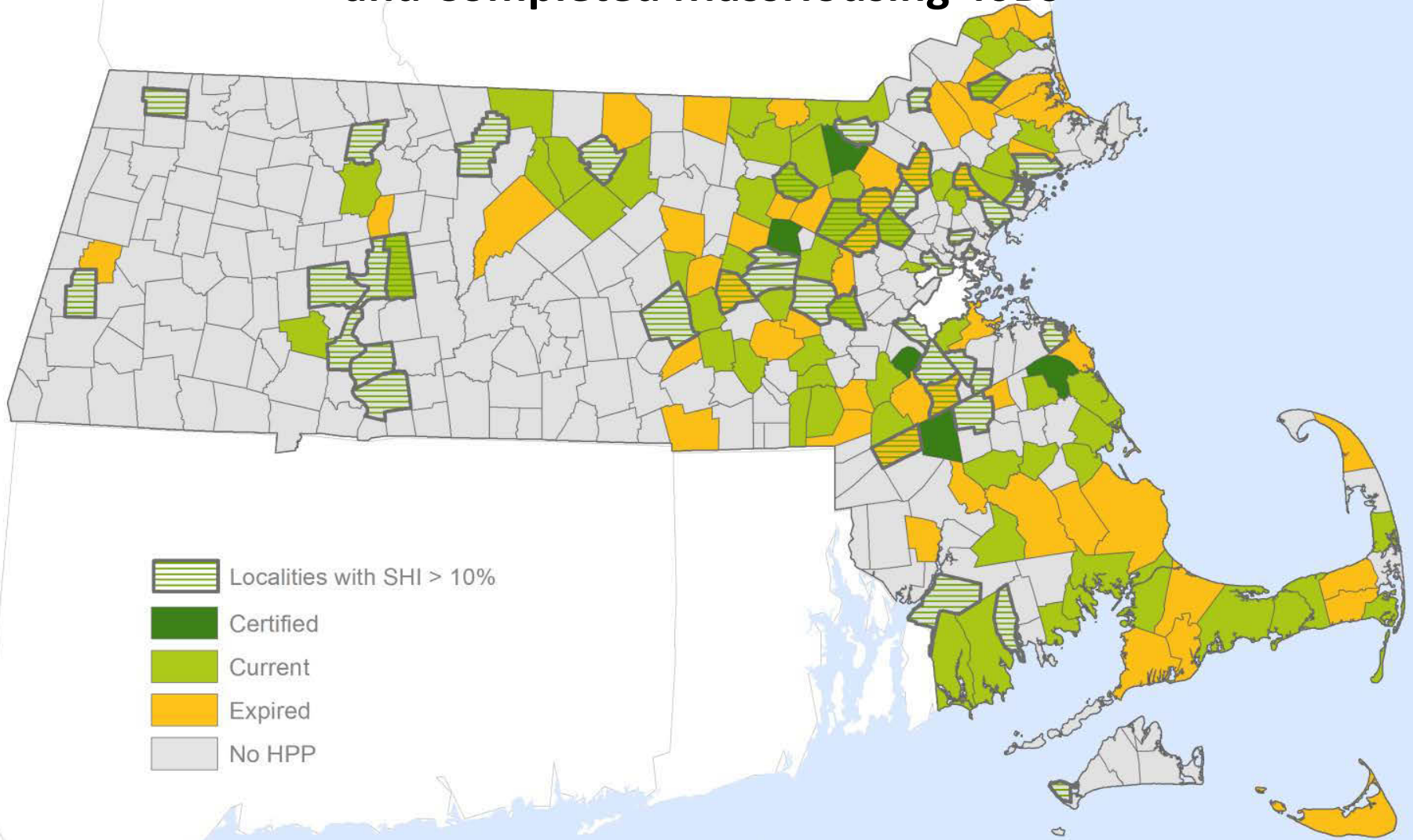
Subsidized Housing Inventory (SHI), Housing Production Plans (HPP) and Completed MassHousing 40Bs



Housing Production Plans

- Created in 2008 to avoid backlash to multiple projects in hot markets
- Allows local control of the development process
- Communities must create a plan, approved at the State level, designating where development should occur (needs, obstacles, goals, implementation strategy, timeline)
- Stipulations for how much housing will be created and by which dates
- Good for 5 years
- Progress against plan is measured
 - ✓ One-year moratorium when 50% achievement
 - ✓ Two-year goal when completed (100% achievement)

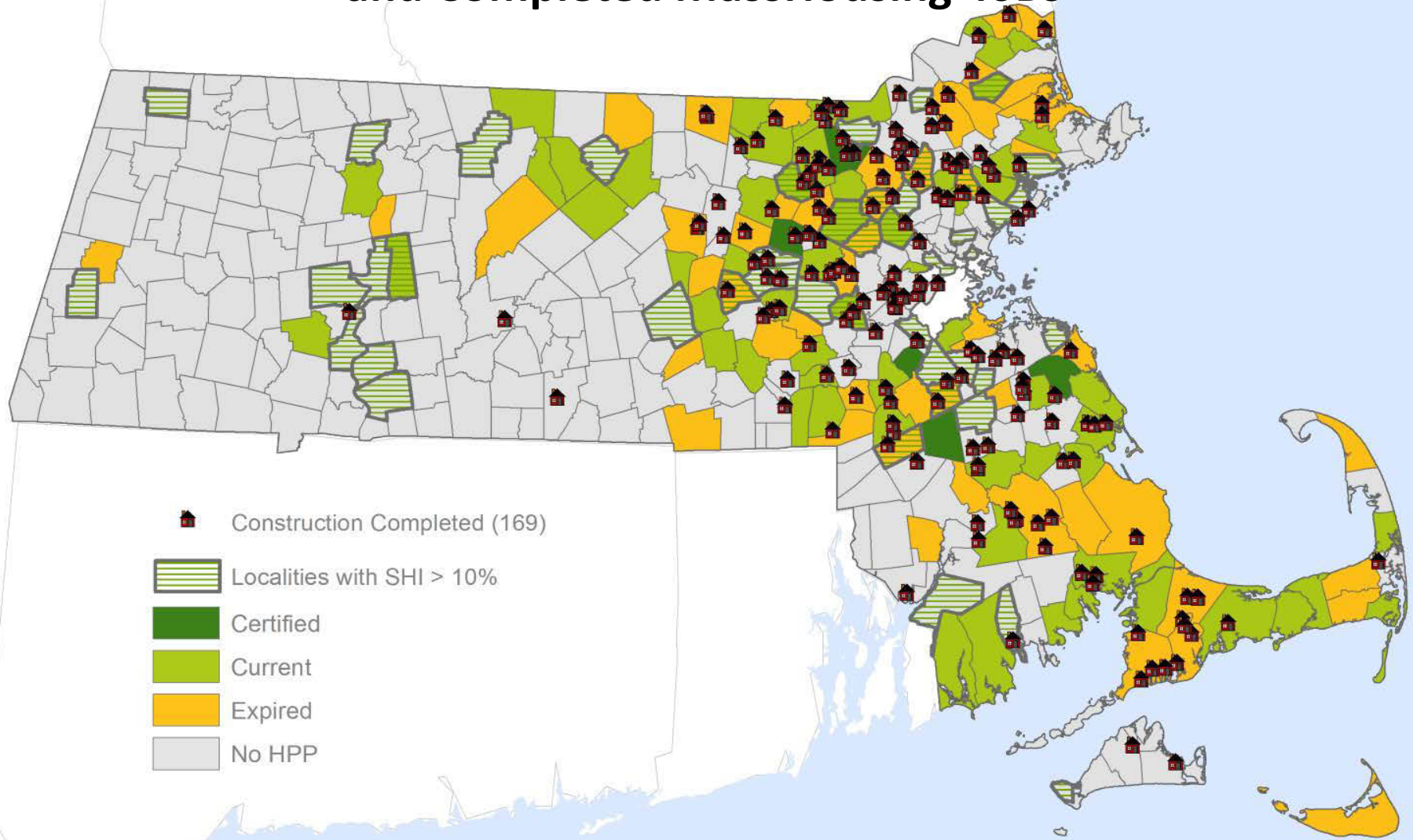
Subsidized Housing Inventory (SHI), Housing Production Plans (HPP) and Completed MassHousing 40Bs



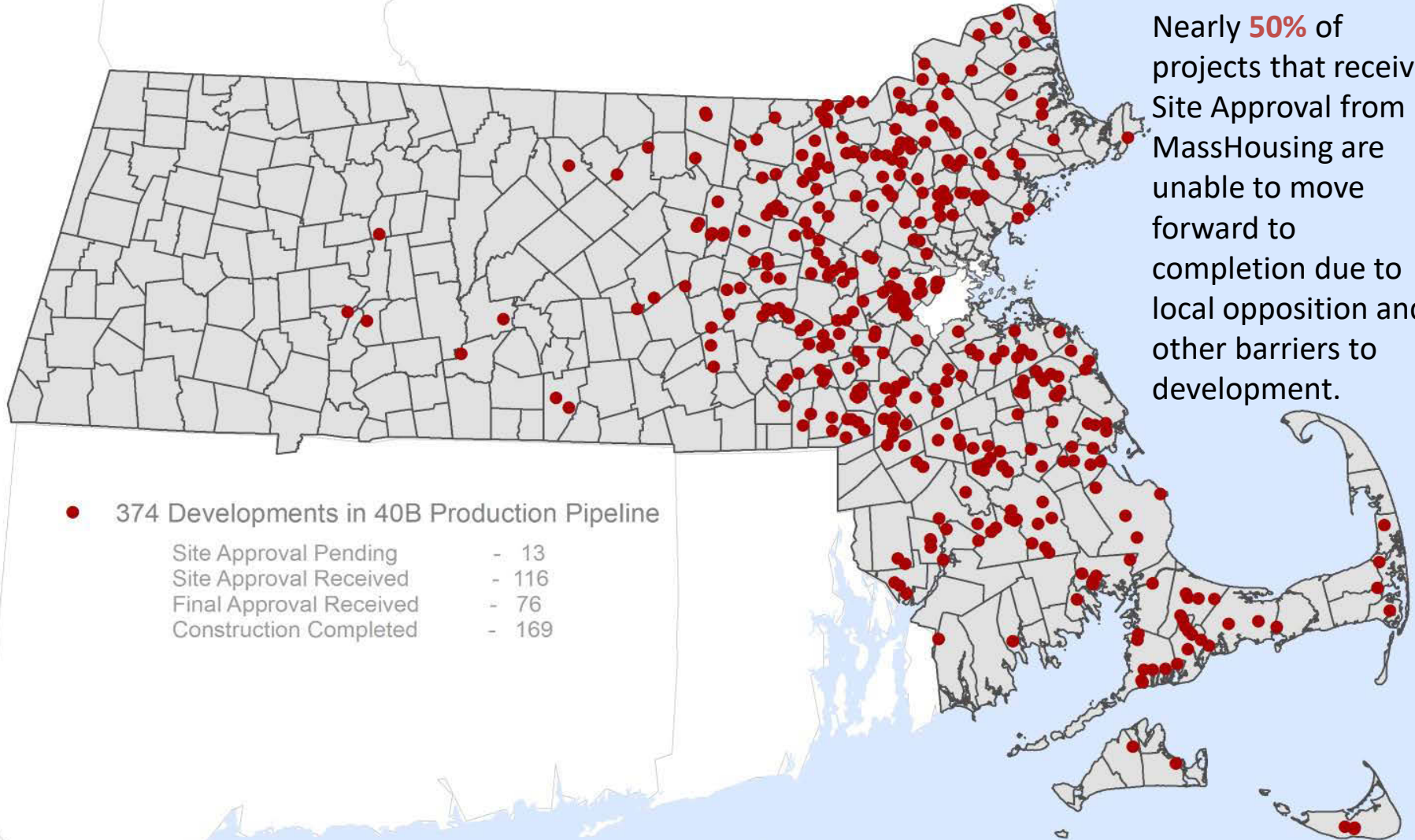
- Localities with SHI > 10%
- Certified
- Current
- Expired
- No HPP



Subsidized Housing Inventory (SHI), Housing Production Plans (HPP) and Completed MassHousing 40Bs



MassHousing 40B Pipeline

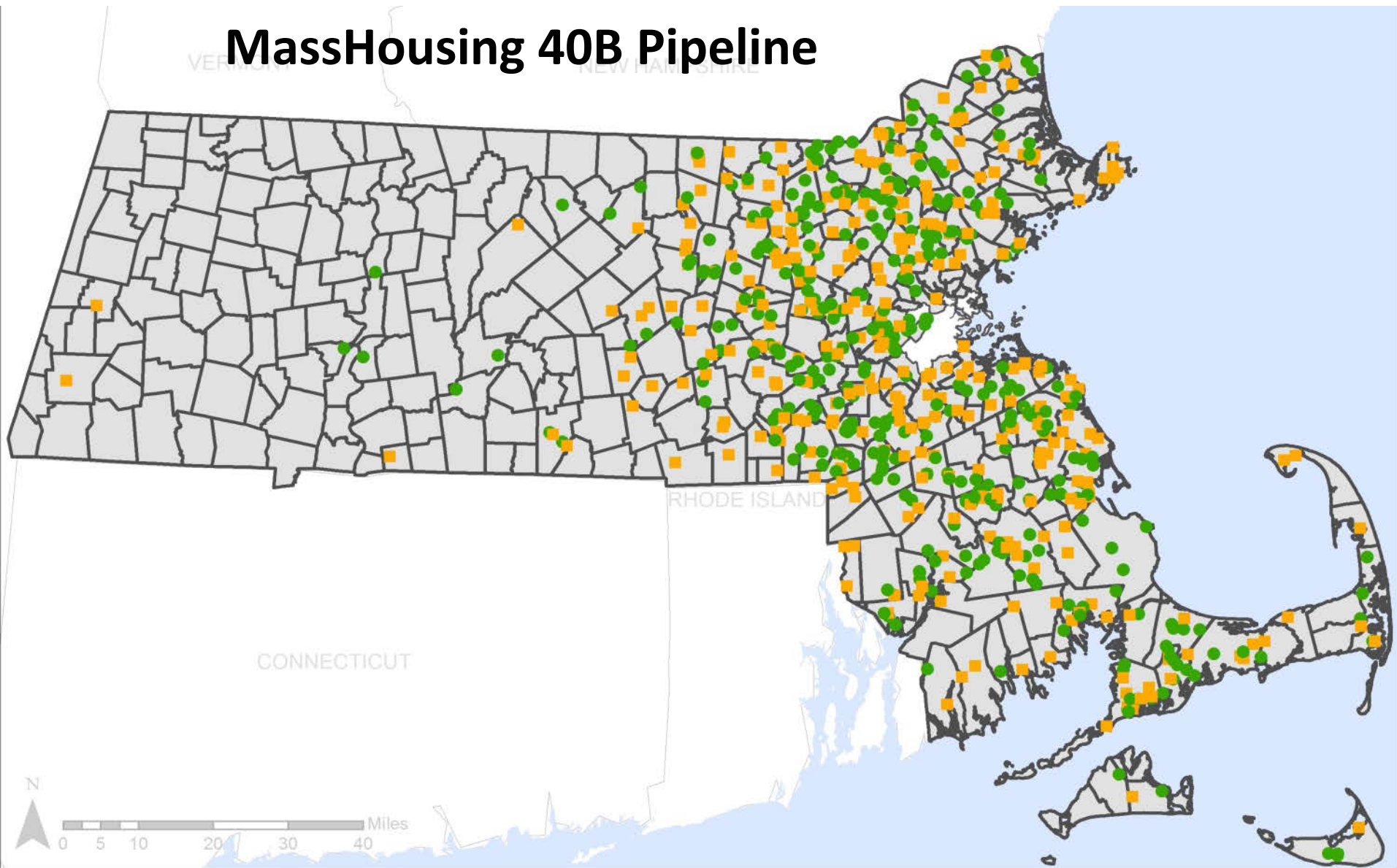


Nearly **50%** of projects that receive Site Approval from MassHousing are unable to move forward to completion due to local opposition and other barriers to development.

- 374 Developments in 40B Production Pipeline
 - Site Approval Pending - 13
 - Site Approval Received - 116
 - Final Approval Received - 76
 - Construction Completed - 169



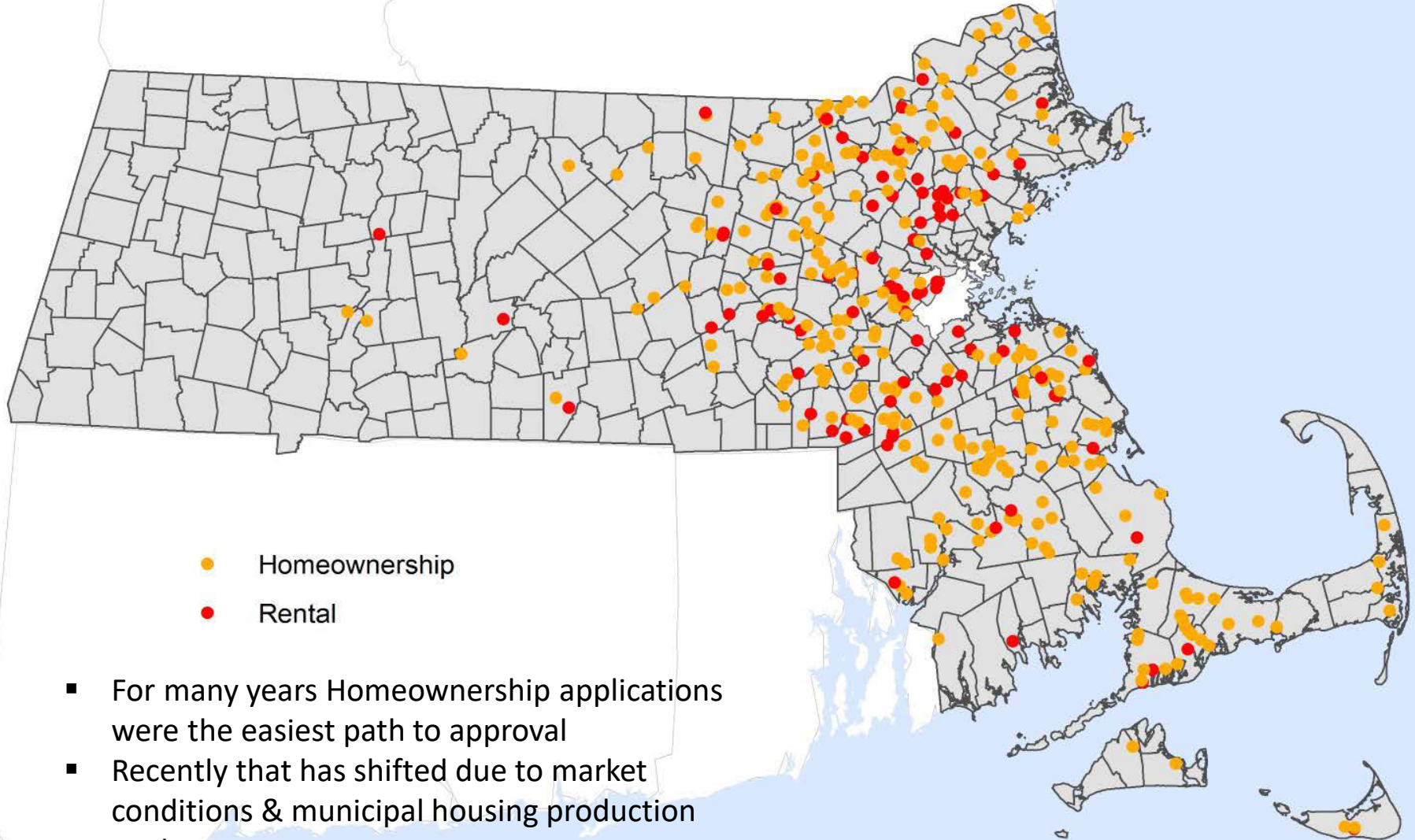
MassHousing 40B Pipeline



40B Pipeline v. Not Constructed (720): 1999 - Present

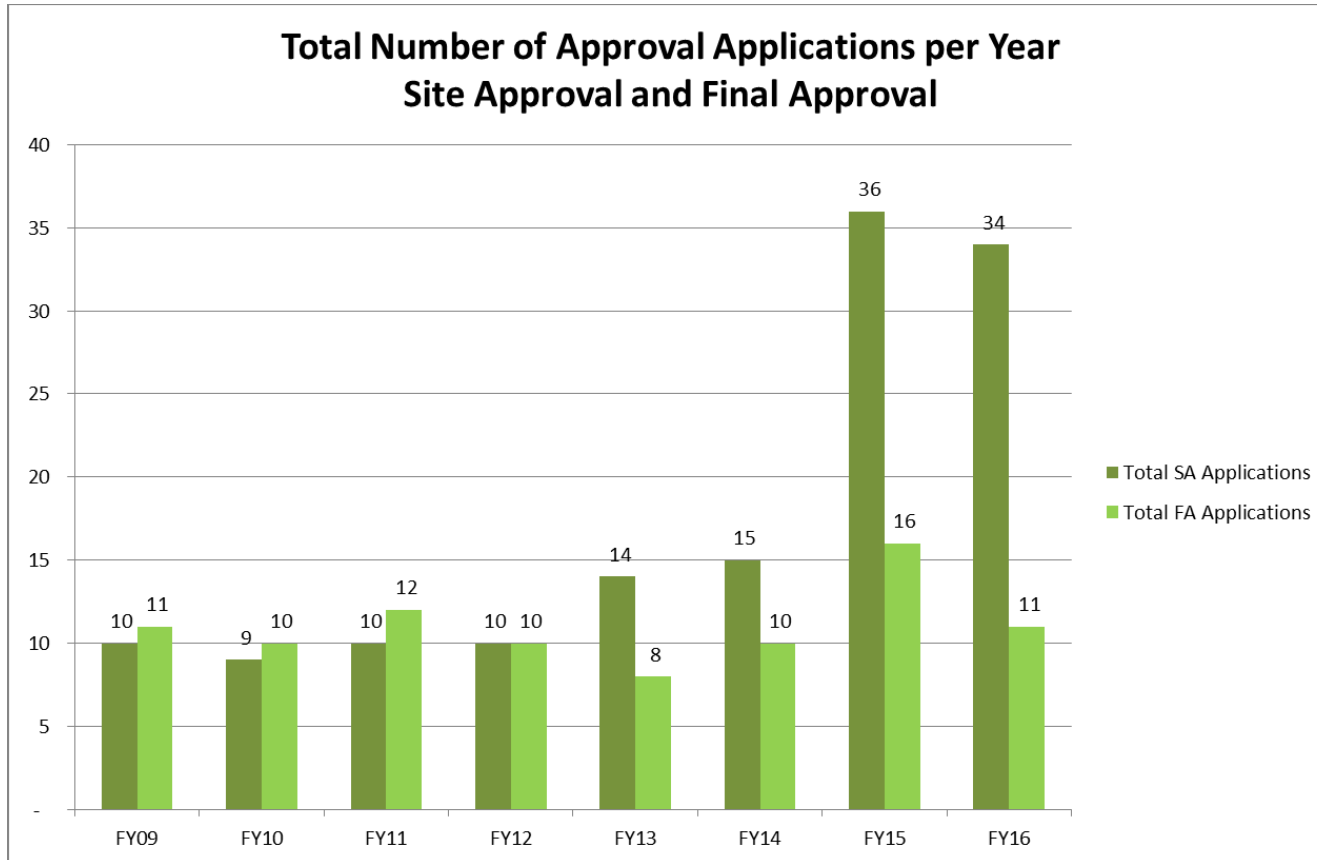
- Part of 40B production pipeline (374)
- Not constructed as a MassHousing 40B (346)

MassHousing 40B Pipeline



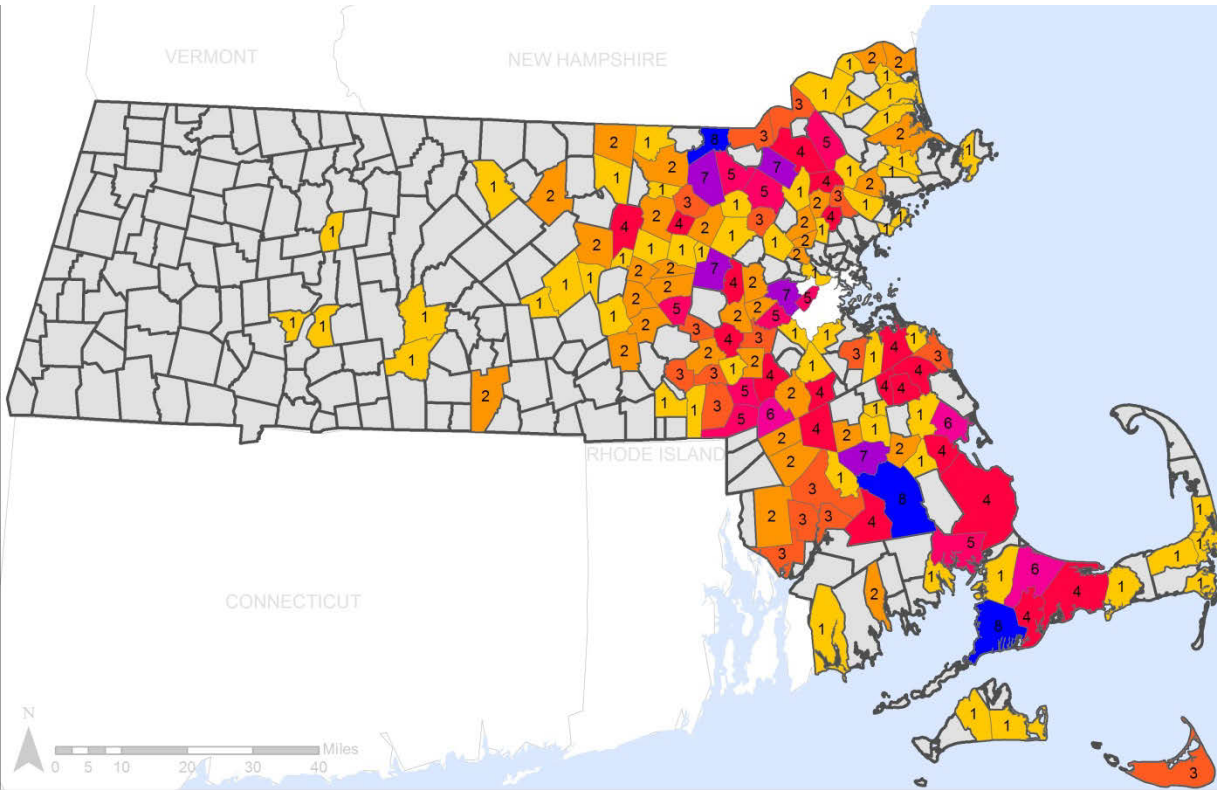
- For many years Homeownership applications were the easiest path to approval
- Recently that has shifted due to market conditions & municipal housing production goals

Recent Trends in 40B Pipeline



Site Approval Applications have risen sharply over the past 2 Fiscal Years. There has been a noticeable increase in the number of rental developments requesting Site Approval

MassHousing 40B Pipeline



40B Pipeline Developments per Town



Site Approval Pending	- 13
Site Approval Received	- 116
Final Approval Received	- 76
Construction Completed	- 169

Controversy and Push-Back

- Community Concerns:
 - Effect of affordable housing on property values?
 - Effect of affordable housing on municipal resources – especially schools?
 - Effect of affordable housing on quality of life?
 - Mega-projects
 - Lack of local capacity



CONCLUSIONS



Conclusions

- Most successful affordable housing/land use planning program in Massachusetts
- 60,000 housing units created as a result of 40B
- Still takes too long to get rental built
- Hardening of lines between the housing “haves and the “have nots”
- No incentives for negotiating in good faith on either side
- Crucial quasi-judicial review settles majority of appealed cases
- Important to give communities a breather for doing the right thing
- No compelling reason to build affordable housing
- Need to translate better the connection between strong economy and a strong housing market

THANK YOU!

Any questions?

