

Massachusetts Smart Growth Legislation: How it Works, How it Compares, and Prospects for Success

by Molly Dunham*

Abstract

The compact and transit-oriented development encouraged by the smart growth movement is intended to address a range of concerns relating to sprawl, including environmental degradation and housing and infrastructure costs. Many states have passed legislation to encourage smart growth development, using a wide range of incentives and mandates to change patterns of local development, including public visioning processes, comprehensive and regional planning requirements, and incentives for smart growth zoning. Massachusetts has passed two incentives, known as Chapters 40R and 40S, in an attempt to reduce the fiscal burden on municipalities of compact residential and mixed-use development and promote their local approval. Local planners, wary of the amount and uncertainty of the program's funding, have yet to take advantage of the incentives, though several localities are said to be considering implementation of the required zoning districts. Though it is too early to judge the effectiveness of smart growth legislation in Massachusetts or elsewhere, the Massachusetts incentive approach, by addressing local budget concerns relating to residential development, is likely to see results proportional to planners' confidence in the availability of funding.

Introduction

No Massachusetts city or town has yet taken advantage of the smart growth legislation passed by the state in 2004. Recently, in November 2005, a provision was added to encourage use of the program by providing additional financial incentives. Planners and developers alike have questions about the two statutes. Why were they passed? How do they work? Will they be successful in convincing local governments to move in the direction of smart growth? How have other states addressed the need for affordable housing and compact land use patterns through smart growth legislation? What has been their experience?

The following analysis begins with a discussion of the concerns that motivated passage of a smart growth statute. Next, Chapter 40R, the primary Massachusetts smart growth statute is summarized, with a look at potential loopholes threatening its effectiveness, followed by a review of local reactions to the statute and its prospects for successful implementation. The impact of Chapter 40S, the addition of state school funding for smart growth districts, is examined, and finally, the wide variety of smart growth legislation in other states is reviewed and the Massachusetts efforts evaluated in that context.

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Why Smart Growth?

Before discussing the addition to the smart growth legislation, I first turn to the original legislation, its intent, and its impact. A report released in January 2006 by Harvard economics professor Edward L. Glaeser (lead author), found, after a survey of 187 cities and towns within 50 miles of Boston, that current regulation of land use and development is a major cause of high local housing costs. In particular, large minimum lot sizes were found to “have the most potent impact on price.” (Greenberger, 2006, p. A1) The economic impacts of the metropolitan Boston housing crisis were a major impetus to the introduction of smart growth legislation. “Several recent studies have found that the high cost of housing in the Boston area is prompting many residents, especially younger people who can’t afford to buy a first home here, to decamp for other states. Massachusetts is the only state that lost population in each of the past two years, according to the US Census, and businesses are increasingly worried about attracting and retaining talented workers.” *Id.*

Housing affordability is not the only goal of smart growth supporters. They include environmental protection resulting from reduced development of greenfields and automobile reliance, increased social equality from access to transit, improved public health through walkable neighborhoods, and reduced municipal costs resulting from compact development. A recent study found that compact growth patterns reduced school costs by 5%, utility costs by 15%, and the cost of road construction and maintenance by 25% over traditional suburban development. (Wickersham, 2005, p. 4)

Given the substantial benefits of compact growth, why are large lot sizes and automobile dependent development the rule? Some attribute it to consumer preference. Glaeser noted, “It is foolish to overestimate the latent demand for public transportation. Americans are enormously fond of their cars, for good or ill.” (Greenberger, 2006, p. A1) Other commonly heard reasons are discriminatory zoning, faster public approvals for previously approved development types, lender conservatism, and fear of overwhelming public services, including utilities and schools, in a given area.

The Initial Effort – Chapter 40R

In 2004, the Massachusetts legislature, noting that local governments had not moved to address the problems of sprawl, provided an incentive in the form of a new statute, Chapter 40R. The statute provides for two types of payments to municipalities encouraging smart growth. First, upon adoption of a smart growth zoning district meeting certain density, transportation, and walkability requirements, a city or town is eligible to receive a one-time payment between \$10,000 and \$600,000 depending on the number of projected housing units, as permitted under the adopted zoning district. (ALM GL Ch. 40R) Upon issuance of building permits for individual housing units, the local government is again eligible for a payment of \$3,000 per unit approved. *Id.*

In exchange for the financial incentives, the state requires that the new smart growth zoning districts meet several standards intended to advance the goals of compact development. To summarize, the major requirements for the zoning district, as outlined in Chapter 40R, are as follows:

- It must be near transit stations or existing concentrated development or otherwise be suitable for mixed-use compact development.
- It must provide a variety of housing types.

- Minimum densities are as follows: 20 units per acre for multi-family housing, 12 units per acre for 2- and 3-family housing, and 8 units per acre for single-family housing.
- Most developments require a minimum of 20% of the residential units to be affordable housing (a defined concept).
- No age restrictions are permitted other than in housing for the elderly, in which case a minimum of 25% of the residential units must be affordable.
- No single smart growth zoning district may exceed 15% of the total land in a city or town.
- Not more than 25% of the total land area in a city or town will be approved as a smart growth district eligible for state payments.
- A district may, but is not required to, provide for mixed-use development.

Lastly, the state's commitment to make the payments promised under Chapter 40R is limited by the size of its dedicated trust fund for the purpose. That fund is to be initially derived from the sale of surplus state land, and no additional budget appropriation has yet been approved for the purpose. As of the end of 2005, the total funds available for Chapter 40R incentive payments were \$4 million. (Martin, 2005, p. 1)

At least two questions are raised by the provisions of 40R. First, the statute requires the smart growth zoning district to be designated in an "eligible location," defined as: "(1) areas near transit stations, including rapid transit, commuter rail and bus and ferry terminals; (2) areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns, and existing rural village districts; or (3) areas that by virtue of their infrastructure, transportation access, existing underutilized facilities, and/or location make highly suitable locations for residential or mixed use smart growth zoning districts." (ALM GL Ch. 40R, §2) The minimum required by this provision, is that the district be in a "highly suitable location" by virtue of, among other options, its "location." This loose definition has been considerably tightened by the regulations adopted to implement the statute, and while true transit-oriented development does not appear to be required by the statute, options for either public transportation or significant pedestrian independence does appear to be mandatory. (760 CMR 59.04)

Another potential loophole is the provision allowing the smart growth district to be designated as senior housing. Local aversion to residential development was summarized in a recent *Boston Globe* article:

"Local officials say the added property tax from a new house-particularly anything short of the supersized "McMansions" that are in favor with so many zoning boards-does not cover the added education costs that come with children in those homes. That claim often lies at the root of the endless maneuvers by Massachusetts communities to keep out new residential development in general, and homes that could house schoolchildren in particular."

"Local land-use policies "have become very anti-child," says John Clifford, town administrator of Marshfield. "The general consensus is, any subdivision that could bring children to town will negatively impact the

town's finances. For a state that is losing population and losing younger population, that is a pretty damaging view.” (Jonas, 2006, p. K1)

It may be that this situation encourages towns to zone for the permitted senior housing, rather than providing for the younger population that is leaving the state. Though Chapter 40S, discussed below, is meant to alleviate local budget concerns through the provision of additional school funding, some do not believe the issue will go away. Clark Ziegler, executive director of the Massachusetts Housing Project noted, “I don't think it's a magic bullet, even with the education funding piece.” Taking the school-cost issue “off the table” is a good idea, he says. “But my experience is that the resistance [to new housing] comes from a much deeper place. You address one issue and people move on to another. You solve a traffic issue and it becomes schools. You solve schools and it becomes groundwater.” *Id.* The success of Chapter 40R greatly depends on Mr. Ziegler being mistaken, an issue that will be played out as localities attempt to implement the new statute.

Prospects for Success

Though in effect since July 1, 2004, to date, no local government has applied for certification of a smart growth district. (Greenberger, 2006, p. A1) To some extent, this apparent lack of interest may be explained by the size of the task facing even an enthusiastic town, which requires extensive research and drafting, followed by the inevitable redrafting that is a necessary part of the public approval process. The creation of an entirely new zoning district may not only affect nearly every corner of an existing zoning code, but require reconsideration of a master plan that was conceived with traditional suburban development goals and patterns in mind.

There is some evidence, however, that local governments are less than enthusiastic. A 2004 Metropolitan Area Planning Council survey of officials in 60 communities found three primary reasons that a majority of cities and towns stated they were unlikely to take advantage of Chapter 40R incentives. First, they were concerned about a program they view as unreasonably shifting control of land use from the local government to the state. Second, they were generally opposed to the density requirements, which they considered excessive. And lastly, the promised payments were simply too small to overcome these drawbacks. (Shartin, 2005, p. 1) Other concerns have been expressed more recently, such as the funding limitations that leave communities uncertain whether they will receive the full amounts specified in Chapter 40R. Though no applications for state certification have been received, the Office of Commonwealth Development notes that 12 local governments have expressed interest in the provisions, leading to an uncertain and competitive environment, with “some local officials worry(ing) that there won't be enough funding for these projects.” (Martin, 2005, p.1) Heidi Griffin, the planning director for North Reading, stated, “The funding mechanism is unclear, and a lot of us, planners, are feeling tense, under pressure to move quickly . . . If we knew there was a bigger pot of money, it might alleviate some of the concern.” *Id.* This atmosphere has even led to an unusual degree of secrecy, with “town planners from various communities . . . not sharing information with each other about new zoning bylaws that are needed to form a smart growth district.” *Id.* Further anxiety about the process is introduced by the procedural differences between Massachusetts

cities and towns, since cities are not required to seek approval through a town vote prior to creating a qualifying district and may therefore be in a position to seek state certification much sooner than towns. *Id.*

One factor in the developing interest in Chapter 40R is Chapter 40B. This code section allows affordable housing developers in any community with less than ten percent of its housing stock qualifying as affordable to substantially bypass local zoning regulations. *Id.* This statute, in place since 1969, has been less than popular with municipalities, who fear losing their traditional land-use controls so dramatically. Some that have still not yet their 40B affordable housing threshold see in the smart growth regulations an opportunity to both reach their ten percent requirement to avoid the 40B consequences and to receive state reimbursement. Because there is no statutory link between the two provisions, however, those communities foresee the affordable housing incentives offered under Chapter 40R (and 40S, see below), being claimed in large part by those cities and towns that have met the ten-percent requirement and face no similar threat of state preemption. *Id.*

Finally, after the passage of Chapter 40R in 2004, communities remained concerned about the burden high-density new development would place on their school systems. Interestingly, because of the current allocation of state school funding, only relatively affluent communities, the same communities struggling to meet their affordable housing goals, would face additional expenses to educate the added students, providing a disincentive to precisely those cities and towns that may have been most likely to show an interest in the program. (Boston Globe Editors, 2005, p. E10) After more than a year passed without a single community participating in the Chapter 40R smart growth plan, the Massachusetts legislature responded in November of 2005 by enacting Chapter 40S, a measure providing additional state funding for those new students moving to designated Chapter 40R housing units. (Shartin, 2005, p. 1)

Chapter 40S

The school cost reimbursement measures enacted in Chapter 40S were, in the opinion of House Speaker Salvatore DiMasi, “necessary to get the Smart Growth initiative up and running.” (Boston Globe Editors, 2005, p. A16) To summarize the complex formula laid out in the statute, each municipality is to receive the excess of the actual per student costs allocable to new students living in the smart growth developments over the portion of the taxes generated by those developments, including property and automobile excise taxes, that would typically be spent on education, according to a statewide average.¹ (2005 Mass. ALS 141) The statute requires regulations to be adopted clarifying the administration of the measure by April 22, 2006, and this has not yet been completed. *Id.* One provision causing concern among communities potentially adopting smart growth zoning districts is found in a single sentence of the new law: “. . . but if the appropriation is insufficient to fully fund the cost of the reimbursement, the division shall calculate the percentage of each

¹ More specifically, the reimbursement formula works as follows:

Reimbursement = Total added education costs – (Education revenues generated + Ch. 70 aid), where:
Education revenues generated = (New property taxes from smart growth development + New automobile excise taxes from smart growth development) x Statewide average proportion of local revenues spent on education

municipality's reimbursement as a share of the statewide reimbursement, and pro-rate each municipality's reimbursement proportionally." *Id.* So though the measure attempts to address local concerns about the impact of smart growth development on municipal budgets, it does so with a large degree of uncertainty, thereby diminishing its potential impact on decision makers.

Smart Growth Legislation in Other States

The Massachusetts legislature has struggled to encourage smart growth development patterns, having to address concerns both of incentive payment claims potentially exceeding the budget allocation and of the complete absence of current applications for the funds nearly 18 months after the program was established. Is Massachusetts acting as a trend-setter, forced to lead the way with little guidance? Or have other states taken either similar incentive approaches or entirely different means of encouraging compact development?

States have a broad variety of tools available to increase smart growth development and reduce sprawl. They may set overall state policy, applicable to state agencies, encouraging consideration of smart growth goals in their activities. This approach may be taken an additional step by requiring state agencies to practice their own development in specified statutory ways. Another option is to require local governments to set their own broad development policies in the form of a master plan. Local governments may also be guided toward smart growth through any combination of state incentives for particular measures and statutory requirements for particular kinds of zoning. Each of these approaches has been attempted in various states, so we may learn from their experiences.

New Jersey provides an example of a state beginning its smart growth process with a statewide vision. In a unique process involving extensive participation and 'cross-acceptance' by communities statewide, a state smart growth plan has been created, which designates areas for growth, limited growth, and conservation. State agencies are generally expected to follow this plan. For local communities, incentives are provided, primarily in the form of priority for state funding, for municipalities to submit their master plans to a state commission for 'plan endorsement,' whereby the plans are deemed to comply with the state plan. Though this voluntary process is likely to have a more gradual effect on development patterns than more specific or required measures, the setting of state public policy, and the participatory process by which it was adopted, may ultimately provide a powerful backdrop to local planning efforts, particularly as they are challenged in the courts, and a strong base from which to build on the examples of early-adopting municipalities. (Source: <http://www.state.nj.us/dca/osg/>)

Maryland has both extended and short circuited the New Jersey approach. After a state master plan was adopted directing growth to designated areas, counties and municipalities have been required to conform their master plans to the seven goals of the state plan, more quickly resulting in adoption of such plans than the voluntary New Jersey process. Similar to the New Jersey program, state dollars for infrastructure and development are also distributed in accordance with the state plan, providing some tangible results without direct state involvement in local land use planning. Maryland's smart growth efforts, without the broad-based public and community participation of the New Jersey plan, have already become vulnerable to changing leadership, as when the

state's smart growth office was abolished upon the election of Governor Robert Ehrlich, Jr. Fortunately for the efforts of prior Governor Glendening, the master planning measures remained in place, though with an obvious loss of momentum. (Source: <http://www.mdp.state.md.us/smartintro.htm>)

Similarly, Arizona's *Growing Smarter* and *Growing Smarter Plus* legislation requires larger and faster growing municipalities to adopt comprehensive plans and revise them every ten years. Local governments are further encouraged to work together and provide input on neighboring plans as a first step toward regional planning. Perhaps most importantly, the legislation allows municipalities to designate boundaries beyond which they will not provide municipal services at public expense. Finally, the state enabling legislation allows communities to provide incentives for infill zoning districts, which may include an expedited approval process. Compared with the New Jersey and Maryland efforts, Arizona has chosen to begin at the local level, but with permissive statutes allowing, rather than directing, local governments to control their growth. Early evidence suggests that municipalities are not taking full advantage of their new powers, with some small towns designating municipal service limits that do not impact even long-term foreseeable growth and others focusing their efforts on neighborhood design standards rather than growth patterns. (Sources: <http://www.smartgrowth.org/news/bystate.asp?state=az&res=1024> and <http://www.commerce.state.az.us/CommunityPlanning/GrowingSmart.asp>)

Wisconsin has perhaps come closer than any other state to implementing smart growth on the ground. In addition to requiring that cities and towns adopt, and zone in accordance with, a comprehensive plan, and providing funding incentives to those municipalities adopting plans with designated smart growth areas, it requires any community of more than 12,500 residents to adopt a zoning district for traditional neighborhood design ("TND"). This new zoning district need not be mapped, but it does begin to open the door to developers considering a TND project by providing at least one theoretically possible administrative means to accomplish this goal.

Conclusions

Compared with these other states, Massachusetts has largely dispensed with the statewide and even regional or local visioning exercises characteristic of other smart growth programs, choosing instead to begin with concrete development on the ground by encouraging local governments to adopt smart growth zoning districts meeting specific standards. Its local-level focus is combined with an incentive, rather than requirement, basis, and the speed with which it is implemented will depend in part on the strength and certainty of those incentives.

For their part, planners may do well to compare any model TND or smart growth ordinance under consideration in their community to the statutory requirements of Chapter 40R. Though some have opposed the state's "one-size-fits-all" approach, the requirements are generally the minimum necessary to ensure compact development without specifying the defining characteristics of zoning districts such as lot sizes, setbacks, street widths, or design guidelines, all factors remaining under local control. (Shartin, 2005, p. 1)

The success of Chapter 40R in encouraging smart growth in Massachusetts will likely depend on the experiences of the first communities attempting to make use of the

statute. Given the substantial effort required by municipalities in drafting and gaining approval of the new zoning district and in following up with state reporting requirements upon implementation of the district, they are unlikely to proceed down this difficult path in the face of early disappointment in other communities. With solid funding in place, however, the Massachusetts approach of encouraging local governments to meet general smart growth guidelines in their individually crafted zoning districts represents an innovative approach with the potential to result in concrete examples of smart growth development even before the older smart growth efforts of other states have borne fruit.

Works Cited

- An Act Relative to Smart Growth and Housing Production. 2005 Mass. ALS 141, Chapter 40S.
- Arizona Department of Commerce. Web site.
<http://www.commerce.state.az.us/CommunityPlanning/GrowingSmart.asp>
- Boston Globe Editors, "Smart Housing Incentive." *The Boston Globe*, October 23, 2005, p. E10.
- Boston Globe Editors, "Unfinished Business." *The Boston Globe*, November 15, 2005, p. A16.
- Greenberger, Scott S. "Housing Slowdown Blamed on Local Rules; Study Says Regulations Raising Home Prices." *The Boston Globe*, January 1, 2006, p. A1.
- Jonas, Michael. "Priced Out: The State's 'Smart-Growth' Plans Are Supposed to Loosen the Housing Squeeze and Give Would-Be Homebuyers a Fighting Chance. Problem Is, No One Seems to be Listening." *The Boston Globe*, January 8, 2006, p. K1.
- Martin, Peter. "State Tries Out New Rewards for Housing." *The Boston Globe*, December 29, 2005, p. 1.
- Maryland Department of Planning. Web site.
<http://www.mdp.state.md.us/smartintro.htm>
- New Jersey Department of Community Affairs, Office of Smart Growth. Web site.
<http://www.state.nj.us/dca/osg/>.
- Shartin, Emily. "Planners Wary of School Aid Bill." *The Boston Globe*, November 27, 2005, p. 1.
- Smart Growth Zoning and Housing Production, ALM GL Ch. 40R (2005).
- Smartgrowth.org. Web site.
<http://www.smartgrowth.org/news/bystate.asp?state=az&res=1024>
- Wickersham, Jay H. (2005) "The Laws of Sprawl and the Law of Smart Growth." in *Smart Growth Development: New Legal Rules, New Project Experiences*. Boston: MCLE, Inc.