

Delayed to death

Dogged opposition, lengthy appeals, and a changing market have conspired to kill at least half of proposed 40B housing projects south of Boston since 1999

By Matt Carroll, Globe Staff | June 17, 2007

More than half of the so-called 40B housing developments proposed in the region have not been built because of opposition from communities and neighbors, as well as the weakened housing market, according to a study set for release tomorrow by the Housing Affordability Initiative at the MIT Center for Real Estate.

The south of Boston area has proved especially challenging to 40B projects. More have run into trouble in this region than in other Boston suburbs, according to the statistics.

The study, which looked at projects that filed for permits from 1999 to 2005, provides ammunition for both sides in the nearly four-decade-long debate over the controversial housing measure, which takes its name from the section of the law that created it. The 40B law allows developers to bypass local zoning requirements to build denser rental or condo developments than local zoning might allow, in return for pricing typically a quarter of the units at below-market rates.

Delays caused by towns' and neighbors' opposition have been a death knell for some projects.

"Opponents are recognizing that if you can delay the start, there is a chance it might not occur at all," said Aaron Gornstein, executive director of Citizens' Housing and Planning Association and a strong backer of the law. Litigation is on the rise, he said. "I think it will happen more frequently, and it is unfortunate."

South of Boston, 41 housing developments -- totaling roughly 4,600 condos and rental units -- were built from 1999 to this year, according to the report.

But more than double that number of projects were originally proposed. In cases where there was a decision by a zoning board, only 43 percent received building permits. The rest were tied up by developers who appealed to the state's Housing Appeals Committee, which handles 40B appeals, or in litigation with neighbors.

Across Greater Boston, the success rate for proposed 40B projects was significantly higher -- 57 percent.

The research also found that the market for 40B condos appeared to be slowing significantly, while the rental market continues to be strong, said Henry Pollakowski, director of the Housing Affordability Initiative.

The study -- "Chapter 40B Permitting and Litigation" -- used data from 113 communities across Greater Boston, where nearly 15,000 40B rental units and condos were built from 1999 to this year. Thirty-one of the communities included in the study are south of Boston. Data were not available from 11 other towns in the area.

The study was funded by real estate developers and housing and public policy organizations. The conclusions provide fodder for both sides of the debate.

Proponents claim the law has helped increase affordable housing across the state. They also say it is an example of "smart growth" housing, which encourages denser development, particularly around transportation centers, such as highways.

Developers see themselves as providing a service through 40B construction. As they build market-rate housing, they help the community by adding in some affordable units not otherwise available.

But many towns don't like giving up control, which is what happens when 40B developments get to bypass local zoning.

"Towns have always been reluctant to see their little town change," said Russ Grabeau of R & C Development Corp., who is building a 60-unit project in Rockland. The project's 15 affordable units will sell for about \$175,000 compared with \$339,900 and \$359,900 for units sold at market rate.

Towns dislike 40Bs because they allow denser development, he said. But if housing is to remain affordable, towns can't continue to limit homes to 1- and 2-acre lots. "It just pushes the prices right up," he said.

Opponents also claim the developments thwart residents' efforts to control the types of housing they want in their town, and often prove costly for the town in increased water and sewer use and school crowding.

More recently, opponents have worried that some developers have overstated costs to illegally increase profits. By law developers must, in exchange for a reprieve from zoning rules, limit profits and turn over any excess to the community for more affordable housing. The state inspector general is investigating several developers who allegedly violated that law.

Many opponents of 40Bs argue that developers use the law as a weapon -- threatening to turn a single-family development into a 40B development if they don't get their way.

"A 40B is the ultimate bludgeon," said Jonathan D. Witten, a Duxbury selectman. "It softens the town up for what the developers really want, like a single-family home development."

It's no surprise that half of all 40Bs don't get built, he said, because developers think they will earn big bucks but fail to anticipate the financial impact of public scrutiny and passing muster with government agencies.

"People are trying to preserve the character of a community," said Norwell Town Administrator James Boudreau.

"A 40B comes in and does away with zoning. It allows you to build things you normally wouldn't allow," he said, such as a large project in a single-family-home neighborhood.

Lynn M. Fisher, an author of the report, described the push and pull between developers and towns as "gamesmanship." Developers don't want to give up density, and towns don't want a development to be too dense.

"Towns want to push a developer as far as they can, and sometimes they overshoot, and the developer decides they can't do it and fights back," and a development ends up in court.

Despite the problems, some see the law as working.

"For all the complaining, it is doing what it was intended to do," by creating new housing, said Clark Ziegler, executive director of the nonprofit Massachusetts Housing Partnership. That's important, because new, affordable housing is needed if the state is to continue to grow economically.

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