Comprehensive Permitting:
Does it Stimulate Negotiation? Is it Enough?

By

Jeffrey B. Litwak

B.S. City and Regional Planning (1990)
California Polytechnic State University, San Luis Obispo

Submitted to the Department of Urban Studies and Planning on May 8, 1992
in partial fulfillment of the requirements for the
Degree of Master of City Planning

at the

Massachusetts Institute of Technology

© 1992 Jeffrey B. Litwak
All Rights Reserved

The author hereby grants to MIT permission to reproduce and to
distribute copies of this thesis document in whole or in part.

Signature of Author

Department of Urban Studies and Planning
May 8, 1992

Certified by

Michael Wheeler, Senior Lecturer
Thesis Supervisor

Accepted by

Professor Ralph Gakenheimer
Chair, MCP Committee

MASSACHUSETTS INSTITUTE
OF TECHNOLOGY

MAY 27 1992
Comprehensive Permitting:  
Does it Stimulate Negotiation? Is it Enough? 

By 

Jeffrey B. Litwak 

Submitted to the Department of Urban Studies and Planning on May 8, 1992 
in partial fulfillment of the requirements for the 
Degree of Master of City Planning 

Abstract 

Comprehensive permitting is one response to the complex land development process resulting from a proliferation of regulatory agencies at different levels of government. Over time, it has become increasingly difficult for developers to meet the requirements of regulatory agencies which have conflicting agendas and statutory requirements. Traditionally, developers must seek approval from multiple agencies with jurisdiction over, or an interest in proposed development projects. 

Comprehensive permitting, where only a single board or multi-agency panel reviews development proposals for applicable federal, state, and local interests and policies, is one way of simplifying the development approval process. The Massachusetts comprehensive permit, created by law in 1969, is one example of the use of comprehensive permitting. 

I analyzed three cases from the Town of Yarmouth, Massachusetts. My goal was to determine the extent to which comprehensive permitting eliminates the problems caused by the increased number of agencies and regulations. I found that while duplicative efforts and whipsawing are eliminated, developers are still subject to lengthy approval processes and multiple pressures to redesign their proposals. The decision-making board in the comprehensive permit process must still reconcile many different interests, understand complex technical information, and consider their political position when reviewing development. I conclude that comprehensive permitting must be thought of as a negotiation and not only as a streamlined development review process. 

Thesis Supervisor: Michael Wheeler 
Senior Lecturer 

2
CREDITS

I am indebted to many people for helping me finish this thesis. First and foremost, this thesis would not have come together in any form had it not been for Michael Wheeler constantly prodding me and asking, "But, what about...?" or "Have you thought about...?" Your patience with my ready, fire, aim technique of writing and always helpful comments are commendable. I also thank Professor Lawrence Susskind whose skill in seeing links between seemingly unrelated issues and whose suggestions for improving my argument were truly exceptional. I treasure the opportunity to have worked closely with both of you.

There are also those who did not offer comments, but must also be thanked as they heard the brunt of my complaints and offered unending support. To Judy, Carol, Sally, and my roommates Brian and Roger, my deepest thanks. I will miss you all. Finally, to my parents Maxine and Philip and brothers Alan and Kenneth, just knowing you were there if I ever needed an ear was enough. I know I didn’t talk to you much about my work and studies, but you’ll always know where to find me if you have any questions. Thanks for your support and instilling in me the desire to surpass mere mediocrity.
<table>
<thead>
<tr>
<th>Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abstract</td>
<td>2</td>
</tr>
<tr>
<td>Credits</td>
<td>3</td>
</tr>
<tr>
<td>Table of Contents</td>
<td>4</td>
</tr>
<tr>
<td>List of Tables</td>
<td>5</td>
</tr>
<tr>
<td>Chapter 1 - Introduction and Overview of Comprehensive Permitting</td>
<td>6</td>
</tr>
<tr>
<td>1.1 Introduction</td>
<td>6</td>
</tr>
<tr>
<td>1.2 Multiplication of Land Use and Environmental Control</td>
<td>8</td>
</tr>
<tr>
<td>1.3 Problems With the Proliferation of Permits</td>
<td>11</td>
</tr>
<tr>
<td>1.4 Joint Hearings as a Response to the Proliferation</td>
<td>14</td>
</tr>
<tr>
<td>1.5 Comprehensive Permitting in Massachusetts</td>
<td>18</td>
</tr>
<tr>
<td>Chapter 2 - The Massachusetts Comprehensive Permit Process</td>
<td>20</td>
</tr>
<tr>
<td>2.1 Comprehensive Permit Process</td>
<td>21</td>
</tr>
<tr>
<td>2.2 Housing Appeals Committee Process</td>
<td>24</td>
</tr>
<tr>
<td>2.3 Experience with Comprehensive Permits and Appeals to HAC</td>
<td>27</td>
</tr>
<tr>
<td>2.4 Summary</td>
<td>28</td>
</tr>
<tr>
<td>Chapter 3 - Development Permitting Cases</td>
<td>32</td>
</tr>
<tr>
<td>3.1 Evaluation of Cases</td>
<td>32</td>
</tr>
<tr>
<td>3.2 Cummaquid Hills</td>
<td>34</td>
</tr>
<tr>
<td>3.3 Shorebrook Park</td>
<td>43</td>
</tr>
<tr>
<td>3.4 German Hill</td>
<td>52</td>
</tr>
<tr>
<td>3.5 Summary</td>
<td>60</td>
</tr>
<tr>
<td>Chapter 4 - Cross-Case Analysis</td>
<td>62</td>
</tr>
<tr>
<td>4.1 Reducing the Amount of Duplication</td>
<td>63</td>
</tr>
<tr>
<td>4.2 Considering All Issues at Once</td>
<td>68</td>
</tr>
<tr>
<td>4.3 Considering Political Interests</td>
<td>73</td>
</tr>
<tr>
<td>4.4 Summary</td>
<td>76</td>
</tr>
<tr>
<td>Chapter 5 - Comprehensive Permitting as Regulatory Negotiation</td>
<td>77</td>
</tr>
<tr>
<td>5.1 Comprehensive Permitting is More Complex than Expected</td>
<td>77</td>
</tr>
<tr>
<td>5.2 Recast Comprehensive Permitting as Regulatory Negotiation</td>
<td>80</td>
</tr>
<tr>
<td>5.3 Summary</td>
<td>86</td>
</tr>
<tr>
<td>Chapter 6 - Conclusion</td>
<td>90</td>
</tr>
<tr>
<td>Annotated Bibliography</td>
<td>92</td>
</tr>
<tr>
<td>Tables</td>
<td>Page</td>
</tr>
<tr>
<td>-----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Table 1.1 - Comprehensive Permit Applications</td>
<td>30</td>
</tr>
<tr>
<td>Table 1.2 - Average Number of Applications Per Year</td>
<td>30</td>
</tr>
<tr>
<td>Table 2.1 - Appeals to the Housing Appeals Committee</td>
<td>31</td>
</tr>
<tr>
<td>Table 2.2 - Average Number of Appeals Per Year</td>
<td>31</td>
</tr>
</tbody>
</table>
CHAPTER 1 - INTRODUCTION AND OVERVIEW OF COMPREHENSIVE PERMITTING

1.1 Introduction

Comprehensive permitting is one response to the complex land development process resulting from a proliferation of regulatory agencies at different levels of government. Traditionally, developers must seek approval from many different permitting agencies with jurisdiction over, or an interest in proposed development projects. Each agency reviews development proposals from its own standpoint. Over time, as the number of required approvals increased, it became more difficult for developers to meet the requirements of regulatory agencies with conflicting agendas and statutory requirements.1 One critic of the development permitting process explained, "Different agencies perceive threats, risks, and uncertainty differently and when all this goes into the decision-making process, there are different conclusions."2

Comprehensive permitting, where a single board or multi-agency panel reviews development proposals for applicable federal, state, and local interests and policies, is one way of simplifying the development approval process and reducing costs. Experience with comprehensive permitting has been mixed. In some communities that have used comprehensive permitting, local officials and developers argued that it successfully simplified the process by reducing uncertainty, delay, and duplication. In other communities, local officials and developers claimed that attempts at

---

comprehensiveness only resulted in another layer of bureaucracy, increasing costs and further delaying the final decision.³

In 1969, the Massachusetts Committee on Urban Affairs recognized that regulatory barriers were preventing the construction of affordable housing. These barriers were addressed in the 1969 Anti-Snob Zoning Act both substantively by giving power to override local zoning to a special State Housing Appeals Committee and procedurally by authorizing developers to apply for a single comprehensive permit from the local Zoning Board of Appeals in lieu of all other local permits.⁴ The comprehensive permit was supposed to simplify the development review process for affordable housing projects.

In this thesis, I analyze two development projects which were approved using the comprehensive permit process and one project which was approved using the traditional development review process. My goal is to determine the extent to which comprehensive permitting eliminates the problems caused by the increased number of agencies and regulations. I found that comprehensive permitting is not sufficient by itself. While duplication and whipsawing are eliminated, developers are still subject to lengthy approval processes and multiple pressures to redesign proposals. I also found the Zoning Board of Appeals must still reconcile many different interests, understand complex technical information, and consider their political position when reviewing development. I conclude that

---

³. Many local and state permit coordination programs are briefly analyzed in: Bosselman, et.al., eds. The Permit Explosion.
⁴. Chapter 774 of the Acts of 1969 (codified as 760 CMR 30.00 et. seq.).
comprehensive permitting must be thought of as a negotiation and not only as a streamlined development review process.

In this first chapter, I give a brief overview of the expansion of environmental and land use control agencies and the problems associated with this increase. I also describe comprehensive permitting in general and its various forms. Chapter 2 describes the Massachusetts comprehensive permit process in some detail. Chapter 3 presents three development permitting case studies (all in the Town of Yarmouth, Massachusetts on Cape Cod). One project was approved through the traditional development review process. The other two were approved through the comprehensive permit process. Chapter 4 analyzes these cases, discussing to what extent the goals of comprehensive permitting were met. Finally, Chapter 5 suggests that to meet its intended goals, comprehensive permitting should be thought of as a negotiation and not simply as a streamlined development review process.

1.2 Multiplication of Land Use and Environmental Controls

The 1960s saw an increased awareness of the impacts of development on the environment. Unprecedented environmental problems were created by residential, commercial, and industrial growth. Cities grew outward and encompassed rural, agricultural, and marginally developable land such as hillsides and flood plains. Catastrophic events occurred, such as the 1969 Santa Barbara oil spill. Also, books began featuring the effects of environmental pollution. Environmental issues once disregarded in favor

---

5. This increase in awareness is discussed by many authors. See for example: Frieden. The Environmental Protection Hustle, Popper. The Politics of Land Use Reform, and Vig and Kraft. Environmental Policy in the 1990s.
of economic development or thought only to be local, were recognized as having serious impacts which affected a great many people.

With this recognition came a desire to regulate development with widespread impacts. "State, regional, or even federal action is necessary where a regulatory decision significantly affects people in more than one locality."6 The National Environmental Policy Act, numerous new laws, and amendments to existing legislation regarding air quality, coastal and marine areas, endangered species, forestry, mining, resource recovery, toxic substances, water quality, and other substantive areas all provided for additional state and federal interest in and control over local land use.7 Centralizing regulation, however, did not replace local zoning and environmental regulation; rather it added to it. This supplementing of local regulation took many forms: (1) separate layers of regulation imposed on top of local zoning, (2) procedural or substantive standards for local zoning decisions, (3) entirely new powers on state, regional, or federal agencies, and (4) shifts of power from local to higher-level government.8

Land use and environmental decisions which had been entirely local before were now subject to regional, state, and federal intervention. Land development became more complex because approvals were needed from many agencies at different levels of government. The process was further

---

7. Vig and Kraft, eds. *Environmental Policy in the 1990s*. Vig and Kraft discuss the increase in environmental regulation in the 1960s and 1970s.
complicated by the increasing number and wider scope of challenges to development which resulted from new legislation encompassing new substantive areas and giving standing to many more people.

And this additional regulation did not occur all at once. New environmental issues were (and still are) continually finding their way to the political agenda. Perfectly justifiable regulations and the necessary enforcement mechanisms were adopted incrementally, seemingly without regard for the design of the overall environmental regulatory system. Where new regulations could have come under the mandate of existing agencies, instead, new agencies with narrow mandates were created. Regulations between agencies were repetitive, conflicting, and confusing. How could developers decide what trade-offs they could make when designing their projects when each agency insisted that its own requirements be satisfied. For example, if a development had a choice between occupying prime agricultural land or affecting a sensitive wildlife area, how should the trade-off be made? A Ford Foundation study concluded:

For the most part...new laws attacked environmental problems piecemeal. Nearly every level of government operated separate agencies to deal with air and water pollution, the discharge of solid waste, the protection of land and wildlife, and the treatment of solid waste. There was little recognition that these functions are interrelated and interdependent.

---

9. For further discussion of repetitive, conflicting, and confusing regulations, see: Bosselman, et. al. The Permit Explosion: Coordination of the Proliferation, Kolis, ed. Thirteen Perspectives on Regulatory Simplification, and Noble, et. al. eds. Groping Through the Maze.

Not only were the number of regulations (and required permits) increasing, but decisions were becoming more discretionary, making getting approval more difficult.\textsuperscript{11} The once straight-forward requirements, telling where specific uses could be located, evolved into a more discretionary system of approval, where one or more agencies could look at whether the uses were needed in an area and if a specific project met more general planning, health, safety, and other criteria. Also, new regulations required the evaluation of a project's specific impacts on the environment where science did not yet understand the issue. Different "experts" had different opinions on what would be the potential effects. That different agencies could have different information or interpret the same information differently, it is no wonder that developers were frustrated at having to assemble many approvals. "[This] growing dissatisfaction with the complexity of governmental processes associated with the proliferation of permits provid[ed] grounds for serious concern."\textsuperscript{12}

\textbf{1.3 Problems With the Proliferation of Permits}

There are many problems associated with the proliferation of permits required at the local level. There is repetition for both developers and town boards, whipsawing of developers (meeting conflicting requirements), costs of delay, uncertainty of outcome, overall complexity of the process (what permits are required and in what sequence, scoping for information, and evaluation standards), and reconciling competing interests in designing the project.

\textsuperscript{11} Mandelker, Daniel R. "Regulatory Simplification: An Overview." in Kolis, ed. Thirteen Perspectives on Regulatory Simplification.

\textsuperscript{12} Bosselman, et. al. The Permit Explosion: Coordination of the Proliferation, Page ix.
Repetition came (and still comes) in many forms. Some boards required separate preliminary and final reviews and, due to overlapping jurisdictions, some boards mimicked the same "concerns" of other boards. Even where mandates differed, there was nothing to stop one board from expressing concern about issues beyond its mandate. For each approval, developers needed to submit applications, meet information demands, and perhaps present the proposal at a hearing. Whipsawing occurred because in order to meet conflicting requirements, developers needed to seek waivers or re-approval from boards who had already given approval on the original design. Pinball tactics, being bounced from one board to another and sometimes back again, made the meeting all the varying interests and regulations difficult. A California study explained that "sometimes one agency does the work of another and sometimes one undoes the work of another. There are many pieces to the picture; but they do not add up to a single whole..."\(^{13}\)

As a result of the proliferation of regulation, developers spent more time just assembling all the necessary approvals before construction could begin. It took a great deal of time to attend so many hearings and compile information to meet the demands of each permitting board. Where new information was requested, developers had to wait for boards to re-evaluate the proposal against the new information. And there was much uncertainty too. Getting approval from one board did not necessarily means that the next

board would give approval. In effect, one board had a multiple veto over the others; one denial and the developer must start over again. Where there was a change of decision-makers or regulations, the originally conceived project was again subject to re-evaluation. If a proposal had not yet been approved, developers faced the possibility of starting over again to meet new political interests or regulations.

The complexity of the process was another problem. With so many boards, it was often difficult to determine which boards would need to give approval, what was the required sequencing of approvals, what information would be needed to satisfy each board, and what evaluation methods would be applied to the project. With the repetition, whipsawing, uncertainty, and complexity, development became more risky, and matching these risks, was costly.

Evaluating what costs are attributable to regulation is difficult. There are both costs due to the substance of the regulations and costs due to the process. Costs due to the substance of regulations include such costs as development impact fees, exactions, and rising land costs due to growth limiting regulations. Costs due to lengthening the process might include higher interest rates, increased costs of holding land, increases in inflation, and greater "cushions." Studies concerning the costs of regulation generally have not distinguished between substantive and procedural costs.\textsuperscript{14} While

\textsuperscript{14} Two studies give estimates of costs due to regulation. It is unclear how much is due to substance and how much is due to process. In San Jose in 1976, at least 20-30 percent of the cost of housing was estimated to be due to growth management policies (ULI and Gruen, Gruen and Associates,
developers are concerned about both substantive and procedural costs, the problems of repetition, whipsawing, uncertainty, and complexity, for which comprehensive permitting is meant to address, are all procedural costs.

Consumers and government officials also complained of increasing costs. It is not clearly understood to what extent developers passed their increased costs to consumers, but it is generally agreed that consumers were paying some of these costs by raising prices of homes, rents, and leases. For government, there were new agencies to be funded and regulations to be established where none (or little) existed before. Government had to provide infrastructure in previously rural and agricultural areas along the outskirts of town or they lost potential tax revenues as development moved outward to other towns in search of more congenial sites to build. The loss of open space and agricultural land was an unintended consequence. And this sprawl pattern of development is an efficient use of land.\textsuperscript{15}

1.4 Joint Hearings as a Response to the Proliferation

Given that the development review is costly to developers, government agencies, and consumers, each has some interest in simplifying the regulatory process. Developers have a major interest in eliminating repetitious applications and hearings, eliminating whipsawing, and reducing costs through expediting and clarifying the process. Government agencies, in the interest of reducing costs and providing better public service, ought to

\textsuperscript{15} Frieden, Bernard J. "The Consumer's Stake in Environmental Regulation." in Kolis, ed. Thirteen Perspectives on Regulatory Simplification.
strive to make the regulatory process more efficient without compromising the quality of review. Certainly eliminating duplication and clarifying the process achieves these goals. Consumers are interested in reducing developers' costs which might be passed on to them and in ensuring that they are getting high-quality products. Simplifying the process means different things to the different parties, but each parties' call for simplification is a reaction to the same problem, the proliferation of regulatory agencies and required permits.

Comprehensive permitting, where a single board or multi-agency panel reviews a development application for applicable federal, state, and local interests and policies, is one method of simplifying the development review process. Comprehensive permitting is a cousin of the joint hearing suggested by the American Law Institute in their Model Land Development Code.16 Employing a joint hearing, argued the ALI, would simplify and speed up the administrative process, but not change the substantive standards for each permit to be issued.

As originally designed, developers who needed multiple approvals would first reference a permit register which listed all permits required by government agencies. Developers would then file applications for each permit required, but rather than each agency holding an individual hearing on each permit application, a single (joint) hearing would be held in which all agencies issuing permits would participate. The hearing would result in a

group recommendation which would be binding unless, within a specified time, a permitting agency issued another decision.

Because the Model Land Development Code was only a "model," local governments tailored the joint hearing idea to their own needs. There seem to be two basic models for the make-up of the board holding the single hearing: (1) a multi-agency panel with representatives from each different permitting agency, and (2) one already existing agency given a new role to determine that all the interests of other agencies are met. Also, the type of decision resulting from the joint hearing differs. In some communities the decision is final, whereas in others the decision is merely a recommendation. There is disagreement over what is the best model for the agency or whether the result of the hearing is binding, but whatever the specifics, the models all address the same perceived problem.

Supporters of the existing agency model claimed that, "Time and effort might be saved if some agency or agency official would have ultimate authority to approve the project." In addition to saving time and money, proponents of the existing agency approach argued that only where all concerns are combined into one decision may tradeoffs between conflicting community policies be addressed and resolved. Because there is a large number of agencies involved in environmental and land use regulation, the exchange of information is hindered, delays are incurred, and overlapping

17. For different ways which joint hearings can be structured, see: Bosselman, et.al. The Permit Explosion, Kolis, ed. Thirteen Perspectives on Regulatory Simplification, and the American Law Institute. A Model Land Development Code.

jurisdictions confuse who has authority. "A single comprehensive decision should be a more accurate reflection of the community's values and opinions than the sum of the decisions of single-issue permits." Perhaps this is an optimistic view of comprehensive permitting. Is it really enough to only set up the comprehensive decision-making forum, or must the substantive issues also be worked through the political process. This idea is addressed in Chapters 4 and 5.

Critics of the multi-agency panel claim that it is merely another level of bureaucracy to the already complex process. Proponents of the multi-agency panel approach argue that "the delegation of all authority over land use and environmental issues to a single 'czar' cannot, realistically speaking, be accomplished. The issues are too complex; our political institutions, too varied." 

While there is disagreement over whether using an existing agency or using an interagency panel is better, there is agreement that joint hearings offer a more unified look at development, a joint hearing should not become another level of bureaucracy, and the decision-making body should be able to adequately evaluate substantive issues.

21. Bosselman, et. al. looks at the experience in a number of communities such as Fairfax County, Virginia, Dade County, Florida, and Los Angeles, California
In this thesis, I analyze the comprehensive permit authorized in the Massachusetts Anti-Snob Zoning Act.²² In this model, developers apply to an existing board (the Zoning Board of Appeals) for one approval in lieu of all other local level permits. The Zoning Board of Appeals issues a decision which is binding upon the other town boards.

1.5 Comprehensive Permitting in Massachusetts

The Massachusetts Legislature, in enacting the Anti-Snob Zoning Act in 1969, found that "necessary land in [less densely populated areas] is unavailable [for affordable housing] because of restrictive zoning controls or similar local regulations. Moreover, where land is available, the process of obtaining local approval is so protracted as to discourage all but the most determined and well-financed builders who often do not have the community at heart."²³ These regulatory barriers were addressed both substantively by giving local zoning override power to a special Housing Appeals Committee, and procedurally by authorizing developers to apply for a single comprehensive permit in lieu of all other local permits.

Comprehensive permitting is one element in the Massachusetts Anti-Snob Zoning Act, but the potential for state override of local zoning is also important because it helps shape the decision whether to approve, approve with conditions, or deny a comprehensive permit. Developers may appeal to a special State Housing Appeals Committee if they have been denied a comprehensive permit or have had conditions attached to their approval which render their project uneconomic. If the Housing Appeals Committee

²² MGL c. 40B §§ 20-23 (also known as Chapter 774 of the Acts of 1969).
²³ 760 CMR 30.01 (2)
determines that a need for affordable housing exists and that general health, safety and planning factors are met, they will overturn the Zoning Board of Appeals' decision, regardless of the specific zoning requirements of the site.

Not surprisingly, there are both supporters and opponents of the comprehensive permit. Communities generally oppose the comprehensive permit because through it, and with the support of the Housing Appeals Committee, developers can request many waivers to local regulations. Also, by consolidating all issues into one permit, many boards lose the power to decide for themselves if a project meets their specific requirements for approval. Developers are generally in favor of the comprehensive permit, not only because by using it they can generally build at densities higher than normally allowed, but also because it generally expedites getting approval.

It is interesting that the Massachusetts comprehensive permit was narrowly defined—to be used only for affordable housing. The legislature found that facilitating the construction of affordable housing was of statewide concern, but the experience of San Jose and Houston suggests that facilitating all permitting might lower the costs of all housing. This leads to a question beyond the scope of this thesis: would towns object to having a comprehensive permit process without the possibility of an override decision by the Housing Appeals Committee?

The Massachusetts comprehensive permit process is explained in more detail in Chapter 2.

---

CHAPTER 2 - THE MASSACHUSETTS COMPREHENSIVE PERMIT PROCESS

The Anti-Snob Zoning Act (MGL c. 40B §§ 20-23) was enacted to promote the construction of low or moderate income (affordable) housing by: (1) allowing a developer to apply for a single comprehensive permit from the Zoning Board of Appeals in lieu of all other required local permits and to request waivers of local requirements which would render the project uneconomic, and (2) authorizing a developer to appeal to the Massachusetts State Housing Appeals Committee any denial or uneconomic condition attached to the approval of a comprehensive permit.

It is important to understand that these two factors work simultaneously. That developers need to seek only one all-inclusive approval and can appeal denials or conditions that render the project uneconomic, and understanding under what conditions the Housing Appeals Committee favors developers, informs the Zoning Board of Appeals decision whether to approve, approve with conditions, or deny a comprehensive permit.

In this chapter, I describe the how developers seek approval through the comprehensive permit process and the appeals process and then summarize local experience and trends with comprehensive permits and appeals to the HAC.25

25. Information about the process of applying for a comprehensive permit and appeals to the HAC was taken from: Massachusetts, State of, Executive Office of Communities & Development. Guidelines for Local Review of Comprehensive Permits, June 1990.
2.1 Comprehensive Permit Process

The comprehensive permit process really starts before the official comprehensive permit application is submitted to the Zoning Board of Appeals. Before a developer can even apply for a comprehensive permit, he must get a project eligibility letter from a subsidizing agency which indicates that the proposed project is eligible for funding under that subsidy program. An eligibility letter does not indicate that funding has been approved, rather that the project meets the requirements of the program and is eligible to apply for funding. The Massachusetts Housing Finance Agency (MHFA) issues the site and project approval to developers seeking funding from a state or private housing program.26

The site approval process has many steps. Prior to submitting an application for site and project approval with MHFA, developers must meet with the local housing partnership and governing body of the community. This ensures that MHFA is not the first to tell the community that an affordable housing project has been proposed. It also demonstrates that the developer has, at least, heard the community's feelings towards the proposal and gives some credibility to the viability of the project before MHFA invest time in reviewing it. MHFA first reviews the application to determine general consistency with the guidelines of the specific program. If consistent, MHFA solicits comments from the local Chief Elected Official. At this stage,

26. The Housing Division of the Executive Office of Communities and Development (EOCD) issues eligibility letters for public housing. Federal agencies issue eligibility letter for projects seeking funding under federal programs. The Massachusetts Housing Partnership issues eligibility letters for projects seeking technical assistance under the Local Initiative Support Program.
communities often request comments from their Planning Board, Conservation Commission, and local housing partnership. A formal public hearing is not required at this time. During this phase, MHFA conducts its own evaluation of the site, project, and design of the project. This includes a visit to the project site and discussions with local officials to learn their concerns with the development.

At the end of this period, an evaluation report is compiled and other comments are collected from the various groups identified above. Based on these comments, a site letter is issued from MHFA that approves, conditionally approves, or denies the application. If the developer receives an approval or a conditional approval then he/she may submit an application to the Zoning Board of Appeals for a comprehensive permit.\textsuperscript{27}

A comprehensive permit application to the Zoning Board of Appeals must include the letter stating that the project is eligible for funding, preliminary drawings and plans showing the project and its context, and a list of requested exemptions to local codes, ordinances, by-laws or regulations, including the zoning and subdivisions by-laws. Developers may also request that they be exempt from application fees. The application should also include additional information which may be necessary for the Zoning Board of Appeals to consider planning, health, and safety factors.

Upon receiving a comprehensive permit, the Zoning Board of Appeals must send copies of the application to relevant local boards to solicit their

\textsuperscript{27} This outline of steps for receiving a site and project approval is given in the MHFA Site Evaluation Application.
advice before and during the hearing process. Section 21 of MGL, Chapter 40B states that "The Board of Appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards..." The Conservation Commission and Board of Health have separate jurisdictions and conduct separate hearings relating to state requirements in their areas.

The Zoning Board of Appeals may dispose of the application in one of three manners. (1) approve the comprehensive permit on the terms and conditions set forth in the application; (2) approve a comprehensive permit with conditions with respect to the site plan, height, size, shape, or building materials that do not render the construction or operation of such housing uneconomic; or (3) deny a comprehensive permit as not consistent with local need.28 The Board may also deny the comprehensive permit application to protect health and safety, promote better site and building design, or preserve open space.29

If a Zoning Board of Appeals denies a comprehensive permit or approves the permit with conditions which the developer believes would

28. A site plan for affordable housing is consistent with local needs if less than 10% of the community's existing housing stock is subsidized low or middle income housing, if less than 1 1/2% of privately owned land zoned for residential, commercial, or industrial purposes is used for affordable housing, or if the proposed site plan would result in the construction of low or middle income housing on not more than 0.3% of total privately owned land or 10 acres in a single calendar year. (MGL c. 40B, § 20)

29. Several Housing Appeals Committee decisions have clearly established that health or safety factors, or valid planning objections must outweigh the regional and local needs for low and moderate income housing. For a summary of these issues, see: Lacasse. The Anti-Snob Zoning Law: The Effectiveness of Chapter 774 in Getting Affordable Housing Built.
make the project uneconomic, he may appeal the decision to the State Housing Appeals Committee (HAC). The HAC, a five member adjudicatory commission, has the power to override local zoning ordinances if the affordable housing project is reasonable.

2.2 Housing Appeals Committee Process

Once a decision is appealed, the HAC holds a pre-hearing conference of counsel to solicit stipulations. At this conference, the HAC encourages the parties to negotiate a settlement on their own.\textsuperscript{30} If the parties choose not to mediate, they bring their cases before the HAC and present expert testimony on technical issues. Abutters can submit amicus briefs, but do not participate directly in the hearing. The hearing provides a review of each party's last best proposal.

Cases are ready for a decision approximately one year after the initial filing with the HAC. Often the HAC takes another year to hand down its ruling. Like a court of law, the HAC generally chooses one proposal; it does not develop an intermediate proposal. In the spirit of the legislative intent of Chapter 774, the HAC most often rules for the developer and allows the affordable housing to be built. Recent statistics have shown that over 90 percent of the HAC decisions have been to overrule a Zoning Board of Appeals' decision.

To facilitate parties settling disputes over affordable housing themselves, HAC sponsors an affordable housing mediation program in

\textsuperscript{30} The Massachusetts State Office of Dispute Resolution operates an affordable housing mediation program.
cooperation with the Office of Dispute Resolution. At the HAC's invitation, a representative of the Office of Dispute Resolution attends the conference of counsel--the first step in the hearing process--and describes the mediation program and its advantages as an alternative to adjudication in the HAC.

The mediator's role is to assist the parties in fashioning a settlement. The mediator does not impose a decision on the parties. The mediation program does not prescribe steps for the mediator and parties to follow; the process is informal. Usually over a period of weeks, the parties meet jointly and separately with the mediator to explore all possible avenues of settlement. Affordable Housing mediations generally take from one to three months and involve approximately 12 joint meetings, private caucuses, and telephone communications.

The Office of Dispute Resolution estimates that the total cost of mediation does not exceed $10,000, divided equally among the parties. Municipalities may seek up to $3000 worth of in-kind technical assistance from the Massachusetts Housing Partnership Short Term Technical Assistance Fund. This fund provides early technical assistance from pre-qualified consultants to municipalities, local housing partnerships, and non-profit corporations for the development of local projects and housing initiatives.

31. Office of Dispute Resolution, Affordable Housing Mediation Program information sheet.
33. It is unclear if MHP would approve an application for money without the technical assistance. This fund was initiated in 1991, and to date, no
It is important to note that the state plays an important role in creating incentives for developers to cooperate with town officials. In order to facilitate the development of affordable housing, the state created the Local Initiative Program which offers technical assistance to a city or town rather than financial assistance to a developer. This technical assistance is the "subsidy" required in order to apply for a comprehensive permit. Developers of local initiative projects must have the written support of the chief elected official and local housing partnership. This program gives towns resources to work with developers without which there might be less incentive for cooperation. Also, subsidies under the Homeownership Opportunity Program (HOP) are limited to developers who can demonstrate a high level of cooperation with local government officials.

A recent trend in getting affordable housing built is the "friendly 774'." This term is used to describe comprehensive permit applications where the town initiates and facilitates the construction of an affordable housing development. Generally, a town acquires land and then requests proposals for building an affordable housing project. The selected developer works with the town boards and Zoning Board of Appeals on designing the project before applying for a comprehensive permit. Communities benefit because they help design affordable housing projects which then count towards their

 municipalities have requested funding under this program only to cover their portion of the cost of mediation.

34. 760 CMR 45.00 Local Initiative Program
35. HOP is jointly administered by the Massachusetts Housing Partnership and the Massachusetts Housing Finance Agency. HOP combines low-interest mortgage financing, state subsidies, and local contributions.
minimum requirements so that they do not face a HAC overrule if they deny a comprehensive permit application.

### 2.3 Experience with Comprehensive Permits and Appeals to the HAC

Nearly every suburb in the Boston area has received applications for comprehensive permits, and more than half of the communities in the Commonwealth have some subsidized housing. Some 35,000 affordable housing units have been proposed through comprehensive permits; approximately 17,000 have been built.

Trends shown in recent statistics for the total number and dispositions of comprehensive permit applications are not surprising. First, the total number of applications has been increasing since Chapter 774's inception in 1969. Second, fewer applications are being denied, and third, more applications are being approved with conditions rather than just approved. Table 1 (at the end of this chapter) shows the total number and dispositions of comprehensive permit applications. The parties interested in building affordable housing are learning how to use Chapter 774 in their favor and how Chapter 774 may work against them in a given situation.

---

38. Many recent studies have been done to document the number and disposition of comprehensive permit applications applied for each year statewide and the number and disposition of appeals to the HAC. However, each study differs and my attempts to update the information using information from the HAC gives yet another set of numbers. The numbers differ, but the trend remains the same.
The increase in the total number of comprehensive permit applications through 1989 might be attributed to many factors such as aggressive state funding and the creation of new housing programs. The decrease in Zoning Boards of Appeals denying comprehensive permits over time might be attributed to local officials learning that the HAC usually decides in favor of the developer.\textsuperscript{40} Table 2 (at the end of this chapter) shows the dispositions of appeals to the HAC. Finally, the increase in the number of conditioned approvals might be attributed to local officials learning that the HAC will not overturn conditions unless the project is made uneconomic due to the conditions.\textsuperscript{41}

\section*{2.4 Summary}

The Massachusetts comprehensive permit is supposed to simplify the development review process for affordable housing projects. Getting final approval though is still a lengthy process because the pre-filing requirements are lengthy. A developer must meet with town officials, seek site approval, and assemble very detailed plans before he can apply for the comprehensive permit. The pre-filing meetings with town officials are not unique to the comprehensive permit, they serve the same purpose as voluntary pre-application reviews, a step found in many communities' development review procedures.

\textsuperscript{40} It would be interesting to study if in the future this percentage will decline as parties learn more what marginal issues they have a chance at successfully challenging or ZBAs find better ways to support denials. In either case, the HAC may have less opportunity to favor the developer.

\textsuperscript{41} Guzman. Chapter 774: Anti-Snob Zoning Two Decades of Impact.
In general, there are two benefits to a pre-application review. First, it gives the developer some knowledge of what the various boards' interests and concerns are for that particular site and project. Second it reduces a developer's uncertainty regarding whether the proposal will be approved or denied--in theory, if a board helps design a proposal, then, feeling more commitment to it, they will be less likely to deny it. The designers of the Anti-Snob Zoning Act seemed to recognize the potential benefits of pre-application review and chose to mandate it as a prerequisite for applying for a comprehensive permit.

Finally, the word "comprehensive" suggests two ideas. First, that there is a consideration of all pertinent issues, and second, that there is a better understanding (comprehension) of the issues. Chapter 3 gives three case studies from the Town of Yarmouth. For the comprehensive permit cases, look for whether the Zoning Board of Appeals discussed all the issues and whether there was really a better understanding of the issues. To what extent did the Zoning Board of Appeals' hearing facilitate discussion and understanding of the issues?
Table 1.1 - Comprehensive Permit Applications

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>#</td>
<td>%</td>
<td>#</td>
<td>%</td>
</tr>
<tr>
<td>Granted</td>
<td>17</td>
<td>15.3</td>
<td>129</td>
<td>66.8</td>
</tr>
<tr>
<td>Conditioned</td>
<td>38</td>
<td>34.2</td>
<td>11</td>
<td>6.0</td>
</tr>
<tr>
<td>Denied</td>
<td>47</td>
<td>42.4</td>
<td>49</td>
<td>27.2</td>
</tr>
<tr>
<td>Other 2</td>
<td>9</td>
<td>8.1</td>
<td>1</td>
<td>0.0</td>
</tr>
<tr>
<td>Total</td>
<td>111</td>
<td>100.0</td>
<td>181</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Notes:
1. Source: Guzman, Margaret. Chapter 774: Anti-Snob Zoning Two Decades of Impact. Clark University Senior Thesis, April 1989. There are not an equal number of years in each category because only summary information is available. In 1978, 1986, and 1989, surveys of comprehensive permits were done, but only summary statistics were collected. These categories are ones that are used in the latest (1989) update.
2. This category includes projects undecided at the local level or at various stages of the appeals process.
3. The totals do not add up because of the disposition of the "other projects." For example, the 1979-1986 column adds up to 190, but this figure double counts the 9 "other" permits from the previous column.

Table 1.2 - Average Number of Applications Per Year

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Granted</td>
<td>1.9</td>
<td>18.4</td>
<td>29.7</td>
</tr>
<tr>
<td>Conditioned</td>
<td>4.2</td>
<td>1.6</td>
<td>13.0</td>
</tr>
<tr>
<td>Denied</td>
<td>5.2</td>
<td>7.0</td>
<td>13.0</td>
</tr>
<tr>
<td>Other</td>
<td>1.0</td>
<td>0.14</td>
<td>6.7</td>
</tr>
</tbody>
</table>
Table 2.1 - Appeals to the Housing Appeals Committee

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Overruled ZBA Decision</td>
<td>46</td>
<td>34.1%</td>
<td>14</td>
<td>34.2%</td>
<td>60</td>
</tr>
<tr>
<td>Sustained ZBA Decision</td>
<td>7</td>
<td>5.2%</td>
<td>0</td>
<td>0.0%</td>
<td>7</td>
</tr>
<tr>
<td>Settlement before Decision</td>
<td>13</td>
<td>9.6%</td>
<td>9</td>
<td>21.9%</td>
<td>22</td>
</tr>
<tr>
<td>Mandamus w/ Stipulations</td>
<td>26</td>
<td>19.3%</td>
<td>6</td>
<td>14.6%</td>
<td>32</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>43</td>
<td>31.8%</td>
<td>12</td>
<td>29.3%</td>
<td>55</td>
</tr>
<tr>
<td>Total Appeals</td>
<td>135</td>
<td>100.0%</td>
<td>96</td>
<td>100.0%</td>
<td>231</td>
</tr>
</tbody>
</table>

Notes:
2. In 1989, at the time of the survey, only 41 appeals had been decided; there were 55 active appeals at the HAC.

Table 2.2 - Average Number of Appeals Per Year

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Overruled ZBA Decision</td>
<td>2.7</td>
<td>4.7</td>
</tr>
<tr>
<td>Sustained ZBA Decision</td>
<td>0.4</td>
<td>0.0</td>
</tr>
<tr>
<td>Settlement before Decision</td>
<td>0.8</td>
<td>3.0</td>
</tr>
<tr>
<td>Mandamus w/ Stipulations</td>
<td>1.5</td>
<td>2.0</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>2.5</td>
<td>4.0</td>
</tr>
</tbody>
</table>
CHAPTER 3 - DEVELOPMENT PERMITTING CASES

This chapter summarizes three development permitting cases in the Town of Yarmouth, Massachusetts: (1) Cummaquid Hills, a cluster of single family homes, (2) Shorebrook Park, a multi-family condominium project, and (3) German Hill, a single family home development. In the first case, the developer followed the traditional subdivision and development review process in Yarmouth. In the second case, the developer sought approval through the Massachusetts comprehensive permit process, designing the project and then applying for a comprehensive permit. The third case, also a comprehensive permit project, was a "friendly 774." The developer was a town agency (the Fair Housing Committee) and because a mediator was hired to assist in building consensus among the town boards on the design of the project before applying for a comprehensive permit.

3.1 Evaluation of Cases

When reading the three cases, note both the formal process for reviewing development proposals and what additional (ad hoc) steps were taken by the developers and town boards. In the Cummaquid Hills case, the developer needed five approvals before he could apply for a construction permit. In the comprehensive permit cases, the developers needed only one approval. In all three cases, however, each developer consulted with the town boards either prior to or during the formal review process. And in the comprehensive permit cases, these ad hoc negotiations certainly helped shape the final approval. In none of the cases did the actual process which the developers went through follow only the formal approval process.
Proponents of comprehensive permitting argue that comprehensive permitting both speeds up the decision-making process and improves the quality of the proposed development because all the issues regarding its benefits and impacts are considered at the same. To evaluate whether the comprehensive permitting is faster, I looked at the potential amount of duplication. Specifically, I considered:

(1) How many times the developer had to redesign the proposal once the hearings started. Redesigns are costly both financially and in the time that they add to the process; therefore reducing the number of times that a developer needs to redesign a proposal once in the hearing process is desirable.

(2) Whether the developer was whipsawed--i.e., did the developer have to address conflicting requirements. Similar to redesigns, developers need to adjust their strategy for getting approval when faced with conflicting requirements. Seeking re-approvals or additional waivers as a result of conflicting standards is an often unanticipated step in the process.

(3) How many separate hearings there were for the developer to attend. I looked at whether the developers seemed to be making the same presentation and arguments before each town board, whether some issues were reviewed by multiple boards, and whether one board considered the same issues multiple times. Each separate hearing is time-consuming, the developer must submit an application, and then allow time for the project to be reviewed by staff, and be scheduled on the agenda.
I cannot evaluate the quality of the proposed development (it is certainly subjective), but since proponents of comprehensive permitting argue that comprehensive permitting improves the quality of the proposed development because all the substantive issues are considered at the same, I looked at what steps were taken to have all the issues considered at once:

(1) Whether the developer sought assistance from the various town boards or the community in designing the project. This assistance not only gives the developer some knowledge of what the various boards interests and concerns are for that particular site and project, but also the informal assistance is an opportunity for boards to offer suggestions beyond their mandate—a more inclusive consideration of the proposal.

(2) Whether the developer explored many design options, or seemed to settle on only one. It is unlikely that the first attempt to solve a problem will be the best, however, by exploring many options the developer can find new and perhaps better ways to meet everybody's interests.

(3) Whether there were integrative solutions developed to resolve issues. Integrative solutions, where the interests of many boards are met, demonstrates that the issues were considered comprehensively.

3.2 Cummaquid Hills

In March, 1988, the Cummaquid Hills Realty Trust (developer) submitted a preliminary subdivision plan for a single family residential cluster on 15.5 acres in the Town of Yarmouth. The cluster was a portion of a

---

42. Information about this case was gathered from project files from various agencies, from personal interviews with David Kellogg, Town Planner (April 9, 1992), and Bill Wood, Chair of the Fair Housing Committee (April 9, 1992).
larger proposal, most of which was located in the adjoining Town of Barnstable; the Town of Yarmouth was concerned only with the cluster portion of the entire proposal as only this portion was in Yarmouth. The proposal showed 13 reduced-size lots (less than 40,000 square feet) clustered on approximately one-third of the site with the remaining area dedicated as open space. According to the Yarmouth Subdivision By-Law, the developer needed to receive six separate approvals before he could apply to the Building Inspector for construction permits:

(1) approval from the Planning Board for the preliminary subdivision plan;
(2) approval from the Site Plan Review Team for internal site planning issues;
(3) special permit from the Zoning Board of Appeals for the cluster concept and regional planning issues;
(4) approval from the Board of Health for wetland protection and nitrate loading standards;
(5) approval from the Conservation Commission on the amount and management of open space; and,
(6) final approval by the Planning Board for the final subdivision plan.

As in many communities, the Town of Yarmouth encourages developers to consult with the Planning Board and Town Planner for an informal review of their proposal. This pre-application review, according to the Subdivision By-Law, is an opportunity to exchange information; a public hearing is not required and minutes of the discussion are not kept. The developer of Cummaquid Hills opted to attend the pre-application review and met with the Planning Board and Town Planner to ask questions about
what boards and agencies might have jurisdiction and what regulations (such as lot size, frontage, setbacks, etc) might apply to him. He also brought a concept plan for the Planning Board and Town Planner to review showing 13-15 lots clustered on approximately 5 acres with the remaining 10 acres dedicated to the city for open space and passive recreation. The two major issues were the reduced lot size allowed by the cluster concept (smaller than the R-40 zone--residential-40,000 sq. ft. lots--allowed), and special setback requirements because the property bordered a pond.

The preliminary subdivision plan submitted to the Planning Board for approval showed 13 lots clustered on approximately five acres--much the same as the concept plan. At a public hearing in March 1988, the Planning Board approved the preliminary plan on the condition that the special permit for the cluster division be approved by the Zoning Board of Appeals. No objectors showed up to this hearing (perhaps because the site is remote). In approving the preliminary plan, the Planning Board expressed concern that one lot (lot 13) did not meet frontage requirements on the proposed street, nor building and septic system setback requirements from the pond. Although they did not require that lot 13 be eliminated, they stated that eliminating it would not cause economic hardship to the developer.

The Planning Board does not decide on cluster divisions but must approve the preliminary plan before it can be heard by the Zoning Board of Appeals. That a developer must get a special permit for the cluster concept from the Zoning Board of Appeals instead of the Planning Board seems to invite whipsawing. The Zoning Board of Appeals generally approves variances and special permits for uses not allowed as-of-right, and since
Yarmouth wanted cluster divisions to be reviewed as a special use, giving the power of approval to the Zoning Board of Appeals was logical. In the case of cluster developments, however, the cluster concept is more like a subdivision which must be approved by the Planning Board. Therefore it might have made more sense for the Planning Board to review cluster developments too.43

Before the Zoning Board of Appeals holds a public hearing for the special permit to approve the cluster division, the developer must receive site plan approval from the Site Plan Review Team. Site plan review is done to ensure that the proposal is consistent with on-site planning issues: internal circulation and egress from the site, building location, access by fire and service equipment, utilities and drainage, environmental impacts, and compliance with the character of the neighborhood. The Site Plan Review Team is made up of the Building Inspector, Town Planner, Water Superintendent, and Health Agent and may include the Fire Chief, Town Engineer and a representative of the Conservation Commission. This team looks at issues in a multi-disciplinary approach. While they might fit the "multi-agency" model of joint hearings, they have only a narrow mandate--to consider on-site issues.

Site plan review is generally informal; the Site Plan Review Team meets with the developer to discuss its concerns. The developer presents the project, listens to the concerns of the individuals on the review team, and

43. At the 1992 Yarmouth Town Meeting, an amendment to the Subdivision By-Law transferring the power of approval for cluster divisions from the Zoning Board of Appeals back to the Planning Board of Appeals will be considered. The ZBA is not expected to oppose this.
answers questions. A public hearing is not held and minutes are not kept, although the site plan approval contains statements of interest and concern by individuals of the review team. The Site Plan Review Team cannot bind the developer. Individual boards, however, may enforce the interests and concerns of the Site Plan Review Team.

In May, the Site Plan Review Team identified a number of issues. The Planning Board's concerns about the preliminary plan were re-expressed. The Town Engineer questioned the amount of developable land because the land was largely classified as "severe," and must pass deep hole and percolation tests before being declared suitable for septic systems. The Board of Health required that a public hearing be held in conjunction with their nitrate loading regulations, and expressed concern that lot 13 might not meet septic system setback requirements from the pond. The Fire Chief expressed concern about the driveway layouts shown on two other lots (23 and 24). He also asked that wider driveways be built for fire and rescue vehicles on lots 13, 23 and 24, that fire hydrants be installed, and that "adequate" house numbering be provided. The Conservation Commission asked that the plan show how the open space was to be managed. Finally, as a group, the Site Plan Review Team urged that cumulative impacts of this and potential future development be considered at the time of approval, and that the Zoning Board of Appeals consider a conventional layout plan--as none had been prepared to date.

In preparation for the Zoning Board of Appeals' hearing, the developer answered many of the Site Plan Review Team's questions. The developer's attorney proposed that the open space be "conveyed to an entity comprised of
lot owners within the development." The Town of Yarmouth would be granted an easement to use the open space for passive recreation only and be responsible for enforcing the restrictions. A traffic study was conducted, showing that at peak rush hour, less than one car per minute on average would enter or exit the site. And, anticipating needing the information for both the Zoning Board of Appeals and the Board of Health hearings, the developer hired an outside engineer to conduct the deep hole and percolation tests. The tests indicated that the soil was suitable for septic systems and that the septic system setback requirement for lot 13 could be reduced. The developer did not eliminate lot 13 as requested by the Planning Board, nor increase driveway widths as requested by the Fire Chief.

The Zoning Board of Appeals, to approve a cluster development, must make a number of findings (1) that the proposed subdivision plan allows relatively intensive use of land while not increasing the population density on a large scale; (2) that the plan preserves open space for conservation and passive recreation; (3) that the plan introduces variety and choice into residential development; (4) that the plan contributes to meeting housing needs; and, (5) that the plan facilitates economical and efficient provision of public services. In addition, the Zoning Board of Appeals must find that undue nuisance, hazard, or congestion will not be created by the project, and that there will be no harm to the established or future character of the neighborhood or town.

The developer made an application to the Zoning Board of Appeals requesting two approvals: a special permit for the cluster concept, and a variance for the building and septic system setback requirements on lot 13 and
driveway widths on lots 13, 23 and 24. The Zoning Board of Appeals sent copies of the special permit application and proposal to the members of the site review team for comments. Only the Planning Board responded, urging the Zoning Board of Appeals to approve the cluster, but eliminate lot 13 and require that lots 23 and 24 share a common driveway.

The Zoning Board of Appeals granted the special permit for the cluster development but required that lots 23 and 24 share a common driveway as requested by the Fire Chief and urged by the Planning Board. Included in the special permit was an allowance for a narrow driveway, and reduced building and septic system setbacks for lot 13. The Board of Health would have the final say on whether the soil was suitable for the proposed septic systems and whether to allow the reduced septic system setback for lot 13. The Zoning Board of Appeals also required that the developer withdraw the request for a variance as those issues were allowed in the special permit.

The Zoning Board of Appeals also seemed to disregard the Site Plan Review Team's request to consider the cumulative impacts of the project along with potential future development even though a currently undeveloped parcel adjacent to the developed portion of the proposed cluster had a potential for 12 or 13 additional lots. The Zoning Board of Appeals simply stated that because egress into Cummaquid Hills would be through

44. Perhaps the developer's reason for applying for a variance at the same time was because of uncertainty of the extent of Zoning Board of Appeals' action on the special permit application.
45. The developer was also asked to withdraw the request for the variance, which he did because the Zoning Board of Appeals approved the special permit without needing a variance.
the Town of Barnstable, cumulative impacts were not an issue. Nor did the Zoning Board of Appeals consider a conventional layout plan. This was not part of their required review.

The Board of Health hearing was held after the Zoning Board of Appeals hearing--their approval was not necessary for the Zoning Board of Appeals to issue a special permit. The Board of Health found that the soil on the cluster site was suitable for the proposed septic systems and approved the reduced building setback on lot 13 and the use of the septic system if it were located along the westerly side of the lot, farthest away from the pond.

The Planning Board approved the final subdivision plan--the same plan which the Zoning Board of Appeals approved--and the final plan was filed with the City Clerk's office on July 19, 1988. The project has been completed and is fully occupied.

Analysis
The developer needed a total of six separate approvals from the Planning Board (twice), Site Plan Review Team, Zoning Board of Appeals, Board of Health, and Conservation Commission. And for each, the developer had to file separate applications, wait to be scheduled on the agenda, attend the hearings, and wait for a decision. The whole process of getting approval from applying for a preliminary plan approval to filing the final map with the City Clerk took six months. In this case, the developer did not have to make major revisions to the design of the project after submitting the application, although the possibility certainly existed. Many of the issues mentioned by the Site Plan Review Team could have led to major changes in
the design of the project. Such changes would have been required had the project site not passed the deep hole and percolation tests, had the Board of Health found that lot 13 was not buildable, or had the Zoning Board of Appeals required the developer to consider a conventional layout. Neither did the developer seem to be whipsawed, but again, the potential certainly existed because he needed approvals from both the Zoning Board of Appeals and the Board of Health concerning the proposed reduced septic system setback on lot 13.

The developer did not seek any assistance of the town boards in designing the project after the pre-application review. The proposal at the pre-application review before the Planning Board showed 13-15 lots. The preliminary plan showed 13 lots and this plan was virtually unchanged throughout the entire hearings process. That there was little contact with the town boards and that the pre-application plan and approved preliminary plan were similar, indicates that the developer may not have explored many ways of meeting the individual interests and requirements before committing to the 13-lot configuration. Perhaps though, many possibilities were considered before the concept plan was developed. It is interesting to note that the town boards went beyond their narrow mandate to look inclusively at the issues. They could not require changes (nor commit other boards to integrative solutions) in response to concerns which went beyond their mandate. The Site Plan Review Team was mandated to approve the proposal on internal (on-site) considerations only, but they also considered off-site nitrate-loading, areawide traffic, and community use of open space. The Zoning Board of Appeals was only mandated to give approval on communitywide (off-site) planning issues, but they considered the setbacks and driveway width for lot
13 too. Where the "official" process envisioned substantive issues being considered separately, the town boards supplemented the process with their own inclusive reviews.

3.3 Shorebrook Park

In August 1987, Shorebrook Trust (developer) applied to the Yarmouth Zoning Board of Appeals for a comprehensive permit to construct a 64 unit multi-family condominium cluster development on a 3.2 acre site. Funding subsidies for the project were to be through the Massachusetts Homeownership Opportunity Program (HOP). The Zoning Board of Appeals denied the comprehensive permit; the developer appealed the decision to the Massachusetts Housing Appeals Committee (HAC) who overturned the denial; and finally, the Zoning Board of Appeals appealed the HAC decision to the State Supreme Judicial Court who upheld the HAC decision. Soon after this decision, though the developer abandoned the project for lack of funding to remove toxins from the site. The project site is the former site of the Yarmouth solid waste landfill, and then after the landfill closed, it was used as an oil storage facility.

In November, 1986, before making application to MHFA, the developer met with the Board of Selectmen to discuss his proposal. At that meeting, the Board of Selectmen endorsed the concept of affordable housing, but stated

---

46. Information about this case was gathered from project files from various agencies, and from personal interviews with David Kellogg, Town Planner (April 9, 1992) and Bill Wood, Chair of the Fair Housing Committee (April 9, 1992).

47. Although required by the MHFA application, the developer did not meet with the Yarmouth Fair Housing Committee until after the Zoning Board of Appeals opened the public hearing.
that 64 units on the site exceeded a reasonable density in the Town of Yarmouth. As a result of that meeting, the Board of Selectmen directed the town planner to quickly develop guidelines to adopt concerning density, percentage of affordable units, and other issues which would generate a point score for affordable housing and comprehensive permit projects. The town planner did this (without public participation) and the Board of Selectmen adopted a guideline of eight units per acre for affordable housing and comprehensive permit projects. This quick response was perhaps because the Board of Selectmen wanted to establish a position on what are planning, health, and safety criteria in case they ever needed to defend a decision denying a comprehensive permit before the HAC.

The developer went ahead with his 64 unit concept and applied to the Massachusetts Housing Finance Agency (MHFA). MHFA approved the 64 unit concept, finding that the site was appropriate for housing (despite the hazardous waste) and that the 64 unit project was feasible and consistent with the HOP guidelines. Half of the units would be affordable and the other half would be market-rate units. Prior to submitting the site approval application, and perhaps intending to re-assure MHFA that the site could be cleaned, the developer removed an unspecified number of old oil storage tanks and agreed to remove additional contaminated materials and soil as needed.48

48. As an aside, at the time of the purchase, it appears that neither the developer, nor the bank was aware of what the site was previously used for. The developer paid top dollar for the site ($180,000 in 1986) and after the developer went bankrupt (after abandoning the project), the bank took ownership. Since then, the bank has tried numerous times to give the site back to the city, but the city does not want responsibility for it. The property currently sits as open space and this is acceptable to the city until a developer purchases it and cleans it up.
After receiving site approval, the developer began work on the comprehensive permit application. Town staff do not recall, and nor do the project files show evidence that the developer consulted with the town while preparing the application. In December, 1987, the developer formally applied to the Zoning Board of Appeals for a comprehensive permit. The application for 64 units included the preliminary site development plan, construction drawings (landscape plan and plan and elevation views of the model units), preliminary utilities plan, and a list of requested exceptions to local codes.

As required by law, the Zoning Board of Appeals forwarded copies of the application to the various town boards and departments: Planning Board, Board of Health, Fire Department, Water Department, Engineering Department, Site Plan Review Team members, Building Inspector, School Board and Conservation Commission. Each board returned comments and a recommendation that the application be denied for various substantive reasons.

The Planning Board was concerned that the site was not suitable for affordable housing because of "unsuitable materials" on the site itself and because of its adjacency to the Town's Highway Department and Town-owned site which was proposed to be used as the town's composting pit. In addition, the Planning Board expressed concern that the proposed density (21 units per acre) did not meet the Board of Selectmen's guidelines. The Board of Health and Water Department both claimed that a wastewater treatment facility would be needed after projecting that the development would produce a nitrate load of nearly 100 part per million (well over the allowed 5 ppm).
The Fire Department indicated that sprinklers, not shown in the proposed units, would be necessary. The Engineering Department and Site Plan Review Team expressed concern over the traffic impacts of the project. The developer's traffic impact study concluded that no appreciable impacts would be generated by the project; however, the Engineering Department and Site Plan Review Team provided evidence that the traffic would exacerbate an already dangerous intersection. In addition, there were a number of already approved, but still unbuilt projects in the same vicinity; cumulatively, the impacts would be significant. The School Board was concerned that many of the 208 projected residents would be of school age and that there would be a major impact on the school bus system and classroom space. The Conservation Commission rejected that developer's proposal that abutting open space would satisfy their open space requirement. Finally, the Board of Selectmen urged that their adopted standard of eight units per acre be enforced.

The Zoning Board of Appeals opened the public hearing in January, 1988 and continued it for three additional meeting nights. The four nights spanned a total of two months. The developer was represented by his attorney and had his architect appear as an expert witness. In the course of the hearings, numerous questions were posed to the developer's representatives by members of the Zoning Board of Appeals and other town boards. Representatives from town boards also spoke opposing the development, and through the Zoning Board of Appeals, requested further information and documentation from the developer. On the first night, January 27, 1988, the developer's representatives presented the proposal and called numerous witnesses to speak in favor of the project. After many
hours, but with still further testimony in support of the proposal to be heard, the hearing was continued until February 12.

On February 6, before the continued hearing reconvened, the executive secretary to the Board of Selectmen attended a workshop on comprehensive permits sponsored by a group of planning consultants and state officials in Holyoke, MA. On February 9, the executive secretary suggested to the Zoning Board of Appeals that they apply to the Massachusetts Housing Partnership (MHP) for financial assistance to hire a technical advisor to help them review and understand the technical complexities of the proposal, and negotiate and seek concessions from the developer. With a $7500 grant from MHP, the Zoning Board of Appeals hired I.E.P., Inc. The executive secretary also suggested that the Zoning Board of Appeals negotiate with the developer. "All of the speakers [at the workshop] emphasized that the Board of Appeals can, and should, negotiate with applicants for comprehensive permits. They all viewed the comprehensive permit as an opportunity for the town to receive some benefit from a developer in exchange for the loosening of zoning restrictions."  

49. It is unclear whether the executive secretary attended the conference in response to the Shorebrook Park application, or whether the timing was merely coincidental.

50. MHP operated a Municipal Assistance Program which made funds available to municipalities to hire technical experts to assist them in reviewing comprehensive permit applications. A similar program, the Short-Term Technical Assistance Program exists today in place of the MAP.

51. Memorandum from executive secretary to the Zoning Board of Appeals, 2/9/88 (Exhibit HH in the ZBA hearing packet).
The Board of Selectmen suggested a "list of conditions that the Zoning Board of Appeals should set in exchange for loosening the zoning requirements:" (1) mandating sprinklers in each unit, (2) completing a school impact study, (3) contributing towards the construction cost of the proposed abutting composting pit, (4) improving an off-site recreation area, (5) improving the septage treatment facility at the new town landfill, and (6) limiting the project to eight units per acre. The Board of Selectmen seemed to misunderstand the concept of seeking concessions from the developer. The workshop emphasized that through negotiation, the Zoning Board of Appeals can ask for concessions from the developer, and the developer can choose whether or not to agree to provide additional studies and even unrelated mitigation. With a comprehensive permit, a developer is entitled to override zoning requirements so long as planning, health and safety issues are still met. The Board of Selectmen seemed to take the concept as an opportunity to apply conditions to the comprehensive permit—that granting waivers and issuing a comprehensive permit was itself a concession, and not an entitlement from the town. The Board of Selectmen saw the role of the technical advisor as helping them get their requested conditions.

At the February 12 meeting, at the request of the Board of Selectmen and after more testimony from proponents of the project, the Zoning Board of Appeals continued the hearing again to March 9 to allow time for I.E.P. to complete their review of the developer's application and supporting information, meet with the developer and his representatives, and provide their assessment of the project.
On March 9, the developer's representatives informed the Zoning Board of Appeals that they met with I.E.P. and had agreed to reduce the overall number of units from 64 down to 52. The developer's representatives also responded to many of the questions and information requests that had yet gone unanswered from previous nights. Then, after further questioning by the Board, the developer's representatives suggested that the Zoning Board of Appeals appoint a subcommittee consisting of two members of the Board to meet, negotiate, and attempt to formulate a recommendation to the full Board upon which a decision could be based. The hearing was continued again until March 31.

The subcommittee met three times with the developer and his representatives during the next three weeks. These meetings were also attended by a committee of representatives from the Board of Selectmen, the Board of Health, Fire Department, Planning Board, and others. The developer's attorney took on a mediator's role, getting issues and concerns out into the open and suggesting possible concessions. Discussions focused mostly on economic limitations within which the developer was working rather than solutions to the various interests and concerns. The developer agreed to reduce the number of units again, down to 47—less than I.E.P.'s recommendation of 52. No agreement was reached on the design of the project or on any of the Board of Selectmen's proposed conditions. Both the Massachusetts Housing Partnership and the Massachusetts Housing Finance Authority approved the reduction.

On March 31, at the continued hearing, the subcommittee reported to the full Board that they had a new understanding of the economic
considerations within which the developer was working. Additional questions followed this presentation and then the Zoning Board of Appeals ended the public hearing.

After this meeting, the Board of Selectmen voted to endorse the project, but with a maximum density of 8 units per acre. This seems to have been a political move by the Board of Selectmen. In the formal comprehensive permit process, they are bystanders--they cannot approve nor deny the project. Perhaps the Board of Selectmen saw their votes as an opportunity to demonstrate a commitment to building affordable housing (this was one of the first comprehensive permits in Yarmouth) and as a way to bring pressure to bear on the Zoning Board of Appeals to take seriously their guidelines for affordable housing and comprehensive permit projects.52

On April 15, 1988, the Zoning Board of Appeals debated the project and, in a four to one vote, approved the comprehensive permit with a maximum of 25 units, even though I.E.P. stated that 52 units were needed to make the project economically feasible and the developer had already agreed to only 47 units. The developer was directed to re-submit a new proposal for approval showing a maximum of 25 units, and that when redesigning the project, the new plans should be consistent with the type of design, layout, and construction as was originally proposed. In its decision, the Zoning Board of

52. The five members of the Yarmouth Zoning Board of Appeals are appointed by the Board of Selectmen; they serve for five years and have their terms staggered by one year. Interviews for new members are held each year and members up for reappointment must be re-interviewed. The nine alternate members are also appointed and serve one year terms.
Appeals stated that it applied the guidelines and criteria of the *Yarmouth Development Guidelines and Project Evaluation Criteria for Affordable Housing Projects*, the document prepared by the town planner in 1986 at the directive of the Board of Selectmen.

The developer appealed the decision to the Housing Appeals Committee, arguing that the reduced density condition rendered the project economically unfeasible. On May 3, 1989, approximately one year after the appeal was filed, the HAC overturned the Yarmouth Zoning Board of Appeals decision, and approved the 47 units agreed upon by the developer in negotiations with the Zoning Board of Appeals subcommittee. This decision was later upheld by the Massachusetts State Judicial Supreme Court following an appeal by the Yarmouth Zoning Board of Appeals.

The Shorebrook Park project was never constructed. The costs of cleaning the site were prohibitive and soon after the Supreme Judicial Court decision, the developer went bankrupt. It is unclear why the developer abandoned the project. One explanation might be that the prices for the market-rate units went down with the economy and that the smaller profits from the market-rate units could no longer offset the cost of the affordable units. Perhaps the money set aside to clean the site was used up in the appeals process--simply getting approval for the project. Perhaps there were more toxins on the site than originally believed; only 47 units would not cover the costs of the additional clean-up and the developer may not have wanted to try to amend the permit.

**Analysis**
The Shorebrook Park developer attended only one public hearing, but it was continued for four separate nights spanning two months. In a sense, duplication was eliminated; the developer filed only one application and presented the project only once. But consider the number of times the proposal was reshaped during those two months. In response to I.E.P.'s analysis, the developer offered to reduce the proposal from 64 down to 52 units, and then, during the subcommittee negotiations, down to 47 units.

There was little contact between the developer and town boards after the initial discussion with the Board of Selectmen. Nor did it appear that the developer explored many ways to meet the interests of the town boards before making the application. This exploration was the intent of the subcommittee. The subcommittee, however, seemed to focus on how to reduce the total number of units given the developer's economic limitations; there were no integrative solutions, only compromises. Also, the comprehensive permit process did not eliminate the developer's need to redesign the project. As a condition of the approval from the Zoning Board of Appeals and the Housing Appeals Committee, the developer had to redesign the project.

3.4 German Hill\textsuperscript{53}

In April, 1989, the German Hill Estates Associates applied to the Yarmouth Zoning Board of Appeals for a comprehensive permit to construct 37 single family units under the Homeownership Opportunity Program.

\textsuperscript{53} Information about this case was gathered from project files from various agencies, from phone interviews with Noah Dorius, consultant to the Yarmouth Fair Housing Committee (March, 18, 1992), and personal interviews with David Kellogg, Town Planner (April 9, 1992), and Bill Wood, Chair of the Fair Housing Committee (April 9, 1992).
(HOP) on a 10.9 acres site. In January, 1987, at a Town Meeting, the Yarmouth Fair Housing Committee was authorized to create the German Hill Estates Associates, a limited dividend organization and acquire a lease on the German Hill site (by eminent domain) specifically to construct an affordable housing project. In December, 1987, the acquisition was finalized. The Yarmouth Fair Housing Committee was the applicant for the project, but they needed a contractor who would work within the Committee’s concept for the site.

Soon after the German Hill Estates Associates was established in early 1987, the Fair Housing Committee issued a request for proposals (RFP) to construct approximately 40 units on the site. Proposals would be evaluated based on specific building standards and criteria and were required to have many of the same elements as a comprehensive permit application. The proposal, however, would not be accepted as the comprehensive permit application; the chosen contractor was expected to work with the Fair Housing Committee in putting together the final application. In addition, the RFP required that proposals include building a one-quarter mile access road to the site. This made any proposal economically infeasible if the contractor were to stay within HOP home price guidelines. Only one proposal was received and it did not include building the access road. None of the proposals were accepted and the Fair Housing Committee wanted to revise and re-issue the RFP.

In October 1987, to assist in revising the proposal, selecting a contractor, and getting final approval, the Fair Housing Committee hired Noah Dorius, a planning consultant, using the Massachusetts Municipal Assistance Program
(administered by the Massachusetts Housing Partnership). The second RFP consisted included guidelines reflecting Yarmouth's goals regarding affordable housing and only a very few general standards and criteria for reviewing the proposals. Proposals were judged on the contractor's credentials, the quality of their work, and the potential for a good working relationship with the town. The intention was to make the proposals open to more input from the potential contractors themselves. A pre-bid conference was even held for contractors who were considering whether or not to submit a proposal. This time, six proposals were received, and in early 1988, the Fair Housing Committee chose Dacey Construction as the contractor. During the next several months, Dorius assisted the Fair Housing Committee and Dacey in preparing the comprehensive permit application by arranging and facilitating discussions with various town boards and suggesting possible ways of meeting the various interests.

When the Fair Housing Committee, Dacey, and the various town boards met to discuss the proposal, Dorius emphasized that discussions should focus on their interests and concerns, that judgment of the permissibility of the project overall should be deferred, and that they ought to explore many possible options. Initially, Dorius suggested that the Fair Housing Committee, Dacey, and the town boards refrain from committing early to any single proposal; however, as ideas were introduced and refined, Dorius encouraged them to work from one single document, rather than trying to piece together elements of many different possible options.

54. This program no longer exists. The early technical assistance program is its successor, but it gives much less financial assistance.
55. In order to receive HOP subsidies, a developer needs to prove that there is a good working relationship with the town.
According to Dorius and Bill Wood, Chair of the Yarmouth Fair Housing Committee, communications were frequent and information was exchanged freely.

This pre-filing consultation is similar in purpose to the voluntary pre-application review suggested in the Zoning Ordinance. In both cases, developers aim to have their proposals endorsed by the various town boards before the formal hearings. Comprehensive permitting, however, differs from the traditional development review process because there are fewer hearings after a consensus is reached. There is less opportunity for town boards to affect the final approval if they renege on their endorsement after the application is submitted.

The town boards who worked with Dacey and the Fair Housing Committee were: the Planning Board, Site Plan Review Team, Board of Health, Conservation Commission, Engineering Department, Water Department, Fire Department, and School Board. In addition, the Massachusetts Housing Finance Agency, Massachusetts Housing Partnership and the Old King's Highway Regional Historic Commission were consulted. The major issues were how to finance the access road to and from the site and proximity of the access road to a designated wetland, nitrate loading, and architectural design of the units.

The Planning Board, Site Plan Review Team, Engineering Department, and Board of Selectmen requested that Dacey construct an access road onto the site and improve and widen the existing connecting road. Dacey, speaking through the Fair Housing Committee, argued that requiring these before the
town would issue certificates of occupancy would make the project economically infeasible; he could not afford to build the road first. They explored many options including the town providing materials, labor, or other resources. The final agreement, formed in part from a suggestion made by Dorius, was that the town would issue certificates of occupancy for half of the units when only the base layer of asphalt was down on all the roadways. The remaining certificates of occupancy would be issued after all the roads were completed. Phasing the road construction costs made the project economically feasible, and the Fire Department was satisfied that safety would not be compromised before the roads were completed.

The access road was designed to run through an area which is occasionally flooded. The Fair Housing Committee and Engineering Department argued that the area was not a wetland because the flooding was artificially created—caused by runoff from Route 6 nearby—and that in constructing the road, they could just relocate the flooding. The Conservation Commission, however, required that the road be re-designed around the wetland—24 feet from the original alignment. Recall that the Conservation Commission must approve the project separately from the comprehensive permit. In order to get the Conservation Commission to endorse the proposal, the Fair Housing Committee agreed to move the road. The re-aligned road would not cost more than the originally proposed road for the contractor to build, and because this issue was being addressed in the preliminary design of the road, the additional cost to the town Engineering Department for redesign would be minimal.
The third major issue was nitrate-loading. The German Hill site is within a zone of contribution for public water supply. The Board of Health and Water Department found that the density of the project (even at only 3.39 units per acre) would cause the Board of Health's nitrate loading standards to be exceeded. The project was projected to produce a nitrate load of 18.3 parts per million where the standards only allowed 5 ppm. Discussions about this issue focused on whether to waive the nitrate-loading standard or annex abutting land to the project. The Board of Selectmen, however, agreed to allow approximately 30 acres of abutting town-owned open space to be considered part of the development only for calculating nitrate loads. With the additional 30 acres included in the calculations, the resulting total nitrate load was only 4.9 ppm. It is interesting that the Town allowed using the abutting 30 acres in calculating nitrate loading for this project, but rejected a similar proposal for the Shorebrook Park development.

The other major issue was the architectural detail of the units. This was a contentious issue because German Hill is located in the jurisdiction of the Old King's Highway Regional Historic Commission. This Commission is responsible for ensuring that architectural features of buildings are consistent with "Cape Cod character," and must approve building design before a building permit can be issued. Of particular concern was the setback of second stories on the units. To date, the Commission had always allowed the second story to be flush with the first story so long as there was an eave to separate the two stories. For the German Hill project, however, the Commission insisted that second stories be set four feet back from the first story. This requirement increased the cost of the units because the second story could not be build directly on top of the load bearing walls on the first story. Additional
foundation and construction work and building materials were needed to support the second story. Dorius suggested that a common way to cut construction costs is to leave the second story of some of the units unfinished. This option was approved by the Building Inspector, and in the end, approximately half of the units had only rough construction completed on the second floor.

In November, 1988, when all the issues were resolved, and it appeared that all the town boards were satisfied with the proposal, the Fair Housing Committee sent a memorandum of understanding documenting opinions and agreements reached to the town boards who had an interest in the project. No changes in the proposal were made, and the Fair Housing Committee and Dacey applied to the Massachusetts Housing Finance Authority (MHFA) for site approval.

In March 1989, MHFA, finding that the memorandum of understanding demonstrated a high level of developer-community cooperation to merit the use of HOP funds and that the proposal was within HOP guidelines, gave its site approval. In April, the Fair Housing Committee and Dacey completed and submitted the comprehensive permit application. The memorandum of understanding was included in the application in hopes that it would create an agenda for discussion at the comprehensive permit hearing. By the time the comprehensive permit application was submitted, the Zoning Board of Appeals and all other town boards, having seen the project evolve, supported the concept of affordable housing and actual design; there were no surprises at the hearing.
At the Zoning Board of Appeals hearing on May 24, Dacey presented the proposal, the Fair Housing Committee and Town Planner spoke as advocates for the proposal, and letters of support from all the town boards were read. The Board asked Dacey to clarify many issues and for more information regarding engineering standards for the intersection at the beginning of the access road. The hearing was continued for one week, during which time Dacey's engineer and the town engineer developed a joint response. Also, responding to another comment made at the hearing, Dacey filed a request with the Massachusetts Department of Transportation to cut back a fence which impaired fire access views into the site. On May 30, the hearing was re-convened and after a short question and answer period, the Zoning Board of Appeals voted unanimously to approve the comprehensive permit. In its decision, the Zoning Board of Appeals noted the "strong support" by the Yarmouth Board of Selectmen.

After the decision, however, the Massachusetts Housing Partnership informed the Fair Housing Committee that the state did not allow a ground lease from the Town to the developer. In December 1989, the Town of Yarmouth, at a special town meeting, voted by more than two-thirds to deed the German Hill site over to the German Hill Estates Associates. Such a high percentage of approval at the town meeting demonstrated the community's support for the project too. A hearing to amend the comprehensive permit was scheduled for two days after the town meeting and in another unanimous decision, the Zoning Board of Appeals allowed for a ground lease or sale from the Town to the Fair Housing Committee and then to the home purchasers. It is interesting that the Zoning Board of Appeals could have required other concessions from the developer (having so much already
invested in the project at a late stage) at the second hearing, but chose to only amend the permit as requested.

The entire process from the issuance of the second RFP to groundbreaking was approximately two years. The project is now complete and is at full occupancy.

Analysis

The German Hill case demonstrates that getting approval need not be a long, difficult process. By using the town boards to help design the proposal, the Fair Housing Committee and Dacey were able to address nearly all the various concerns and interests. Only minor engineering and fire access issues prevented the decision from being made in one night. While the plan did not have to be redesigned after the hearing process had been initiated, there were extensive reshaping in the pre-filing stage. The Fair Housing Committee explored many options with the town boards and after the Fair Housing Committee had gathered information about the town boards concerns and interests, they put together a preliminary proposal and asked the other boards how the design could be improved. A number of integrative solutions were developed too, concerning the access road, nitrate loading, and architectural details.

3.5 Summary

These three cases were all similar projects but had different experiences in getting approval. In the Cummaquid Hills case, the developer received approval after five hearings spanning six months. In the Shorebrook Park case, the developer received approval after four separate nights of hearings at
the Zoning Board of Appeals extending over for two months--and then the reduced density rendered the project unfeasible. It took another year before all the appeal was been heard and decided in favor of the developer. In the German Hill case, the developer received approval from the Zoning Board of Appeals on the second of two nights within one week. What accounted for these differences? Chapter 4 compares the different experiences of the developers.
CHAPTER 4 - CROSS-CASE ANALYSIS

This chapter analyzes the three cases described in chapter 3. I compare the cases to determine to what extent comprehensive permitting reduced the amount of duplication and what steps the developer went through to have the issues considered inclusively instead of one at a time. The cases suggest that comprehensive permitting reduces the amount of duplication for both the developer and town boards, but does not necessarily result in a fast decision. The cases also suggest that the issues can be considered inclusively, but that the comprehensive permit hearing is not a forum where the various interests and concerns can be reconciled. Finally, the comprehensive permit process and appeal to the HAC seems to give false expectations to developers that their project will be approved quickly. Zoning Boards of Appeals may find it in the best interest to deny a project and wait for the HAC to overturn their decision--this delays projects.

The cases were all residential developments from the same town, proposed in the late 1980s. There are, however, differences in the proposed densities, specific sites, substantive issues, and actual proposals; each of which could have informed how the developers used the formal and informal process. Previous experience could also be a factor in a developer's strategy to seek approval; the cooperation in the German Hill case could have been in response the contentiousness of the Shorebrook Park case. An ideal study would hold all of these factors constant. Nevertheless, it is possible to identify whether there was duplication and what steps the developer took to have the issues considered inclusively instead of one at a time.
4.1 Reducing the Amount of Duplication

To determine if duplication was reduced, I looked at how many separate hearings there were for the developer to attend, whether the developer was whipsawed (i.e., required by different boards to meet conflicting requirements), and how many times the developer had to redesign the proposal once the hearings started.

Number of Separate Hearings

In the Cummaquid Hills case, the developer went through many different reviews in order to get final subdivision and cluster approval: (1) pre-application review, (2) preliminary review, (3) site plan review, (4) cluster concept review, (5) Board of Health review, (6) Conservation Commission review, and (7) final subdivision review. The developer submitted virtually the same design each time. The Planning Board reviewed the proposal four times and offered comments to the Zoning Board of Appeals once; the Board of Health reviewed the proposal twice; and the other boards each reviewed the project once and submitted comments to the Zoning Board of Appeals. For each hearing, the developer made separate applications and presentations. The whole process of getting approval, from applying for a preliminary plan approval to filing the final map with the City Clerk, took six months.

Theoretically, each step in the traditional development review process looks at different issues. The preliminary subdivision (sketch plan) review step should inform the Planning Board aware that a subdivision is being considered and give the developer feedback before he is entrenched in a specific design. Site plan review is supposed to consider the internal impacts
of the project. Tentative plan approval by the Planning Board (or special permit for the cluster concept by the Zoning Board of Appeals) is supposed to consider impacts external to the site. Finally, the Planning Board must approve the final subdivision plan, even though if the project meets all the conditions of the tentative plan approval, final approval cannot be denied. While the scope of review is supposed to differ at each stage, in reality the different boards still look at the same issues, even though they cannot make decisions on issues outside their mandate.

In the Cummaquid Hills case, not only were there many reviews, but the boards considered issues which were under the mandate of other boards. The Site Plan Review Team was mandated to approve the proposal on internal (on-site) considerations only, but they also considered off-site nitrate-loading, areawide traffic, and community use of open space. The Zoning Board of Appeals was mandated to only give approval on communitywide (off-site) planning issues, but they considered the setbacks and driveway width for lot 13 too. Where the "official" process envisioned substantive issues being considered separately, the town boards supplemented the process with their own more-inclusive reviews and this was repetitive.

Compare this to comprehensive permitting. In both the Shorebrook Park and German Hill cases the developer made only one application, which was forwarded to each town board, and one presentation to the Zoning Board of Appeals. Issues which were divided between many different boards in the Cummaquins Hills case were consolidated into the Zoning Board of Appeals hearing, and there was no preliminary approval—only a single final decision. Where in the Cummaquid Hills case, the hearings took six months, the
Shorebrook Park hearings took two months and the German Hill hearings took only one week. Time was saved by only submitting one application and only making one presentation and because there was no lengthy staff review nor waiting to get on the agendas of the many boards. Perhaps time was also saved because many boards did not each consider the same issues; what might have been repetitive discussion was consolidated into the Zoning Board of Appeals' hearing. All these factors contributed to shortening the time before a final decision on the comprehensive permit was issued.

While receiving a decision through comprehensive permitting seems faster than if the developer has to assemble many approvals from many different boards, the Shorebrook Park illustrates that a fast decision is not necessarily a good thing. The 25 unit limitation was economically unfeasible; the developer could not even think about building until the State Housing Appeals Committee decided his appeal, (and even then this was pursued by the town up to the State Supreme Judicial Court). Both comprehensive permit projects were approved, but the German Hill case demonstrates that time invested in building consensus among the boards before submitting an application is not time wasted. This idea is discussed later in this chapter.

Whipsawing

Meeting all the varying interests and regulations when designing a project is difficult enough, but more so when one board's interests or regulations contradict those of another board. In traditional development review, developers may be whipsawed—that is, required by one board to make changes that contradict the requirements of another board. Where requirements or interests conflict, the developer must either obtain waivers
or seek re-approval by boards who have already given approval on the original proposal. Whipsawing is most frustrating and problematic after the developer has begun the hearing process because this is when it is most time-consuming and costly to redesign projects. Comprehensive permitting eliminates whipsawing because it exposes contradictions to the decision-making board. Where only one board reviews the proposal, the dilemma of choosing which of the conflicting standards to apply to the proposal becomes the responsibility of that board. The developer is relieved of shuttling back and forth between boards to obtain waivers or seek re-approvals.

While the developer in the Cummaquid Hills case did not seem to be whipsawed, the possibility certainly existed. Both the Zoning Board of Appeals and the Board of Health approved the reduced septic system setback on lot 13. Suppose, however, that the Board of Health found that reducing the septic system setback on lot 13 would be detrimental to the pond (or that the soil on the entire property was unsuitable for the intensity of the proposed septic systems), the developer would have had to redesign the project and seek re-approvals from the Planning Board, Site Plan Review Team, and Zoning Board of Appeals.

Eliminating whipsawing eliminates one source of uncertainty for developers (the problems of which were discussed in chapter 1). But towns also benefit from eliminating whipsawing. Where a developer shuttles between boards, his focus is on a specific project, not broader policy. Comprehensive permitting makes the town explicitly aware of inconsistencies in their policies and interests, highlighting them for future development proposals. Where there may be little communication between
town boards, this is the first step in initiating action to resolve inconsistencies on a policy level.

**Redesigns**

While comprehensive permitting eliminates a developer's responsibility to meet two conflicting standards, it does not eliminate the need to redesign proposals. The Shorebrook Park case illustrates this point. The Zoning Board of Appeals approved only 25 total units, down from the originally proposed 64, and required that the developer redesign and submit the proposal again for review. The requirement was affirmed by the Housing Appeals Committee when they overturned the Zoning Board of Appeals' decision and allowed 47 total units.

The German Hill proposal was approved virtually unchanged from the comprehensive permit application. How did the Fair Housing Committee and Dacey accomplish this? All of the issues were explored prior to the application being submitted. The Fair Housing Committee, Dacey, and town boards explored many ideas and design options before there was commitment to any one proposal. Getting this consensus was a proactive measure to ensure that the final comprehensive permit was acceptable to every board. The Fair Housing Committee did not follow the traditional "decide, announce, defend" sequence of development, where the developer "decides" on the design, "announces" the decision, and then "defends" the decision at the hearings. Instead, the Fair Housing Committee "decided" and "announced" jointly with the town boards, eliminating the need for defending the design at the hearings.
These pre-application discussions were not unique to the German Hill case. A pre-application review, such as the Cummaquid Hills developer attended, is supposed to be a chance for the boards to give feedback to the developer about the concept so that the preliminary plan may meet the interests and formal requirements before an application is submitted. The developer of Cummaquid Hills could have gone through the same pre-filing negotiation as the Fair Housing Committee and Dacey in the German Hill case. There is, however, a greater difficulty holding together the agreement through many hearings and board reviews. Where many town boards must give approval on a project, if one board requires a change, the other town boards must re-evaluate the new information; the entire deal might be sacrificed. Comprehensive permitting offers developers more assurance that agreements reached in their pre-application discussions will either remain undisturbed or that the one decision-making board considers all the trade-offs before requiring changes. Where many town boards can tinker with the proposal, no single board is looking out for the synergistic effects of requiring even only one change.

4.2 Considering All Issues at Once

Proponents of comprehensive permitting argue that considering all issues and trade-offs at once not only reduces duplication, but also improves the quality of the proposed development. To see what steps were taken to have all the issues considered at once, I looked at whether the developer sought assistance from the various town boards in designing the project, whether the developer explored many design options, and whether there were integrative solutions developed to resolve issues.
The comprehensive permit process envisions bringing together the developer and Zoning Board of Appeals where the Zoning Board of Appeals speaks for the interests and concerns of the town boards. This creates a forum (the Zoning Board of Appeals hearing) for discussing all the interests of the various town boards at once. Each town board submits comments about what issues they want the Zoning Board of Appeals to discuss in the hearing and consider in their decision. The Zoning Board of Appeals then reviews the application in light of the concerns and interests of the various town boards.

This formal process seemed to be followed closely in the Shorebrook Park case. The developer designed the project, submitted the application, and attended the Zoning Board of Appeals hearings to defend it. The Zoning Board of Appeals' hearing was the forum for meeting the different interests and reconciling the concerns of different boards. But the sheer number and complexity of interests and concerns was more than the ZBA seemed willing or able to balance. A subcommittee was formed to try to fashion an integrative compromise design. At the subcommittee meetings, two representatives of the Zoning Board of Appeals met with the developer and representatives from other town boards.

By the time the subcommittee formed, the developer had a significant financial and time investment in the original proposal. Perhaps because the developer tried to reduce the extent to which the proposal would need to be redesigned, the negotiations within the subcommittee were more of a haggling over the number of units and discussion of how substantive issues were related to the economic viability of the project rather than an exploration for integrative solutions to meet the underlying interests of the
The German Hill case differs from the Shorebrook Park case because all the interests of the various town boards were met and concerns reconciled prior to the Zoning Board of Appeals' hearing. The "forum" that the comprehensive permit process created was preceded by informal negotiations which spawned innovative and integrative solutions. And this worked in part because the developer could be mostly confident that the agreements would stand--that only one board, instead of many might tinker with the proposal. Instead of the Zoning Board of Appeals' hearing being a place for hashing out differences, the discussions could focus on verifying that the proposal met all the formal requirements and interests of the town boards.

Getting Assistance from Town Boards and Exploring Many Options

Seeking pre-application assistance from the town boards serves two purposes. First, it gives the developer some knowledge of what the various boards' interests and concerns are for that particular site and project. Developers can anticipate the types of questions that a board might have for their proposal and address them explicitly either in the design or at the hearing. For example, in the Cummaquid Hills case, the Fire Chief was concerned about driveway alignment on two of the lots. Although the lots met the strict requirements of the law, when applied to the site, the Fire Chief wanted the driveways to be still wider for better access. The second benefit of a pre-application review is that it gives a developer greater certainty whether
the proposal will be approved or denied—in theory, if a board helps design a proposal, then, feeling more commitment to it, they will be more likely to support it in hearings.

In all cases, the developers talked to town boards before submitting applications, but to different degrees. In the Cummaquid Hills case, the developer only attended a pre-hearing conference, suggested in the Yarmouth Zoning By-Law. In the Shorebrook Park case, the developer only met with the Board of Selectmen to inform them of his proposal (a requirement of the MHFA site approval process). In neither case did the developers seek additional assistance, nor did they alter the project concept to address the concerns discussed in the pre-application meetings. The Cummaquid Hills developer did not reduce the setbacks nor widen the driveways, but instead applied for a variance (perhaps hoping to get around the possibility that the Zoning Board of Appeals might require that the driveways be redesigned). The Shorebrook Park developer did not decrease the project’s density. Not changing the proposals might indicate that alternative design options were left unexplored. And this is not surprising. Neither developer expected that changes would be required, but were prepared nonetheless. The Cummaquid Hills developer made out an application for a variance and the Shorebrook Park developer knew that he could appeal to the HAC. The formal process seemed to give options that the developers perceived as better than redesigning the proposals. It is interesting to note that in both cases, the concerns mentioned in the early meetings were not forgotten—they were again and again throughout the hearings process.
In the German Hill case, however, there was frequent and open communication between the Fair Housing Committee, Dacey and the various town boards to design the project. Ideas were shared and design options were explored (given the general guidelines of 37 total units and housing prices to remain within the HOP specifications) before there was commitment to any one proposal. The Zoning Board of Appeals, having been involved in the preliminary design, knew what concessions had already been made, and why the project was designed as it was. In keeping the Zoning Board of Appeals informed of their progress, the Fair Housing Committee and Dacey answered many questions before they became contentious issues. The extensive pre-application collaboration was very long--approximately one year--but in the hearings, not only was there no opposition from the boards, the boards actually endorsed the project.

**Integrative Solutions**

In neither the Cummaquid Hills case, nor the Shorebrook Park case were there integrative solutions. How could there have been solutions integrating many issues if the developers did not talk to the town boards and explore options? Developers do not have a monopoly on good ideas. That there were no integrative solutions in the Cummaquid Hills case might also be because of the difficulty of boards making commitments contingent upon action taken by other boards. For example, the Planning Board could have withdrawn their request to eliminate lot 13 in exchange for concessions from other boards. In order to get this sort of agreement, the developer would have to get both boards to independently approve it and as mentioned above, not be assured that another board would not undo it.
In the German Hill case, there were extraordinarily integrative agreements. Phasing the construction of the access and internal roads required approval by the Engineering and Fire Departments. Using the Board of Selectmen's proposal to include approximately 30 acres of abutting town-owned open space in their nitrate-loading calculations required approval by the Board of Health, Water Department, and Conservation Commission. Leaving the interior of the second stories of some units unfinished to offset costs of additional exterior detail required by the Old King's Highway Regional Historic Commission required approval by the Building Inspector. It is interesting to note the these agreements were not technical solutions, rather they were a reframing of the problem--something that is unlikely to occur when only haggling over the number of units.

4.3 Considering Political Interests

The Shorebrook developer seemed to decide (perhaps only implicitly) that trying to get approval for a very dense project was a better option than compromising. There seems to be little incentive for a developer to go beyond the formal comprehensive permit process because developers look at the record of the Housing Appeals Committee and see that it has historically favored developers and overturned Zoning Board of Appeals' decisions. As shown in Table 2 (in Chapter 2), the Housing Appeals Committee has ruled in favor of the developer's proposal in approximately 90 percent of the cases which the HAC decided.

The developer might get approval from the Housing Appeals Committee, but many of the projects approved at that stage are abandoned. The statistics show that fewer projects get built following a Housing Appeals
Committee approval than following only a Zoning Board of Appeals approval. The shift in power due to possibility of the Housing Appeals Committee overriding the local decision is less pronounced than originally envisioned when the law was enacted.

While developers see that they can appeal a decision to the Housing Appeals Committee, the Zoning Board of Appeals can also use the Housing Appeals Committee to advance their interests. A Zoning Board of Appeals might have an interest in denying the project or attaching uneconomic conditions in an attempt to stall the final decision. Delay often works against a developer, making a project uneconomic with extended carrying costs. In addition, funding, labor, or material commitments for the project may dry up before a project receives approval or be exhausted just in getting approval. Another reason that Zoning Board of Appeals might want to deny a project is that they can use the Housing Appeals Committee as a scapegoat for making the tough decision. In the Shorebrook Park case, the Zoning Board of Appeals almost had to deny the permit or as they did, approve a maximum of 25 units, because they are appointed by the Board of Selectmen, and could easily not be re-appointed at the expiration of their terms.

But the Housing Appeals Committee override is only part of the Anti-Snob Zoning Law. The comprehensive permit also changes bargaining power internally between town boards. Comprehensive permitting shifts bargaining power to the Zoning Board of Appeals from the from other town boards. By having their interests represented by the Zoning Board of Appeals, other

56. Resnick. "Mediating Affordable Housing Disputes in Massachusetts: Optimal Intervention Points."
town boards lose the power to decide for themselves whether or not their interests are met and the power to enforce solutions to meet their concerns. The Zoning Board of Appeals, may amplify or disregard the interests and concerns of the other town boards. In the Shorebrook Park case, the Board of Selectmen could not attach their conditions to the project as they might have done if they were had permitting authority. Instead, they put pressure on the Zoning Board of Appeals to approve the project with a maximum of 25 units (and certainly some of this pressure came from the Board of Selectmen's authority to appoint the Zoning Board of Appeals).

Comprehensive permitting also takes bargaining power away from potential objectors. Objectors generally lose their power to get concessions by threatening to delay projects;\textsuperscript{57} there are fewer stages at which delays can occur. Historically, and to this day, a powerful strategy for objectors has been to stall projects through the hearing process or through litigation with one or more agencies. Comprehensive permitting, by centralizing decision-making, reduces objectors' ability to challenge actions taken by individual boards. Interestingly enough, citizen participation was not an important factor in any of the three cases; this is perhaps because the sites are all in remote areas. But note that the formal comprehensive permit process only requires that notice be sent to abutters and other interested town residents for the Zoning Board of Appeals' hearings. Unless the other town boards hold information.

hearings (which occasionally happens), residents do not have input into town boards' comments to the Zoning Board of Appeals.

4.4 Summary

In this chapter, I have tried to show that comprehensive permitting addresses some of the problems which resulted from the proliferation of regulation. The number of hearings is reduced, whipsawing is eliminated, and only one board can require redesigns; yet there is still delay. Also, comprehensive permitting forces developers to attend pre-application meetings, and by establishing a forum for discussing all issues at once, it facilitates the exploration of many options and integrative agreements; yet developers submit proposals that a Zoning Board of Appeals cannot (politically) approve. The Anti-Snob Zoning Act envisioned both simplifying the development review process through comprehensive permitting and taking away a town's power to reject affordable housing proposals. But developers must still get approval from a board that must address a multitude of technically complex issues and consider that the Zoning Board of Appeals still has the power of delay.
CHAPTER 5 - COMPREHENSIVE PERMITTING IS ONE FORM OF REGULATORY NEGOTIATION

As we can see from chapter 4, the comprehensive permit process does not meet the goals that it was originally developed to meet. As illustrated by the Shorebrook Park case, developers do what is expected of them under the law, but the comprehensive permit does not really simplify the decision-making process. And rulings from the Housing Appeals Committee, even if favorable, often come too late. The law envisions the Zoning Board of Appeals synthesizing the various interests and concerns of town boards and other parties at the comprehensive permit hearing. In reality though, the sheer number of interested parties, technical complexity of information, and political interests complicates this task.

5.1 Comprehensive Permitting is More Complex Than Originally Expected

Reconciling all the different interests and concerns is often too complex for Zoning Boards of Appeals. There are more parties in a comprehensive permit process than originally anticipated. The proliferation of regulation has resulted in there being more parties and more interests for each development proposal. There is new regulation for environmental concerns that did not exist in 1969 when the Anti-Snob Zoning Act was enacted. Addressing these additional concerns has complicated the task of Zoning Boards of Appeals meeting all interests in their final decision. In the Shorebrook Park case, the subcommittee was formed to assist the Zoning Board of Appeals, but as noted, the developer was too entrenched in the original design to make meaningful trade-offs possible.
In addition to the increased amount of regulation, the issues addressed in the regulations are becoming more technical and more difficult to understand. Zoning Boards of Appeals do not have the expertise to judge the effects of making trade-offs among all the issues, especially when they are as technical, subjective, or dependant on other factors such as nitrate-loading, architectural detail, and phasing of construction tasks. Where a Zoning Board of Appeals can take the advice of town boards on single issues (for example, whether or not the proposal meets nitrate loading standards), no single board itself can evaluate what construction standards for an access road could be loosened in exchange for reducing density. The town boards and developer must determine what trade-offs are optimal. That Zoning Boards of Appeals make sub-optimal trade-offs might also explain the increasing number of appeals to the Housing Appeals Committee based on burdensome conditions. Zoning Boards of Appeals might be enforcing some issues without realizing how that requirement impacts the profitability of the project overall.58

And developers realize that the Housing Appeals Committee most often rules in their favor, and it is therefore rational to expect that will try to maximize the number of units and request many waivers. Developers do not perceive an incentive to design projects that a Zoning Board of Appeals can approve and still look like they made a wise decision. It might therefore be best for a Zoning Board of Appeals to deny the project and then blame the Housing Appeals Committee when they are forced to approve it. In the Shorebrook Park case, the developer followed this formal process with little additional work. The developer applied for a comprehensive permit and

58. See Chapter 2.3 Experience with Comprehensive Permits and Appeals to the HAC
requested a number of waivers for a very high density project. The Zoning Board of Appeals, however, could not accept a proposal which more than doubled the Board of Selectmen's guidelines when they are appointed by the Board of Selectmen. Zoning Boards of Appeals do not simply review the application to see if there is a local need and if it meets health, planning, and safety factors, they also must maintain their political viability. The application process seems easier for a developer, but it is not a replacement for the political needs of the Zoning Board of Appeals. The comprehensive permit hearing is actually more complex than what was originally envisioned. There are more interests to reconcile, more complex issues to deal with, and political concerns to consider.

Finally, we are seeing that towns are using the law to proactively meet their affordable housing requirement (that is determine for themselves how they will meet the state-mandated 10 percent goal), and thus eliminate the possibility of the Housing Appeals Committee overriding other comprehensive permit decisions. This is what happened in the German Hill case. Recent regulations have created incentives for towns to work cooperatively with developers, but the original Anti-Snob Zoning Act did not envision that communities would actively plan for and seek developers to build affordable housing. The law does not explicitly encourage this proactive cooperation nor give guidelines for a community to go about doing this; each community must invent its own method and adapt it as it

59. Edith Netter in "Bridging the Housing Gap" discusses Housing Plans and the Local Initiative Program as two ways in which community's are encourages to work with developers in building affordable housing.
progresses. Perhaps towns must go through a Shorebrook Park-type case before they see the possibility for and potential benefit of a German Hill.\textsuperscript{60}

Given that comprehensive permitting does not necessarily simplify the development review process, and that there are no regulations telling how to cooperatively develop affordable housing, what are guidelines for developers and communities to follow to meet the goals of simplifying the development review process developers and meeting affordable housing needs for towns?

5.2 Comprehensive Permitting Should be Recast as Regulatory Negotiation

The German Hill case is similar to other public dispute resolution efforts. The Fair Housing Committee and Dacey's success in getting early assistance from all the town boards and thus quick approval from the Zoning Board of Appeals suggests that comprehensive permitting in general should be recast as regulatory negotiation. Regulatory negotiation, in short, is a process where interested parties such as environmental groups, the business sector, and affected consumers assist agencies in their traditional functions such as permitting, rulemaking, enforcement, grant-making, investment strategies, and rate-setting. Typically the parties seek consensus on what action to take before that action is formally implemented. Theoretically, if all the interests are met during the negotiations, then there will not be later challenges to the action. Regulatory negotiation is illustrated by the following

\textsuperscript{60} An interesting study beyond the scope of this thesis would be if (and why or why not) towns always have a contentious case before they attempt to proactively develop affordable housing.
case of Anyport harbor where a creative agreement for where to put dredged material was developed through negotiation.\textsuperscript{61}

Everyone at Anyport agreed that something needed to be done to preserve the town's maritime industry, but not at expense of marine environment. Anyport harbor is the major industry in town and is used by both cargo ships and pleasure boaters. Because of its safe harbor on the otherwise rocky shoreline, Anyport operates the only loading dock within 300 miles. Anyport is also a regular stop for pleasure boaters because there are good facilities for maintenance and repair work. Revenues from the cargo transport operation help keep the facilities up-to-date and in good condition. In 1990, however, Anyport needed to dredge its shipping channel again and there seemed to be no good place to put the spoils. The current dumping site was recently closed because of damage to fish populations, and a new designated site had not yet been opened.

A section 404 dredge-and-fill permit from the Army Corps of Engineers (under the Clean Water Act) is required for dumping dredge spoils. The Army Corps of Engineers is required to consult with the Environmental Protection Agency (EPA) to be sure that projects under consideration are not damaging to the environment. If the EPA finds that there would be unacceptable environmental damage, they may object to the issuance of the permit. The permit is moved to the federal hierarchy at this stage where the

\textsuperscript{61} The case is mostly fictitious with facts taken from many different situations and some facts invented to demonstrate specific objectives. 404 permits which are required under the terms of the Clean Water Act have been successfully negotiated. See Susskind, Bacow, and Wheeler. \textit{Resolving Environmental Regulatory Disputes} for one true case.
Army Corps Division Engineer (and then if necessary, the Chief Engineer in Washington D.C.) tries to resolve the differences with the EPA. Failing that, the EPA administrator has the final authority to deny the permit.

State and federal officials encouraged the harbor master at Anyport to use an offshore site they had been studying for some time as a possible new permanent site. That site, however, was up for consideration to be designated an ocean sanctuary and Coastal Advocates, an environmental group, had already called upon the EPA to intervene and not allow the dumping. Anticipating that the shipping channel would be prohibitively shallow before the 404 permit could be issued, the harbor master decided to try to negotiate a solution before applying to the Army Corps for a permit. He envisioned that the negotiated solution would be the proposal that the Army Corps would consider.

The harbor master called upon a mediator from the local university to bring together all the parties who might have an interest in where to put the dredge spoils. Six major parties in addition to the harbor were invited to the negotiations. The Army Corps of Engineers would carry out the dredging and transport to the dumping site. The Army Corps generally pays a large portion of dredging costs and so they wanted to keep costs down as much as possible. The EPA needed to be assured that there would be no unacceptable damage to the environment. The State Department of Environmental Management regulates development along the shoreline and was invited because the dredging plans might ultimately have affected the expansion of the harbor which DEM would later have to approve. A representative of the Mayor's office was present to support the harbor master. Residents of a wealthy
neighborhood along the channel did not want the expansion because it might result in increased boating traffic. Finally, Coastal Advocates, a coalition of environmental groups was concerned that the dredging and disposal activities would significantly affect natural processes and harm the living systems in the channel and offshore.

Because the harbor needed to be dredged right away, the parties agreed to a schedule of one-half day meetings held every two weeks until they developed a solution. There were a total of four meetings held. At the first meeting, the mediator convened the negotiators at the harbor and together the negotiators walked around the harbor and discussed each party's interests and concerns about the dredging project. This helped build a common understanding of the site and issues. Before leaving at the end of the day, the mediator encouraged the negotiators to each think of three places that the spoils might go (an ideal place, an acceptable place, and an unacceptable place). At the second meeting, the negotiators presented their ideas and asked questions of each other. The mediator summarized the discussion and noted that none of the parties identified the offshore site as ideal. Two other sites were noted more by at least three of the negotiators as either acceptable or ideal: a diked agricultural area adjacent to the harbor, and a marsh, approximately one-mile inland which people had been using for years to dump yard waste and abandoned automobiles. At the third meeting, the discussions focused around which of these two sites was more suitable and what information would be needed (and who would gather it) to make a final decision.
At the fourth meeting, the group agreed that the adjacent agricultural land was the best option because it had the cheapest transport costs and with the spoils, the Army Corps of Engineers could restore the wetland which had been drained for agriculture. In addition, the harbor agreed to reduce the operating hours of the loading dock and consolidate their expansion activities on a smaller area to buffer the wetland from runoff and undue noise. Following three months of planning for dredging and designing the new wetland (dump site), the Army Corps of Engineers issued the 404 permit with no objections.

The agreement met the needs of each party. The Army Corps would be certain that the EPA would not override their authority; the EPA suggested the diked agricultural area and thus did not oppose it; the harbor could get their permit and begin dredging right away; the residents' concerns about boating traffic were addressed in the agreement to operate only during certain hours; and the environmental groups not only had their concerns about the dumping met, but also re-created a wetland.

The negotiation over the dump site for the dredge spoils had six characteristics common to most cases of regulatory negotiation:

1. The process was ad-hoc. Convening the parties, discussing interests and concerns, and developing the final agreement did not follow a pre-established process; the mediator and the parties developed a process to meet their particular need of getting approval quickly so dredging could begin right away.
(2) The negotiations were informal and did not occur in a bureaucratized fashion. In a formal hearing to decide the permit, parties or their hired advocates may only get three minutes to testify in support or opposition to the proposal; in the negotiation, the parties themselves could speak for much longer and were encouraged to brainstorm without taking a position in favor or opposition to the ideas. And the power of parties to decide if the agreement meets their interests remained in their hands and not the hand of elected or appointed representatives.

(3) The negotiators conducted fact-finding jointly. By walking around the harbor, the group built a common information base. Also, the group decided what information might be needed to evaluate the proposed sites and who would gather it, thus adding legitimacy to whatever information would be used.

(4) The negotiation was managed by a mediator. The mediator convened the parties and kept the process both moving quickly by assigning tasks (such as thinking of three places to consider) and focused by summarizing the discussions at the end of each day.

(5) The decision was made by consensus. In this case all the parties benefitted; sometimes parties may not benefit, but they agree to not challenge the outcome because they recognize that it is the best possible outcome and determine for themselves that they can live with it. At a formal hearing, other interested parties do not have a vote in the final outcome.
Finally, the process was supplementary to the formal decision-making process, occurring before the application was made. The negotiators, including the Army Corps of Engineers and EPA helped develop the proposal with which the harbor master would apply to the Army Corps of Engineers. The negotiator did not issue the permit, but jointly developed the proposal that would need to be approved through the formal process.

5.3 Summary

Because comprehensive permitting is characterized by having many different interests, technically complex information, and political concerns, it should be thought of as regulatory negotiation.

An ad-hoc process is necessary because not every comprehensive permit case is the same; the parties need to develop a process that meets their particular needs--for example, sorting through a large number of interests or conducting extensive fact-finding. The custom-designed process, in order to optimize the final proposal, should also allow for more open communication between the decision-making board, other town boards, and developer than generally occurs in the formal process. Reconciling many different interests and understanding complex technical information cannot be accomplished when parties must communicate to the decision-making board through written comments and formal testimony. And it is important to build a common information base among the parties. An uninformed (non-expert) decision-making board cannot possibly understand complex information if testimony by one party's "expert" contradicts that of another "expert."
Also, it is important that all the town boards recognize that the proposal is the best possible outcome and determine for themselves that they can live with it. This helps ensure that the town boards can meet their political interests by approving the proposal, and not only by opposing it, even though they may not have a vote in the final outcome. Creating such a viable outcome is best achieved before the developer becomes entrenched in his proposal and before town boards have a formal opportunity to oppose the proposal. The Shorebrook Park case demonstrates that creative problem-solving is difficult if it is attempted once the formal hearings have started. For this reason, the negotiations should precede the formal decision-making process and result in a joint proposal to the decision-making board.

Finally, comprehensive permitting should provide that a mediator be hired. In the German Hill case, the mediator's specific tasks were in getting started, helping prepare the agenda (preparing the RFP), inventing and packaging options, and binding the parties. The mediator also arranged and facilitated discussions with various town boards and suggested possible ways of meeting the various interests. Lastly, the mediator helped commit the parties to the design by documenting the opinions and agreements reached into a memorandum of understanding.62 A mediator brings process skills to the project and adds credibility to the possible solutions.63

---

63. An interesting study would be whether a Zoning Board of Appeals or staff to the Board could play the role of mediator. To test this empirically requires that many more cases be analyzed. For general discussion about
How then can we encourage parties to think of comprehensive permitting as regulatory negotiation? One option is to educate town officials. Recall in the Shorebrook Park case that the executive secretary to the Board of Selectmen attended a workshop on comprehensive permitting, and that at the workshop, negotiation with developers was encouraged. Although the workshop did not seem to get the message of consensual negotiation across to the executive secretary, it is an example of educating local officials about negotiation. Education might also be a mandatory requirement of being appointed to the Zoning Board of Appeals.

Another way to encourage regulatory negotiation is to provide state funding. This is already done for the Office of Dispute Resolution Mediation Program, but this program occurs only once an appeal has been filed. Expanding the HAC-sponsored Office of Dispute Resolution Mediation Program and providing funding is not a new suggestion. It is important to note though that regulatory negotiation is contextually different from the HAC program. In regulatory negotiation, there might be many parties; in the HAC program, negotiation generally takes place between only the Zoning Board of Appeals and the developer. Also, when initiating regulatory negotiation, the issues are less-defined than in the HAC program. Such early intervention will likely be a longer (and therefore more costly) commitment.

---

64. Resnick. "Mediating Affordable Housing Disputes in Massachusetts: Optimal Intervention Points."
A third option for encouraging regulatory negotiation is to authorize its use in the regulations themselves. An example of this is the Mediation Option in the Pennsylvania Municipalities Planning Code.65 The Pennsylvania Mediation Option states that mediation is voluntary and recognizes that cases differ; therefore, instead of telling municipalities exactly how mediation should be conducted, it lays out seven items which must be considered to before mediation has a legitimate chance of success: (1) funding mediation, (2) selecting a mediator, (3) time-limits and other closure requirements for mediation, (4) suspending formal time limits on board action, (5) identifying all interested parties, (6) determining if the mediation will be open or closed to the public, and (7) assuring that mediated solutions are in writing and signed by parties.

In sum, there are many ways to encourage that comprehensive permitting be considered as regulatory negotiation. The three that I suggest here have been tried. No one is the best in all situations.

65. Pennsylvania Municipalities Planning Code, § 908.1 - Description of Mediation Option. Other references to the Mediation Option include: § 508 (7) - section on Subdivision Plat Approval, § 609 (f) - section on Zoning Ordinance Amendments, and § section on Planning Residential Developments.
I analyzed the comprehensive permit process authorized in the Massachusetts Anti-Snob Zoning Act whereby developers apply to the Zoning Board of Appeals for one approval in lieu of all other local level permits. The Massachusetts comprehensive permit is supposed to simplify the development review process for affordable housing projects. Proponents of comprehensive permitting argue that comprehensive permitting both speeds up the decision-making process and improves the quality of the proposed development because all the issues regarding its benefits and impacts are considered at the same. 

I analyzed three cases testing to what extent the goals of comprehensive permitting were met. My criteria for evaluating whether the process was indeed faster were: (1) How many times the developer had to redesign the proposal once the hearings started; (2) Was the developer whipsawed; and, (3) How many separate hearings there were for the developer to attend. To see what steps were taken to have all the issues considered at once, I considered: (1) Whether the developer sought assistance from the various town boards or the community in designing the project; (2) Whether the developer explored many design options, or seemed to settle on only one; and (3) Whether there were integrative solutions developed to resolve issues.

From the cases, it appears that the number of hearings is reduced, whipsawing is eliminated, and only one board can require redesigns; yet there is still delay. Also, comprehensive permitting forces developers to attend pre-application meetings, and by establishing a forum for discussing all issues at
once, it facilitates the exploration of many options and integrative agreements; yet developers submit proposals that a Zoning Board of Appeals cannot (politically) approve.

Comprehensive permitting, is characterized by many different interests, technically complex information, and political concerns--all issues which have been resolved through regulatory negotiation. Comprehensive permitting, therefore, should not be thought of only as means of simplifying the development review process, it should be cast as regulatory negotiation.
ANOTATED BIBLIOGRAPHY

Regulatory Simplification


   The American Law Institute suggests joint hearings for situations where developers undertake projects which require multiple approvals. The joint hearing would not change the substantive requirements under which the permits are issued, but merely authorize a coordinated procedure to simplify and speed up the administrative process.


   This book summarizes arguments that the proliferation of environmental and land use controls at all levels of government has greatly increased the complexity of the development process, and suggests that control systems be simplified so that developers can deal with fewer regulatory agencies. Many techniques for achieving better coordination between the various agencies at state, regional, and local levels of government are examined.


   Frieden explores the consequences of growth policies in the San Francisco Bay Area. Many unintended consequences of environmental protection have resulted, including a rise in housing costs, a shift in development to less regulated areas, and even water rationing. Frieden also explores the extent to which government action imposes great costs on some people in order to produce benefits for others.


   This book looks at the experience of California, Delaware, Florida, Maine, New York, Oregon, and Vermont in state-level land use controls. The study also considers the "observable failures" of the old, exclusively local land use control system. It also evaluates the extent to which direct state intervention has actually improved the regulatory system's performance.

This book is the collection of papers presented and discussions had at the February, 1978 ULI seminar on regulatory reform. The papers cover: (1) the conceptual overview of the problem from both government's and consumers' perspectives, (2) successful regulatory reforms at the state and local levels, and (3) specific suggestions for simplifying development processes.


This article summarizes the discussion of a seminar on regulatory simplification held by the Urban Land Institute in October, 1978. The major problem with the regulatory system, identified at the seminar, was the lack of certainty and predictability. The two basic problems causing uncertainty are vague standards which allow discretion and an unsatisfactory vested rights doctrine which fails to give protection to developers in the regulatory process.


This article reviews California's Permit Streamlining Act (1977) which generally provides application requirements and time limits and standards for review. Three "judicial strikes" against the Act limit its application: (1) legislative acts are not subject to the Act, (2) approvals must wait legislative action, and (3) due process may be denied under the Act.


"Developing land and reviewing proposed developments for their conformity to planning and environmental requirements have become increasingly cumbersome processes--frustrating in many ways to all participants." This book analyzes attempts in foreign countries to coordinate permitting procedures. Specifically, the authors look at experience in England, Australia, The Netherlands, Mexico, and France.

The Urban Land Institute conducted a seminar on regulatory reform in February, 1978. The two problems identified were the confusing, complex, and often contradictory system of regulations, and that regulation has become ineffective, forcing development into less regulated areas. Attempts at state and local reform options were discussed at the seminar and are summarized in the article.


Popper discusses the move to centralize planning and zoning regulation in the 1970s. This book is a critical assessment of what this centralized regulation has accomplished. Six state-level planning programs are analyzed and evaluated with discussion about public and bureaucratic implementation difficulties, economic effects of the program, and environmental effects. Finally, Popper offers suggestions for making centralized regulation work better.


This book is the report of the Rockefeller Task Force on Land Use and Urban Growth, created in the Summer, 1972. The report looks at ways to "organize, control, and coordinate the process of urban development so as to protect what we value most in the environmental, cultural, and aesthetic characteristics of the land while meeting essential needs of the changing U.S. population for new housing, roads, power plants, shopping centers, parks, businesses, and industrial facilities."


This report analyzes the extent to which governmental regulations are responsible for the recent rapid inflation in the price of new housing. Seven areas of regulation are considered: building codes, energy conservation codes, subdivision requirements, zoning controls, growth controls, environmental controls, and financing regulations. The book also contains some recommendations for ways in which government regulations can be made more effective while also being less burdensome to the housing industry.

This article suggests ways in which development review can be accelerated. Specifically, it discusses: creating a single development ordinance, developing a consolidated application, providing a form of one-stop shopping or joint hearing, establishing an ombudsman or permit expediter, putting time limits on decisions, various tinkering with the regulatory process, using negotiation as a regulatory tool, and taking the planning commission out of the process.


This ULI report looks at the effects of the increased land use and environmental policies on housing costs, specifically, its effect on land prices, developer costs, and developer profits. The report then turns to two case studies: San Jose, CA and Jacksonville, FL. In San Jose, it was estimated that at least 20-30 percent of the cost of housing was due to growth management policies. In Jacksonville, raw land prices and site improvement costs increased more than the rate of inflation, but that housing prices generally rose at about the same rate as inflation.


This report addresses three questions concerning the effect of regulation on housing prices in Houston: What are the government regulations which affect the housing development process? Are these regulations increasing the time it takes to develop land? What are the costs that this increased time brings about? The study concludes that regulations have increased the time to develop land by approximately 5 1/2 months and that costs associated with regulation increased the price of housing by approximately 10 percent.


The first chapter of this book discusses environmental policy from the 1970s to the 1990s. During the 1970s, the amount of regulation escalated, and this escalation continues. The trend seem to be one of increased environmental regulation in an era of deregulation.

This manual reports on successful streamlining techniques for zoning, subdivision, environmental, and site-development ordinances. The pros and cons of these techniques are examined, and advice for assessing the effects of these techniques in other communities is given.

Negotiation and Mediation


   This book looks, not at the mediation process itself, but rather at the politics of the process. By politics, Amy refers to the issues of power, equality and democracy that are necessarily involved in any policy making process. In writing the book, Amy assumes that mediation is a new form of politics, and is not above it. The book compares both the arguments describing the benefits of mediation as advocated by mediators and arguments describing the limitations of mediation.


   This book looks at negotiating environmental disputes. It discusses the beginnings and growth of the environmental dispute resolution field, how efficient are environmental dispute resolution processes, and what can be expected in the future. Using empirical data, the author looks at how successful these processes have been, and suggests what factors affect the likelihood of success. There are also summaries of over 50 environmental disputes which have been negotiated.


   Edelman talks about what it means to institutionalize dispute resolution alternatives. Of particular interest is his discussion that "institutionalization" is a relative term; a program may be institutionalized in some ways but not in others. There are at least five dimensions of institutionalization: extent of permanent financing, comprehensive role within the substantive area covered, breadth of substantive area covered, degree of compulsory participation, and geographic scale.

Pennsylvania has a "Mediation Option" in the state enabling statute for zoning, subdivision, and other local development controls. This paper analyzes the text of the Mediation Option and discusses some questions that frequently come up on the Mediation Option. The following issues regarding local implementation are discussed: 1. funding mediation, 2. selecting a mediator, 3. completing mediation, including time limits, 4. suspending time limits otherwise authorized in the act, 5. identifying additional parties and affording them the opportunity to participate, 6. whether the mediation sessions should be open or closed, and 7. assuring that mediated solutions are in writing and signed by the parties.


This paper analyzes Pennsylvania's "Mediation Option" and includes a briefing sheet of 10 questions and answers on the Mediation Option. These questions ask why mediation is necessary, and how it will be implemented. Emrich and Sweet argue that institutionalized mediation is necessary because a recognized mediation procedure lends legitimacy to negotiation and because most groups would be included into the settlement process.


Getting to YES offers a concise, step-by-step strategy for resolving conflict. Fisher and Ury suggest using the following principles: 1. separate the people from the problem, 2. focus on interests, not positions, 3. invent options for mutual gain, and 4. insist on using objective criteria. In addition, Fisher and Ury introduce the BATNA (Best Alternative to a Negotiated Agreement) principle by which negotiators can evaluate possible agreements.


Forester argues that substance, power, and passion all play a role in development negotiations. A case study is given where a developer meets with the local planning department. Forester analyzes this discussion and offers ideas where either party could have acted differently to achieve a different outcome. In any development
negotiation, there is the substance of the proposal, the power struggle
between the developer and the planners and between the planners and
the local officials, and finally, there is passion; people not only have
interests, but they care about those interests as well.


This book argues that any account of planning must face political
realities such as working within political institutions, on political
issues, and on problems whose most basic technical components may
be celebrated by some and contested by others. Chapter 6 looks at
planning in the face of conflict: mediated negotiation strategies in
practice. Forester identifies six strategies that a planner can employ in
mediating local land use conflicts: 1. Planner as regulator, 2. Pre-
Active and interested mediation, and 6. Split the job--you mediate, I'll
negotiate. In addition, Forester discusses administrative implications
for planning organizations.

9. Forester, John and David Stitzel. "Beyond Neutrality: The Possibilities of
Activist Mediation in Public Sector Conflicts." Negotiation Journal. (July,
1989).

This article explores the arguments for neutral and non-neutral
(activist) mediation in public sector disputes. Two questions are
analyzed. First, how is it possible for planners to work as mediators in
non-neutral ways? Is activist mediation simply an impossible role to
perform? Second, if planners could adopt more of less-activist
mediating roles, what difference would this make in the face of power
imbalances between conflicting parties.

10. Forester, John Envisioning the Politics of Public Sector Dispute
University, Department of City and Regional Planning, Dec. 1989.

Forester explores public dispute resolution through themes of
democratic political theory and republican political theory. Public
sector mediators, Forester argues, face the challenge of nurturing
deliberative processes that produce enduring agreements while being
inclusive or properly representative and sensitive to power imbalances
at the same time. In addition, Forester challenges the adequacy of
empirical approaches to the study of public dispute resolution, arguing
that normative concerns of political philosophy must be taken
seriously.

   This report, prepared by four graduate students at Tufts University, looks at institutionalizing facilitation and mediation into local zoning hearing procedures. There is a discussion of current literature and cases where this is being done--such as in Upper Merion Township, PA. There is also discussion of how mediation can improve the zoning hearing process. Finally, the authors present a model for the use of facilitation and mediation in the Planned Unit Development approval process in Bristol, RI.


   This book is an excellent overview of the field of dispute resolution. It is written similar to law texts and gives case studies, and balanced theory, i.e., arguments of both proponents and opponents to alternative dispute resolution are given.


   Goldberger argues that negotiations are too informal, that rules must be spelled out clearly and followed without deal-making. Looking at linkage programs in major cities, he argues that developers are making the rules, not following them. Current zoning regulations seem to be a baseline from which negotiations start. Also, there are examples of negotiated agreements being used to forgive zoning violations. The informality of not having a strict formula for negotiating "incentives" seems to strengthen the developer's position, while at the same time weakening the city's position (i.e., the city's land use regulations).


   Gray describes how collaboration, a method which she describes for solving shared problems and resolving conflicts, can be used in order to help organizations join forces, pool information, and reach mutually satisfying agreements. She outlines steps for undertaking a successful collaborative effort--exploring how to get parties together in order to define the problem, establish an agenda, and implement a solution.

Harter argues that the administrative process may be particularly pertinent to a general discussion of dispute resolution. As administrative processes evolved and matured, those processes had to struggle--and are still struggling--to define their relationship to the courts. Thus, the "institutionalization" of dispute resolution may learn much from the administrative process, and in turn, the administrative process can profitably draw on the insights we are gaining on various forms of dispute resolution.


Bargaining is, and will continue to be, an important factor in the land development process. Almost every decision point in the land development process provides opportunity for bargaining. Six major reasons for why bargaining is acceptable are offered: (1) constraints on bargaining would lead to further reductions in public works, (2) bargaining is fully consistent with strong, effective policy, (3) private property rights are not diminished, (4) consequences of widespread use of bargaining are acceptable, (5) because jurisdiction and developers are risk-averse and prefer delaying capital outlays, they find many forms of bargaining are preferable to the old instruments for providing public works, (6) bargaining is defensible against legal attack.


This book is an outgrowth of a seminar on negotiating development approvals held by ABA's section on Urban, State, and Local Government Law and the Urban Land Institute. It includes papers and outlines written by the speakers at the seminar. The book's forward states that flexible zoning and growth management being adopted by many jurisdictions require negotiations as part of development review. Similarly, public/private joint ventures necessitate substantial negotiations and frequently complicated agreements. Finally, in many cities and suburbs, large, complex projects are approved only after protracted bargaining with neighborhood and special interest groups and with public officials.

This is a how-to-do-it report that shows how all parties with a legitimate stake in disputes can work together in resolving them through mediated negotiation. Six case studies establish mediation as an efficient, practical alternative to traditional ways of resolving disputes. Key steps common to most mediated negotiation efforts are detailed, drawing from the case studies. A more general discussion of when mediated negotiation might be useful and successful is given. Finally, the kinds of costs associated with this process are identified along with potential sources of financial support.


This book details techniques for mediating disputes. Moore discusses various roles of the mediator and offers a model of mediation for discussion. He shows what to do before the actual mediation begins, gives a step-by-step guide on conducting mediation sessions, and describes techniques for bringing conflicts to formal settlement.


With increasing frequency, potential problems about the scale and design, activity mix, land and water treatment, and other features of major commercial, residential, and mixed-use proposals are being settled through negotiation. Rivkin discusses the changing political climate that led to negotiation, the roots of negotiation, and two cases which were resolved by negotiation. Finally, Rivkin looks at essentials for negotiation and possible limitations on negotiating development.


This book looks at financing capital improvements through the use of development fees, special assessments, and exactions. Snyder and Stegman conducted field research in Florida, California, Colorado, and North Carolina. Throughout the book, the authors distinguish between scheduled (pre-determined) and negotiated fees and exactions. They argue that developers prefer the predictability of fixed fee schedules over negotiated exactions. Also, off-site infrastructure is
more often financed through negotiations than on-site; cities prefer not to formalize off-site requirements because they might be illegal and they want the flexibility associated with case-by-case negotiation.


This book examines the potential for negotiation and mediation to resolve disputes that arise in a community over the siting and construction of new facilities. Sullivan, in chapter 10, looks at the design of a formal negotiation process and suggests what are the crucial questions which must be considered in designing the process. These questions are: 1. Which development decisions should be resolved by negotiation, 2. What issues constitute a bargaining agenda, 3. Who participates, 4. Who resolves procedural disputes, 5. How can negotiations encourage progress and prevent delay, 6. What constitutes a negotiator's power and how should power be distributed, 7. How can agreements be officially recognized and disputes formally concluded, and 8. How can one incorporate technical knowledge into this review process.


This book examines seven regulatory negotiation case studies to learn about the obstacles to out-of-court resolution of environmental regulatory disputes and prospects for informal dispute resolution. The three major conclusions were that informal dispute resolution is more effective, informal dispute resolution is more beneficial to all the interested parties, and sometimes a mediator is necessary. In addition, there are three underlying, cross-cutting issues: whether negotiation at the outset leads to an expectation of compromise later, that negotiators tend to offer packages rather than focus on issues, and that negotiation draws on the experience and judgment of all interested parties.


This book applies interest-based negotiation principles set forth in Getting to YES to resolving public sector disputes. Susskind and Cruikshank discuss possible issues, such as sunshine laws, that create special considerations for using consensual dispute resolution processes in the public sector. Both assisted and unassisted negotiation is discussed. Finally, there is a chapter suggesting methods for public
officials, business interests, and community groups to take action and avoid some of the possible difficulties discussed earlier in the book.


This paper describes a negotiated investment strategy in Malden, Massachusetts. There were three teams (government, business, and citizen) who negotiated spending priorities for the city government. The actual negotiations were conducted by subgroups with representatives from each team.


Tomain discusses the benefits of using mediation as an alternative to litigation in land use disputes. He claims that before a local body engages in mediation, it should have legal authority--i.e., state enabling legislation and a local ordinance. Finally, Tomain gives a model ordinance for incorporating land use mediation into an existing system.


This paper argues that procedures and forums can be deliberately created to promote negotiation. This is demonstrated using a mediation case of an intermunicipal dispute in Connecticut over regional affordable housing problems. State legislation offered funding priority to any region that successfully negotiated a compact. Analysis concludes that the mediation was successful in part because barriers to negotiation were overcome. Ten such barriers are considered.

Massachusetts Anti-Snob Zoning Act


In Chapter 8, "Resolving Local Regulatory Disputes and Building Consensus for Affordable," Michael Wheeler argues that local land use regulation establishes the context in which development approvals are negotiated. For example, comprehensive permitting in the Anti-Snob Zoning Act changes the bargaining power of the various interested parties.

   The author updated a 1986 statewide survey of communities charting the use of Chapter 774. Her findings included: that the Anti-Snob Zoning Law has not entirely satisfied the need for low and middle income housing (LMIH), the construction of over 17,000 units may be attributed to Chapter 774, nearly every suburb of Boston has had at least one comprehensive permit application, and many communities are taking the initiative to actively construct LMIH.


   Lacasse reviews the impact of Chapter 774 and concludes that a project is much more likely to be built if the local ZBA grants a comprehensive permit when it is first requested. The mere presence of the Housing Appeals Committee has made it possible for many developers to go on and build LMIH projects.


5. Massachusetts Housing Finance Agency. *Comprehensive Permit Site and Project Approval Application*.


   This booklet describes ideas, implementation strategies and evaluations of techniques used by developers and/or communities to provide affordable housing in Massachusetts. Sixteen projects are described. In some projects, the town itself took the lead to accommodate affordable housing projects. The importance of the private sector involvement is emphasized, and the re-use of existing structures, alternative forms of homeownership (cooperatives, land trusts), and transitional housing are also discussed.

This pamphlet describes current funding and technical assistance programs for developers of affordable housing and town boards in the communities where the projects are proposed.


This guidebook recommends procedures for a Zoning Board of Appeals to follow during the comprehensive permit process (scope of review, hearing process, ZBA decision, and post-ZBA decision actions), and discusses the most common issues and problems.


This booklet describes the Local Initiative Program (760 CMR 45.00) and application requirements. The Local Initiative Program was established to give more flexibility to cities and towns to provide low and moderate income housing. The requirement for financial subsidy for comprehensive permit projects may be fulfilled with technical and other non-financial assistance provided through the Local Initiative Program. This booklet also contains a copy of the regulations.


This article argues that new state regulations encourage local officials and developer to work together. The author reviews "Community Participation in Subsidized Housing" (760 CMR 46.00 et. seq.) and the "Local Initiative Program" (760 CMR 45.00). These regulations give
communities more ways to satisfy state affordable housing requirements.


This article argues that a mediation option at the local level should be provided for developers of affordable housing. A survey of attorneys representing developers and towns indicates that both sides would be receptive to this early intervention and that an early intervention point would, on the whole, serve all parties' needs. The author recommends that the Massachusetts Office of Dispute Resolution expand its Affordable Housing Mediation Program to include a mediation option for proposals while still at the Zoning Board of Appeals.

**Town of Yarmouth**

1. Cummaquid Hills, Various project files.

2. Dorius, Noah, consultant to the Yarmouth Fair Housing Committee, Telephone interview, March, 18, 1992.

3. German Hill, Zoning Board of Appeals project file.


5. Shorebrook Park, Zoning Board of Appeals project file.

6. Wood, Bill, Chair, Fair Housing Committee, Personal interview, April 9, 1992.